U.S. Department of Labor

Office of Administrative Law Judges
36 E. 7th St., Suite 2525
Cincinnati, Ohio 45202

(513) 684-3252
(513) 684-6108 (FAX)

Issue Date: 25 April 2019

Case No.: 2018-TAE-00005

In the Matter of:

JAMES L. BRADY, SR.,
H-2A LABOR CONTRACTOR,

Respondent.

DECISION AND ORDER

This matter arises under the H2-A provisions of the Immigration and Nationality Act ("INA" or "Act"), 8 U.S.C. § 1188 *et seq.*, as amended by the Immigration Reform and Control Act, and implementing regulations at 20 C.F.R. Part 655 and 29 C.F.R. Part 501. The H-2A nonimmigrant worker visa program permits employers to employ foreign workers on a temporary or seasonal basis when insufficient U.S. workers are "able, willing, and qualified" to do the job, and when employing foreign workers will not "adversely affect the wages and working conditions of" similarly situated U.S. workers. 75 Fed. Reg. 6884 (Feb. 12, 2010); 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184(c)(1), 1188.1; 20 C.F.R. Part 655. The Administrator of the Wage and Hour Division, United States Department of Labor (the "Administrator" or "WHD") alleges that James L. Brady, Sr. (the "Respondent" or "Mr. Brady") violated the Act and regulations from June 26, 2013, through September 18, 2015. James Brady owns a tobacco farm located in Lebanon, Kentucky.

Procedural History

Following an investigation into the Respondent's farm, the Administrator issued a Notice of Determination of Wages Owed and Assessing Civil Money Penalties ("Determination Letter") on June 5, 2017.[1] In the Determination Letter, the Administrator assessed against the Respondent (1) $86,843.05 in unpaid wages owed to forty-two workers; and (2) $56,025.00 in civil money penalties calculated in accordance with 29 C.F.R. § 501. (ALJX 2.) The Determination Letter alleged that the Respondent committed these violations in and around Lebanon, Kentucky, during a period from June 26, 2013, through September 18, 2015, when he employed foreign workers under the H-2A program. By letter dated June 30, 2017, the Respondent timely requested a hearing pursuant to 29 C.F.R. § 501.33. Thereafter, on January 24, 2018, the

[1] The Order of Reference clarified that the date on the Determination Letter should have been June 5, 2017, not June 5, 2015.

Administrator referred the Order of Reference to the Office of Administrative Law Judges for a hearing in accordance with 29 C.F.R. § 502.37.

This case was assigned to the undersigned on February 8, 2018. Pursuant to a Notice of Hearing dated April 17, 2018, and a Revised Notice of Hearing dated June 20, 2018, a hearing in this matter was scheduled for November 28, 2018, in Lebanon, Kentucky.

On July 16, 2018, the Administrator issued a Request for Permission to Conduct Remote Depositions of former H-2A workers located in Mexico. By letter dated July 17, 2018, the Respondent objected to the Administrator's request and alleged that the Administrator failed to present supporting documentation indicating that the H-2A workers were unable to travel to Kentucky for depositions. On July 17, 2018, I held a conference call with the parties to discuss the Administrator's request to conduct telephonic depositions. Thereafter, on July 30, 2018, the Administrator filed a reply to the Respondent's objection. On August 17, 2018, after considering both parties' positions on this matter, I issued an Order Granting Administrator's Request to Conduct Remote Depositions.

On November 28, 2018, I held a hearing in this case in Lebanon, Kentucky. Both parties were represented by counsel at the hearing.[2] I admitted into evidence ALJX 1-7[3] and AX 1-21.[4] (Tr. at 12-30.) The Respondent did not initially submit any evidence into the record, but, at the

[2] In this Decision and Order, "ALJX" refers to the Administrative Law Judge's Exhibits, "AX" refers to the Administrator's Exhibits, "RX" refers to the Respondent's Exhibits, and "Tr." refers to the transcript of the hearing held on November 28, 2018, in Lebanon, Kentucky.

[3] I admitted the following Administrative Law Judge's Exhibits into the record at the hearing: (1) Revised Notice of Hearing and Prehearing Order dated June 20, 2018 (ALJX 1); (2) Notice of Determination of Wages Owed Assessing Civil Money Penalties dated June 5, 2017 (ALJX 2); (3) Order of Reference dated January 24, 2018 (ALJX 3); (4) Respondent's Notice of Appeal dated June 5, 2017 (ALJX 4); (5) Order Granting Administrator's Request to Conduct Remote Depositions dated August 17, 2018 (ALJX 5); (6) Respondent's Prehearing Statement (ALJX 6); and (7) Administrator's Prehearing Statement (ALJX 7). Moreover, although filed into the record on October 26, 2018, for ease of reference I hereby identify as ALJX 8 the Respondent's Responses to Administrator's Second Set of Interrogatories and Requests for Production and Request for Admission.

