

U.S. Department of Labor

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

T. J. ...



In the Matter of:

**Disputes concerning the payment of prevailing
wage rates and overtime pay by:**

**ARB CASE NOS: 12-093
12-095**

WEEKS MARINE, INC. (Contractor)

ALJ CASE NO: 2009-DBA-006

RESPONDENT.

DATE: APR 29 2015

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

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

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For Respondent:

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

For Administrator, Wage and Hour Division:

**Quinn M. Philbin, Esq. (argued); Nickole C. Winnett, Esq.; Jonathan T. Rees, Esq.;
William C. Lesser, Esq.; Jennifer S. Brand, Esq.; M. Patricia Smith, Esq.; *U.S.
Department of Labor*, Washington, District of Columbia**

For the Associated Builders and Contractors, as Amicus Curiae:

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

**Before: E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; Joanne Royce,
Administrative Appeals Judge; and Luis A. Corchado, *Administrative Appeals Judge*. Judge
Corchado, dissenting.**

DECISION AND ORDER OF REMAND

This case is before the Administrative Review Board pursuant to the Davis-Bacon Act, as amended (DBA), 40 U.S.C.A. §§ 3141-3148 (Thomson Reuters 2014), and its implementing

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regulations at 29 C.F.R. Parts 1, 5, and 7 (2010).¹ Consolidated on appeal before the Administrative Review Board (ARB) are petitions by Contractor/Respondent Weeks Marine, Inc. (ARB No. 12-093) and the Deputy Administrator of the Wage and Hour Division (ARB No. 12-095) seeking review of a Department of Labor Administrative Law Judge's Decision and Order issued June 26, 2012 (D. & O.), in which the ALJ concluded that Respondent Weeks Marine violated the DBA by failing to reimburse certain of its employees for lodging costs. For the reasons that follow, the Board affirms, in part, the ALJ's Decision and Order and remands the case for further consideration consistent with this Decision and Order of Remand.

BACKGROUND²

In September 2007, the U.S. Army Corps of Engineers awarded Contract No. W912DS-07-C-0027 ("the Contract") to Respondent Weeks Marine, a marine construction and dredging contractor, for the maintenance, dredging, and beach replenishment of Fire Island Inlet, Fire Island, in Suffolk County, New York ("Fire Island Project"). The Contract was subject to the DBA, the CWHSSA, and the Department of Labor's regulations at 29 C.F.R. Part 5. Incorporated into the Contract were the Collective Bargaining Agreements (CBAs) that Respondent had entered into with the International Union of Operating Engineers Locals 25 and 138, which governed Respondent's payment of prevailing wages, fringe benefits, and overtime for the Fire Island Project.

The work to be performed under the Contract generally consisted of using heavy equipment to dredge the ocean and replenish the beach. Work began in November of 2007 and ended in April of 2008. Weeks Marine was required to timely complete its work under the Contract, or else pay liquidated damages of \$1,580 for each calendar day of delay until the work was completed absent a time extension. As a result, the Fire Island Project was typically in operation 24 hours a day, and employees generally worked seven days a week with no days off.

The Local 25 CBA, under which the union supplies government contractors with qualified and experienced labor, covers a thirty-five state region from northern Maine to the western panhandle of Florida. As a result, Local 25 members residing within this territorial area

¹ The Deputy Administrator of the Wage and Hour Division, Department of Labor, initiated this action before the Office of Administrative Law Judges (OALJ) pursuant to an Order of Reference dated June 5, 2009, charging Respondent Weeks Marine with violations of the DBA and the Contract Work Hours and Safety Standards Act (CWHSSA), 40 U.S.C.A. § 3701 et seq. (Thomson West 2005 & Supp. 2014). As the result of Partial Consent Findings resolving the issues arising under the CWHSSA subsequently filed with, and approved by, the presiding Administrative Law Judge, the sole issue before the ARB in this appeal arises under the DBA.

² Unless otherwise noted, the Background Statement is based on the findings of fact set forth in the ALJ's Decision and Order of June 26, 2012 (D. & O.), at pp. 23-24, the ALJ's summary of witness testimony and documentary evidence set forth in the D. & O. at pp. 7-23, and the stipulated facts set forth in the Administrator's and Weeks Marine's Pre-Hearing Statements submitted before the ALJ.

eligible for employment under the CBA generally must travel to job sites far from their home residence. In this case, the nine Local 25 employees Respondent hired, whose wages and lodging expenses are in dispute,³ did not live within daily commuting distance of the Fire Island Project.⁴ To secure and maintain their employment with Respondent, they thus were required to travel to and temporarily reside during the course of their employment in the immediate vicinity of the Fire Island dredging project.

Local 25 members working on the Fire Island Project performed specialized dredging activities. Respondent also hired members of Local 138, who lived in the immediate vicinity of the job site, to perform less specialized work on the project. Local 138 employees were not qualified to do the dredging work performed by the Local 25 employees.

Because the nine Local 25 employees did not live within commuting distance of the Fire Island Project, they secured and paid for their on-site lodging accommodations, which primarily consisted of renting hotel or motel rooms, and in a number of instances resulted in employees sharing the accommodations out of necessity due to the cost of the facilities. Respondent did not reimburse the nine employees for their lodging costs during the duration of their employment on the Fire Island Project.

