



Issue Date: 23 October 2013

CASE NO.: 2012-TAE-00004

In the Matter of:

**JOHN PEROULIS & SONS SHEEP, INC.,
et al.,**

Respondents

APPEARANCES:

**TYLER P. MCLEOD
For the Secretary of Labor**

**SAM D. STARRITT
For Respondents**

**BEFORE: PATRICK M. ROSENOW
Administrative Law Judge**

**DECISION AND ORDER
BACKGROUND**

This matter arises under the H2-A provisions of the Immigration and Nationality Act, 8 U.S.C. § 1188, *et seq.*, as amended by the Immigration Reform and Control Act of 1986, (“the Act”), and the implementing regulations found at 20 C.F.R. Part 655 and 29 C.F.R. Part 501.¹ I ruled on a companion case involving the termination of one worker on 27 Jun 13.²

Respondents raise sheep on a ranch in northwestern Colorado and routinely employ nonimmigrant shepherders through the DOL’s H-2A visa program. They have done so for at least 30 years. In December 2009, investigators for the Wage and Hour Division (WHD) arrived at Respondents’ ranch to investigate their compliance with the H-2A program. The investigation period covered 21 Nov 08 through 1 Dec 09. During this period, Respondent employed workers under two ETA-approved applications (Job Orders No. 1 and No. 2), covering the periods from 17 Oct 08 to 16 Oct 09 and 17 Oct 09 to 16 Oct 10.³

¹ The parties dispute which iteration of the regulations apply to the present claim. See *infra*.

² 2012-TAE-00006. There, a shepherd was terminated after Respondents observed elk meat hanging near his sheep wagon on their ranch and alerted the Colorado Division of Wildlife. I granted a partial summary decision, finding that Respondent failed to give proper notice, mooted any questions about good cause for termination and making Respondents liable for the minimum contract guarantee and transportation costs. WHD dismissed the housing violation it had assessed upon the issuance of a final order directing Respondents to pay a total of \$9,216.51 for the $\frac{3}{4}$ guarantee and transport.

³ Job Order No. 1 was filed as application case number C-08231-14551 and Job Order No. 2 was filed as application case number C-09233-20383.

Following the investigation, WHD charged violations in several categories. The first category involved the mobile range housing requirements established in a 2001 ETA Field Memorandum. Those violations included (1) knowingly assigning two workers to occupy mobile sheep wagons⁴ that were certified for occupancy by only one adult and (2) not providing a compliant egress window. The second category was based on WHD's determination that two workers at a ranch location were living in range housing rather than fixed-site housing, which has a different set of regulatory requirements. Those specific violations included lack of electricity in the wagons; improper bathing, handwashing, and laundry facilities; and proximity to sheep pens.

The third category of violations related to regulations regarding payroll, including the failure to timely pay and provide wage statements to H-2A workers for September and October 2009. The fourth category addressed transportation and subsistence costs and alleged Respondent failed to pay subsistence costs to six workers and reimburse Roel Espejo Camayo deducted inbound transportation costs. WHD also alleged Respondent deducted amounts in excess of inbound transportation costs from the pay of Jhoseman Samiego Fernandez.⁵ In the final category, WHD alleged Respondents charged workers for bread and thereby failed to comply with the free food requirement of the H-2A program.

As a result of these alleged violations, WHD assessed back wages of \$1,031.70 for Mr. Camayo's inbound transportation reimbursement, \$59.40 in subsistence pay, and \$13.80 for bread that should have been free for the workers.⁶ WHD also assessed a total of \$44,490 in civil money penalties (CMPs).

On 16 Apr 13, Respondents moved for partial summary decision on the ground that the Department of Labor improperly assessed higher CMPs for Job Order No. 2, based on a 2008 Rule that was suspended by the Department before the violations were charged against it. I delayed a decision on the motion until the parties submitted their final briefs. The parties agreed to waive a formal hearing and submitted their evidence and argument to me on the record, which consists of the following:⁷

WHD's Exhibits (GX) 1-30
Respondent's Exhibits (RX) 1-19

My findings and conclusions are based upon the evidence introduced and the arguments presented.

⁴ The wagons are also referred to "campitos" or "camps" in the record.

⁵ Mr. Fernandez was later reimbursed by Respondents but a CMP for the violation remained. See GX-5.

⁶ In its brief, WHD argued that Respondents owed workers \$56.40 as subsistence pay and sought back wages of \$1,104.90. However $\$1,031.70 + \$56.40 + \$13.80 = \$1,101.90$. This discrepancy is accounted for by what I assume now to be a typographical error in WHD's brief, which stated that \$56.40 was owed, rather than the \$59.40 (\$9.90 per day of travel for six workers) that was in GX-5. Because this difference in subsistence figures accounts for the discrepancy, I use the figure from GX-5.

⁷ The parties were cautioned that since a number of exhibits (specifically GX-6, 8, 22; RX-1, 3, 4, 6) appeared to be *en globo* collections of records, counsel must cite in their post hearing briefs to the specific page of any exhibit in excess of 20 pages for that page to be considered a part of the record upon which the decision will be based.

APPLICABLE LAW

Overview

The H-2A visa program arose out of the Immigration and Nationality Act of 1952. An eligible foreign worker is an alien

having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform other temporary services or labor if unemployed persons capable of performing such service or labor cannot be found in this country[.]⁸

Congress amended the program in 1986 to create separate agricultural and non-agricultural temporary foreign worker programs, leading to the H-2A program.⁹ The Secretary of Labor enforces the attestations an employer makes in a temporary agricultural labor certification application and the regulations that implement the H-2A program.¹⁰ Failure to abide by program regulations may result in monetary penalties imposed by the Department's Employment Standards Administration (ETA), debarment from filing other H-2A certification applications, and proceedings for specific performance, injunctive, or other equitable relief.¹¹

A civil money penalty may be assessed by the Administrator for each violation of the work contract or [the applicable] regulations.¹² In determining the amount of such penalty, "the WHD Administrator shall consider the type of violation committed and other relevant factors[.]" including: previous history of violations, the number of workers affected, the gravity of the violations, efforts made in good faith to comply with the H-2A program, explanation of person charged with the violation, commitment to future compliance, and the extent to which the violator achieved a financial gain due to the violation or the potential financial loss or injury to the workers.¹³

Because of the unique nature of the sheepherding business, the regulations provide that the Administrator has the authority to establish, continue, revise, or revoke special procedures for processing these applications.¹⁴ In 2001, the ETA issued a Field Memorandum outlining such special procedures for temporary foreign sheepherders and goatherders under the provisions of the H-2A program requirements.¹⁵ These guidelines governed all H-2A requests for FLSA-

⁸ 8 U.S.C.A. § 1101(a)(15)(H)(ii)(b) (2013).

⁹ Staff of House Comm. On Education and Labor, 102d Cong., 1st Sess., Report on the Use of Temporary Foreign Workers in the Florida Sugar Cane Industry 3-4 (Comm. Print 1991).

¹⁰ 29 C.F.R. §§ 501.1, 501.5, 501.16, 501.17 (2010).

¹¹ See *In the Matter of Global Horizons, Inc.*, 2006-TLC-00013 at slip op. 4 (ALJ Nov. 30, 2006).

¹² 29 C.F.R. § 501.19(a) (2010).

¹³ 29 C.F.R. § 501.19(b) (2010).

¹⁴ 20 C.F.R. § 655.102 (2010).

¹⁵ ETA Field Memorandum 24-01 (August 1, 2001); 20 C.F.R. § 655.93(b) (2001): "[i]n order to provide for a limited degree of flexibility in carrying out the Secretary's responsibilities under the INA, while not deviating from the statutory requirements to determine U.S. worker availability and make a determination as to adverse effect, the Director has the authority to establish special procedures for processing H-2A applications when employers can demonstrate upon written application to and consultation with the Director that special procedures are necessary,...(c)...[t]his subpart shall be construed to permit the Director to continue and, where the Director deems

exempt sheepherders and goatherders with a date of need filed on or after 30 Jun 01. These special procedures stated an expiration date of 31 Aug 03, but remained in place until they were rescinded by Field Memorandum 32-10, issued 14 Jun 11.¹⁶

In accordance with the regulations, standards in the Field Memorandum are used in determining the adequacy of mobile housing for use on the range.¹⁷ Housing used exclusively at the ranch site is subject to the same standards as those for other agricultural workers.¹⁸

A party has a right to a *de novo* hearing before an Administrative Law Judge, the decision of whom “shall include a statement of the findings and conclusions, with reasons and basis therefor, upon each material issue presented on the record.”¹⁹ The decision may affirm, deny, reverse, or modify in whole or in part the decision of the WHD Administrator. In general, an ALJ lacks the inherent authority to rule on the validity of a regulation or to invalidate a regulation as written.²⁰

1987/2008 Rules

In 1987, the Department of Labor promulgated a series of regulations in furtherance of the H-2A program (1987 Rule). In 2008, it promulgated new H-2A regulations (2008 Rule), superseding the 1987 Rule and coming into effect on 17 Jan 09.²¹ The 2008 Rule was designed to eliminate duplicative H-2A activities, more rigorously penalize noncompliant parties, and protect workers.²² On 17 Mar 09, however, the Department issued a notice of proposed rulemaking (NPRM) proposing to suspend the 2008 Rule and reinstate the 1987 Rule.²³ The NPRM stated:

As we move forward with implementing the Final Rule, however, it is rapidly becoming evident that the Department and the SWAs may lack sufficient resources to effectively and efficiently implement the H-2A Final Rule. This has already resulted in processing delays; the delays will become even greater as applications for the upcoming growing season are now being filed with the Department. The Department has been unable to implement the sequence of operational events required to avoid confusion and application processing delays....The Department believes that it has a responsibility to employers, workers, SWAs, and the public to ensure that a new regulatory regime has a sound basis and is capable of effective implementation. Suspending the new H-2A Final

appropriate, to revise the special procedures previously in effect for the handling of applications for sheepherders in the Western states[.]”