[4] I admitted the following Administrator's Exhibits into the record at the hearing: (1) The deposition testimony of Reynaldo Arteaga-del Angel (AX 1); (2) The deposition testimony of Misael Arteaga-Hipolito (AX 2); (3) The deposition testimony of Antonio Arteaga-Hipolito (AX 3); (4) The deposition testimony of Eduardo Robles-del Angel (AX 4); (5) The deposition testimony of Ruben Alfonso Garcia-Guerrero (AX 5); (6) Declaration of the Southern Migrant Legal Services (attached to pre-hearing statement) (AX 6); (7) Section H-2A of the Immigration Reform and Control Act Narrative Report (AX 7); (8) Memorandum from the Fraud Prevention Unit, Kentucky Consular Center/U.S. Consulate Nuevo Laredo, to the Department of Labor Wage and Hour Division (AX 8); (9) Fax from the Southern Migrant Legal Services Regarding H-2A workers at James Brady Farms (AX 9); (10) Letter dated May 24, 2013, from the Department of Labor Employment and Training Administration granting the Respondent's application for H-2A certification (AX 10); (11) Letter dated April 25, 2014, from the Department of Labor Employment and Training Administration granting the Respondent's application for H-2A certification (AX 11); (12) Letter dated May 1, 2015, from the Department of Labor Employment and Training Administration granting the Respondent's application for H-2A certification (AX 12); (13) Employee Personal Interview Statements (AX 13); (14) Workplace Photographs (AX 14); (15) Housing Safety and Health Checklist (AX 15); (16) Earnings Records - Hours and Earnings Statement (AX 16); (17) Imaged Checks (AX 17); (18) Kentucky Employers' Mutual Insurance Policy (AX 18); (19) Initial Conference Notes dated July 17, 2015 (AX 19); (20) H-2A CMP Computation Summary Sheet (AX 20); and (21) Summary of Unpaid Wages (AX 21).

end of the hearing, he moved to submit a document showing that Mr. Brady had been treated at Spring View Hospital on November 28, 2018. I hereby admit this document into the record as RX 1. At the hearing, I granted the Respondent's request for additional time to submit evidence concerning Mr. Brady's medical condition. (Tr. at 197.) Moreover, I gave the parties until March 1, 2019, to submit closing briefs. (Tr. at 198.) The Respondent did not submit any evidence into the record after the hearing. By order dated February 22, 2019, I granted the Administrator's request for two additional weeks to submit closing briefs. On March 15, 2019, the Administrator filed a Post-Hearing Brief ("Brief"). The Respondent never filed a post-hearing brief. The record is now closed.

Issues

1. Whether the Respondent violated various provisions of 20 C.F.R. § 655.122;[5]

2. Whether the Respondent violated 20 C.F.R. § 655.135(e); and

3. Whether the unpaid wages penalties and civil money penalties ("CMPs") assessed by the Administrator are appropriate.

Summary of the Evidence

While I have considered all of the evidence of record, I have only summarized the evidence that is relevant to resolving the issues in this case.

Hearing Testimony of Anthony Martinez, Wage and Hour Investigator

Anthony Martinez, an Investigator in the U.S. Department of Labor's Wage and Hour Division, testified on behalf of the Administrator at the hearing on November 28, 2018. He was the only person who testified at the hearing.

Investigator Martinez stated that he had worked as an investigator for fifteen years and he was the lead investigator in this case. (Tr. at 42, 44.) He stated that he was fluent in Spanish and English and he was able to communicate fully with the H-2A workers he interviewed while investigating this case. (Tr. at 45.) He testified that the period of investigation into the Respondent was June 26, 2013, through September 18, 2015. (Tr. at 100.)

In discussing what prompted an investigation into the Respondent's farm, Investigator Martinez explained that this case began with a complaint made by the Southern Migrant Legal Services. (Tr. at 48; AX 9.) Moreover, he stated that the WHD received an e-mail from the Fraud Prevention Unit, Kentucky Consular Center/U.S. Consulate Nuevo Laredo, which requested that WHD review alleged violations by the Respondent. (Tr. at 49; AX 8.) Investigator Martinez

[5] Specifically, the Administrator alleged that the Respondent violated the following provisions of 20 C.F.R. § 655.122: (a); (d)(1); (e); (h)(1); (h)(2); (i); (j)(1); (k); (l); (m); (p); and (q).

discussed the voluntary statement made by Martin Lucas Andres to the Fraud Prevention Unit at the U.S. Consulate. (Tr. at 77-87.)

Investigator Martinez testified that after reviewing the casefile and allegations against the Respondent, he and Toby Keith, another bilingual investigator at the WHD, interviewed the H-2A workers who made employee interview statements. (AX 13; Tr. at 46, 102-104.) He agreed that the document entitled "Section H-2A of the Immigration Reform and Control Act Narrative Report," admitted into evidence as AX 7, contained his written findings of the case. (Tr. at 46-47.)

Investigator Martinez discussed all four of the Respondent's Applications for Temporary Labor Certification ("Application" or "contract"). (Tr. at 95-100.) He explained that each Application explained the regulations required of the Respondent. (Tr. at 100.) Moreover, Investigator Martinez described the process for obtaining labor certification from the Employment and Training Administration in the U.S. Department of Labor ("ETA") and discussed the H-2A program generally. (Tr. at 50-66.) Moreover, he discussed regulatory requirements relating to minimum pay, insurance, housing, transportation, hours, wage rates, and recordkeeping, which were all listed in the Respondent's Applications. (Tr. at 50-77; AX 8.) He further agreed that Mr. Brady signed these Applications under penalty of perjury. (Tr. at 65.)