Neither the CBA nor the Contract required Respondent to pay lodging costs for its hired employees. Pursuant to the CBA, each of the Local 25 employees nevertheless received a \$35 per diem subsistence allowance for each day they worked on the Fire Island Project, intended to defray the cost of meals, lodging, and other incidental expenses such as phone calls, laundry, work boots, and work clothes.⁵ The Local 25 CBA subsistence allowance provision in effect at the time provided that:

[Weeks Marine] will continue to make available to employees employed on work afloat or ashore, meals and sleeping quarters when the dredge is on contract or when mobilizing or demobilizing. When meals and sleeping quarters are not available to employees employed to work afloat or on shore, [Weeks Marine] will grant each of such employees a subsistence allowance in a minimum amount of . . . \$35.00 per day effective October 1, 2007. . . .

³ The nine Local 25 employees are Larry Campbell, Leon Evans, Michael Fricke, Terry Howell, William H. Johnson, William E. Johnson, Jr., Coy Polston, Richard Sellman, and John Tatman.

⁴ Camile Coppola, the WHD investigator, testified that the nine employees from Local 25 lived in several different states: Louisiana, Mississippi, Georgia, Alabama, Massachusetts, and New Jersey. D. & O. at 11; Hearing Transcript (Tr.) at 178.

⁵ Local 138 union members employed on the Fire Island Project did not receive any subsistence allowance or per diem payments from Respondent.

Local 25 CBA, Section 17. Because the \$35 per diem (\$245 per week) that Respondent paid its Local 25 employees was insufficient to pay their lodging costs, particularly since the per diem was intended to also cover meals and other incidental expenses, even when employees shared hotel rooms, the Local 25 employees had to pay much if not most of the lodging costs themselves.

Proceedings before the Wage and Hour Division

Following an investigation that began in January 2008, the Wage and Hour Division (WHD) notified Weeks Marine by letter dated August 26, 2008, that it was in violation of the prevailing wage requirements of the DBA because it failed to reimburse the nine Local 25 employees for lodging expenses they incurred while working on the Fire Island Project. The Administrator also concluded that Respondent had violated the DBA by failing to pay certain operators fringe benefits in accordance with the applicable wage determination, and that Respondent misclassified and failed to pay overtime to certain employees. As a result, the Administrator determined that the nine Local 25 employees were owed back wages of \$21,831.35 for their unreimbursed lodging costs. Wage and Hour assessed the back wages owed the employees based on the actual cost of lodging incurred by each employee. Full credit was given to Respondent for the per diem payments made if such payments had not already been applied to Respondent's other DBA and CWHSSA violations.⁶

Proceedings before the Office of Administrative Law Judges

Pursuant to a request for hearing with WHD, on June 5, 2009, the WHD Administrator filed an Order of Reference with the Office of Administrative Law Judges (OALJ) asserting that Weeks Marine failed to pay prevailing wage rates and fringe benefits. The Order of Reference alleged that Weeks Marine disregarded its obligations to its employees under the DBA, and committed violations of the CWHSSA's labor standards provisions during the dredging of the beach at Fire Island, New York. The parties subsequently filed Partial Consent Findings with the ALJ that resolved all but the issue of unreimbursed lodging costs that is presently before the ARB on appeal. The presiding ALJ approved the Partial Consent Findings by order issued November 23, 2009.⁷

The sole issue remaining before the presiding ALJ following issuance of the order approving the parties' consent findings involved WHD's charge that Weeks Marine failed to reimburse the nine Local 25 employees for lodging costs totaling \$21,831.35. Following hearing, the ALJ issued a Decision and Order on June 26, 2012, in which the ALJ found that

⁶ For some of the Local 25 employees, no per diem credit was available for the unreimbursed lodging back wage computations because Wage and Hour applied Respondent's payment of the per diem to the misclassification and fringe benefit claims ultimately paid pursuant to the Order Approving Partial Consent Findings subsequently issued by the ALJ. See n.7, *infra*.

⁷ Pursuant to the Order Approving Partial Consent Findings, issued November 23, 2009, Weeks Marine paid \$75,426.38 in back wages to twelve employees for prevailing wages, fringe benefits, and overtime violations.

Weeks Marine's failure to reimburse the nine Local 25 employees for their lodging costs above the \$35 per diem specified in the Local 25 CBA violated the DBA. However, the ALJ rejected WHD's assessment that Weeks Marine owed \$21,831.35 in unreimbursed lodging costs to the nine employees based on their actual incurred lodging costs. Instead, the ALJ ordered Weeks Marine to pay a total of \$9,058.84 to the employees based on the lowest lodging rate incurred by the employees, less credit for any CBA per diem received that was not previously credited against other violations pursuant to the earlier settlement.⁸

Both Weeks Marine and the Wage and Hour Administrator appeal the ALJ's June 26, 2012 Decision and Order.

JURISDICTION AND STANDARD OF REVIEW

Pursuant to Secretary of Labor Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378-69,380 (Nov. 16, 2012), the ARB is delegated the Secretary's authority to review cases arising under, inter alia, the DBA. Consistent with that authority, the ARB has jurisdiction and authority to decide, in its discretion, appeals from decisions of Department of Labor ALJs arising under 29 C.F.R. Parts 1, 3 and 5, including decisions involving controversies concerning the payment of prevailing wage rates. 29 C.F.R. § 7.1(b).

