

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

FILE: B-217807

DATE: August 22, 1985

MATTER OF: John Buick Construction Company -
Applicability of Davis-Bacon Act to
Owner/Operators

DIGEST:

1. An owner/operator of earth moving equipment who files a claim under the Davis-Bacon Act is entitled to payment since the Act's minimum wage provisions apply to owner/operators of equipment who are employed as laborers or mechanics on federal construction sites. Where there is no evidence of a subcontract our Office will not defer consideration of the Davis-Bacon Act claim of an owner/operator who meets the statutory and regulatory criteria for payment.

2. Owner/operator of earth moving equipment is not entitled to the full amount of his claim since the payment from the General Accounting Office that is due an employee underpaid in violation of the Davis-Bacon Act is limited to the amounts properly withheld and payable under that Act. The General Accounting Office may disburse to such underpaid employees no more than the difference between the prevailing wage rate applicable and the amount of payment already received.

The Director, Division of Contract Standards Operations, United States Department of Labor, by a letter dated February 13, 1985, has requested our decision on the proper amount of payment to be disbursed to an underpaid

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employee within the scope of the Davis-Bacon Act, 40 U.S.C. §§ 276a to 276a-5 (1982). The first issue raised by the Director's inquiry is whether the Davis-Bacon Act minimum wage provisions are applicable to owner/operators of equipment. If such an employee is within the scope of Davis-Bacon Act protection the second issue is raised. That issue is whether the proper payment to the underpaid owner/operator is the full amount billable by him to the contractor or, instead, is the applicable wage rate as stipulated in the contract between the prime contractor and the contracting agency.

We conclude that an employee who is an owner/operator of equipment is a laborer or mechanic subject to the protection of the minimum wage provisions of the Davis-Bacon Act. Such an employee, when underpaid, is entitled under the Davis-Bacon Act to be paid the wage rate stipulated in the contract between the prime contractor and the contracting agency.

FACTS

John Buick Construction Company (John Buick) performed work for the United States Forest Service (Forest Service) in the Mendocino National Forest in California. The work was agreed to by the parties in Contract Number 50-9129-1-0034, dated September 26, 1981, and was subject to Davis-Bacon Act labor stipulations for construction or repair work on government property. In the course of performing its contract with the Forest Service, John Buick employed Mr. Lee Howard, an owner/operator of earth moving equipment. Mr. Howard performed 17 hours of excavation work on the construction site but received no payment. Mr. Howard was not paid because John Buick failed to consider an owner/operator to be an employee for the purpose of Davis-Bacon Act minimum payment requirements. Instead, Mr. Howard was considered to be a "supplier" of excavation services, was treated as an otherwise unprivileged creditor of John Buick and, in accordance with the poor financial condition of the company, was not paid.

Mr. Howard has submitted a claim for unpaid wages under the Davis-Bacon Act, 40 U.S.C. § 276a, supra. The amount claimed is \$1,700, which is the \$100 per hour rate stipulated by his agreement with John Buick multiplied by the 17 hours he worked. The prevailing wage rate applicable to a laborer or mechanic of Mr. Howard's class, as set out in

the contract between John Buick and the Forest Service and in Wage Decision Number CA-81-5132, is power equipment operator (group 10), \$25.42 per hour. In accordance with 40 U.S.C. § 276a, the contracting officer withheld \$2,251.25 from payment due to John Buick in order to cover the wages owed to underpaid employees.^{1/} That sum is now on deposit with the Claims Group, General Government Division, United States General Accounting Office.

DISCUSSION

Applicability of Davis-Bacon Act

The Davis-Bacon Act states that all mechanics and laborers employed directly on the construction site must be paid at least the prevailing wage rate "regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and such laborers and mechanics * * *." 40 U.S.C. § 276a(a), supra. The irrelevance of the employee's contractual relationship with the contractor in determining the employee's status as a laborer or mechanic has been recognized by the courts, the Attorney General, and by this Office. See, United States v. Landis & Young, 16 F. Supp. 832 (W.D. La. 1935); 40 Op. Att'y Gen. 488 (1960); T. W. P. Company, 59 Comp. Gen. 422 (1980); T. W. P. Company - Reconsideration, 61 Comp. Gen. 231 (1982). Applicable regulations define a laborer or mechanic as "at least those workers whose duties are manual or physical in nature (including those workers who use tools or who are performing the work of a trade), * * *." 29 C.F.R. § 5.2(m) (1984).