In discussing the regulatory requirements, Investigator Martinez testified that an employer intending to deduct wages for housing was required to articulate those deductions in the contract. He stated that the contract between Mr. Brady and the H-2A workers did not provide for any such deductions. (Tr. at 64.) Moreover, Investigator Martinez explained that even if Mr. Brady did not have forty hours' worth of work for the H-2A workers, under the contract Mr. Brady was still required to pay them for three-fourths of those hours, which would amount to thirty hours per week. (Tr. at 66-74.) As to regulatory transportation requirements, Investigator Martinez explained that when H-2A workers pay for their inbound transportation, meaning their transportation to their place of employment, the employer must reimburse them by the midpoint of the contract. (Tr. at 87.) Moreover, he stated that the employer is required to pay for outbound transportation, either the day the H-2A workers leave or prior to that. (Tr. at 88.)

Investigator Martinez discussed the housing violations he uncovered by interviewing the H-2A workers and inspecting the living accommodations the Respondent provided. (Tr. at 88, 115.) He explained that he inspected the H-2A workers' living quarters to ensure that they adhered to Occupational Safety and Health Administration ("OSHA") housing regulations under 20 C.F.R. § 655.122(h), which were listed in the contract. (Tr. at 119.) He discussed the photos identified in AX 14, which he took in July 2015. (Tr. at 117-133.) Investigator Martinez stated that men and women were living in the same housing facility. (Tr. at 117.) Moreover, he testified that he uncovered the following OSHA housing violations in the trailer where Mr. Brady housed the H-2A workers:

- The windows did not have a screens on them (Tr. 118-121; AX 14 at 1-2);
- The trailer had rubbish in it (Tr. at 120, 124; AX 14 at 1, 6);
- The trash can did not have a lid on it (Tr. at 120, 124; AX 14 at 1, 6);
- The trailer had "a lack of underpinning," which could allow hot or cold air, rodents, varmints, or insects to enter (Tr. at 121-122; AX 14 at 3);

- The trailer had insects (Tr. at 122, 130; AX 14 at 15-16, 20);
- The kitchen was not structural due to a hole in the wall (Tr. at 123; AX 14 at 5);
- The trailer did not have heat or air conditioning (Tr. at 123-124);
- The mattresses were on the floor, were not clean, and were not elevated and/or separated (Tr. at 124-125m 129; AX 14 at 7-8, 13-14);
- The trailer walls had holes in them (Tr. at 128-1312; AX 14 at 11-12, 19-20); and
- The floor was not structurally sound (Tr. at 133; AX 14 at 20).

Investigator Martinez testified that he did not know when the housing came out of compliance. (Tr. at 173.) He testified that he completed the Housing Safety and Health Checklist, which is in the record as AX 15. (Tr. a 134.) He agreed that the reasons underlying the violations were set forth in the photographs and the Housing Safety and Health Checklist. (Tr. at 135-136.)

Investigator Martinez testified that when he interviewed the H-2A workers, they reported that they did not receive the hourly pay rate listed in the contract. (Tr. at 104, 109.) Rather, they reported that the Respondent paid them approximately $8.00 per hour. (Tr. at 104-105.) Moreover, they reported that the Respondent did not pay them for all of the hours they worked. (Tr. at 112.) Investigator Martinez testified that his investigation revealed that some H-2A workers were paid rates of $8.29, $8.58, $9.67, $9.72, and $10.10, while corresponding workers were paid $8.00 to perform the same work listed in the H-2A contract. (Tr. at 112.) Furthermore, his interviews with H-2A workers revealed that Mr. Brady had not reimbursed them for inbound transportation costs. (Tr. at 113-114.) In addition, Investigator Martinez found that Mr. Brady failed to provide pay stubs to the H-2A workers or corresponding workers. (Tr. at 114.)

Investigator Martinez testified that he received earnings and hours statements from Mr. Brady, but they were "limited" records and did not include everything that he requested. (Tr. at 136.) He agreed that these records were contained in AX 16. (Tr. at 136-137.) He testified that instead of paying the H-2A workers the contract rate of $10.10, the earnings records showed that Mr. Brady paid them only $8.00 per hour. (AX 16; Tr. at 38.) Other than what was contained in AX 16, Investigator Martinez testified that Mr. Brady did not provide him with any other earnings records or statements. (Tr. at 139.)

Investigator Martinez explained that AX 17 contained copies of checks that Mr. Brady provided to him. (Tr. at 139.) He agreed that the checks were from July and August 2015, when the contract required Mr. Brady to pay H-2A workers $10.28 per hour. (Tr. at 40; AX 17.) He explained that records did not clearly identify how many hours of work Mr. Brady offered to the H-2A workers or how much Mr. Brady paid them per hour. (Tr. at 141-143.) Moreover, Investigator Martinez testified that Mr. Brady did not provide him any other pay records for the H-2A employees. (Tr. at 143-144.)