In considering matters within the scope of its jurisdiction under the DBA, the ARB is authorized to act "as fully and finally as might the Secretary of Labor concerning such matters." 29 C.F.R. § 7.1(d). Nevertheless, the Board essentially serves as an appellate agency in the review of matters arising under the DBA, and thus is not authorized to hear matters de novo "except upon a showing of extraordinary circumstances." 29 C.F.R. § 7.1(e).⁹ Where the evidentiary record or the findings are found lacking, the Board may remand the case "for the taking of additional evidence and the making of new or modified findings by reason of the additional evidence." *Id.*

⁸ The ALJ ordered the following awards to be paid the nine Local 25 employees: Larry Campbell, \$1,703.00; Leon Evans, \$2,429.30; Michael Fricke, \$0.00; Terry Howell, \$610.96; William H. Johnson, Jr., \$1,200.36; William Johnson, \$0.00; Coy Polston, \$2629.36; Richard Sellman, \$0.00; John Tatman, \$485.86. D. & O. at 31.

⁹ This general prohibition against de novo review means that the Board will not conduct an evidentiary hearing but will rely on the evidentiary record that was before the ALJ and the arguments presented by the parties on appeal. *In re Y-12 Nat'l Sec. Complex*, ARB No. 11-083, slip op. at 5 (Aug. 8, 2013). See also, 5 U.S.C.A. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule . . .").

DISCUSSION

The DBA requires any employer that enters into a contract in excess of \$2,000 with the federal government for construction, alteration, or repair of public buildings and public works to pay its employed laborers and mechanics the minimum prevailing wage and fringe benefit rates. See 40 U.S.C.A. § 3142(a), (b). It was enacted to protect employees from substandard earnings by setting a floor for wages on federal government projects. *United States v. Binghamton Const. Co., Inc.*, 347 U.S. 171- 176-78, n.13 (1954). Accordingly, the DBA and its implementing regulations require that government contractors and subcontractors pay all mechanics and laborers employed directly on the work site “the full amounts” of prevailing wages and fringe benefits to which the employees are entitled, “unconditionally” and “without subsequent deduction or rebate on any account, . . . regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and the laborers and mechanics.” 40 U.S.C.A. § 3142(c); 29 C.F.R. § 5.5(a)(1). See *Bldg. & Constr. Trades, AFL-CIO, v. Reich*, 40 F.3d 1275, 1277 (D.C. Cir. 1994).

The primary issue before the Administrative Review Board in this matter is whether an employer is obligated under 40 U.S.C.A. § 3142 of the Davis Bacon Act to reimburse lodging expenses incurred by employees who exclusively work for the employer at a job site beyond commuting distance from their home residence.¹⁰ The Board’s analysis of this issue begins with recognition that there is no legal difference between an employer directly deducting a cost from a worker’s wages, and shifting to the employee a cost that the employer could not lawfully directly deduct from wages. *Arriaga v. Fl. Pacific Farms*, 305 F.3d 1228, 1236 (11th Cir. 2002); *Salazar-Martinez v. Fowler Bros.*, 781 F. Supp. 2d 183, 191 n.5 (WDNY 2011). “An employer may not deduct from employee wages the cost of facilities which primarily benefit the employer if such deductions drive wages below the minimum wage. This rule cannot be avoided by simply requiring employees to make such purchases on their own, either in advance of or during the employment.” *Arriaga*, 305 F.3d at 1236 (citing 29 C.F.R. §§ 531.35; 531.36(b)). Shifting a cost to the employee that cannot be lawfully deducted directly from or credited against the employee’s wages constitutes an unlawful de facto deduction that impermissibly drives the employee’s pay below the required prevailing wage. The effect is no different than had the employer paid the cost and then deducted it from the wages owed. *Arriaga*, 305 F.3d at 1237. Indeed, the ARB has recognized this fundamental principal (without expressly articulating it) in finding violations of DBA’s prevailing wage requirement in *In re KP&L Elec. Contractors, Inc.*, ARB No. 99-039, ALJ No. 1996-DBA-034 (ARB May 31, 2000)¹¹ (involving employer’s failure

¹⁰ Other issues raised on appeal by either Weeks Marine or the Wage & Hour Administrator, addressed *infra*, are: (1) Whether a ruling requiring Weeks Marine to reimburse its employees’ lodging costs constitutes an unlawful rule by adjudication and/or violates Weeks Marine’s due process rights? (2) If the ARB concludes that the employees are entitled to reimbursement of their lodging, whether the employees are entitled to reimbursement of their actual costs, or a discounted amount?

¹¹ The ARB’s decision in *KP&L* adopted by reference the ALJ’s decision from which appeal to the ARB arose in full. Accordingly, citation to *KP&L* in the ARB’s decision will at times cite to the ALJ’s Decision and Order of December 31, 1998, which is throughout this decision cited as *KP&L(ALJ)*.

to reimburse employees' lodging costs), *In re William J. Lang Land Clearing, Inc.*, ARB No. 01-072,-079; ALJ No. 1998-DBA-001 (ARB Sept. 28, 2004) (involving crediting cost of employer-provided lodging against prevailing wages), and *In re Calculus, Inc.*, WAB No. 93-06 (Oct. 29, 1993) (involving employer's crediting of per diem payment against prevailing wage obligations).