¹⁶ ETA Field Memorandum 32-10 (June 14, 2011).

¹⁷ 20 C.F.R. § 655.102(b)(1)(ii) (2001); *see* Mobile Range Requirements, *infra* at p. 6.

¹⁸ 20 C.F.R. §§654.400-654.417, 1910.142 (2001); *see* Ranch Housing Requirements, *infra* at p. 7.

¹⁹ 29 C.F.R. §501.41(b) (2010).

²⁰ *See Bolton Spring Farm*, 2008-TLC-00028 (BALCA May 16, 2008); *Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 1117 (6th Cir. 1984).

²¹ *North Carolina Growers' Ass'n. v. Solis*, 644 F. Supp. 2d 664,667 (M.D.N.C. 2009); Temporary Agricultural Employment of H-2A Aliens in the United States; Modernizing the Temporary Labor Certification Process and Enforcement, 73 Fed. Reg. 77,110 (Dec. 18, 2008).

²² 73 Fed. Reg. 77,110 (Dec. 18, 2008).

²³ Temporary Employment of H-2A Aliens in the United States, 74 Fed. Reg. 11,408 (Mar. 17, 2009).

Rule and reinstating the prior rule on an interim basis will allow this examination to occur while maintaining the previous status quo.²⁴

The NPRM went on to state many more reasons why the Department felt suspension of the Rule was appropriate. It had a ten-day comment period. On 29 May 09, the Department issued a new H-2A rule scheduled to take effect on 29 Jun 09 (Substitution Rule). It stated:

The Department of Labor (DOL or Department) is suspending the H-2A Final Rule published on December 18, 2008 and in effect as of January 17, 2009....To ensure continued functioning of the H-2A program, the Department is republishing and reinstating the regulations in place on January 16, 2009 [1987 Rule] for a period of 9 months, after which the Department will either have engaged in further rulemaking or lift the suspension.²⁵

On 9 Jun 09, the North Carolina Growers' Association and others filed a complaint against the Department and its officers, alleging violations of the Administrative Procedure Act in forming the Substitution Rule and moved to preliminarily enjoin the Department from implementing the Rule. On 29 Jun 09, the U.S. District Court for the Middle District of North Carolina issued a preliminary injunction against the Department's Final Suspension of the December 2008 Final H-2A Rule.²⁶

The Department published a statement on its website in response to the decision, stating "[a]s a result of this court action, and unless and until additional court action takes place, the Suspension is no longer in effect; the December 2008 Final Rule remains in effect."²⁷

The Fourth Circuit Court of Appeals affirmed the District Court's decision and found the Department's reinstatement of the 1987 regulations was arbitrary and capricious "because the Department did not provide a meaningful opportunity for comment, and did not solicit or receive relevant comments regarding the substance or merits of either set of regulations."²⁸

Mobile Range Requirements

Housing provided by the employer must meet the full set of DOL Occupational Safety and Health Administration standards. Housing for workers principally engaged in the range production of livestock must meet standards of the DOL Occupational Safety and Health Administration for such housing. In the absence of such standards, range housing for shepherders and other workers engaged in the range production of livestock shall meet guidelines issued by ETA.²⁹

²⁴ *Id.*

²⁵ Temporary Employment of H-2A Aliens in the United States, 74 Fed. Reg. 25,972, 25,972 (May 29, 2009).

²⁶ *North Carolina Growers' Ass'n.*, 644 F. Supp. 2d at 674.

²⁷ U.S. Department of Labor Employment and Training Administration, Foreign Labor News Archive, "Suspension Enjoined," Jun. 29, 2009. Available at <http://www.foreignlaborcert.doleta.gov/archives.cfm>. Accessed 26 Aug 13.

²⁸ *North Carolina Growers' Ass'n., Inc.*, 702 F.3d 755, 770 (4th Cir. 2012).

²⁹ 20 C.F.R. § 655.102(b)(1)(i)-(ii) (2008).

ETA Field Memorandum 24-01 states in pertinent part:

In accordance with regulations at 20 C.F.R. § 655.102(b)(1)(ii), standards in this section must be used in determining the adequacy of mobile housing for use on the range. Both range and ranch site housing may be self-certified by an employer. Individual employers must submit a signed statement with the application for labor certification assuring that the housing is available, is sufficient to accommodate the number of workers being requested, and meets DOL standards.

Housing shall be structurally sound, in good repair, in sanitary condition and shall provide protection to occupants against the elements. Housing, other than tents, shall have flooring constructed of rigid materials easy to clean and so located as to prevent ground and surface water from entering. Each housing unit shall have at least one window which can be opened or skylight opening directly to the outdoors. Mobile housing units for range use must have a second means of escape. The second egress must be a window which can be easily opened, a hatch or other provision. It must be demonstrated that the herder would be able to crawl through the second egress without difficulty. Tents may be used where terrain and/or land regulations do not permit use of other more substantial mobile housing which provides facilities and protection closer in conformance with the Department's intent.

Separate sleeping unit shall be provided for each person, except in a family arrangement. Such a unit shall include a comfortable bed, cot or bunk with a clean mattress. When filing an application for certification, the employer may request a variance from the separate sleeping units requirement [to] allow for a second herder to temporarily join the herding operation. The employer must explain why it is impractical to set up a second unit. The second herder must provide his/her individual sleeping bag or bed roll. If this is impractical, the employer must supply a sleeping bag or bed roll.³⁰

Ranch Housing Requirements

Pursuant to 20 C.F.R. Section 654.401(a), employers whose housing was constructed prior to April 1980 may follow the ETA standards set forth in the regulations.³¹ All housing sites must have electricity.³² Bathing and hand washing facilities shall be provided and supplied with hot and cold water under pressure. Laundry facilities shall be provided and supplied with hot and cold water under pressure. They must be clean, sanitary, and within 200 feet of each living unit.³³ Housing shall not be subject to or in proximity to conditions that create or are likely to create offensive odors, flies, noise, traffic, or other similar hazard.³⁴

³⁰ ETA Field Memorandum 24-01, Part III (emphasis in original).

³¹ 20 C.F.R. §654.401(a) (2008).

³² 20 CFR § 654.410(a) (2008).

³³ 20 CFR § 654.412(a), (d) (2008).

³⁴ 20 CFR § 654.404(b) (2008).

Payroll

Workers must be paid twice monthly in accordance with the frequency of pay requirement at 20 C.F.R. § 655.102(b)(10), unless the contract reflects that employer/employee mutually agreed to a monthly payment arrangement.³⁵ Wage statements must be provided on or before each payday.³⁶

Transportation and Subsistence Costs

All shepherd employer must offer to provide advance transportation and subsistence costs to workers being recruited. Determinations on advance transportation and subsistence matters must be made in accordance with the regulations.³⁷ An employer may deduct the cost of inbound transportation from a worker's pay, provided that the employee is reimbursed the full amount upon completion of fifty percent of the contract period.³⁸ Employers are required to advance subsistence and inbound travel costs when it is the custom to do so and must pay them (if not advanced) upon completion of 50% of the contract.³⁹ These requirements are also stated in the 2001 Special Procedures.

Free Food Requirements

All H-2A shepherd employer are required to offer their U.S. and foreign workers free food. Board arrangements can involve the provision of three prepared meals a day when workers are in camp, or free and convenient cooking facilities and provision of food for the workers to prepare themselves while in camp or on the range.⁴⁰

ISSUES AND POSITIONS OF THE PARTIES

Respondents noted in the brief that while they dispute some of the facts alleged by WHD in relation to the range housing violations, there are no factual disputes as to the allegations related to ranch housing, wage statements, missing pay, illegal deductions, and transportation/subsistence. The most significant disagreement is over the CMPs, which comprise the overwhelming majority of the amount WHD seeks from Respondent. That question in turn depends largely on what rules applied.

³⁵ 20 C.F.R. § 655.102(b)(10) (2008).

³⁶ 20 C.F.R. § 655.102(b)(8) (2008).

³⁷ 20 C.F.R. § 655.102(b)(5) (2008).

³⁸ 20 C.F.R. § 655.102(b)(13) (2008).

³⁹ 20 C.F.R. § 655.102(b)(5) (2008).

⁴⁰ 20 C.F.R. § 655.102(b)(4) (2008).

1987/2008 Rule

Respondents argue that WHD abused its discretion in assessing CMPs against them. First, Respondent claims that \$38,000 of these CMPs must be denied because the Secretary does not have authority to assess civil money penalties pursuant to the 2008 Rule.⁴¹ Respondents dispute which regulations were in place at the time of their second job order, which is relevant because the amount of CMPs varies based upon whether the 1987 Rule or the 2008 Rule was in effect. Respondents argue that the 1987 Rule, which provided for a cap on CMPs of \$1,000 for each violation, was applicable rather than the 2008 Rule that capped CMPs at \$5,000 each. Respondents note that the 2008 Rule was voluntarily suspended by the Department to provide more time for implementation and research, and the Department at least implicitly reinstated the 1987 Rules during that time.

WHD counters that the 2008 Rule applies to those CMPs assessed on Job Order No. 2, because a federal court enjoined it from suspending the 2008 Rule.⁴² WHD submits that it interpreted the injunction as effective nationwide and that it notified the public that as it could not suspend the 2008 Rules, they remained in force. Consequently, the 2008 Rule continued to apply until the 2010 Rule went into effect and it properly applied the 2008 Rule to the violations it found with respect to Job Order No. 2.

Respondents reply that whatever the initial scope of the preliminary injunction issued by the District Court, it does not apply in this case, because the claims against the Department were dismissed as moot before any final relief was awarded.

