U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

In the Matter of:

ADMINISTRATOR, WAGE AND, HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,

PLAINTIFF,

v.

SUN VALLEY ORCHARDS, LLC,

RESPONDENT.

ARB CASE NO. 2020-0018

ALJ CASE NO. 2017-TAE-00003

DATE: May 27, 2021

Appearances:

For the Complainants:

Christopher J. Schulte, Esq.; *CJ Lake, LLC*; Washington, District of Columbia

For the Respondent:

Kate S. O'Scannlain, Esq., Jennifer S. Brand, Esq., Sarah K. Marcus, Esq., Rachel Goldberg, Esq.; and Amelia Bell Bryson, Esq.; *Office of the Solicitor, U.S. Department of Labor*; Washington, District of Columbia

Before: James D. McGinley, *Chief Administrative Appeals Judge*; James A. Haynes and Stephen M. Godek, *Administrative Appeals Judges*

DECISION AND ORDER

PER CURIAM. This case arises under the worker protection provisions of the H-2A temporary agricultural worker program of the Immigration and Nationality Act (INA) and the H-2A implementing regulations.[1] The Administrator of the Wage and Hour Division, United States Department of Labor (Administrator), filed a Notice of Determination, finding that Sun Valley Orchards, LLC (Respondent) violated multiple H-2A program regulations through the actions of its agent, Agustin Hernandez. The Administrator assessed back wages and civil money penalties (CMPs) against the Respondent for violating the governing H-2A regulations.

Respondent requested a hearing, and the Administrator referred the matter to the Office of Administrative Law Judges (OALJ). After a hearing, an Administrative Law Judge (ALJ) issued a Decision and Order Affirming in Part and Modifying in Part the Administrator's Findings (D. & O.). The ALJ found that Respondent violated several of the H-2A program requirements and owed a total of $344,945.80 in back wages and $211,800 in CMPs.

Respondent appealed the ALJ's findings to the Administrative Review Board (Board). After considering the record and the parties' arguments, we conclude that the ALJ correctly determined that Respondent committed serious violations of the H-2A program requirements and, as a result of these violations, the ALJ properly awarded back wages and assessed CMPs. Therefore, we affirm the ALJ's decision.

BACKGROUND

Respondent is a New Jersey farm owned by the Marino family, including brothers Russell and Joseph.[2] At all relevant times, Respondent employed Hernandez as its supervisor of the farmworkers.[3] Hernandez supervised the workers in every aspect of their lives and work. Hernandez oriented the workers, maintained their housing facilities, sold them meals and drinks, oversaw

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[1] *See* 8 U.S.C. § 1188(c); 20 C.F.R. § 655, Subpart B; 29 C.F.R. § 501.

[2] D. & O. at 3. Both brothers play a role in the events that give rise to this appeal.

[3] *Id.* at 4, 9-11.

transportation, and distributed pay.[4] Workers paid Hernandez for meals, drinks, housing, and transportation.[5]

Respondent filed two job orders with the Department of Labor (Department) to hire H-2A workers to pick produce crops from April 13 to October 10, 2015.[6] It was Respondent's first time utilizing the H-2A program.[7] In these job orders, Respondent represented to the Department and the H-2A workers that it would "furnish free cooking and kitchen facilities to those workers who are entitled to live in the employer housing so that workers may prepare their own meals."[8]

During the 2015 growing season, the H-2A workers, and many of Respondent's domestic workers, lived at Respondent's housing facility.[9] However, the kitchen at the workers' housing facilities was not large enough to allow the workers to cook their own meals after returning from their shifts.[10] Instead, Hernandez managed a meal plan for the workers, as instructed by Respondent, in which Hernandez would provide cooked food for a fee of $75 to $80 per week.[11] All of the H-2A workers participated in the meal plan at some point.[12] Respondent owned the kitchen, paid its utility bills, and directed Hernandez to maintain records of meal purchases and not to make a profit from the meal plan.[13] The workers did not pay Respondent directly for the meal plan. Instead, Hernandez would take the workers' checks to the bank to cash them and then return the remaining money after deducting the amount owed for the meal plan.[14]

The farmworkers harvested asparagus and peppers. The workers' shifts lasted for twelve hours each day with only a single, one-hour, break.[15] Potable

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4 *Id*. at 9-11.
5 *Id*. at 11.
6 *Id*. at 3-4.
7 *Id*. at 20.
8 *Id*. at 15.
9 *Id*. at 4.
10 *Id*. at 12.
11 *Id*. at 10.
12 *Id*. at 4, 40.
13 *Id*. at 8, 10.
14 *Id*. at 8.
15 *Id*. at 9.

drinking water and clean bathroom facilities were not consistently available to the workers while working in the fields.[16]

Many other aspects of the workers' living and working conditions were inadequate. The workers' dormitories had dirty bathrooms without hot water and two broken sinks.[17] The windows and doors lacked screens and garbage cans lacked lids, which attracted flies and other pests.[18] Respondent transported the workers from the dormitories in unsafe school buses that were driven by workers who were not licensed drivers.[19] A Wage and Hour Division (WHD) investigator found that three of the five buses used by Respondent had worn, unsafe tires and one that had a broken rear turn signal.[20]

Hernandez sold non-alcoholic beverages to the workers in the kitchen and while he supervised them in the fields.[21] He also sold beer to the workers from the kitchen, though he did not have a state license to sell alcohol.[22] Hernandez did not maintain records of the drink sales.