The question before us is thus whether, by requiring the Local 25 employees to pay their own lodging costs, Weeks Marine effectively shifted to the employees a cost that was the employer's obligation to bear; a cost that could not lawfully have been directly deducted from the employees' wages had Weeks Marine provided their lodging at company expense.

Section 15f19 of the Field Operations Handbook does little to assist in resolving this question. To begin with, as the ARB noted in *Lang*, the Field Handbook merely provides "guidance" to which the ARB and WAB have looked for "interpretive assistance." *Lang*, ARB No. 01-072,-079; slip op. at 13. *Accord Calculus*, WAB No. 93-06, slip op. at 2-3. *See also KP&L*(ALJ), ALJ No. 1996-DBA-034, slip op. at 29 (referring to § 15f19 as "not dispositive policy"). Consistent with the ARB's consideration of its interpretative significance, the Sixth Circuit has viewed the Field Handbook's provisions as "internal enforcement guidelines" that, while useful in providing guidance, are nevertheless "not controlling by reason of their authority" to the resolution of issues arising under the DBA. *Reich v. Miss Paula's Day Care Ctr., Inc.*, 37 F.3d 1191, 1194 (6th Cir. 1994).

In *KP&L*, the ARB reached the conclusion that the lodging at issue was for the benefit of KP&L (and thus KP&L's responsibility) independently of Section 15f19. Having reached its conclusion, the Field Handbook was subsequently cited as "buttress[ing]" that conclusion given that the factual scenario Section 15f19 addressed was "precisely the situation at issue" in that case. *KP&L*(ALJ), ALJ No. 1996-DBA-034, slip op. at 28-29. This leads to the second reason Section 15f19 is of little assistance in resolving the issue before us in *Weeks Marine*: the facts in this case differ significantly from the factual scenario addressed by §15f19 of the Field Handbook.

This is not to say that Section 15f19 is not of interpretive assistance. Its conclusion that the employees' lodging expenses were properly reimbursable by the employer is based upon the determination that the expenses were incurred *primarily for the employer's benefit and convenience*. This is illustrative of the "balancing of benefits" test (also referred to as the "primarily benefits" test) applicable under the Fair Labor Standards Act, and thus the Davis Bacon Act (DBA) (as discussed below) for determining whether expenses incurred by an employee are subject to reimbursement by the employer.

I. Whether the Local 25 employees' lodging at the Fire Island Project was primarily for the benefit and convenience of Weeks Marine or the Local 25 employees

Under the Davis Bacon Act a covered contractor is required to pay its employees the prevailing wage "unconditionally" and "without subsequent deduction or rebate." 40 U.S.C.A. § 3142(c)(1). The DBA's implementing regulations provide, however, that the statutory requirement that prevailing wages be paid "without subsequent deduction" is subject to those

exceptions “permitted by regulations issued by the Secretary of Labor under the Copeland Act (29 C.F.R. Part 3).” 29 C.F.R. § 5.5(a)(1).¹² “The deductions permitted under 29 C.F.R. §§ 3.5 and 3.6 evince ‘an overarching concern that deductions from the employee’s prevailing wage under the Davis-Bacon Act do not benefit the employer directly or indirectly.’” *IBEW v. Brock*, 68 F.3d 1194, 1203 (9th Cir. 1995) (quoting *Bldg. & Constr. Trades*, 40 F.3d at 1281). Pertinent to this case is 29 C.F.R. § 3.5(j) of the Copeland Act regulations, which provides for the deduction from an employee’s wages of the “reasonable cost” of lodging meeting the requirements of section 3(m) of the FLSA (29 U.S.C.A. § 203(m)) and the FLSA’s implementing regulations found at 29 C.F.R. Part 531.

Citing 29 C.F.R. § 3.5, Respondent argues that because the FLSA permits an employer to credit lodging costs towards the minimum wage requirement thereunder, having paid the nine Local 25 employees the required prevailing hourly wage and fringe benefit amounts, the Davis Bacon Act does not require it to additionally pay or reimburse the employees’ lodging costs. In support of its position, Respondent cites *Soler v. G & U, Inc.*, 833 F.2d 1104 (2d Cir. 1987), an FLSA case in which the Second Circuit held that the employer could deduct the cost of lodging provided migrant workers from their salaries as a credit against the FLSA-required minimum wage. We agree that *Soler* is relevant to an understanding of to what extent lodging expenses incurred by an employee may constitute a deduction from prevailing wage obligations under the DBA that is subject to reimbursement. However, Respondent’s reliance on 29 C.F.R. § 3.5 and *Soler* is misplaced, as explained below.