WHD responds that the final disposition of the Federal District court is itself moot, because in the interim, DOL implemented the 2010 Rules. Thus, the 2008 Rules remained in force until the implementation of the 2010 Rule. It maintains the district court's temporary injunction of the suspension of the 2008 Rules was never vacated or nullified.⁴³

⁴¹ Respondents argue in the alternative that they had a license to house two workers in a single wagon during the winter under 5 U.S.C. § 558(c)(2), and that Congress did not delegate authority to pursue remedial objectives through its Commerce Clause power. *See* note 43, *infra*.

⁴² *See North Carolina Growers' Ass'n*, 644 F. Supp. 2d at 667.

⁴³ Respondents also argue that the Secretary has failed to comply with the requirements of the Administrative Procedure Act to enforce the range housing violations: Section 555(e) of the APA requires prompt notice of the denial of a license be given and be accompanied by a brief statement of the grounds for denial. (5 U.S.C. § 555(e)). Moreover, a license "with reference to any activity of a continuing nature does not expire until the application has been finally determined by the agency." (5 U.S.C. § 558(c)(2)). Therefore, Respondents conclude, because they have employed sheepherders under the H-2A program for over 30 years, and have housed two workers in single wagons during the winter months that entire time, they established a license with reference to this ongoing activity. Moreover, they assert that Respondents have applied each year since the adoption of the 2001 Special Procedures for a variance to house workers two to a wagon, and the Department of Labor has never ruled on those requests (a claim that is unsupported by any evidence in the record). This argument however, and the fact that Respondents have had an ongoing license or have been certified to employ H-2A sheepherders, does not preclude the WHD from assessing fines where it finds regulatory violations. Acceptance of an H-2A application is acknowledgment of an employer's attestations that they will follow the prescribed regulations. The burden is not on the WHD to find violations before certification is granted.

Mobile Range Requirements

Respondents allege they have applied for a variance to house two workers per sheep wagon during the winter months for every year since the inception of the H-2A program. They argue that their decision to house workers in such a way is required for the safety of the workers and to meet the logistical demands of the job.⁴⁴ Additionally, Respondents argue the workers prefer this arrangement and accept it voluntarily. Respondents also argue they had a longstanding license to house workers two to a wagon, because they housed workers in such a way before there was ever a regulatory prohibition against such conduct.⁴⁵

WHD's position is that Respondents willfully violated the H-2A mobile range requirements by assigning two workers to live in a single wagon during the winter months. Moreover, WHD asserts that Respondents violated the same requirements by not providing an appropriately-sized window for egress. Respondents did not articulate a substantive factual argument against that allegation. Neither did they address the allegations related to ranch housing, payroll, transportation costs, subsistence costs, and free food requirements.

EVIDENCE

*Job orders and the agricultural work contract state in pertinent part:*⁴⁶

Job Order No. C-08231-14551: Respondent applied for certification for 20 sheepherder positions from 17 Oct 08 to 16 Oct 09. Wages were \$750 per month plus room and board and the duties were: attend sheep flock grazing on range or pasture; move sheep to and about area assigned for grazing; prevent animals from wandering and becoming lost; use trained dogs to round up strays and assist in moving flock to other locations; bed down sheep each night; guard against predatory animals and prevent them from eating poisonous plants. May assist in lambing, docking, castrating, dehorning, shearing, vaccinating, drenching and medicating animals. May attend sheep and lambs in barns during lambing season. May brand, tag, slip or otherwise mark sheep for identification purposes. May sort and cut culls. May feed animals supplementary rations.

Employees must be able to live and work singly or in small groups of workers in isolated areas for extended periods of time.

The application described 21 housing units with a total capacity of 23, located on the range in Southern WY and Northern Colorado. It stated that “[h]ousing will be clean and in compliance with applicable standards when occupied. Workers will be responsible for maintaining housing in a neat, clean manner....On ranches with more than one approved housing site, the workers will be required to live at any approved housing site, and to move from site to site as the work requires.”

⁴⁴ See Respondents' Brief at p. 6.

⁴⁵ *Id.* at p. 12-13.

⁴⁶ GX-1, 2, 3; RX-5.

No housing will be occupied at any time by more workers than the approved capacity of such housing that complies with the U.S. Department of Labor requirements for mobile housing for range herders.

Employer will furnish free food, free and convenient cooking and kitchen facilities so workers may prepare their own meals. Employer will provide (on a voluntary basis) transportation to assure workers access to stores where they can purchase groceries. During certain seasons of the year, the employer may, at the employer's option, provide the worker with prepared meals, at no cost to the workers.

Workers will be paid twice monthly, in accordance with 20 CFR 655.102(1), (10), unless the employer and employee mutually agree to a monthly pay schedule. Workers will be paid on the 15th of each month and will be provided with an earnings statement, which contains at a minimum total earnings, and all deductions. The statements will comply with 20 CFR 655.102(b)(8).

The employer will provide advance transportation for reasonable (most economical) common carrier[.] If providing travel in advance is not the prevailing industry practice, the employer will reimburse the worker for transportation costs and subsistence to the employer's work site when the worker completes 50% of the work period. Transportation which was advanced to the worker will be deducted from the worker's pay, but then will be reimbursed to the worker upon 50% completion of the work contract. The employer will also provide advance subsistence at a minimum amount of \$9.90 per 24-hour period of travel from the place of recruitment to the place of employment, if it is the prevailing practice. Workers who provide receipts for meals and non-alcoholic beverages in excess of \$9.90 will be reimbursed during the first pay period, up to the maximum amount of \$39.00 per 24-hour period of travel from the place of recruitment to the place of employment.

Job Order No. C-09233-20383: Employer requested 23 total workers for the period between 17 Oct 09 and 16 Oct 10, with 13 classified under new employment and ten a continuation of previously-approved employment without change with the same employer. The wages and job duties were identical to the previous job order. The application was reviewed and certified on 27 Oct 09.

2010 Variance Documentation states in pertinent part:⁴⁷

A self-certification housing inspection was completed for Respondents on 3 Oct 10 by Stanley Peroulis. The inspection consisted of 21 mobile units with capacity of one each and two mobile units with the capacity of four, for a total capacity of 25. On 4 Oct 10, Respondents requested a variance to allow two men to sleep in a single sheep wagon.

⁴⁷ RX-7.

*The 12 Oct 10 Department of Labor Notice of Determination and violation summary states in pertinent part:*⁴⁸

An investigation covering the periods 17 Oct 08 to 16 Oct 09 and 17 Oct 09 to 1 Dec 09 disclosed that Respondents failed to comply with Section 218 of the INA and applicable regulations at 20 C.F.R. Part 655 and 29 C.F.R. Parts 501 and 502. As a consequence of the H-2A violations, it was determined that \$21,685.94 was owed to thirteen workers for unpaid wages, and CMPs were assessed in the amount of \$49,890. The following matrix was included [consolidated with the summary of violations listed in GX-5 and edited to reflect violations that were later withdrawn]:

Summary of Violations Under ETA Job Order C-08231-14551 (Job Order No. 1)

Regulatory Requirement Violated	Summary Description	Unpaid Wages Owed	Civil Money Penalty
20 CFR §655.102(b)(7)	Employer failed to keep accurate and adequate records, specifically evidence of payroll deposits for the month of September 2009.		\$0
20 CFR §655.102(b)(1)	Employer failed to provide for or secure housing for those workers who are not reasonably able to return to their permanent residence at the end of the work day, without charge to the worker, that complies with the applicable housing and health standards. Specifically, employer used sheep wagons as temporary labor camps and had two sheep herders living in sheep wagons that were certified for one occupant with windows too small to escape through.		\$3,010 for range housing violations and \$1,960 for ranch housing violations)
20 CFR §102(b)(8)	Failure to provide wage statements. Employer did not provide a wage statement to employees for the month of September 2009.		\$720
20 C.F.R. §655.102(b)(10)	Failure to pay wages when due. Employer failed to make	\$9,150 (paid)	\$1,680

⁴⁸ GX-4, 5.

		payroll for the month of September 2009.		
20 C.F.R. §655.102(b)(13)		Illegal deductions taken. Employer deducted too much pay from Jhosemar Samaniego Fernandez's pay for reimbursement of fronted inbound transportation costs	\$0 (Paid)	\$80
20 C.F.R. §655.102(b)(6)		Failure to pay the ¾ guarantee. Specifically the investigation disclosed that employer failed to pay Juvencio S. Damian the ¾ guarantee.	\$0	\$0
20 C.F.R. §655.102(b)(4)		Failure to comply with meals requirements. Employer charged for bread provided to the sheep herders on the range.	\$13.80	\$0
20 C.F.R. §655.102(b)(3)		Failure to provide necessary supplies at no charge. Employer charged employees for gloves and rain gear.	\$366.62 (rescinded)	\$400 (rescinded)
20 C.F.R. §655.102(b)(6)		Failure to comply with transportation to place of employment/daily subsistence requirements. Specifically, employer did not pay the \$9.90 subsistence for inbound transportation and did not reimburse Roel E. Camayo for transportation costs.	\$1,091.10 (\$1,031.70 + \$59.40)	\$1,000

Summary of Violations Under ETA Job Order C-09233-20383 (Job Order No. 2)

Regulatory Requirement Violated	Summary Description	Unpaid Wages Owed	Civil Money Penalty
20 C.F.R. §655.104(d)-655.105(e)(2)	Employer failed to provide for or secure housing for those workers who are not reasonably able to return to their permanent residence at the end of the work day, without charge to the worker, that complies with the applicable housing and health standards. Specifically, employer used range housing sheep wagons as temporary labor camps.	\$0	\$1,200

20 C.F.R. § 655.104(d)(2)	Failure to provide range housing which met ETA guidelines. Specifically, employer had two sheep herders living in wagons certified for one occupant and had windows too small to escape through.	\$0	\$20,000
20 C.F.R. § 655.104(l)- 655.105(g)	Failure to pay the offered/required wage rate. Specifically, employer failed to make payroll for work performed in September and October 2009.	\$9,150.00 (paid)	\$8,400
20 C.F.R. § 655.104(k)	Failure to provide hours and earnings statements. Specifically, employer did not provide a wage statement to employees for work performed in September and October 2009.	\$0	\$8,400

The revised total was \$1,104.90 in unpaid wages and required reimbursement and \$44,490 in CMPs.⁴⁹

Respondents' responses to discovery requests state in pertinent part:⁵⁰ Respondents admit that they failed to meet payroll during the months of September and October 2009 for their H-2A workers, albeit with the knowledge and consent of such workers. During that time there were 12 persons employed under the H-2A program, 11 of whom earned \$750 per month and one of whom earned \$900 per month.