In May 2015, nineteen workers sought a meeting with management to raise concerns about their living and working conditions.[23] Workers testified that Russell Marino was very angry at the meeting and fired the workers.[24] Respondent subsequently distributed worker departure forms that falsely stated the workers were resigning because of personal issues, such as a sick family member.[25] Respondent did not allow the workers to state on the forms that they were fired.[26] Respondent provided the forms to Department and other government agencies after the workers signed them.[27] Russell Marino testified that he listed a false reason for the workers' departure because he did not want to make it harder for the workers to

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16 *Id.* at 18-20.
17 *Id.* at 6-7, 29.
18 *Id.* at 46.
19 *Id.* at 8, 21.
20 *Id.* at 8.
21 *Id.* at 16.
22 *Id.* at 7.
23 *Id.* at 14.
24 *Id.* at 14-15, 44.
25 *Id.* at 19-20.
26 *Id.* at 20.
27 *Id.* at 20, 49.

find work later with a mark on their record but he also admitted it was to "protect against . . . this lawsuit."[28] Respondent replaced the workers with other H-2A workers.[29]

In August, Respondent laid off another group of forty-four workers because of a pepper crop failure.[30] Respondent had these workers also sign forms falsely stating their reasons for leaving.[31]

The WHD investigated Respondent to ensure compliance with H-2A regulations during the 2015 growing season.[32] On June 22, 2016, the Administrator issued a Notice of Determination after the investigation, alleging multiple violations of the H-2A program and assessing $369,703.22 in back wages and $212,250 in CMPs against Respondent.[33] Respondent requested a hearing before an ALJ, and the Administrator referred the matter to the OALJ.[34]

ALJ DECISION

The ALJ held an evidentiary hearing on July 18 through 21, 2017 and issued her decision on October 28, 2019.[35] The ALJ made several narrative findings of fact, including that "[k]itchen access was unavailable or otherwise denied" to the workers and that Respondent informed the workers that they could purchase a meal plan for $75 to $80 a week.[36] The ALJ also found that potable water and clean bathroom facilities were only sporadically available, especially in the fields, and that the workers' housing was inadequate.[37] Further, the ALJ found that Respondent fired the nineteen workers in May 2015 after the contentious meeting and that Respondent provided the terminated workers with worker departure forms that gave false reasons for leaving.[38]

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28 *Id*. at 19-20.
29 *Id*. at 17.
30 *Id*. at 12.
31 *Id*. at 20-21.
32 *Id*. at 6.
33 *Id*.
34 *Id*.
35 *Id*. at 2, 6.
36 *Id*. at 20.
37 *Id*.
38 *Id*. at 20-21.

The ALJ then discussed the Administrator's violation findings and the back wages and CMPs assessed against Respondent. As an initial matter, the ALJ found that Hernandez acted as Respondent's agent at all relevant times with actual and apparent authority.[39] Under 20 C.F.R. § 655.122(p), the ALJ held that the Administrator properly found that Respondent unlawfully deducted from the workers' wages for the meals, non-alcoholic beverages, and beer under 20 C.F.R. § 655.122(g), (p), and (q).[40] Under 20 C.F.R. § 655.122(p), Respondent could not make deductions from the workers' pay that provided a profit or violated any law.

The ALJ found that Respondent was required to remit back pay for the deductions made from the workers' wages for the meals and non-alcoholic beverages.[41] Under 20 C.F.R. § 655.122(p)(1), job orders must list any deduction not required by law. The ALJ found that Respondent failed to note the deductions for the meal plan in the job orders, depriving the workers of the wage promised to them in the job order.[42] The ALJ explained that the assessment of the entire amount deducted from the workers for the meal plan provided them their contractual right to the wage promised in the job orders and provided a deterrent effect to future employers who may also attempt to alter the terms of the job order upon the workers' arrival.[43] Thus, ALJ affirmed the Administrator's $128,285 back wage assessment for the amount that Hernandez deducted for the meal plan. The ALJ also upheld the Administrator's decision to assess one $1,350 CMP per affected worker for all of the meal and drink violations, totaling $198,450.[44]

The ALJ further found that Respondent profited from the sales of the non-alcoholic beverages to the workers. The ALJ approved of the WHD's use of the *Anderson v. Mt. Clemens Pottery Co.*,[45] method for calculating the back pay, in which an employee need only show a just and reasonable inference of the amount owed if the employer fails to keep records documenting the unpaid wages. However, the ALJ found the preponderance of the evidence established the workers

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39 *Id.* at 36.

40 *Id.* at 35.

41 *Id.* at 39-40.

42 *Id.* at 39.

43 *Id.*

44 *Id.* Under H-2A regulations at the time of the assessment, CMPs may not exceed $1,500 per violation. 29 C.F.R. § 501.19(c) (2010).