Similar to the DBA requirement that prevailing wages be paid “unconditionally” and “without subsequent deduction,” the minimum wage that 29 U.S.C.A. § 206 of the Fair Labor Standards Act requires employers to pay their employees, “cannot be considered to have been paid by the employer and received by the employee unless they are paid finally and unconditionally or ‘free and clear.’” 29 C.F.R. § 531.35. “This rule prohibits any arrangement that ‘tend[s] to shift part of the employer’s business expense to the employees . . . to the extent that it reduce[s] an employee’s wage below the statutory minimum.’” *Ramos-Barrientos v. Bland Farms*, 661 F.3d 587, 594-595 (11th Cir. 2011) (citations omitted).

Notwithstanding the requirement that an employee’s minimum wage be paid “unconditionally,” FLSA section 3(m) provides that the wages paid any employee may include the “reasonable cost” to the employer “of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees.” 29 U.S.C.A. § 203(m) (emphasis added). In *Soler*, the Second Circuit construed this provision as establishing a statutory presumption that the reasonable cost

¹² To aid in the enforcement of DBA’s prevailing wage provisions, the Department of Labor issued 29 C.F.R. Part 3, regulations under the Copeland Act, 40 U.S.C.A. § 3145, that prohibit “kickbacks” or deductions that effectively reduce a covered employee’s pay below prevailing wage requirements. *Bldg. & Constr. Trades*, 40 F.3d at 1277. See 29 C.F.R. § 3.1 (“This part is intended to aid in the enforcement of the minimum wage provisions of the Davis-Bacon Act and the various statutes dealing with federally assisted construction that contain similar minimum wage provisions . . .”).

of lodging customarily furnished by an employer to its employees constitutes compensation that is deductible from the minimum wage an employee is owed. *Soler*, 833 F.2d at 1108-1110.

The Second Circuit did not, however, conclude that employee lodging is in all cases primarily for the benefit of the employee. The court viewed the statutory presumption of Section 203(m) as a *rebuttable* presumption subject to the “balancing of benefits” test under 29 C.F.R. § 531.3(d)(1).¹³

[It] is not to say, however, that in all cases the statutory presumption that housing and board are reasonable costs exempts on-site housing facilities from the scrutiny of the Regulation’s balancing test safeguard. Special circumstances may exist where lodging is of little benefit to an employee, such as when an employer requires an employee to live on-site to meet a particular need of the employer, [citation omitted], or when an employee is required to be ‘on call’ at the employer’s behest. . . . Where the statutory presumption is rebutted by substantial evidence demonstrating that the housing is not a benefit running primarily to the employee, but rather a burden imposed upon the employee in furtherance of the employer’s business, the Administrator is empowered to find that the cost of on-site housing is not reasonable, and therefore may not be subsumed within an employee’s wage.

Soler, 833 F.2d at 1109-1110. This determination, the court pointed out, should accordingly be made by the Administrator “on a case-by-case basis.” *Id.*

Soler is not alone in holding that Section 203(m)’s presumption that lodging is for the benefit of the employee is a *rebuttable* presumption subject to the “balancing of benefits” test. The Eleventh Circuit, in *Ramos-Barrientos*, expressly rejected the employer’s argument that the “balancing of benefits” test is inapplicable to housing. The court agreed, instead, with the Secretary of Labor’s argument that “section 203(m) establishes only a presumption that the cost of housing may be included in wages and that this presumption may be rebutted when the provision of the housing is ‘primarily for the benefit or convenience of the employer.’” 661 F.2d at 596.

As the analysis in both *Soler* and *Ramos-Barrientos* demonstrates, the question as to the “reasonableness” of the cost/expenditure of the lodging at issue employs a balancing test of whether the lodging is primarily for the benefit and convenience of the employer or the

¹³ *Soler* interpreted the “balancing of benefits” test under 29 C.F.R. § 531.3(d)(1) as providing: “If the item in question primarily benefits the employer, the cost of that facility will not be recognized as reasonable and will not be an allowable inclusion in an employee’s wage; if the item primarily benefits the employee, it will be construed to be a reasonable cost, like housing and meals, within the meaning of § 3(m).” 833 F.2d at 1109.

employee.¹⁴ This determination, both *Soler* and *Ramos-Barrientos* note, is a judgment that must be made based on the facts of the particular case. *Soler*, 833 F.2d at 1110; *Ramos-Barrientos*, 661 F.3d at 596. If the lodging is found to be of primary benefit *to the employer*, its cost may not be deducted from wages if incurred by the employer or, should the employee have incurred the cost of the lodging, the employee's expenditure must be reimbursed by the employer. If, on the other hand, the lodging is determined to be of primary benefit *to the employee*, it will be deemed reasonable and thus subject to deduction from the employee's required wages, *provided* the lodging is "customarily furnished" within the meaning of FLSA Section 3(m).