Respondents admit that during the investigative period, not more than two sheepherders used a single sheep wagon for sleeping when tending sheep, but primarily during the winter months and with the consent of the herders. Respondents admit that a variance from Job Service has not been issued to house more than one H-2A worker in a single wagon, but that they have applied for variances and the applications are pending.

Mobile Sheep Wagon Certifications for 2007 state in pertinent part:⁵¹

Employer self-certified 18 mobile sheep wagons. Sixteen were stated to contain one double or bunk bed each, and to be 12 feet in length, seven feet in width, and seven feet in height. Two were certified to contain two double or bunk beds each, and to be 14.3 feet in length, six and a half feet wide, and seven feet in height.

⁴⁹ According to the affidavit of Amy Debisschop, Respondents provided information in discovery that confirmed the H-2A workers were eventually paid for the months of September and October 2009, and the \$9,150 assessed in back wages under each job order (\$18,300 in total) was withdrawn. Affidavit of Amy Debisschop, 18 Jun 13 at p. 3.

⁵⁰ GX-6 (as cited, see n. 6), p. 2-3, 6-7.

⁵¹ GX-9.

*Various statements by employees state in pertinent part:*⁵²

Ambrosio Damian, 1 Dec 09: The first time he worked for Respondents was in 1986. In the summer they go to the mountains to fatten the small sheep, with one person in each trailer. In the winter they go in pairs: one watches/cares for the sheep and the other moves the trailer and gets the food and water for the sheep. In the winter they sleep in the same bed but in two separate sleeping bags. Because he has worked for Respondents for a long time, they pay for his transportation and do not deduct it from his wages.

Ambrosio Damian, 2 Dec 09: He was paid in September for the work in August 2009. He does not have proof of payment in September, October, and November.⁵³ He thinks the deposit was made because he made a wire transfer and the money was received in Peru. He does not know why a receipt hasn't been provided and has not asked anyone why he doesn't have one. He gets charged for bread and he gets the original receipt. The wage statement has the deduction. He lives in wagon number 1128 with Roger Damian Yachas. They started using the same wagon around 1 Oct 09. Before, he was alone in the mountains with the sheep.

Roger Damian Yachas, 2 Dec 09: He had to pay out of pocket for his own food from Peru to Hayden. On his first flight, he was provided a meal. He bought a sandwich for lunch and dinner and was not reimbursed for it. His salary is \$750 per month and he doesn't know when he is paid. August was the last time he was paid. His boss has yet to provide him September and October's check stubs. When he first arrived at the ranch, he was fences until about 15 Sept 09. He lived alone in one of the wagons. Beginning 16 Sept 09, he started going toward the mountains and to the desert. He lives with Ambrosio Damian. There is a mattress for the two of them to sleep on though they both have sleeping bags. There are eight shepherders. Two of them sleep in each camper, and they are: Leopoldo Berasti and Nelson Fernandez, Gabriel Damian and Josemar Samaniego, Gabriel Huaman and Nemesio. His boss paid his way there from Peru. For six months this will be deducted from his pay.

Gabriel Huaman-Tocas, 3 Dec 09: He left Peru on 24 Aug 08. He did not have to pay anything for food while he traveled. He hardly ate anything during his voyage to the U.S. The boss paid for all of the expenses of the ticket to travel there, but deducted little by little for six months then reimbursed the total amount the seventh month. He stays in camper number 1192. In the summer they live one person to each camper. There are two shepherds to the camp in the winter. They start together the month of October until the end of May. His companion is Jhosemar Samanego. He has his own sleeping bag but has to share the bed with his companion. The boss deducts for their clothing or other food like soda and breads. The documents of pay have always arrived but he is missing the last three months of September, October, and November. There is a window in his camper

⁵² GX-10-14, 18, 19, 24, 25.

⁵³ The record established that employees received payment for their work in November 2009 after they were interviewed in early December.

but he cannot open it because of the snow. He can't exit through it because of its small size.

Jhosemar Samaniego, 24 Sept 10: He shares his campito with Gabriel. During the birthing of the lambs, he lived by himself in a campito. After the birthing he was sent to water the fields. During that time, he also lived by himself in a campito. In November, he started to work outside of the ranch. It was then that he started living with Gabriel. Each one of them has a sleeping bag, but they sleep in the same bed. He has not received a check for September, October, or December. He believes they all are in the same situation. Gabriel has also not received his check.

Ramon Huayas Inga, 1 Dec 09: He started working in 1998. The pay was \$750 per month and has not changed. He entered the country on an airplane and has not left since then. The cost of the flight was deducted in payments and was returned to him after he completed six months of work. For the last two years, he has been paid every two months. When he gets paid, he is provided a proof of payment from the bank. The receipt has the amount on the account. His last payment was for August 2009. He gets paid every 15th for the previous month. He is owed for September and October. He worked in the ranch from April to the last week of May. In the ranch, he helped birth the lambs. After that, he irrigated the grass, which happens in June and July. He takes the campito with him when he goes to irrigate. After July, he fixes fences. He does not go to the mountains. When he is in the ranch, he stays in campito number 1118. For hand washing, there is a water fountain. He has a tin bathtub. He can go through the window of his campito but he has not done it.

Johnny Flavio Lapa-Damian, 1 Dec 09: From time to time he goes out to where the sheep are grazing, but the majority of time he is at the ranch, taking care of the sheep and dealing with horses. When he temporarily goes to the camp he stays two or three days for each man that he goes to help. When he is at the camp he stays in the trailer of the man who is at that camp. They sleep in the same bed but each one has his own sleeping bag. From October to May he feeds and cares for the sheep and horses. Two or three times per year they move the sheep for about two or three days to the camps. At the ranch he does different things: takes materials to the camps, cleans the ranch area, does general upkeep, rides and shoes horses, repairs fences, and brings sick sheep back to the ranch.

Roel Espejo Camayo, 13 Nov 09: He was told he'd be paid \$750 per month. They took out \$171 per month from his check to pay for the airplane ticket and were going to take it out in six installments. They told him that they would reimburse him that money in September and they never did. They didn't pay him anything in September, October, or November. They lived with two people in a campito. There was a little window on the side of the bed. All of the campitos have windows, but they are all different sizes. Some of them are big enough to leave through and others are not.

Stanley Peroulis testified in deposition in pertinent part:⁵⁴

Their business, Peroulis & Sons, runs sheep in northwestern Colorado and southwestern Wyoming for wool and meat. His brothers Harry, Louie, and Tony all share ownership equally in the company and are its directors. His brother Louie is involved with him in the day-to-day operations, Harry is the business manager, and Tony is a silent partner.

During the period of October 2008 to December 2009, they had about 12 employees, most of whom were H-2A employees. At the time, he and Louie were in charge of directing and supervising the H-2A workers.

They have a ranch southwest of Hayden, the Baggs ranch (their main headquarters), and the Four Mile ranch, where he lives. The lambs are born in May and that happens between the Baggs Ranch and Four Mile Ranch. They stay around there until about July, when they go up to a higher altitude and the men go out to camps in tents. Four Mile is north of the Craig Mountains and the ranch southeast of Hayden is closer to the high mountains. They come back down in September, walk the sheep back to headquarters, and then go into Wyoming, which they call “the desert,” for the winter.

The shepherders watch the sheep when they’re in the desert or the mountains. They get up early, take care of their horses and the sheep, and doctor any sick animals. Their daily duties change every day, depending on the conditions. They have about 8,000 sheep. In the summer they assign one man per herd and in the winter they assign two. They have been hiring H-2A workers for over 30 years.

He thinks they have 23 or 24 sheep wagons they use for mobile housing. They’re old and are moved from ranch to ranch, all over the range. They keep them painted and make sure the stoves are working all the time. Some are better insulated and they use those in the wintertime. Others are lighter and are strictly used up in the mountains in the summertime. They don’t track them formally, but they are out there every two or three days and know where the wagons are. They don’t use all of the wagons at once. Out of the 23 wagons reflected on the certification forms, two of them were certified for two adults.

His understanding is that the capacity certification has to do with the square footage of the wagons. During the winter months, they assign two shepherders to a single wagon on a temporary basis, for two or three months. They don’t use the wagons certified for two adults, because they’re much too heavy. They’re too big for the horses to pull and they’re not practical. If they’re going to use them, they use them in the summer, when they can pull with pickup trucks. Generally they have three herds out on the desert.

⁵⁴ Herein identified as RX-18 and GX-28.

The winter months can be anywhere from November to March, when there's snow, which they depend on for the sheep's water. They ask an older herder who he'd like for a companero, and he'll generally pick someone. There's no written consent, and the two individuals will be in a wagon for four months or so. He knows that practice is customary in the industry, because they see their neighbors and talk to them.

One worker is a camp mover and one is a shepherd. They both do both jobs. One cannot take care of all the duties alone. They are just too numerous and the days are too short. In the summer, there are fewer sheep and they don't have to deal with blizzards and short days. A typical winter sheep band is two summer bands. There are 2,000 to 2,500 sheep with two herders assigned. In the summer, it's typically 900 ewes.

Putting two to a wagon is the best and safest way to do it. The herder and the camp mover always communicate the risks. They communicate where the sheep are, they've always got a warm meal, and the camp is always close to the sheep. There's no other way it could be done on the Wyoming desert. It all has to do with the men's safety. Every year they apply for variances to put two men in a wagon. Generally the paperwork gets lost and they have to reapply.