45 328 U.S. 680 (1946).

purchased an average of 4 drinks a day rather than the Administrator's finding of 4.42.[46] Therefore, the ALJ modified the back wages from $71,790.08 to $64,960.[47]

The ALJ found that the beer sales were also unlawful deductions because Hernandez sold beer without a license in violation of New Jersey law[48] and ordered Respondent to remit the $8,972.61 of profits from the sales.[49]

The ALJ next found the Administrator properly found that Respondent discharged twenty-four workers before they had been offered work for at least three-fourths of the workdays specified in the job orders in violation of 20 C.F.R. § 655.122(i)(1).[50] For the nineteen workers who left after the meeting with management in May 2015, the ALJ recalled the workers' consistent testimony that Russell Marino became hostile to the workers and terminated their positions in anger.[51] The ALJ credited the workers' testimony over Joseph Marino's testimony regarding the meeting because he "was unable to specifically remember what was said" during the argument.[52] Therefore, the ALJ found that Respondent terminated the nineteen workers' employment before they worked the three-fourths of the hours promised in the job orders and was liable for any back pay because of the terminations.[53]

The ALJ further found that Respondent violated the three-fourths guarantee for four of the workers that were laid off in August 2015 because of a crop failure. The ALJ noted that counsel for Respondent agreed to the Administrator's calculations of the hours given to the four workers at the hearing and did not defend against the alleged violation in its post-hearing brief.[54] The ALJ also found that

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[46] D. & O. at 41.

[47] *Id*. at 42.

[48] The parties stipulated that the beer sales violated New Jersey state law. *Id*. at 38.

[49] *Id*. at 42. Because Hernandez failed to maintain records for the beer sold to workers, the Administrator also employed the *Mt. Clemens* method in determining the profits from the beer sales, which the ALJ found to be reasonable. *Id*. at 41.

[50] *Id*. at 43.

[51] *Id*. at 43-44.

[52] *Id*. at 44.

[53] *Id*. The ALJ also found in the alternative that Respondent constructively discharged the workers through the poor working and living conditions. *Id*. at 44-46.

[54] *Id*. at 47.

Respondent failed to satisfy its guarantee for one worker, Jose Islas Larraga, because the record contained no evidence that he abandoned his job.[55]

The ALJ affirmed the Administrator's $142,728.22 assessment of back wages for the three-fourths violations, noting that Respondent did not contest the calculations for the nineteen workers and Larraga and was unable to prove that the calculations for the four workers were unreasonable.[56] The ALJ further found that the Administrator's assessment of one $1,350 CMP for the violations was reasonable.[57]

Next, the ALJ affirmed the Administrator's single $1,350 CMP for Respondent's unlawful attempts to cause the workers to waive their three-fourths guarantee.[58] The worker departure forms provided by Respondent to the Department falsely stated that the workers left voluntarily for personal reasons, which Respondent admitted was false.[59] Though the forms did not expressly state that they were giving up their three-fourths guarantee, the ALJ noted that the misrepresentation that they left voluntarily would proximately cause the workers to waive the guarantee under 20 C.F.R. § 655.122(n).[60]

The ALJ affirmed the Administrator's $3,150 CMP for Respondent's inadequate housing conditions, including the missing screens, uncovered garbage cans, and shortage of hot water, that violated § 655.122(d)(1).[61] The ALJ also affirmed the Administrator's $7,500 in CMPs for Respondent's use of substandard transportation and unlicensed drivers in violation of § 655.122(h)(4).[62]

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55 *Id*.

56 *Id*. at 47-48.

57 *Id*. at 48. Respondent does not contest the back pay and CMP calculations on appeal.

58 *Id*. at 49-50. Respondent does not contest the calculation of the CMP on appeal.

59 *Id*.

60 *Id*. at 49.

61 *Id*. at 50. The ALJ did find that the Administrator's $450 CMP for a mattress found on the ground of the dormitories was unreasonable because the evidence did not establish that the mattress was unlawfully unclean. *Id*. at 51-52.

62 *Id*. at 52-53. Respondent does not contest the CMPs for the transportation violations on appeal.

In total, the ALJ imposed $344,945.80 in back wages and $211,800 in CMPs against Respondent.[63] Respondent petitioned for review of the decision thereafter.

JURISDICTION AND STANDARD OF REVIEW

The Board has jurisdiction to hear appeals concerning questions of law or fact from ALJ final decisions in cases under the INA's H-2A provisions and its implementing regulations.[64] The Board will affirm the ALJ's factual findings if supported by substantial evidence but reviews all conclusions of law de novo.[65] Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[66]

DISCUSSION

Respondent presents many arguments against several aspects of the ALJ's decision on appeal. Respondent contests the ALJ's finding that at all relevant times, Hernandez acted as Respondent's agent. Respondent also contests the ALJ's findings against it for the unlawful meal and drink deductions, the three-fourths guarantee violations, and the attempted waiver violation. We shall address each argument in turn.

1. Hernandez's Status as an Agent of Respondent

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[63] *Id*. at 53-54. The total back wages and CMPs included: $128,285 in back wages and $198,450 in CMPs for the meal-related violations; $64,960 in back wages for the soft drinks sold; $8,972.61 in back wages for the beer sold; $142,728.22 in back wages and $1,350 in CMPs for the three-fourths guarantee violations; $1,350 in CMPs for the attempted waiver; $3,150 in CMPs for the inadequate housing; and $7,500 for the substandard transportation and unlicensed drivers. *Id*. at 54-55.