Investigator Martinez testified that the document from Kentucky Employer's Mutual Insurance showed that the Respondent's workers' compensation insurance had lapsed. (Tr. at 148-149; AX 18.)

When asked whether Mr. Brady ever mentioned a fire during the course of WHD's investigation, Investigator Martinez replied, "I've never heard of a fire at all." (Tr. at 144.) He

testified that Mr. Brady and Mr. Brady's son were at the initial conference. (AX 7; Tr. at 146.) When he discussed recordkeeping requirements with Mr. Brady at the conference, Investigator Martinez stated that Mr. Brady said he "was going to try and do better." (Tr. at 144.) Investigator Martinez referenced his written report, in which he reported that Mr. Brady stated that he did not know he was required to keep records. (Tr. at 145.)

Investigator Martinez discussed each violation and explained that he made his determinations through interviews with workers and the Respondent's "lack of records." (Tr. at 151.) He reiterated that Mr. Brady: (1) did not transport H-2A workers to and from their place employment; (2) charged the H-2A workers to live on his property; (3) did not pay H-2A workers on time; (4) failed to comply with earnings records requirements; (5) failed to comply with pay statement requirements; (6) failed reimburse at least three H-2A workers for inbound and outbound transportation; and (7) failed to pay the three-fourths guarantee. (AX 20; Tr. at 151-159.)

When questions about the penalties WHD assessed, Investigator Martinez explained that the H-2A CMP Computation Summary Sheet listed all of the violations WHD found, mitigating factors WHD applied, and civil monetary penalties WHD assessed. (AX 20; Tr. at 149-150, 154.) Investigator Martinez testified that each civil monetary penalty ("CMP") started at $1,500, but could be reduced by mitigating factors. (Tr. at 159.) He stated that his narrative report explained which factors he applied to lessen each assessed CMP. (Tr. at 160-163.) Moreover, he testified that he listed the back wages the Respondent owed to various H-2A workers in the Summary of Unpaid Wages. (AX 21; Tr. at 163-165.)

Deposition Testimony of Reynaldo Arteaga-del Angel

Reynaldo Arteaga-del Angel testified by telephonic deposition on October 18, 2018. (AX 1.) He was in Veracruz, Mexico, at the time of his deposition. (AX 1 at 8.) He agreed that he had previously given statements to Investigator Martinez and the Department of Labor in Indianapolis. (AX 1 at 10.)

Mr. Angel testified that he worked for Mr. Brady in Lebanon, Kentucky, in June 2015, and returned to Mexico in September 2015, which he recalled based on the arrival and departure stamps in his passport. (AX 1 at 13-14.) He testified that in addition to working for the Respondent in 2015, he worked for the Respondent six or seven years prior. (AX 11 at 22.)

Mr. Angel testified that he paid "out of pocket" for his visa, passport, and transportation from Monterrey, Mexico, where he got his visa, to Lebanon, Kentucky. (AX 1 at 15-19.) He stated that the Respondent never repaid him for those costs. (AX 1 at 19-20.) He further testified that he paid to get from Kentucky back Mexico. (*Id*.) Moreover, Mr. Angel testified that he paid $50.00 for his own mattress and $6.00 per day to use a van. (AX 1 at 29.)

When questioned about his living quarters, Mr. Angel testified that five people were living in a trailer, which he said was in bad shape. (AX 1 at 23-25.) He explained that the carpet was dirty, the floor was "rotten," the windows did not have glass on them, the trailer door did not have a lock, and the stove only had one working burner. (AX 1 at 23-28.) He claimed that he

addressed the problems with Mr. Brady's son on "several occasions," but they were never fixed. (AX 1 at 24, 27.) Moreover, Mr. Angel stated that the floor and walls had rat holes in them. (AX 1 at 28-29.) He added that he told both Mr. Brady and Mr. Brady's son about the presence of rats. (AX 1 at 29.)

Mr. Angel testified that Mr. Brady paid him $8.00 per hour, even though the contract stated that he was supposed to be paid $10.50 per hour. (AX 1 at 33.) Moreover, Mr. Angel stated that Mr. Brady and his son "got angry" when he discussed the discrepancy between his pay rate and the contract rate. (*Id*.) He testified that the Respondent never paid him the rate listed in the contract. (AX 1 at 34.) In fact, in reference to the contract, Mr. Angel said that Mr. Brady said he "would do whatever he wanted and those papers meant nothing to him." (AX 1 at 34.) Mr. Angel testified that he did not get a receipt for the pay he received from Mr. Brady. (AX 1 at 35.) He explained that Mr. Brady did not pay him for "a week or a month after" he completed the work, adding that he "never had any money for food." (AX 1 at 36.)

When asked whether he worked for three-fourths of the number of hours listed in the contract, Mr. Angel testified that he had not. When asked whether he refused work from Mr. Brady, Mr. Angel explained that Mr. Brady wanted him to perform work that was not in his contract, but he "refused" to perform such work. (AX 1 at 34-35.) Mr. Angel explained that when Mr. Brady asked him to work with marijuana plants, he contacted the Mexican and American consulates. (AX 1 at 35.)