He can recall talking about having two people to a wagon with Wage and Hour. It never seemed like a big deal, because they weren't trying to hide anything.

Other than the door, the secondary egress for the wagons is the window on the backside. Only four or five of their wagons have side windows. Most of the windows are aluminum or plastic and are easily kicked out. Some of the older wagons have wooden frames. Some windows are on a slide, others are on hinges, but they can all be kicked out at any time. They repair the windows if they're broken and check to see if they open, but he can't say how often. There's not a window in one of their wagons that he can't get out, and he's bigger than any man who's ever worked for them. He has gotten out through them to prove it can be done.

Johnny Lapa-Damian and Ramon Inga might have been stationed at the Baggs ranch in December 2009. The Baggs ranch is closer to the desert. At the ranch, they stay in sheep wagons, which are temporary and move from one ranch to another, depending on where the sheep are. They might be moved to Four Mile to take care of sheep in a week or four or five days. There, the sheep are under fence. The workers aren't actually out riding horses and herding the sheep, but they're doctoring them and tending them. He can't remember how long those individuals were there in December 2009. When the sheep are in corrals, there are self-feeders and waterers and there isn't always a man there.

The bathing facilities are like those in all sheep camps: they have a wash tub with a pump and a well. There is hot water from a tea kettle. There is rural electric power available with outlets about a maximum of fifteen feet away from the wagons. There's a sink at the commissary, but no toilets. The commissary is about 100 yards east of the camp area.

The bottom wage for the H-2A shepherders is \$750 a month. Some men who have worked for them longer get paid more. Payment is made to the employees on the 15th of the month, but sometimes money is advanced to them, if they want to send money or something. Sometimes payment is made on the 10th or the 11th. It just depends on when they got down to the office. He is in charge of processing payroll every month and he uses a secretary to fill out pay stubs.

He is aware of the allegation that payroll was missed in September and October 2009. There was refinancing at the bank at the time, and they told the investigators exactly what was going on. On a ranch that's mortgaged to provide operating money for the year, there's an anniversary date where the money comes due and there's a re-signing and refinancing agreement with the bank. Sometimes that date hits at inopportune times when the operating line may not be there. That's just business. Agricultural refinancing is different because of the time they have their cash crop. They ship lambs in September, but may not see any income until December or January.

They had spoken to the herders about the delay in payroll. If they had money that needed to be sent, it was sent. If the workers wanted any personal items from the store, it was taken to them on credit. They did not get written consent, but they discussed it with them and told them exactly what was going on. They give copies of their payroll statements to the workers on payday. If they had one in the office, they gave it to the workers. They don't have the workers sign anything saying they received the statements.

They make travel arrangements for the workers and pay for everything. Supposedly they deduct the travel arrangements from their salary for the first six months and then reimburse it. The subsistence pay that's supposed to be provided has changed. The tickets they bought said there would be meals on the plane, so they thought the workers would have no expenses to speak of.

He talked to some people from Wage and Hour during the investigation that started in December 2009. One of them was Michael Speer, and another was a woman named Amy, who told them what a small deal it was and that they should be able to settle it that day. The small deal has gone from a molehill to a mountain, which is why they're appealing it. They were supposed to get back to them in March and April, and they came back in May, but nothing was finalized. Michael told them it was a small deal they should be able to settle, and that it would have no bearing whatsoever on them and their ability to bring men from Peru. They have had over 40 denials in two years. He flat lied to them. They have been so undermanned, and he knows it's strictly because of their appeal in this decision. They never had a problem in the past.

Harry Peroulis testified in deposition in pertinent part:⁵⁵

He is part owner and participates to a degree as an office manager. Louis and Stanley Peroulis are the designated managers, and Louis is the designated president. He is the secretary. He works about an hour a week in that position. Tony works zero hours per week, and Stanley and Louis work full time. The business sells lambs, wool, and occasionally hay.

The subject matter of this complaint are incidental claims the Department of Labor makes versus their claims of compliance. All of them have been resolved except for two. One of the issues, that Respondents failed to keep adequate payroll, has been resolved. The payment was deferred because they were in their renewal process when monthly payroll was due, so it wasn't paid until the following month, after their notes were reviewed and the finances were back in order. The wages were paid, it just wasn't reflected in the records. It was paid late. Until the notes were renewed they didn't have access to their funds.

The other issue is that seasonally they put two men in a camp. That issue will be resolved in the very near future either by legislation or it will be grandfathered in, because it's been an industry standard since the beginning of time and there are too many pluses in the men's interest. They take the safety of their men very seriously, especially in the winter.

Louis Peroulis testified in deposition in pertinent part:⁵⁶

He has been involved in the family business since the day of his birth. He is currently a partner, and his primary responsibility is the daily operations of the ranch. He deals about equally with employees and his brother, Stanley. He resides at the Baggs residence part time and both he and Stanley reside at the Hayden residence in the summer.

He has had occasion to hire and fire H-2A employees. At present, they have six H-2A workers in their employment. They had more between October 2008 and December 2009, but he doesn't remember exactly how many. He thinks Ambrosio Damian, who is still employed by them, was employed back during that period.

The majority of their employees are up toward the Hayden ranch in the summertime and toward the Baggs and Four Mile ranches in winter. When they're in either of those places, he sees them to bring them food and supplies every three or four days, and never less than once a week. He and Stanley share those duties equally. There have absolutely been occasions where it was difficult to reach them due to weather conditions.

⁵⁵ RX-15.

⁵⁶ Herein identified as RX-19.

He has not been directly involved in processing H-2A applications. They've had workers from Peru since they first got into the program, upwards of 30 years. They have sought workers from other countries, including Mexico and Mongolia. The workers probably get a copy of the work contract when they first arrive and start working the day after they arrive or thereabouts. They put new workers with existing employees and that seems like the fastest transition.

He is involved in payroll. He purchases employees' items, takes their statements, and answers any questions they may have. He's aware of a time in September and October 2009 when H-2A workers were not paid because the company was going through a refinancing process. He doesn't know if that happened in the past as a result of refinancing. He was involved in telling the workers what was going on. If they had to have money sent for any reason, it was sent.

The workers have a list in their camp where they list personal items, groceries, provisions they want, and they supply it. When their statement comes, they're provided with a statement of all the items they purchased and original receipts. If there's any discrepancy, they address it. They've never had a problem.

They call the sheep wagons "camps." The company is responsible for repairing and maintaining the wagons. He has done repairs on them his whole life. They clean them thoroughly and fix any structural stuff and paint them. Every year, 90 percent of the camps go through the shop. Each of the camps is numbered. When the Work Force Center certifies the housing, they nail a little engraved plaque in it, but they have their own numbers for their own purposes. Theirs are numbered one through 23.

They do self-certification on the wagons only when they're called for, about every other year. He's not sure how it works, because Stanley does it. Every camp they've had has been cleared and certified as meeting the recommendations of the Labor Department or whoever sets those. He has seen the Job Service measure things in the wagons and stick their heads through windows. He has crawled through every one of the sheep wagons' windows. The older he gets, the more difficulty he has getting through them. He is six feet tall. The windows have hinges on the older models and they've replaced those with sliding, but they're different on all the camps. The dimensions of each window in each camp are different. They don't require the H-2A workers to climb through each window before assigning them.

The wagons are moved by truck if they're not moved by horses. Any of the camps they move in the summer are moved by pickup. It takes two horses to move a wagon. In general in winter they assign four horses to a campsite.

They assign two herders to a wagon because it's herder-friendly. It's better for them and makes their job easier and safer. They prefer and request it. The herders are closer to their sheep and always have the camp warm, food cooked, and don't have to hurry to go to the camp and eat and go back and watch the sheep. They trade off. One guy takes his time to go to the camp, eats, cooks, bathes, does laundry, and the sheep are always taken care of.

The days are short. They have companionship. Everything about it is a plus. When you've been around herders and sheep your whole life, there's no other way to do it. They can't have two wagons out there, because if they had to move two with the horses, it would take them all day. It just can't be done. With the conditions, the mud in the spring, the snow in the winter, it's prohibitive to have two camps. Moving two wagons is a huge problem, because of the short winter days. How far they have to move their campsites depends on the condition of the range, the feed, and the terrain. The herders use their discretion to move where they're comfortable, where they're closer to the sheep.

The safety issue is that if one of them falls off a horse, gets hurt, the other one is always right there. They work together as a team. He can recall several instances where a blizzard has come and an older man has taken a younger man under his wing and shown him to the camp and oriented him. That's why they try to put someone more experienced with someone less experienced.

He has never written a letter to the Department of Labor to seek a variance for the rule of one person per wagon. The company has done that every year. He is not aware of an instance in which a variance was granted. They asked for the reasons he described, the need for safety and a herder-friendly environment.

He does not recall how long the two sheep wagons were at the Baggs ranch in December 2009. Sometimes, when they're not using them, they'll be parked for months. When they're occupied, sometimes they'll be there for four or five days and then they have to take them and move them. It just depends on the job and timing and where they're needed. They've never had H-2A workers permanently assigned to one ranch.

He remembers a May 2010 meeting with Amy DeBisschop and Michael Speer. His two brothers and the sheriff were also there. The sheriff was there because they wanted a level playing field. They've had problems forever with these investigations. "At this time, we can't find anything to cite you for, but give me two or three weeks." That's the way it's been going with the Department of Labor since he can remember. It should be called the Department of Employees. Some of the past issues were things as trivial as the trash being too full of empty cans, and camps being too close to the sheep. That's their job, to be with the sheep. Not enough food or not enough variety of food.

He doesn't recall having any conversations with the Labor Department about how many workers were going to sleep in a sheep wagon or using the wagons as housing when a worker was at the ranch as opposed to in the desert or mountains.