For lodging costs to be allowable as a deduction against the wages owed the employee, it is not enough that the lodging is found to be primarily for the benefit of the employee. The lodging must also meet the "customarily furnished" requirement of 29 C.F.R. § 531.31 (emphasis added):

The reasonable cost of board, lodging, or other facilities may be considered as part of the wage paid an employee only where "customarily" furnished to the employee. Where such facilities are "furnished" to the employee, it will be considered a sufficient satisfaction of this requirement *if the facilities are furnished regularly by the employer to his employees or if the same or similar facilities are customarily furnished by other employers engaged in the same or similar trade, business, or occupation in the same or similar communities.*

To summarize the foregoing as it applies to resolution of whether, in this case, Weeks Marine is obligated under the DBA to reimburse the Local 25 employees their lodging costs: initially, it must be determined whether the employees' on-site, away-from-home lodging was primarily for the benefit and convenience of Weeks Marine or primarily benefited the Local 25 workers. If the substantial evidence of record supports the ALJ's finding that the lodging was primarily for Weeks Marine's benefit and convenience, the company is obligated to reimburse the employees, as the failure to do so would effectively constitute a de facto deduction in the employees' required prevailing wages. If, on the other hand, the lodging was primarily for the benefit of the employees, Weeks Marine is not obligated to reimburse the Local 25 employees, *provided* Weeks Marine establishes that it regularly furnishes such lodging to all of its employees or that the same or similar facilities are customarily furnished by other employers engaged in the dredging business.

Consistent with the FLSA Section 3(m) "balancing of benefits" test are the ARB's decisions in *KP&L* and *Lang*, and that of the WAB in *Calculus*, all arising under the DBA. We turn first to *KP&L*, wherein the issue centered upon whether the employer's requirement that its employees pay their lodging costs at a job site beyond the employees' commuting distances constituted a violation of the DBA requirement that the employees' wages be paid

¹⁴ As previously noted, and as further discussed *infra*, this "balancing of the benefits" test was employed under the Davis-Bacon Act in *Calculus*, *Lang*, and *KP&L*, albeit without the statutory or regulatory basis for so doing having been articulated.

unconditionally. KP&L was located in Lexington, Kentucky, where its employees were regularly employed. Upon entering into a subcontract for work under a government contract at Bowling Green, KP&L employees were sent from Lexington to the jobsite, where the employees were required to stay throughout the work week. KP&L initially paid the employees' lodging. However, upon realizing that the company had grossly underbid the subcontract due to management error, the employees were forced to pay for their own lodging. The employees' lodging expenses were determined to be primarily for the benefit of KP&L, and thus reimbursable, based upon (1) the fact that the employees were confined during the work week to the job site because of the two-hour commuting distance between Lexington and Bowling Green, and (2) the fact that KP&L initially covered the employees' lodging but terminated that arrangement upon discovering that it had underbid the project. The ARB considered Section 15f19 of the Field Operations Handbook to buttress its finding that the lodging was primarily for KP&L's benefit, given that the facts of the case were indistinguishable from the scenario addressed by Section 15f19. "Although not dispositive, this policy lends credence to the notion that the payment of hotel bills in such situations is for the benefit of the employer." *KP&L*(ALJ), ALJ No. 1996-DBA-034, slip op. at 29.

Neither *Lang* nor *Calculus* address the situation where employees working at a jobsite beyond commuting distances are required to pay for their lodging. Yet both are relevant to the question of what constitutes a "conditional" payment of DBA wages. Both address the question of whether an employer's *deduction* from an employee's wages of lodging expenses paid for by the employer violates the requirement of 40 U.S.C.A. § 3142(c)(1) that prevailing wages be paid "unconditionally . . . without subsequent deduction or rebate on any account." Moreover, both reach their respective conclusion based upon the same "balancing of benefits" test applied in *KP&L*, *Soler*, and *Ramos-Barrientos*—*i.e.* whether the lodging payments the employer made were primarily for the benefit of the employees or primarily for the employer's benefit.

In *Lang*, the ARB addressed the question of whether the company could properly credit (and thus deduct from the required prevailing wage) the cost of lodging that it provided its employees working beyond their daily commuting distance. The ARB recognized that under 29 C.F.R. § 3.5(j), the deduction of "not more than the reasonable cost" of subsistence payments meeting the requirements of FLSA Section 3(m) is permitted. Section 3(m), the Board noted, "provides that the statutory term 'wage' may include an employer's 'reasonable cost' (as determined by the Secretary of Labor) of furnishing employees with board, lodging, or other facilities, but only "if such [subsistence payments] are customarily furnished by [the] employer to his employees." *Lang*, ARB No. 01-072,-079; slip op. at 16. However, the ARB pointed out, under 29 C.F.R. § 531(d)(1)'s interpretation of Section 3(m), "subsistence payments are not recognized as reasonable (and are therefore not creditable) if the payments are primarily for the benefit of the employer." *Id.*¹⁵ Having articulated the applicable standard, the ARB assessed the relevant facts in *Lang*:

¹⁵ At footnote 13 of *Lang*, the ARB further noted that "subsistence payments made for the employer's benefit are treated consistently under the DBA and FLSA," citing FOH § 30c03(a), which provides that "[w]here the primary benefit of such facilities is to the employer's business interest, credit will be denied," and that while lodging "is ordinarily considered for the benefit and convenience of the employee, . . . where the employee must travel away from home to further the employer's business . . . housing will be considered as primarily benefiting the employer."

Lang could only perform its far distant DBA contracts (and benefit thereby) if its employees incurred the substantial detriment of traveling to locales far from their homes for most of every work week. Lang's employee travel to the 'special' out-of-area jobs served the primary interest and benefit of the employer. Lang required employees to travel to the 'special' jobs as a condition of their employment. The employees had no choice but to travel on Lang's business in order to get and keep their jobs.