Deposition Testimony of Misael Arteaga-Hipolito

Misael Arteaga-Hipolito testified by telephonic deposition on October 18, 2018. (AX 2.) He stated that he worked for the Respondent in 2013, 2014, and 2015. (AX 2 at 8.)

Misael Arteaga-Hipolito testified that in every year that he worked for Mr. Brady, he paid for his own visa, passport, and transportation costs to and from Kentucky, but Mr. Brady never repaid him. (AX 2 at 10-13.) When asked why he returned to work for Mr. Brady in 2015, even after Mr. Brady had not paid him previously, Mr. Arteaga-Hipolito stated that Mr. Brady "promised to pay" him back for the wages owed "from 2013 through 2015," but Mr. Brady never paid him "anything." (AX 2 at 13-14.)

When asked about his living quarters in 2013, Mr. Arteaga-Hipolito testified that he lived in an apartment in Springfield, but had to pay for his food and gas to get to and from work. (AX 2 at 15-16.) In 2014, he lived in a different apartment in Springfield, where four other men and one other woman also lived. (AX 2 at 16.) He again testified that he had to pay for his own gasoline and food in 2014. (AX 2 at 17.)

Mr. Arteaga-Hipolito testified that he stayed in a trailer with four other men in 2015. (AX 2 at 17-18.) He stated that there were no tables or chairs, the door did not have a lock or complete hinges, the windows did not have glass or screens, and the stove only had one burner. (AX 2 at 18-20.) He explained that he shared a mattress on the floor with another worker. (AX 2 at 20.) Furthermore, he testified that there were holes in the floor of the trailer through which rats crawled. (AX 2 at 20.) When he discussed these issues with Mr. Brady, Mr. Brady stated that he "didn't have money" and the problems with the trailer were never fixed. (*Id*.)

In discussing his wages, Mr. Arteaga-Hipolito testified that Mr. Brady paid him $8.00 per hour in 2013, which was not the hourly rate listed in his contract in 2013. (AX 2 at 21.) In 2014, Mr. Brady paid him the contract rate for one week, but the rest of the time Mr. Brady paid him less than the contract rate. (AX 2 at 22-23.) He explained that he only worked for Mr. Brady for one week in 2015, but Mr. Brady did not pay him the contract rate for that week. (AX 2 at 23-24.) Furthermore, Mr. Arteaga-Hipolito testified that Mr. Brady did not pay him for three-fourths of the hours listed in his contracts in 2013, 2014, or 2015. (AX 2 at 21, 23, 24.)

Mr. Arteaga-Hipolito testified that he never refused work from Mr. Brady. (AX 2 at 26.) When asked whether Mr. Brady asked him to do work outside of his contract, Mr. Arteaga-Hipolito stated that Mr. Brady asked him to "clean marijuana," which he said he refused to do. (*Id*.)

Mr. Arteaga-Hipolito testified that one U.S. worker worked with him in 2013, two worked with him in 2014, and many worked with him in 2015, but he did not know how much Mr. Brady paid them. (AX 2 at 24-25.)

Deposition Testimony of Antonio Arteaga-Hipolito

Antonio Arteaga-Hipolito[6] testified by telephonic deposition on October 18, 2018. (AX 3.) He was in Veracruz, Mexico, at the time of his deposition. (AX 3 at 6.) Antonio testified that he first worked for Mr. Brady in 2013. (AX 3 at 9.)

Antonio testified that he paid for his own visa, passport, food, and transportation to the U.S. and back to Mexico in 2013, 2014, and 2015, but Mr. Brady did not reimburse him for any of those expenses. (AX 3 at 12-17.) He testified that in 2014, he paid $200.00 to live in the same house as Mr. Brady's ex-wife. (AX 3 at 22.) Moreover, he stated that each year that he worked for Mr. Brady, he paid $6.00 per day for gasoline and the use of a van to get to work. (AX 3 at 23-24.) Antonio testified that Mr. Brady did not reimburse him for those expenses. (AX 3 at 23-24.)

Antonio explained that he lived in an apartment in Springfield in 2013. (AX 3 at 18.) In 2015, he lived with five other people in a trailer in Lebanon, which he said was "in bad shape." (*Id*.) He testified that the door did not lock, the stove only had one burner, the floor was "rotten," the trailer had no heat, he did not have a mattress, the windows and doors did not have screens, and the trailer had rats and bed bugs. (AX 3 at 19-20.) He stated that he spoke with Mr. Brady and Mr. Brady's son about the problems he faced, but they told him that they did not have money to make repairs. (AX 3 at 19-20.)

Antonio testified that Mr. Brady paid him for one week's worth of work in 2015, but took a month and a half to do so. (AX 3 at 17.) He testified that even though Mr. Brady had not paid him in 2013, he returned to work in 2014 and 2015 because Mr. Brady "promised us it would all be better and he would pay us what he owed us from the previous" years. (AX 3 at 17-18.)

[6] As two deponents have the surname Arteaga-Hipolito, I will refer to Antonio Arteaga-Hipolito by his first name.