He's not aware of prior occasions where the Department of Labor determined that back wages were owed. Every shepherd that ever worked for them got every dime he had coming and more. He's sure there were instances where CMPs were assessed against them, but he can't remember them. He thinks they have paid some in the past. He cannot recall any situation where an H-2A worker has asked if he could have his own sleeping unit or own wagon in the winter months. A few times there have been disagreements

between the workers residing together where they had to separate them and move them to different wagons.

Amy DeBisschop testified at deposition and stated by affidavit in pertinent part:⁵⁷

She is the assistant district director of the Wage and Hour Division of the U.S. Department of Labor in Denver, Colorado. The Denver office covers the states of North and South Dakota and Colorado.

Her job includes the determination and assessment of civil money penalties for violations of federal law. Regulations specify how much can be assessed. An investigator conducts an investigation and based on the fact that CMPs are appropriate, will precalculate them. As the manager, she reviews the CMPs and makes sure they are correct. The regulations set forth a maximum amount. Depending on the act, there are mitigating and aggravating factors that can be applied, which are also set forth in the regulations. The H-2A regulations have mitigating factors, but she doesn't believe there are aggravating factors. There are eight of them. One is based on the employer's prior history. An employer's commitment to future compliance is another one. If none of the mitigating factors apply, the maximum is assessed.

When she reviews the CMPs assessed, she looks at the facts of the case to decide if the mitigating factors were correctly applied. In the case file there will be a compliance action report and a narrative. The report is a summary of the findings of the case, prepared by the investigator. There are interview statements and back wage computations. There is correspondence from the employer. There may be copies of time sheets and payroll records and there could be a variety of other information the investigator obtained. When the investigator submits a case for review, she receives the file with all the information in it. She reviews all the case files submitted by the ten investigators.

After she looks at the file, they assess any CMPs. If there are back wages owed, there is a back wage file process whereby they obtain proof of payment that the back wages have been paid. Once all of the administrative actions have been taken, the file is administratively closed. That's if the employer agrees to comply and pay. If not, there will be some kind of enforcement action.

If the civil money penalty is greater than \$20,000, then she will discuss it with the regional office in Dallas, Texas.

She did not participate in any investigation of Respondents herself, or attend the site visit. She did attend the final conference on 27 May 10. That is when they discuss the findings with the employer, ask them why the violations occurred, and how they will comply in the future, and obtain a commitment for future compliance. That took place at an office in Craig. She and Michael Speer were there for WHD, as well as three of the Peroulis brothers, and the sheriff. Mr. Speer initially determined the violations found and assessed

⁵⁷ Herein identified as RX-17 and GX-30.

back wages and CMPs. She reviewed his assessments and worked with him in finalizing and communicating the violations and assessments to Respondents.

She has been the supervising manager over one or two investigations of Respondents in the past. She recognizes the H-2A determination letter that was the result of the current enforcement action. Chad Frasier signed it because she was on leave. She did not prepare it. There are a couple of different tables in the record, separated into two different job orders. The first table was for the first job order, under the 1987 H-2A regulations, and the second was under the 2008 H-2A regulations.

Respondents have demonstrated that back wages for the missed payrolls have been paid, so they're only dealing with CMPs on the missed months. Those CMPs deal with the fact of missing the payroll and not providing wage statements for those missed payrolls.

At the time of the final conference, the major issue was housing. Respondents continued to put two shepherders in one campito, which is a violation. At least one of the windows in the campitos was too small to be used as a method of egress. They discussed the missed wage issues and the deductions for tools. Respondents stated that they had paid wages that had been found due at the time of the investigation. They agreed to provide proof of payment of wages for the missed payroll in September and October 2009.

WHD also assessed CMPs for workers performing ranch duties. If workers perform other job functions not in the range, such as farm worker job duties on the ranch that are not incidental, an employer must pay the prevailing hourly wage rate for the particular job, follow wage statement criteria, fixed housing regulations, and other H-2A requirements.

Though the Special Procedures 2001 include a 2003 expiration date, they continued in effect beyond such date. Employers, including Respondents, continued to submit applications and to receive the benefits of the Special Procedures 2001 rather than comply with the general regulatory scheme applicable to all H-2A employers. The Special Procedures 2001 were updated in 2011.⁵⁸ They do not apply to H-2A workers who perform work that is not in the range. H-2A workers performing work at the ranch locations must be provided fixed-site housing that complies with 20 C.F.R. § 654.404-417.

Respondents refused to comply with having one person in a campito on the range. They said it was industry practice to put two in a campito and that it is too difficult to get them where they need to be, so one should be sufficient. At the final conference in May 2010, Stanley and Louis Peroulis admitted that they assigned to two herders to a mobile wagon in winter months for years and did not agree with the Special Procedures 2001 requirement.

⁵⁸ GX-27.

She has been involved in other investigations of shepherd operations in Colorado and Respondents are the only employer she has encountered that puts two in a wagon. The other investigations were not focused on that particular issue.

The Special Procedures 2001 are not, to her knowledge, part of the code of federal regulations or the federal register. A certification is what authorizes an employer to obtain non-immigrant workers on H-2A visas. When ETA certifies an application for foreign workers, they give it a job number, or a certification number. That number is the certification that is alleged to have been violated. Part III of the special procedures outlines the mobile housing for range shepherders. Section L is titled "Sleeping Facilities," and says "separate sleeping unit shall be provided for each person, except in a family arrangement."

Generally, an H-2A employer has to provide housing, and those housing requirements are detailed: electricity, running water, hot and cold water. Because shepherders are a unique industry, they have special procedures, but they still have to provide appropriate housing.

The 1987 Rule applied to all applications/job orders filed on and after 1 Jun 87, up to the effective date of the 2008 Rule, which applied to applications/job orders filed on or after 17 Jan 09. Under the 1987 Rule, WHD assigned a penalty amount in a predetermined base sum for the type of violation, which would not exceed \$1,000. Under the 2008 Rule, each violation was assessed at a base sum of \$1,000.

The Summary of Violations identified CMPs in the amount of \$3,010 for Job Order No. 1 in the combined housing category. One violation was charged for Ambrosio Damian and one for Roger Damian Yachas because they were assigned to the same sheep wagon during that period. The base amount WHD assigned for this type of housing violation under the 1987 Rule was \$350, so two violations equaled \$700. WHD also charged one violation for the egress window that did not open. The base amount of this type of housing violation was \$350, so the total CMP amount for range housing violations totaled \$1,050. The CMPs were not reduced per any mitigating factors because of the repeated nature of the range housing violations.

The summary of violations for Job Order No. 1 also includes the ranch housing violation. They charged four violations for each of the two affected workers, including that the wagons did not have electricity as required, did not have bathing and hand washing facilities with cold and hot water under pressure, there were no laundry facilities, and the wagons were within 18.5 feet of the sheep pens. The base CMP amount under the 1987 Rule was \$350 for each violation resulting in a total amount of \$2,800. They applied a 30% reduction after considering all circumstances, including the small number of workers affected and that assessments were made for the same violations under Job Order No. 2, for a sum total of \$1,960. Added to the range housing CMP amount of \$1,050, the total sum was \$3,010 for housing violations.

The summary of violations for Job Order No. 1 additionally identifies a CMP of \$720 for failure to provide wage statements. The WHD base amount was \$100 per violation for each of the 12 workers who did not receive timely wage statements, and they applied a 40% reduction after considering all circumstances for a total of \$840. The summary identifies a CMP of \$1,680 for failure to pay the wages when due. The WHD base amount was \$200 per violation for each of the 12 workers who did not timely receive pay, for a total of \$2,400. They then applied a 30% reduction.

The summary of violations for Job Order No. 1 identifies a CMP of \$80 for \$100.02 in excess deductions from Jhosemar Samaniego Fernandez. At the final conference, Stanley Peroulis explained the deduction resulted from a mathematical error and Respondents had reimbursed the amount. The CMP base under the 1987 Rule for illegal deduction was \$200 and they applied a 60% reduction after considering all circumstances, for a total of \$80.

The summary also identifies a CMP of \$1,000 for failure to pay subsistence for inbound travel of six H-2A workers [$\$9.90 \times 6$] and back wages owed in the amount of \$1,091.10 as reimbursement to Roel E. Camayo for inbound transportation costs.⁵⁹ Respondents did not agree to pay Mr. Camayo his inbound transportation costs and have not paid any amounts for the subsistence and inbound transportation cost violations. No mitigating factors were considered.

Respondents charged three H-2A workers for sliced bread in the amount of \$13.80. Employers are required to provide workers with meals or the means to prepare meals. The amount was assessed as back wages owed in the summary of violations. Stanley Peroulis stated that workers are provided with food staples and disagreed that Respondents were required to provide workers with bread. He agreed not to charge for bread in the future and they did not assess a CMP in light of the small back wage amount.

The summary of violations for Job Order No. 2 identifies CMPs of \$20,000 for failure to comply with range housing violations and \$1,200 for ranch housing violations under Job Order No. 2 pursuant to the 2008 Rule. Though eight workers were identified as sharing four mobile wagons for the 2009 and 2010 winter season, they assessed four violations for the four workers WHD observed and obtained written statements from: Ambrosio Damian, Roger Damian Yachas, Jhosemar Samenego, and Gabriel Huaman-Tocas. Each violation was determined to be willful and was assessed at the \$5,000 maximum.

It is the maximum because Respondents have been advised that they cannot put two people in a campito. To obtain H-2A workers, Respondents submitted applications that contained clear representations to the ETA that no housing would be occupied by more workers than the approved capacity. They concluded Respondents knowingly and willfully assigned two workers to occupy mobile wagons certified for one adult.

⁵⁹ Deductions for the travel advance of Mr. Camayo were made in the total amount of \$1,031.70. *See GX-25 and GX-29.*

The issue came up prior to the 2009 investigation that resulted in this litigation. She estimates that it came up in 2008 or 2009, but it was a different enforcement action. There were money penalties assessed but Respondents did not pay them.