ARB No. 01-072,-079; slip op. at 17. Based on these facts, the ARB concluded that "Lang's subsistence payments for its employees' meals and lodging were for the primary purpose of furthering the employer's business and not for the primary benefit of the employees," and thus could not be credited as acceptable cash payments against Lang's prevailing wage rate requirement. *Id.*

In *Calculus*, the Wage Appeals Board considered, as in *Lang*, the question of DBA creditability against prevailing wages of meals and lodging subsistence payments to employees working beyond daily commuting distance from their home residence. The WAB ruled that the employer's provision of food and lodging to its employees was primarily for the employer's benefit, based on facts mirroring those in *Lang*.¹⁶ The employees in *Calculus* "had no choice about whether to accept the per diem in lieu of the full prevailing wage payments just as they had no choice about whether to commute to the job or stay at the hotel selected by *Calculus*." *Calculus*, WAB No. 93-06, slip op. at 9. The WAB held that "[s]ince the employees were required to remain at the job site during the week and return on Sunday night, there can be no other conclusion than that the [provided] facilities were for the benefit and convenience of the employer. Accordingly, the per diem payments are not permissible deductions from the wages earned by *Calculus*'s employees." *Id.* at 10.

The ALJ in this case concluded that "the failure to reimburse employees for the cost of [the job site] lodging did impermissibly reduce the Local 25 employees' wages below the prevailing wage rate, in violation of the DBA," based on her finding that "the hotel lodgings were for the benefit of Respondent." D. & O. at 29. While an appropriate application by the ALJ of the "balancing of benefits" test, the Board finds itself in the unenviable position of not being able to determine the evidentiary basis upon which the ALJ found that the lodging was of primary benefit to Weeks Marine. The ALJ merely cites to *Lang* and *KP&L*. However, as previously noted, under the "balancing of benefits" test the determination of whether the lodging at issue is primarily for the benefit of the employer or the employee is a case-by-case determination necessarily dependent upon the facts of the particular case. The ALJ's Decision and Order consists of 17 pages recounting testimonial evidence, followed by a page and one-half of "bullet" findings of fact, some of which may or may not be relevant to the "balancing of benefits" test. However, nowhere in the decision does the ALJ indicate what evidence was weighed in finding that the on-site lodging primarily benefited Weeks Marine as opposed to the Local 25 employees. The limits imposed upon the ARB's appellate authority preclude de novo

¹⁶ For this reason, the ARB in *Lang* viewed *Calculus* as controlling. See *Lang*, ARB No. 01-072,-079; slip op. at 18.

consideration of this case and preclude the Board from making its own findings of fact. Consequently, where confronted with a situation such as this, the Board has no choice but to remand the case to the ALJ pursuant to 29 C.F.R. § 7.1(e) for the taking of additional evidence if necessary and the making of such findings of fact as are necessary and required to determine for whom the lodging for the Local 25 employees primarily benefits.¹⁷

II. Whether holding that Weeks Marine must reimburse its employees' lodging costs constitutes an unlawful rule by adjudication and/or violates its due process rights

As previously mentioned at footnote 10, the parties have raised two other issues on appeal. As part of its petition for review (ARB No. 12-093), Weeks Marine asserts that a ruling requiring it to reimburse its employees' lodging costs constitutes an unlawful rule by adjudication and/or violates Weeks Marine's due process rights. In its cross-appeal (ARB No. 12-095), the Administrator challenges the ALJ's discounted allowance of lodging costs, arguing that the Local 25 employees are entitled to reimbursement of their actual lodging costs.

We turn first to Weeks Marine's argument that an adjudicatory ruling in this case requiring it to reimburse its Local 25 employees' lodging costs constitutes an unlawful rule by adjudication and/or violates its due process rights. We reject both contentions to the extent that any final ruling eventually issued in this case is consistent with the "balancing of benefits" test, which relies on established legal principles. While *KP&L, Lang*, and *Calculus* may address different contexts in which the applicability of 40 U.S.C.A. § 3142(c)(1) was raised, the test in each instance, equally applicable in this case (as has been discussed) is whether or not the lodging at issue is for the primary benefit and convenience of the employer or the employees. Consequently, if the final decision reached in this case requires Weeks Marine to reimburse its employees' lodging costs, that decision constitutes neither rulemaking through adjudication nor a violation of Weeks Marine's due process rights.¹⁸

¹⁷ Of course, should the ALJ on remand find that the lodging primarily benefited the Local 25 employees, as opposed to Weeks Marine, as previously discussed, *supra* at p. 10, before the ALJ can rule on Weeks Marine's behalf, the ALJ must determine whether Weeks Marine regularly furnishes such lodging to all of its employees or if the same or similar lodging is customarily furnished by other employers engaged in the same or similar trade, business, or occupation in the same or similar communities.

¹⁸ "[P]arties dealing with the government 'are expected to know the law,' and 'there is no grave injustice in holding parties to a reasonable knowledge of the law.' Existing administrative and judicial decisions and the Davis-Bacon Act itself put the Company on fair notice of what was required." *Abhe & Svoboda, Inc. v. Chao*, 508 F.3d 1052, 1060 (D.C. Cir. 2007), *rehearing en banc denied* (quoting *ATC Petroleum v. Sanders*, 860 F.2d 1104, 1111, 1112 (D.C. Cir. 1988)). See also *Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc.*, 467 U.S. 51, 63 (1984).