[64] Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13186 (Mar. 6, 2020); 20 C.F.R. § 655.845; 29 C.F.R. § 501.42.

[65] *Adm'r, Wage and Hour Div. v. Fernandez Farms, Inc.*, ARB No. 2016-0097, ALJ No. 2014-TAE-00008, slip op. at 2 (ARB Sept. 16, 2019).

[66] *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

Respondent contests the ALJ's finding that Hernandez acted as Respondent's agent while operating the meal plan and selling the workers beer, thereby making Respondent liable for his unlawful actions. Respondent claims that the principles of agency do not apply because "the theory in this case is breach of contract" and that Hernandez acted independently when operating the meal plan by using the workers' payments to buy food and compensate kitchen staff. The ALJ found that Hernandez acted as Respondent's agent at all relevant times, with both actual and apparent authority over the workers and, therefore, his actions were "legally equivalent to the actions of Respondent."[67]

First, we conclude that the ALJ correctly held that common law agency principles apply to violations arising under the INA, including the H-2A regulations.[68] Therefore, an H-2A employer is liable for its employee's unlawful actions while acting under actual or apparent authority of the employer.[69]

The ALJ found that Hernandez acted with actual authority when he administered the meal plan. An agent acts with actual authority "when at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act."[70] Here, Respondent told Hernandez to operate the same meal plan that Respondent had used for workers before engaging in the H-2A program. It had Hernandez attend Department training sessions concerning meal plans, and instructed Hernandez to maintain the records of the food and beverage sales and to comply with the H-2A program requirements.[71] Under these

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67 D. & O. at 36.

68 *See Ramos-Barrientos v. Bland*, 661 F.3d 587, 601 (11th Cir. 2011); *Arriaga v. Fla. Pac. Farms, L.L.C.*, 305 F.3d 1228, 1245 (11th Cir. 2002) (quoting *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998)) ("When applying agency principles to federal statutes, 'the Restatement (Second) of Agency . . . is a useful beginning point for a discussion of general agency principles'"); *Garcia-Celestino v. Ruiz Harvesting, Inc.*, 843 F.3d 1276, 1289 (11th Cir. 2016) ("The common law principles of agency . . . dictate the parameters of the employment relationship under the H-2A program.").

69 *See Arriaga*, 305 F.3d at 1244-45.

70 Restatement (Third) Of Agency § 2.01 (2006); *see also Castillo*, 96 F. Supp. 2d at 593 ("*Express actual authority* exists 'where the principal has made it clear to the agent that he [or she] wants the act under scrutiny to be done.'") (quoting *Pasant v. Jackson Nat'l Life Ins. Co.*, 52 F.3d 94, 97 (5th Cir. 1995)).

71 D. & O. at 22.

instructions, Hernandez operated the meal plan service and collected money from the workers for the food. Without Hernandez's services, Respondent would not have complied with its requirement to provide meals to its workers. This evidence demonstrates Hernandez reasonably believed that he was operating the meal plan under his employer's instructions and not as his own business. Respondent points to no evidence that would support a legal conclusion to the contrary. Thus, we conclude the ALJ correctly found that Hernandez acted with actual authority.[72]

Though the ALJ found that Hernandez acted as Respondent's agent at all relevant times, the ALJ also found that Hernandez was an "affiliated person" of Respondent when selling beer to the workers. An H-2A employer may not make a deduction from an employee's wages that "includes profit to the employer or to any affiliated person."[73] WHD guidance describes an affiliated person as those "who furnish workers, any person acting in the employer's behalf or interest (directly or indirectly), or who has an interest in the employment relationship."[74] At the very least, Hernandez acted indirectly in Respondent's interest when selling the beer to the workers out of Respondent's kitchen. Therefore, the ALJ correctly found Respondent was liable for any unlawful profit that Hernandez made from the sale of beer to the workers.

2. The Workers' Kitchen Facilities

For the period from June 1, 2015 through October 10, 2015, Respondent signed a job order submitted to the Department in which it promised to "furnish free cooking and kitchen facilities to those workers who are entitled to live in the employer's housing so that workers may prepare their own meals" and that "[o]nce a week the employers will offer to provide (on a voluntary basis by the workers) free transportation to assure workers access to the closest store where they can purchase groceries."[75]

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[72] The ALJ also correctly found that Hernandez acted with apparent authority when administering the meal plan because the workers reasonably believed that Respondent instructed Hernandez to implement the meal plan. D. & O. at 37-38; *see Arriaga*, 305 F.3d at 1245. However, we need not discuss this finding in detail because we affirm the ALJ's finding that Hernandez acted with actual authority.

[73] 20 C.F.R. § 655.122(p)(2).

[74] U.S. DEP'T OF LABOR, WAGE & HOUR DIV., FIELD ASSISTANCE BULLETIN NO. 2012-3 2 (May 17, 2012), https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fab2012_3.pdf.

[75] D. & O. at 15.