Despite the confusion surrounding his classification under the Davis-Bacon Act, it is clear that the Act applies to Mr. Howard insofar as he has been an employee of John Buick and has worked on the construction site under Contract Number 50-9129-1-0034. Because of his status as an owner/operator Mr. Howard's standing under the Davis-Bacon Act is ambiguous when compared to the traditional notion of an employee serving as a laborer or mechanic. However, his contractual relationship with John Buick as an owner/operator, or in any other contractual capacity, does not

^{1/} Mr. Gregg Simpson, a truck driver employed by John Buick, had claimed \$551.25 in unpaid wages. Since first reporting this underpayment, Mr. Simpson has been paid in full and has withdrawn his Davis-Bacon Act claim.

affect his ability to recover under the Davis-Bacon Act if he can, in fact, be classified as a laborer or mechanic. United States v. Landis & Young, 16 F. Supp. at 833-834; 40 Op. Att'y Gen. at 501-502; T. W. P. Company, 59 Comp. Gen. at 424; T. W. P. Company - Reconsideration, 61 Comp. Gen. at 232. As the operator of his own earth moving equipment on the construction site, Mr. Howard falls clearly within the definition of laborer or mechanic set out in 29 C.F.R. § 5.2(m), supra. He performed manual labor in the course of employment by John Buick on a federal construction site.

Mr. Howard's status as an owner/operator is distinguishable from that of owners of subcontracting firms who perform work on construction projects subject to Davis-Bacon Act wage provisions. We have deferred applying Davis-Bacon Act wage rates to owners of subcontracting firms who personally perform work at the worksite until such time as the Department of Labor develops manageable standards for the application of the Act to these individuals. See 61 Comp. Gen. at 233.

In the case of Mr. Howard, however, the record contains no evidence of notice to the Forest Service of subcontractual relationships entered into by John Buick and no evidence of any written subcontract between John Buick and Lee Howard. Additionally, Lee Howard has not indicated that he considered himself to be a subcontractor. Finally, Mr. Howard was carried on John Buick's payroll as an employee. On a similar record this Office has distinguished a subcontractor from an employee in H. C. Wear & Associates, Inc., B-196064, November 18, 1980. On the basis of the criteria set out in that case the relationship between Lee Howard and John Buick is that of an employee to an employer. As an employee engaged in physical labor on the site of a federal construction contract Mr. Howard's minimum wage is protected by the Davis-Bacon Act.

Payment Under the Davis-Bacon Act

According to the Davis-Bacon Act the amount to be withheld from the contractor in order to compensate underpaid employees is "the difference between the rates of wages required by the contract to be paid laborers and mechanics on the work, and the rates of wages received by such laborers and mechanics and not refunded to the contractor, subcontractors, or their agents." 40 U.S.C. § 276a(a), supra. The General Accounting Office is responsible for the

disbursement to the underpaid employees of the money withheld from contractors for violations of the Davis-Bacon Act. 40 U.S.C. § 276a-2(a) (1982). However, claims for amounts over that withheld according to the formula set out in 40 U.S.C. § 276a(a) must be made directly against the contractor or its surety. Cf. 46 Comp. Gen. 178, 179 (1966) (Miller Act bond claim). The reason for this is that the only claim against the government is for that portion of wages that are held and properly payable under the Davis-Bacon Act, which is the difference between the wage rate stipulated in the contract and the payment actually received by the employee. Where the settlement of the statutory claim is insufficient to cover the entire amount owed by the employer to the employee, then the underpaid employee is left to other legal remedies against the employer. See 40 U.S.C. § 276a-2(b) (1982).

Mr. Howard's Davis-Bacon Act claim is for the full \$1,700 allegedly due from John Buick. Unfortunately, he is entitled under that Act only to the amount properly withheld and payable. This amount is the difference between the prevailing wage rate applicable to a power equipment operator under Contract Number 50-9129-1-0034 and the compensation actually received by Mr. Howard. As he has been paid nothing, this amount is the prevailing wage rate of \$25.42 multiplied by the 17 hours that Mr. Howard worked for John Buick, or \$432.14.

Mr. Howard's claim to the remaining \$1,267.86 is certainly legitimate insofar as he is owed compensation for the use of his earthmover by John Buick. However, the authority of our Office to determine and pay Davis-Bacon Act claims does not extend to collateral claims of the employee against the employer. The Davis-Bacon remedy merely provides a minimum wage. Other than the payment of the minimum wages mandated by the Davis-Bacon Act, the settlement of obligations between contractors and those furnishing labor to them is a matter outside the jurisdiction of our Office, there being no privity of contract between laborers or mechanics and the United States. Cf. Vern Willard, B-210544, March 14, 1983, 83-1 CPD 27 (Jurisdiction of General Accounting Office under Miller Act limited to that imposed by statute). Mr. Howard must consider other available action to recover the remainder of the amount claimed from John Buick.

CONCLUSION

We find that the minimum wage provisions of the Davis-Bacon Act apply to owner/operators insofar as such employees are in fact laborers or mechanics performing work on the construction site under a federal contract. The payments to owner/operators, and to other laborers or mechanics, resulting from violations of the Davis-Bacon Act are limited to those amounts properly withheld and payable as defined by that Act at 40 U.S.C. § 276a(a). Application of this decision will be effected by directing our Claims Group to disburse \$432.14 to Mr. Lee Howard in payment of his Davis-Bacon Act claim arising under Contract Number 50-9129-1-0034, dated September 26, 1981, between John Buick Construction Company and the Forest Service. The balance withheld from the contractor will be disbursed to John Buick Construction Company or its successors.

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for Henry R. Wray
Associate General Counsel