III. Whether Weeks Marine's Local 25 employees are entitled to reimbursement of their actual lodging costs

The remaining issue, the Administrator raised in his petition for review (ARB No. 12-095), is whether the Local 25 employees are entitled (should they ultimately prevail) to reimbursement of their actual costs, or a discounted amount as the ALJ ruled. Because 40 U.S.C.A. § 3142(c)(1) requires the "unconditional" payment of the prevailing wage without deduction or rebate, we find merit in the Administrator's argument that the ALJ committed reversible error in awarding only partial reimbursement of the lodging expenses incurred by the employees.

Section 3142(c)(1) requires payment of the prevailing wage "regardless of any contractual relationship" that might otherwise exist. This language might appear to support a ruling that the Local 25 CBA per diem (\$35) *not* be taken into consideration in calculating the amount of any reimbursement found owing the employees. However, we view the \$35 per diem payment as effectively a partial reimbursement by Weeks Marine of its employees' subsistence costs. Thus, we conclude that should the ALJ order Weeks Marine upon remand to reimburse any or all of the Local 25 employees for their lodging costs, the order of reimbursement award reimbursement of actual lodging costs less the \$35 per diem that each of the nine employees received (taking into consideration any application by the Administrator of the \$35 per diem as an offset against other Weeks Marine DBA obligations).

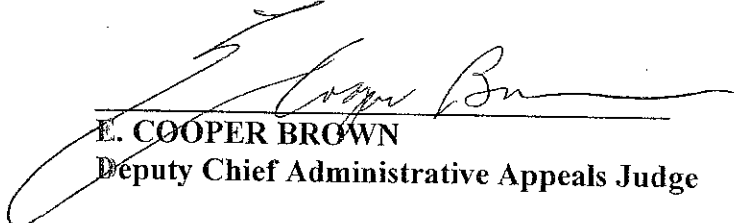
In subjecting any obligation to reimburse the Local 25 employees for their actual lodging costs, we are not unmindful of Respondent's concern that such a ruling could impose an obligation without limits upon an employer. We note that should Weeks Marine be required upon remand to reimburse the nine employees, it will be because it did not provide lodging that was primarily for its benefit and convenience. To avoid the "dark cloud on the horizon" of unlimited lodging reimbursement costs in such situations, while at the same time assuring compliance with DBA's requirement that prevailing wages be paid unconditionally and without subsequent deduction, future employers subject to the DBA have numerous options. For example, employers can provide the employee reasonable lodging, in which case an employee who chooses other accommodations would be required to pay any expense over and above the cost of lodging the employer provided out of his/her own pocket. An employer presumably could also identify to its employees reasonable lodging for which it would reimburse the employee should the employee incur the lodging expense, with those employees choosing to reside elsewhere being required, as a result, to pay any expense over and above the cost of employer-identified lodging. Alternatively, the employer could, as Weeks Marine did in this case, not provide any lodging, leaving it to the employees to find their own, but then placing the employer at risk for paying whatever lodging costs the employees were forced to assume because lodging was not provided.

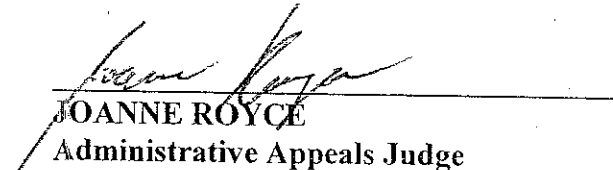
CONCLUSION

For the foregoing reasons, the ALJ's Decision and Order is **AFFIRMED, IN PART**, and **REMANDED** to the ALJ for further consideration consistent with this Decision and Remand

Order. Whether further evidentiary proceedings are warranted in light of today's ruling is a matter left to the ALJ to decide.


SO ORDERED.


 E. COOPER BROWN
 Deputy Chief Administrative Appeals Judge


 JOANNE ROYCE
 Administrative Appeals Judge

Judge Corchado, dissenting:

I would reverse the ALJ and, therefore, respectfully dissent for several reasons. I will simply list those reasons due to the age of this case and that we are remanding it for further consideration. The precise question I see in this unique case is whether federal law requires Weeks Marine to pay the relocation, lodging, and food expenses of a non-employee (new hire) who accepts new employment at a worksite disclosed in the job solicitation for employment under the facts of this case. In my view, none of the law cited by the Administrator (statutes, regulations, written guidance policy manual, cases) requires the payment of such extraordinary expenses for a new employee who chooses to work away from his home. After the bidding and contracting process ended in this case, nothing in the record shows that a payment of this extraordinary expense was required or that such payment was the prevailing practice in the industry. Weeks Marine hired individuals for a job at Fire Island, New York. Folks who took that job chose to go there. The record is unclear about the emergency work in Philadelphia and perhaps that needs to be clarified. To send this back to the ALJ to apply a "balancing test" assumes that there is a statute, regulation, or other binding law that would potentially obligate Weeks Marine for the expenses sought in this case. I believe the "benefit of the employer" rule does not apply to this case. In my view, Congress must pass this type of legislation.


 LUIS A. CORCHADO
 Administrative Appeals Judge