Respondent contends the ALJ's finding that it failed to provide the kitchen facilities contractually promised to the workers is not supported by the evidence in the record. Respondent claims the testimony was "inconsistent" regarding how many workers could simultaneously use the kitchen and that some workers either used the kitchen or never asked to use it. However, Respondent's argument misses the point. Even if there were inconsistencies, they do not undercut the ALJ's finding that Respondent failed to meet its legal obligation to provide the workers with access to its kitchen to prepare meals on their own, nor would they provide an evidentiary basis to disturb the ALJ's findings on this issue. The Administrator points out that Hernandez testified that the kitchen was too small for the workers to prepare their own food. Hernandez's wife, who worked in the kitchen, further explained that workers were not allowed to use the kitchen.[76] Hernandez himself testified that workers were only allowed to store small items in the kitchen, and the workers who were able to cook for themselves purchased and used a hot plate in the dormitories.[77] Thus, we conclude that the ALJ's finding is supported by substantial evidence in the record.

3. The Back Wages and CMPs for the Undisclosed Meal Plan Deductions

Respondent contests the ALJ's order of $128,185 in back wages and $198,450 in CMPs for the deductions made from the workers' wages for the undisclosed meal plan under 20 C.F.R. § 655.122(p). Respondent argues that Hernandez did not deduct the meal plan costs from the workers' pay because the record demonstrated that the workers would pay him after they received their cash, and that the ALJ's decision to assess a per-worker CMP rather than a single CMP is excessive because there was only one violation of failing to disclose the meal charges.

As an initial matter, Respondent fails to accurately describe how the workers paid for the meal plan. As the ALJ observed, the workers never paid in cash for either the meals or the beverages Hernandez sold. Instead, Hernandez would cash the workers' checks at the bank and then return the money to them, minus what was owed for meals and beverages.[78]

Further, the manner in which Hernandez charged the workers for the meal plan is irrelevant because shifting a cost that Respondent could not deduct

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76 Hearing Transcript (Tr.) at 175-76; Plaintiff's Exhibit (PX) 19 at 809.

77 Tr. at 176; PX-19 at 1103-06.

78 D. & O. at 8.

"constitutes an unlawful de facto deduction that impermissibly drives the employee's pay below the required prevailing wage."[79] The Board has held 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."[80] Here, whether Hernandez took the money before or after providing the workers' pay is a distinction without a difference because the effect would be the same. The workers' would lose $75-80 of their earnings. Thus, the charges Hernandez took out of the workers' pay for the meal plans were deductions.

Respondent's contention that the Administrator can only assess one CMP for its failure to disclose the meal plan is incorrect. H-2A regulations permit the Administrator to assess a CMP "for each violation of the work contract" including each failure to "pay an individual worker properly or to honor the terms or conditions of a worker's employment."[81] Under each worker's job contract, Respondent falsely represented that an adequate kitchen would be provided. Further, Hernandez, acting as Respondent's agent, failed to pay each worker properly by subtracting deductions from each worker's pay that were not disclosed in the job orders. Therefore, Respondent failed to honor the terms of each worker's job contract, resulting in a violation for each worker Respondent employed.

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[79] *Weeks Marine, Inc.*, ARB Nos. 2012-0093, -0095, ALJ No. 2009-DBA-00006, slip op. at 7 (ARB Apr. 29, 2015); *see also Arriaga*, 305 F.3d at 1236 (holding that the FLSA rule prohibiting deductions for the costs of facilities that primarily benefit the employer "cannot be avoided by simply requiring employees to make such purchases on their own, either in advance of or during the employment"). The H-2A regulations incorporate FLSA regulations for the permissibility of deductions. 20 C.F.R. § 655.122(p) ("The principles applied in determining whether deductions are reasonable . . . are explained in more detail in 29 CFR part 531.").

[80] *Weeks Marine, Inc.*, ARB Nos. 2012-0093, slip op. at 6-7 (considering a cost that the employer could not lawfully deduct from employee wages under Davis-Bacon Act regulations that also incorporate FLSA standards for the permissibility of deductions).

[81] 29 C.F.R. § 501.19(a) (2010) ("Each failure . . . constitutes a separate violation.").

The Administrator is granted discretion in "fashioning an appropriate remedy for a violation" within the limits of the H-2A regulations.[82] The regulations permit the Administrator to assess up to $1,500 per CMP.[83] The Administrator's decision to assess one $1,350 CMP for each worker that was misled by the job order was not an abuse of her discretion.

4. The Impact of the Failure to Disclose the Meal Plan

Respondent argues that the ALJ's order for $128,285 in back wages and $198,450 in CMPs for the unlawful meal plan deductions should be reversed because its failure to disclose the meal plan charges would not have impacted the Department's decision to approve Respondent's H-2A application or the workers' decision to accept the job orders. Respondent claims that the purpose of the H-2A disclosure requirements is: (1) to inform potential workers of the terms of conditions so they can decide whether to accept the job; and (2) to allow the Department to know whether the terms of the job might adversely affect similarly-employed domestic workers. Respondent cites *Matter of Global Horizons*, in which an ALJ granted partial summary decision to the employer that had failed to accurately disclose meal charges because the employer did not exploit the workers by overcharging for meals.[84] Thus, Respondent claims that the back wages and CMPs are not warranted because Respondent did not profit off of the meal plan.