The summary of violations for Job Order No. 2 identifies a CMP of \$8,400 for failure to provide wage statements. They applied \$1,000 per violation for each of the 12 workers who did not receive the timely wage statements, and a 30% reduction after considering all circumstances, including that Respondents obtained little to no financial gain and penalty assessments were made for the same violations under Job Order No. 1. The summary for Job Order No. 2 identifies a CMP of \$8,400 for failure to pay wages when due. They applied \$1,000 per violation for each of the 12 workers who did not timely receive pay and applied a 30% reduction after considering all circumstances.

For the windows, they look at a number of factors to decide if one is too small for somebody to escape through. They look at the window, interview the workers and ask them if they can get out of them. Employers have to have a pre-occupancy inspection in order to house employees. Some of the wagons are capable of housing two people, which is noted on the pre-occupancy inspection forms from the Department of Labor. If you request a variance, then two people can be temporarily housed in the same unit. She doesn't believe wagon number 1124 is the subject of a variance, though the form for it says "occupancy two."

Respondents were also fined for keeping two units at the ranch site on basically a permanent status. The case file indicated Respondents acknowledged the units were permanently located at the ranch, as did interview statements.

Respondents provided more complete information through discovery that confirmed the H-2A workers were eventually paid for September and October 2009. The \$9,150 assessed as back wages under each job order (\$18,300 in total) was withdrawn, though WHD did not withdraw the corresponding CMPs.

Kalen Fraser (f/k/a Hillyer) testified in deposition and stated by affidavit in pertinent part:⁶⁰

She is an investigator for the U.S. Department of Labor and has been employed there since July 2009. She is fluent in writing and speaking Spanish. She investigates compliance with several federal labor laws. During her first year, most of her time was spent on Fair Labor Standards Act investigations. She has conducted 12 H-2A compliance investigations involving H-2A sheep shearers, sheepherders, livestock workers, and orchard workers. An investigation of an employer's compliance with the H-2A program typically involves reviewing records, interviewing and obtaining written statements from the employer and employees, and inspecting housing compliance with applicable regulations.

⁶⁰ Herein identified as RX-16 and GX-29.

Respondents were required to submit each application to the ETA pursuant to the Special Procedures 2001. Each application includes an “Attachment A” prepared by Respondents that includes specific information required by Special Procedures 2001.

She is not responsible for determining the final number for CMPs, but her findings are included in the report that the manager takes into consideration to assess them. Her manager has always been Amy DeBisschop. She fills out a form for an investigation and submits it. If management feels they need more facts, they ask her. She uses spreadsheets to calculate CMPs and they have a computer program that calculates them using information they input. She fills in different things and it takes into consideration different pieces of information. She doesn't put in anything original. What she remembers for the H-2A investigations is filling out a spreadsheet.

The investigation of Respondents was assigned to her. The first visit to Respondents was unannounced, in early December 2009. There were nine people there,⁶¹ including Del Cranford, Rosalinda Huffman, Jose Garcia, Eden Ramirez, Jason Helms, Michael Speer, Jennifer Casey, and Matt Finnigan. They were called upon to investigate Respondents' compliance with the H-2A regulations, based on a complaint. She thinks part of the complaint had to do with wages not being paid. She believes Michael spoke with Respondents and they gave him permission to interview employees at the ranch. She conducted the interviews in Spanish and wrote answers down in Spanish. At the end of the interview, she asked if they could read Spanish and if they say no, she read it to them. If yes, they read it. Then they signed and dated it. She thinks they interviewed six employees. They also looked at the housing. They conducted the interviews in the wagons and they had to drive out to them. They always go out to where the employees are; a lot of times they're in remote locations and they don't want to put more of a burden on the employer than is necessary.

They spent hours driving around looking for sheep to find herders to interview. They did not have good directions. In other investigations, she has either had very specific instructions of how to get where the shepherders are or the employer has driven her.

There were two campitos parked about 100 feet from the big house at the ranch. Eden interviewed someone and she listened. He asked questions they always ask, like the history of how they found out about the job, did they get a contract, who is their contact in Peru, and their job duties. The person they interviewed said he lived in that campito and was stationed at the ranch. She believes he lived there alone. She thinks the employee they interviewed and one other were taking care of animals, irrigating, and doing general maintenance and cleanup of the ranch throughout the year. The rules require that there are certain types of housing available to employees working at the ranch and the campitos did not meet those conditions. Michael Speer was the author of the final narrative.

⁶¹ C.f. affidavit, which states there were six members of the investigation team.

She knows that when she did an interview out on the range, there was only one campito and there were two people. They told them there were two people living together in the campito, and she's pretty sure they said it was just during the wintertime. One of them may have said that their food gets a little low sometimes. They did not make any statements about clothing. They had sleeping bags and bedrolls. She doesn't recall if she measured any windows. She knows they were measured. She asked the employees if they could exit through the window. If they said no, sometimes it wasn't necessarily because the window was too small, but because it was obstructed by something. They investigated four wagons during December 2009. They wouldn't cite any violations for wagons no one was living in. The investigators confirmed that two workers were assigned to and occupied a single wagon in the desert area during the employment periods of each application.

The wagons are certified by the State Department of Labor every third year, and are self-certified by the employers the other years. These certifications don't play a role in their investigations, other than to provide information.

Part III L of the Special Procedures 2001 required that each worker have a separate sleeping unit that includes a comfortable bed, cot or bunk with a clean mattress. The section permits an employer to obtain a variance from the separate sleeping unit requirement from the State Workforce Agency when a second herder temporarily joins the herding operation. The 2011 Special Procedures clarify that "temporary" is limited to three consecutive days. Respondents never obtained a variance.

The investigation established that Ambrosio Damian and Roger Damian Yachas were sharing a single-occupancy wagon from 1 Oct 09 through at least 2 Dec 09, when the investigation team met with them in the range. The video the investigators took shows Rosalinda Huffman and Del Cranford attempting to open the window in wagon 1192 and they were unable to do so. It also shows the window's dimensions as 11 inches by 19 inches.

She and other investigators observed H-2A workers living in wagons stationed at the Baggs Ranch. Ramon Huayas Inga and Johnny Flavio Lapa-Damian occupied those wagons, which were near the sheep pen and had been there for some time. There was no evidence of recent movement and the portable toilet had been used and was dirty.

She did not participate in the preparation of the WH-55, the spreadsheet investigators can use to record information about payroll. None of the people they spoke to in December 2009 had been paid for September, October, or November. November technically wouldn't have been paid until December 15. There was an issue with them not being paid inbound subsistence amounts. That amount changes every year, and is how much you have to pay H-2A workers per day of travel, for food. Every year a new amount is published in the Federal Register.

The WH-55 would have the information necessary for someone reviewing the file to determine the facts and what amount of money is due for said violation. To prepare for testimony, she would review the WH-55 and the interviews, and probably the narrative, because she'd want to see the information they did and didn't look at. Sometimes they have copies of the payroll that would show where the information came from; she may look at those to get a complete picture. The WH-55 contained the issues of the payroll not being met, the subsistence, the travel issue for one employee, the bread thing, and the three-fourths guarantee.

DISCUSSION

Given that Respondents conceded all of WHD's factual allegations except for a few that relate to the range housing, the case is primarily about regulatory and statutory interpretation and constitutionality. Respondents essentially argue that I should overrule the WHD's interpretation of the various statutes and corresponding regulations (along with the meaning of the district court's injunction of the suspension) as incorrect and even unconstitutional.

Respondent's argument draws into clear focus the distinction between Article III judges and administrative law judges. For all the independence given them by the APA, ALJs remain part of the agency and hold only those powers given them by the agency and the APA. They are in the first instance neutral fact finders who then apply the law and regulations, but as interpreted by the agency,⁶² even if the judge believes the interpretation is incorrect or even unconstitutional. The remedy for parties who seek to overturn an agency decision because it has acted *ultra vires* in terms of creating and promulgating regulations, interpreting statutes, or constitutional constraints, is in Article III courts. Although they are free to weigh the evidence as they see best and may make factual findings that are contrary to the agency's factual allegations, ALJs must still apply to those facts the agency's interpretation of the law.

1987 or 2008 Rules

A central issue in this case is the parties' fundamental disagreement over what Rules properly applied to Job Order No. 2. Respondents insist that the agency's suspension of the 2008 Rules meant that the 1987 Rules were in effect, and the district court's injunction of that suspension and subsequent reinstatement of the 2008 Rules was without effect. The Agency argues that the court injunction was binding and its reinstatement of the 2008 Rules was valid and applied to Job Order 2.

In general, an ALJ lacks the inherent authority to rule on the validity of a regulation or to invalidate a regulation as written. That limitation does not mean I cannot assess the evidence before me to determine any facts that will determine which Rule applied to Job Order No. 2. However, in this circumstance there do not appear to be any contested factual issues for me to decide. In general, my review is focused on determining, whether, given the uncontested facts, Job Order No. 2 comes under the 2008 Rule as interpreted by the agency. The issue of whether that interpretation was valid is not properly before me as the ALJ.

⁶² See *Bolton Spring Farm*, 2008-TLC-00028; *Gibas*, 748 F.2d 1112.

The record contains minimal evidence about the process by which the agency determined it would apply the 2008 Rule to the second job order, beyond argument in its brief that the decision was made after the *North Carolina Growers'* decision was issued. The employment period for Job Order No. 2 ran from 17 Oct 09 to 16 Oct 10, and Respondent submitted its H-2A application on that job order in August 2009. The 2008 Rule applied as written to applications filed on or after 17 Jan 09.⁶³ Notwithstanding the Agency's ill-fated attempt to suspend the 2008 Rule and reinstate the 1987 Rule to allow more time for implementation, the agency's clear interpretation of its regulations (albeit in the context of the injunctive District Court order) is that the suspension of the 2008 Rule was invalid *ab initio* and the 2008 Final Rule remained in effect⁶⁴ for Job Order No. 2.