Antonio testified that Mr. Brady paid him $8.00 per hour in 2013, but he said he was supposed to be paid $9.40 per hour under his contract. (AX 3 at 24.) He further stated that he was supposed to make $10.20 per hour in 2014, and either $10.20 or $10.40 per hour in 2015, but Mr. Brady only paid him $8.00 per hour both years. (AX 3 at 25-26.) Moreover, he testified that he did not work for three-fourths of the hours listed in his contract during any year that he worked for the Respondent. (AX 3 at 24-26.) Antonio explained that he only worked for one week in 2015. (AX 3 at 26.) He stated that Mr. Brady asked him to clean marijuana, but he refused to do so because it was "prohibited." (AX 3 at 27.)

Antonio testified that one U.S. worker worked for Mr. Brady in 2013 and two worked for Mr. Brady in 2014, and but he was unaware of their hourly rates because Mr. Brady paid them separately. (AX 3 at 25.)

Deposition Testimony of Eduardo Robles-del Angel

Eduardo Robles-del Angel[7] testified by telephonic deposition on October 19, 2018. (AX 4.) Eduardo stated that he only worked for the Respondent in 2015. (AX 4 at 8.) He testified that he "left for the United States on June 2, [2015]" and then spent a week in Monterrey while he was waiting for his visa to be processed. (*Id*.)

Eduardo testified that he paid out of pocket for his visa and all related expenses, but Mr. Brady never reimbursed him for any of the expenses he incurred. (AX 4 at 9-11, 17.) Moreover, he testified that he purchased his own mattress. (AX 4 at 12.)

When he discussed his living quarters, Eduardo explained that he lived in a trailer, which was "not in good condition." (AX 4 at 11.) He said he did not have a bed, the door was "falling off," the windows did not have screens, and the trailer did not have air conditioning or heat. (AX 4 at 12.) He testified that he slept on a mattress located on the floor and the trailer had bed bugs. (*Id*.) Eduardo stated that he reported these conditions to Mr. Brady's son. (AX 4 at 13.) He testified that he did not speak with Mr. Brady about these issues because he never went to Mr. Brady's house and Mr. Brady did not visit the trailer. (AX 4 at 16.) Moreover, he explained that there was a language barrier. (*Id*.)

In discussing the work he performed for the Respondent, Eduardo testified that Mr. Brady told him there was no tobacco work to perform, but said there was work "cleaning up the marijuana." (AX 4 at 14.) He stated that he refused to do such work because he knew it was prohibited in Mexico. (*Id*.) He claimed that he never refused to do tobacco-related work. (*Id*.)

Eduardo could not recall, exactly, the pay rate listed in his contract, but he thought the Respondent paid him less than $10.00 per hour. (AX 4 at 15-16.) He stated that he worked for fifty-two hours and the Respondent paid him approximately $400.00 dollars in total. (AX 4 at 15.) He added that although Mr. Brady eventually paid him, he was there for "a month and a half with no food or water." (AX 4 at 16-17.) He explained that the consulate gave him $100.00 so he could "survive." (AX 4 at 17.)

[7] As two deponents have the surname Angel, I will refer to Eduardo Robles-del Angel by his first name.

Eduardo thought that one U.S. worker was working for Mr. Brady at the same time as him, but he did not know the person's name or pay rate. (AX 4 at 17.)

Deposition Testimony of Ruben Alfonso Garcia-Guerrero

Ruben Alfonso Garcia-Guerrero testified by telephonic deposition on October 19, 2018. (AX 5.) He said that he worked for Mr. Brady in 2013, 2014, and 2015. (AX 5 at 8-11.)

Mr. Alfonso Garcia-Guerrero stated that he paid for his own visa, transportation, and expenses to get to and from Kentucky in 2013, 2014, and 2015, but Mr. Brady never repaid him for those expenses. (AX 5 at 8-12.) He stated that when he asked for reimbursement, as provided in the contract, Mr. Brady stated that he did not "have enough money for that." (AX 5 at 9.) Moreover, Mr. Alfonso Garcia-Guerrero stated that he had to pay to have the trash taken out, pay for food, pay to wash his clothes, and pay $6.00 for gasoline to get to and from work. (AX 5 at 14, 19-22.) He testified that Mr. Brady's son made him pay $6.00 to get to work, to do errands, and to do laundry. (AX 5 at 22.) He testified that he paid $6.00 every other day in 2013 and every three days in 2014 and 2015. (AX 5 at 21-23.) When asked why he agreed to return to work for Mr. Brady, Mr. Garcia-Guerrero testified that Mr. Brady "promised" him more work and agreed to reimburse him "for all" of his "work expenses from the trip." (AX 5 at 11.)

In discussing his living conditions, Mr. Garcia-Guerrero testified that he lived with six other men in a two-room apartment in Springfield, Kentucky, in 2013. (AX 5 at 12-13.) He stated that there was only one mattress on the floor, so people shared it. (AX 5 at 13-14.) He stated that after he complained to Mr. Brady, Mr. Brady brought the workers other mattresses that "had bed bugs."