The deductions were unlawful because they were not disclosed, not because they provided a profit. The H-2A wage requirements are not "met where *undisclosed* or unauthorized deductions, rebates, or refunds reduce the wage payment made to the employee below the minimum amounts required."[85] Here, the undisclosed deductions for the meal plan reduced the workers' wages below the required wages (*i.e.* the wages specified in the job orders). Therefore, the back pay award for all

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[82] *Overdevest Nurseries, LP*, 2015-TAE-00008, slip op. at 18 (OALJ Feb. 18, 2016) (citing *Wage & Hour Div. v. Kutty*, ARB No. 2003-0022, 2001-LCA-00010 to -00025 (ARB May 31, 2005)); 29 C.F.R. § 501.19(a) (2010) ("A civil money penalty *may* be assessed by the WHD Administrator for each violation of the work contract.") (emphasis added).

[83] 29 C.F.R. § 501.19(c) (2010) (CMPs "will not exceed $1,500 per violation.")

[84] *Matter of Global Horizons*, ALJ No. 2010-TAE-00002, slip op. at 9 (OALJ Dec. 17, 2010).

[85] 20 C.F.R. § 655.122(p)(2).

meal plan deductions allows the workers to receive the wages that they were contractually promised.[86]

Further, Respondent's citation to *Global Horizons* does not support its argument because the ALJ in that case ultimately awarded the workers back wages in the full amount of undisclosed meal plan deductions.[87] The ALJ in that case decided to grant summary decision to deny CMPs, not back wages, for the failure to disclose because the employer was "already being penalized the entire cost of buying food and paying cooks to prepare" the food.[88]

Last, whether providing a meal plan instead of cooking facilities would affect any of the workers' decisions to work for Respondent is irrelevant because all workers still received an inaccurate job order and had their wages reduced below the wage promised in the order. Further, Respondent provided inaccurate information to the Department that it relied upon in the application approval process. The Department depends on this information to ensure that the employment of the H-2A workers "will not adversely affect the wages and working conditions of" domestic workers.[89] Therefore, the Administrator appropriately assessed the back wages and CMPs both to provide the workers with the wages they were promised and to deter other H-2A employers from making the same failures to disclose in a potentially exploitative way.

5. The Back Wages for the Beverage Sales

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[86] Respondent does not contest the Administrator's calculation of back wages for the meal plan deductions.

[87] *Matter of Global Horizons*, ALJ No. 2010-TAE-00002, slip op. at 2-3 (OALJ Dec. 13, 2011). The ALJ noted that the fact that the employer did not profit off the workers did not absolve it from liability for back wages because the failure to disclose the meal plan still "thwarted the regulatory scheme" and "circumvented the Department's review and approval of the amounts being deducted," which is "an important step in assuring that Congress' prohibition of preferential treatment for the alien workers is enforced." *Id.* at 2 n.7.

[88] *Matter of Global Horizons*, ALJ No. 2010-TAE-00002, slip op. at 9 (OALJ Dec. 17, 2010).

[89] 8 U.S.C § 1188(a)(1)(B).

Respondent contests the $64,960 back wages award for Hernandez's soft drink sales to the workers.[90] Respondent claims that testimony established that potable water was available to the workers at all times and that Hernandez's sales had no impact on Respondent's profits. Respondent adds that there was no testimony for why it was necessary for the workers to buy the soft drinks and that the H-2A regulations do not justify an award of free drinks to the workers.

We agree that the regulations generally do not require H-2A employers to provide soft drinks to its workers. However, if an employer or an "affiliated person" does sell them drinks, the regulations prohibit them from profiting from the sales.[91] If an employer or affiliated person does unlawfully sell the workers drinks, the employer is liable for the amount charged that reduced the employee's wages below the amount promised in the job orders.[92] Hernandez, who was acting as Respondent's agent when selling the drinks out of the kitchen or in the fields while supervising the workers, testified that he sold the beverages at a profit.[93] Thus, the soft drink sales were unlawful deductions from the workers' wages.

Further, although Respondent contends that evidence demonstrated that water was available at meals and at all times in the fields, the ALJ did not base her finding on the availability of potable water. Rather, the ALJ relied on her finding that drinkable water was sporadically available[94] to support her decision to award the full amount charged for the soft drinks. Even if Respondent had consistently provided its workers with clean, drinkable water at all times, Hernandez's sale of

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[90] Respondent does not contest the calculation of the back wages award.

[91] *See* 20 C.F.R. § 655.122(p)(2) ("A deduction is not reasonable if it includes a profit to the employer or to any affiliated person.").

[92] *Id*. ("The wage requirements of § 655.120 will not be met where undisclosed or unauthorized deductions . . . reduce the wage payment made to the employee below the minimum amounts required."); 29 C.F.R. § 501.16(a)(1) ("Whenever the WHD Administrator believes that 8 U.S.C. 1188, 20 CFR part 655, subpart B . . . have been violated, such action shall be taken and such proceedings instituted as deemed appropriate, including . . . the recovery of unpaid wages" and "the enforcement of provisions of the work contract.").

[93] D. & O. at 16; Tr. at 195 ("Q: You would pay 13 to $14 for a 24-pack of soda? A: Yes. Q: Workers were charged $1 per soda? A: Seventy-five cents, I think.").

[94] The ALJ found that workers did not have consistent access to potable water, based on workers' consistent testimony that clean water was not always available. D. & O. at 18-19.

beverages for a profit still violated the regulations, and therefore, Respondent would be liable for the back wages.