Applying the law and regulation as interpreted by the agency I find that that the 2008 Rule applied to Job Order No. 2.

Violations

Mobile Range Requirements: Egress Window

WHD submitted evidence that one of the windows in one of the sheep wagons measured 11 inches by 19 inches.⁶⁵ The Special Procedures state that "the second egress must be a window which can be easily opened, a hutch or other provision. It must be demonstrated that the herder would be able to crawl through the second egress without difficulty." The record does not show whether or not the H-2A employees in the wagon whose window was cited were of a size that would allow them to crawl through without difficulty. Gabriel Huaman-Tocas stated that he could not exit through the window because of its small size and because the snow prevented it from opening. Stanley Peroulis testified that he can get out of any of the windows in any of the sheep wagons, and he is larger than any of the workers. He also testified that any of the windows can be kicked out in an emergency. Louis Peroulis also testified that he is six feet tall and has crawled through each of the sheep wagons' windows. Kalen Fraser testified that two investigators attempted to open the window in wagon number 1192 and were unable to do so, and the submitted video evidence corroborates her testimony.⁶⁶

Accordingly, I find that WHD's finding of a violation of range housing requirements with respect to the egress window in wagon number 1192 is supported by a preponderance of the evidence. The corresponding CMPs are affirmed.

Ranch Housing Requirements

The requirements for fixed-site housing are clearly set forth in the regulations. Unless the housing is mobile range housing for sheepherders, it must meet the criteria in 20 C.F.R. Section 655.401.⁶⁷

⁶³ 73 Fed. Reg. 77,110 (Dec. 18, 2008).

⁶⁴ 74 Fed. Reg. 45,906 (Sept. 4, 2009).

⁶⁵ This wagon was identified as No. 1192, inhabited by Gabriel Huaman-Tocas and Jhosemar Samaniego.

⁶⁶ GX-17.

⁶⁷ 20 C.F.R. §§654.400-654.417, 1910.142 (2001).

The WHD investigators found that the workers housed in mobile sheep wagons at the Baggs Ranch in December 2009 were housed improperly, because they were more or less permanently assigned to complete tasks at the ranch, rather than on the range. The significant issue appears to be whether any workers were actually stationed at the ranch for extended periods rather than incidentally.

Stanley Peroulis testified that he thought Johnny Lapa-Damian and Ramon Inga were stationed at the Baggs Ranch in December 2009, while they tended sheep in pens there. He stated that during that time, the workers lived in the mobile sheep wagons, which would be moved to other ranch sites as necessary. Louis Peroulis testified that the workers would stay in the wagons at the ranch for four or five days and that they've never had H-2A workers assigned permanently to a ranch. Kalen Fraser's testimony corroborated that Ramon Huayas Inga and Johnny Lapa-Damian occupied wagons stationed at the Baggs Ranch. She stated that the wagons were close to the sheep pens and there was no evidence of recent movement. Mr. Lapa-Damian's and Mr. Inga's statements corroborated the WHD finding that they were essentially permanently assigned to the ranch for certain periods of the year. Mr. Lapa-Damian stated that he temporarily will go out to the camps two or three times per year, for two or three days to help other workers on the range, but from October to May he is stationed at a ranch. Mr. Inga stated that he did not go to the mountains and that he worked in the ranch during April and May and fixed fences after July.⁶⁸

The preponderance of the evidence shows that at least Mr. Lapa-Damian was assigned to the ranch essentially on a permanent basis, making only occasional short trips out to the range to assist other workers. Because Respondents applied for the H-2A workers under the 2001 Special Procedures, they attested their workers would be working according to the guidelines set forth therein. The Special Procedures indicate workers "may perform other farm or ranch chores related to the production and husbandry of sheep and/or goats on an incidental basis."⁶⁹ Employers wishing to supplement the shepherders' standard job description with additional duties required due to business necessity can do so on a case-by-case basis, contingent on the review and approval of the Regional Office.⁷⁰ Respondent's Job Orders state workers are required to live on the ranch or on the range, and that fixed-site housing in compliance with applicable standards will be provided.⁷¹

The record supports WHD's conclusion and indicates that it is more likely than not that Mr. Lapa-Damian and Mr. Inga were living full-time at a ranch site and performing farm and range duties on more than an "incidental" basis, for months at a time, including irrigating and fixing fences. It also supports the conclusion that the mobile sheep wagons did not meet the regulatory requirements for fixed-site housing. Therefore, the violations and corresponding CMPs are affirmed.

⁶⁸ It was not clear where Mr. Inga conducted the irrigation duties.

⁶⁹ GX-7 at p. 5.

⁷⁰ *Id.*

⁷¹ GX-1 at p. 4.

Payroll

Respondents conceded that they were late in paying their H-2A workers in September and October 2009, arguing only that the delay did not harm the workers and that the workers acquiesced to the circumstances. The record supports the WHD's findings that Respondents violated the regulations with regard to timely paying its workers. The record also supports the finding that Respondents did not timely provide payroll statements to its workers during the same period. The violations and corresponding CMPs are affirmed.

Transportation/Subsistence Costs

Respondents presented no evidence in opposition to WHD's findings that they failed to pay Roel Espejo Camayo deducted inbound transportation costs, deducted amounts in excess of inbound transportation costs from Jhosemar Samaniego Fernandez, and failed to pay subsistence costs to six workers. The record supports those findings and the violations and corresponding CMP are affirmed.

Free Food Requirements

WHD found that Respondents' failure to provide free bread for its employees violated the regulations and the Special Procedures, which require employers to provide free food for the H-2A employees. Respondents charged three workers for sliced bread, in an amount of \$13.80. Respondents provided evidence that they stocked workers with staples, including canned pork and beans, potatoes, rice, flour to make tortillas, onions, peas, tomatoes, corn, canned milk, sugar, coffee, salt, and lamb meat. Workers interviewed stated that they had enough food. The regulations do not specify what food is required to be provided, and I find that Respondents' charges for bread did not violate them. The assessment of back wages owed in the amount of \$13.80 is denied.

Mobile Range Requirements: Number of Herders Per Wagon

The workers stated and Respondents conceded that they were sleeping two to a bed in the sheep wagons. This violates the H-2A Special Procedures 2001, which exposed Respondents to liability in the form of CMPs.⁷² There is no real factual dispute that Respondents were in technical violation of the specific language of the guidance document.

Respondents do object, though, on two general and related grounds. They start by pointing out that strict application of the requirement in winter is unrealistic and actually endangers the herders.⁷³ Respondents also note that what they do is the standard industry practice and that the agency has known for years that it is the practice. Respondents further argue that

⁷² Respondents do not argue the validity of the H-2A Special Procedures 2001 as the basis for assessing CMPs, other than mentioning that the document stated it was to expire 31 Aug 03.

⁷³ WHD accurately points out that it is not logistically or physically impossible to comply, but fails to address the economic implications of doing so.

they submitted variance (license) requests to WHD to address the problem, but they were never answered.⁷⁴

Respondents' position is based in equity and public policy, rather than statutory and regulatory language. They begin with an estoppel argument, arguing that the agency has known about the practice for years, but only now seeks to enforce the regulation. They also suggest that the regulation, as interpreted and enforced by the agency does nothing to help the herders it was designed to protect. The argument that they are entitled to a variance until such time as it is denied would make more sense, had a request ever been formally accepted (or denied).

In any event, WHD is acting within the regulation and scope of the guidance document. Whether the requirement is good (or even reasonable public policy) is not for me to decide. The same is true of the questions of whether Respondents detrimentally relied on years of knowing agency acquiescence and if WHD's decision to now enforce the regulations is fair, or even rational. Respondents submit many compelling arguments why, in the winter months, it is safer and more practical to house sheepherders in such a way. Nonetheless, my task is to determine if WHD accurately applied the language of the law and regulation. I find that the Special Procedures clearly outline the requirements for range housing, including that workers must have individual sleeping units. Consequently, the assessed violations are affirmed.

The record does not show, however, that the WHD fully considered Respondents' explanations in deciding whether or not to apply any mitigation to the assessed CMPs, which amounted to \$21,050 for Job Orders No 1 and 2. While it only assessed CMPs for four violations (and there were eight workers whose housing was affected by the violation), there was no evidence presented that WHD seriously considered Respondents' arguments about why they housed their workers in such a way during the winter months, and they applied no mitigation to the figures. Respondents did have a prior history of violations, which they fully admitted. Nevertheless, to comply with its own regulations, WHD had to also consider the gravity of the violations, efforts made in good faith to comply, the explanations of the employer charged with the violation, and the extent to which the violator achieved financial gain due to the violation.

Amy DeBisschop testified that the CMPs for the housing violation were not reduced because of the "repeat history" of Respondents' violations. In other words, because Respondents were on notice that putting two workers in a wagon was considered a violation, mitigation on the grounds of their explanations for the actions, or whether or not they materially gained for doing so, were not considered. Given Respondents' vehement and consistent position that the nature of the work for which their H-2A application has been certified year after year requires them to house two workers to one wagon for a period during the winter months, the record should show how WHD at least considered these explanations as factors before deciding not to apply any mitigation to the assessed CMPs. If WHD did in fact consider these factors, the record before me does not reflect that.

⁷⁴ The only evidence that Respondents requested a variance is RX-7, which is dated 4 Oct 10 and falls outside the period of Job Order No. 1 (17 Oct 08 to 16 Oct 09) and nearly outside the period of Job Order No. 2 (17 Oct 09 to 16 Oct 10). In any case, Respondents' variance request would have only covered future job orders, not the ones at issue here.

The assessed violations for range housing are affirmed, but the determined CMPs related to this issue for Job Orders No. 1 and No. 2 are remanded for WHD to consider other mitigating factors in light of Respondents' explanations and whether or not they gained financially from the arrangement.

ORDERED this 23rd day of October, 2013 at Covington, Louisiana.

PATRICK M. ROSENOW
Administrative Law Judge