In 2014, Mr. Garcia-Guerrero lived in an apartment with five other people, which was slightly larger than his apartment in 2013, and he later lived in a trailer. (AX 5 at 15.) He testified that the workers shared the apartment with a woman named Irene Gobero. (AX 5 at 16.) He stated that his mattress had bed bugs and the furnace and air conditioning were broken. (*Id*.) Mr. Garcia-Guerrero testified that he complained to Mr. Brady and Mr. Brady's son about these problems, but they were never fixed. (AX 5 at 16-17.)

Mr. Garcia-Guerrero moved into a trailer for the rest of 2014, where he lived with seven people. (AX 5 at 17.) He said that the trailer did not have heat, air conditioning, or operable windows. (AX 5 at 17.) Although he had a mattress, it was on the floor. (AX 5 at 18.) Moreover, he stated that rats came into the trailer, the stove only had one burner, and the doors did not have screens on them. (*Id*.) He also lived in the trailer in 2015, when he said it was in "even worse" condition. (AX 5 at 20.) He testified that he did not "have food and water" until he spoke with someone at the consulate in Indianapolis. (AX 5 at 29.)

Mr. Garcia-Guerrero testified that other than one week in 2014, when the Respondent paid him his contract rate, the Respondent paid him only $8.00 per hour in 2013, 2014, and 2015.

(AX 5 at 24-26.) Moreover, the Respondent did not give him three-fourths of the contract hours in any year that he worked for the Respondent. (AX 5 at 24, 25.)

Mr. Garcia-Guerrero testified that he only worked for fifty-two hours in 2015 because Mr. Brady did not have anything ready for planting. (AX 5 at 26.) He stated that Mr. Brady "offered work, but it was cleaning marijuana." (AX 5 at 28.)

Mr. Garcia-Guerrero testified that he worked alongside one U.S. worker in 2013, two in 2014, and one in 2015, but he did not know how much Mr. Brady paid them. (AX 5 at 25, 27.)

Declaration of Attorney Melia Amal Bouhabib

The Administrator submitted into evidence a declaration signed by Melia Amal Bouhabib, an attorney for the Southern Migrant Legal Services. (AX 6.) She stated that on June 22, 2015, her office "received a call from several severely distressed H-2A workers employed at James L. Brady Sr.'s tobacco farm" in Lebanon, Kentucky. She stated that they complained of poor housing conditions and lack of pay. She explained that she facilitated a written complaint to the U.S. Department of Labor on behalf of these H-2A workers, which she submitted on July 1, 2015. (AX 6.)

The written complaint from the Southern Migrant Legal Services to the WHD documents that workers had received no pay for tasks done on the Respondent's farm in 2015, even though they had completed between forty and eighty hours of work. (AX 9.) Furthermore, the memo documented that the Respondent had not paid the workers the adverse effect wage rate ("AEWR"), the Respondent had not reimbursed the workers for visa expenses and transportation, and the workers had been living in a structurally unsound trailer and were running out of food. (*Id*.)

Memorandum from the Fraud Prevention Unit

A Memorandum from the Fraud Prevention Unit, Kentucky Consular Center/U.S. Consulate Nuevo Laredo to the WHD contains voluntary declarations from Martin Lucas Andres, who claimed that the Respondent did not pay him in full for his work in 2015. (AX 8.) Mr. Andres attested that the Respondent paid him $300.00 per week, which was half of what Mr. Brady was supposed to pay him. He further stated that the Respondent owed ten workers approximately $1,850.00 each. (*Id*.)

Letters Approving the Respondent's Applications for Temporary Labor Certification

The ETA approved four Applications for temporary labor certification filed by the Respondent. (AX 8; AX 10; AX 11; AX 12.) Specifically, on May 24, 2013, the ETA approved the Respondent's Application for seven H-2A workers. (AX 10.) On April 25, 2014, the ETA approved the Respondent's Application for fourteen H-2A workers. (AX 11.) On March 31, 2015, the ETA approved the Respondent's Application for thirteen H-2A workers. (AX 8.) Finally, on May 1, 2015, the ETA approved the Respondent's Application for four H-2A workers. (AX 12.) In each Application, the ETA reminded the Respondent that he was required to "comply with all assurances, guarantees and other requirements contained in Departmental

regulations at 20 CFR § 655 Subpart B and 20 CFR § 653, Subpart F." (AX 8; AX 10; AX 11; AX 12.)

Employee Personal Interview Statements

The record contains various Employee Personal Interview Statements given by H-2A workers who worked for the Respondent. (AX 13.)

Workplace Photographs

The record contains twenty photographs of the trailer that housed H-2A workers. (AX 14.)