Hernandez also sold beer to the workers from the kitchen, in violation of state law because he did not have a license to sell alcohol.[95] Hernandez did not maintain records of the drink sales, so the Administrator reconstructed the amount of drinks sold to the workers.[96] The Administrator determined that Respondent owed $8,972.61 in back wages for the profit Hernandez earned through his sale of beer in violation of state law.[97]

Respondent claims that the Administrator's calculations of Hernandez's beer sales were incorrect because the investigator based the calculations off of a different brand of beer, store, and price used by Hernandez. However, because Respondent failed to keep records of the beer sold to the workers, the ALJ correctly applied the *Anderson v. Mt. Clemens Pottery Co.* burden shifting framework, in which the plaintiff only needs to produce sufficient evidence of the wages owed as a matter of just and reasonable inference.[98] The burden then shifts to the employer to produce evidence of the precise amount owed, and if the employer fails to do so, the court may award damages that need only be "approximate."[99]

Because Respondent could not rebut the Administrator's calculations with precise amounts, the ALJ was correct in awarding back wages that were an approximation of Hernandez's profits. The Administrator used the prices for beer at wholesale retailer Costco, while Hernandez had purchased the beer at Sam's Club, another wholesale club likely to sell products at similar prices.[100] Further, the Administrator used the price of Coors Light to calculate the profits, which is one of

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95 *Id.* at 7.

96 *Id.* at 7-8, 24-25.

97 *Id.* at 24. To calculate Hernandez's estimated profit from the beer sales, a WHD investigator used the price of $20.99 per thirty-pack of Coors Light, which is one brand of beer Hernandez sold, based upon the cost from a wholesale club similar to the one used by Hernandez to buy the beer. The investigator determined that he profited $1.30 per can because Hernandez sold the beer for $2 a can and each beer cost him $.70 to buy. The investigator determined Respondent profited $18.20 off each worker per week based on a reasonable estimation of how much beer each worker bought per week. *Id.* at 7-8.

98 *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946).

99 *Id.* at 687-88.

100 D. & O. at 42.

the brands of beer Hernandez sold.[101] The *Mt. Clemens* standard only requires estimates; precision is not required. Therefore, the ALJ's finding of $8,972.61 in profits from the beer sales was reasonable.

6. The Three-Fourths Guarantee Violations and Waiver Attempts

Respondent contests the award of $142,728.22 in back wages and $1,350 in CMPs for the ALJ's findings that Respondent had violated the three-fourths guarantee for several workers.[102] H-2A employers must offer each worker "employment for a total number of work hours equal to at least three-fourths of the workdays" that are "specified in the work contract."[103] A worker that abandons employment or is terminated for cause is not entitled to the guarantee.[104]

For the nineteen workers that left in May 2015, Respondent disputes the ALJ's finding that Respondent terminated the workers without cause and the ALJ's credibility determination that favored the workers over Respondent's witnesses. Respondent cites one worker's uncorroborated testimony that Russell Marino tried to hit him as evidence that the workers' testimony lacked credibility and claims that it would have been illogical to fire the workers during harvest season.

The Board gives ALJ credibility determinations "great deference" if they are not "inherently incredible or patently unreasonable."[105] The Board affords such deference because the ALJ is able to observe the "witnesses' demeanor while testifying" and "the extent to which their testimony is supported or contradicted by other credible evidence."[106] Here, the ALJ noted the consistency of the testimony of several of the workers' regarding the May 2015 meeting and that Joseph Marino's hearing testimony contradicted his deposition. Although one worker's uncorroborated testimony about an alleged assault does not bolster the ALJ's credibility finding, it does not make the determination "inherently incredible or

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101 *Id.* at 7-8.

102 Respondent does not contest the calculation of the back wages award or CMPs.

103 20 C.F.R. § 655.122(i)(1).

104 § 655.122(n).

105 *Kanj v. Viejas Band of Kumeyaay Indians*, ARB No. 2012-0002, ALJ No. 2006-WPC-00001, slip op. at 6 (ARB Aug. 29, 2012).

106 *Id.* (quoting *Caldwell v. EG&G Def. Materials, Inc.*, ARB No. 2005-0101, ALJ No. 2003-SDW-00001, slip op. at 12 (ARB Oct. 31, 2008)).

patently unreasonable." The ALJ's credibility determination is substantial evidence that Respondent made "a rash, and perhaps illogical, decision" to fire the workers at that meeting and replace them in violation of their three-fourths guarantee.[107]

The Respondent also disputes the ALJ's finding that Respondent violated the three-fourths guarantee for four workers who were sent home after the pepper crop had become diseased.[108] Respondent claims that the four workers were offered the required hours but were unable to work them because they were sick or injured. However, Respondent waived this argument before the ALJ by agreeing to the Administrator's calculations regarding the three-fourths violations for the four workers and by failing to raise any argument against the alleged violation in its post-hearing brief.[109] Even if it did not waive the argument, Respondent does not cite to any evidence in the record demonstrating that the four workers were offered the required amount of work. Therefore, we affirm the ALJ's three-fourths violation finding concerning these four workers.[110]

Respondent contests the ALJ's finding that it attempted to waive the workers' three-fourths guarantees by falsifying their departure forms to say they

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[107] D. & O. at 44. The ALJ also found in the alternative that Respondent constructively discharged the nineteen workers. *Id.* at 44-46. Because we affirm the ALJ's finding that Respondent actually discharged the workers, we need not discuss the ALJ's alternative finding regarding constructive discharge.

[108] *Id.* at 12, 47.

[109] *Sandra Lee Bart*, ARB No. 2019-0004, ALJ No. 2017-TAE-00014, slip op. at 4-5 (ARB Sept. 22, 2020) ("Under our well-established precedent, we decline to consider arguments that a party raises for the first time on appeal."). Counsel for Respondent withdrew an exhibit containing its own calculations of the hours worked and stated he "was wrong" about its contents. D. & O. at 47.

[110] The Administrator claims that Respondent appears to group one worker, Islas Larraga, who left in June 2015, in with the four workers who were dismissed in August. The ALJ made a separate finding that the record contained no evidence that he abandoned his job and that Respondent violated his three-fourths guarantee. D. & O. at 47. Even if he did abandon the job, Respondent still failed to report the end of his employment to the Department as required. 20 C.F.R. § 655.122(n) ("If the worker voluntarily abandons employment . . . and the employer notifies [the Department,] . . . the worker is not entitled to the three-fourths guarantee.").

left voluntarily.[111] Respondent argues that it was not attempting to have the workers waive their three-fourths guarantee because they never presented the forms to WHD investigators to explain their departures. However, H-2A regulations state that an employer may not "*seek* to have an H-2A worker . . . waive any rights conferred under 8 U.S.C. 1188, 20 CFR part 655, subpart B."[112] Respondent had asked the workers to sign the falsified form. Whether Respondent presented the forms to WHD investigators is irrelevant in this case. Substantial evidence supports the finding that it was attempting to waive their rights because Respondent admitted that no workers had sick or deceased family members and that the purpose of falsifying the forms was "to protect against . . . this lawsuit."

7. Remaining Arguments

Respondent contests the $3,150 in CMPs for the workers' inadequate living conditions, stating that the "condition of the housing resulted from lack of care by the workers living there, but more importantly, could have been remedied immediately if the WHD Investigator had been interested in the workers' living conditions rather than in assessing CMPs and raised the issue to Sun Valley in a timely manner." We are unable to discern any legal argument from this statement, nor do we see any abuse of discretion in the ALJ's order of CMPs for the workers' poor housing conditions.

Last, in a section titled "Estoppel/Laches/Mitigation," Respondent complains that the WHD improperly failed to raise concerns about the meal plan charges and bring an enforcement action in a timely manner. Respondent claims that the WHD knew of the meal plan in July 2015 but did not discuss any issue with Respondent until February 2016. This argument is without merit.[113] Respondent admits that there is no case law that applies the doctrines of laches or estoppel to a government enforcement action and that H-2A employers are ultimately still responsible for complying with the regulations. Indeed, the Administrator notes that there is no

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[111] Respondent does not contest the calculation of the $1,350 CMP for the violation.

[112] 29 C.F.R. § 501.5 (emphasis added).

[113] We must make the point that participation in the H-2B visa program is voluntary. Respondent was under no compulsion to file a request for visas as a means to fulfill its projected employment needs. However, having received the benefit of government action, Respondent was obliged to tell the truth, and to meet the obligations it had undertaken both to its visa employees and to the federal government. We see no mitigating factors. On the contrary, Respondent appears to have simply violated the law.

regulatory requirement for the WHD to notify an employer the instant a violation is suspected and that the Supreme Court has long recognized that laches is not a defense to a government enforcement action.[114]

CONCLUSION

For the foregoing reasons, we agree with the ALJ's following findings, determination of back wages, and CMP assessments:

1. Respondent violated 20 C.F.R. § 655.122(g), (p), and (q) by making false promises about kitchen access and failing to disclose meal charges. As a result, it owes $128,285 in back wages, and $198,450 in CMPs.

2. Respondent violated 20 C.F.R. § 655.122(p) through the sale of drinks and other items at a profit or in violation of state law. As a result, it owes $64,960 in back wages for non-alcoholic drinks sold and $8,972.61 for the profit it made from the beer it sold.

3. Respondent violated 20 C.F.R. § 655.122(i) by discharging certain workers prior to such workers meeting the three-fourths guarantee. As a result, it owes $142,728.22 in back wages, and $1,350 in CMPs.

4. Respondent violated 29 C.F.R. § 501.5 by attempting to cause workers to waive the three-fourths guarantee at 20 C.F.R. § 655.122(i). As a result, it owes $1,350 in CMPs.

5. Respondent violated 20 C.F.R. § 655.122(d) through the provision of inadequate housing. As a result, it owes $3,150 in CMPs.

6. Respondent violated 20 C.F.R. § 655.122(h)(4) through substandard transportation and unlicensed drivers. As a result, it owes $7,500 in CMPs.

Therefore, we **AFFIRM** the ALJ's Decision and Order Affirming in Part and Modifying in Part the Administrator's Findings.

SO ORDERED.

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[114] *See Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917) ("As a general rule, laches or neglect of duty on the part of officers of the government is no defense to a suit by it to enforce a public right or protect a public interest.").