Kentucky Employers' Mutual Insurance Policy

A copy of the Respondent's insurance coverage from Kentucky Employers' Mutual Insurance Policy shows that he had workers' compensation coverage beginning on April 1, 2013, but it expired on April 1, 2014. (AX 18 at 1.) Thereafter, he had insurance beginning on April 1, 2015, but it expired on June 22, 2015. (AX 18 at 2.) On July 18, 2015, the Respondent secured insurance again, but the policy expired on July 18, 2016. (AX 18 at 3.)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Act and regulations are silent concerning the standard of review an administrative law judge must apply in a TAE case. However, 29 C.F.R. § 501.33 provides that any person seeking review of the Administrator's determination may request a hearing before an administrative law judge. Furthermore, 29 C.F.R. § 501.34(a) provides that "[e]xcept as specifically provided in the regulations in this part, the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges established by the Secretary at 29 CFR part 18 shall apply to administrative proceedings described in this part." Moreover, 29 C.F.R. § 501.34 (b) provides that as provided in the Administrative Procedure Act, "any oral or documentary evidence may be received in proceedings under this part." Finally, the regulations provide that the administrative law judge "may affirm, deny, reverse, or modify, in whole or in part, the determination of the WHD Administrator." 29 C.F.R. § 501.41.

Because the regulations provide for a hearing in which an administrative law judge admits evidence, I find that the regulations imply a de novo review. Consistent with this view, in *Administrator, Wage and Hour Div. v. John Peroulis*, 2016 DOL Ad. Rev. Bd. LEXIS 50, ALJ No. 2012-TAE-004 (ARB Sept. 12, 2016), the Administrative Review Board ("ARB") found that an administrative law judge did not err in reviewing CMP factors de novo. The ARB explained that the administrative process outlined at 29 C.F.R. § 501.41(b) gives the parties "the right to a de novo hearing before the ALJ" and, thereafter, any "party may file an objection that triggers an Order of Reference to the Office of ALJ's and gives the objecting party an opportunity to have a hearing with the ALJ." Moreover, the ARB emphasized that WHD's "assessment is attached to the Order of Reference, which becomes akin to a complaint before the ALJ" and 29 C.F.R. § 501.41 "provides that the ALJ may alter or amend the W1-W's assessment." *Administrator,*

Wage and Hour Div. v. John Peroulis, 2016 DOL Ad. Rev. Bd. LEXIS 50, ALJ No. 2012-TAE-004 (ARB Sept. 12, 2016). Based on the Act, the regulations, and precedent from the ARB, I will review the Administrator's assessment of CMPs de novo and consider whether any of the mitigating factors at 29 C.F.R. § 501.19(b) are applicable to each violation.

Credibility Determinations

After reviewing the entire record, I find that the Administrator's witnesses are more credible than Mr. Brady is. Despite the Administrator's attempts to depose Mr. Brady, which included serving Mr. Brady with a notice of deposition on July 17, 2018, accompanied by a subpoena signed by the undersigned on July 12, 2018, Mr. Brady failed to make himself available for deposition. Moreover, he neither appeared at the hearing on November 28, 2018, nor filed any exhibits into evidence. As Mr. Brady has not testified in this proceeding, I have based my credibility determinations on the evidence of record and the statements made by Mr. Brady's counsel.

Although Mr. Brady failed to appear for deposition or hearing, he did respond to the Administrator's interrogatories and his counsel appeared at the hearing and cross-examined the Administrator's witness. Based on statements made in the interrogatories and at the hearing, it is evident that the Respondent's entire argument rests upon his unfounded allegation that a fire destroyed all of the evidence that he could have put forth to defend himself in this case.

Specifically, in response to the Administrator's second set of interrogatories, Mr. Brady wrote that a fire in February 2015, which he said occurred at 2500 Poplar Corner Road in Lebanon, Kentucky, destroyed his H-2A records. (ALJX 8 at 1-2.) Moreover, he attested that it was an electrical fire caused by faulty wiring and the "interior of the home was destroyed and required a complete renovation." (ALJX 8 at 2.) When asked to state whether he notified an insurance carrier of the fire that destroyed his records, Mr. Brady wrote, "State Farm Insurance Company; I do not recall the claim number or the adjuster." (*Id.*) The Administrator also submitted a request for production of "each and every document that evidences the fire that destroyed Respondent's records related to the employment of H-2A workers between June 26, 2013 and February 26, 2014." (ALJX 8 at 3.) Despite the Administrator's requests, the Respondent failed to submit any such evidence to the Administrator or into the record in this case.

Moreover, in his prehearing statement, counsel for the Respondent asserted that Mr. Brady "paid each of the H-2A workers and kept records, however, the records were destroyed by fire." (Respondent's Prehearing Statement at 1.) At the hearing, counsel for the Respondent continued to make this claim by reiterating the Respondent's position that "[b]ut for the destruction of those records," the Respondent "could exonerate himself of these charges." (Tr. at 36.) When asked whether he had a report from the fire department or a claim from the Respondent's insurance company, counsel for the Respondent stated that he did not "have anything of that nature at this time." (*Id.*) Despite the Respondent's allegation, he has not put forth any evidence documenting a fire.

Moreover, Investigator Martinez testified that Mr. Brady never mentioned a fire during his investigation, which further undermines the Respondent's sole defense. (Tr. at 144.) In fact, Investigator Martinez testified that Mr. Brady stated that he did not know he was required to keep records and that he "was going to try and do better." (Tr. at 144-145.) Consistent with his testimony, Investigator Martinez's written report documents that Mr. Brady reported that he "did not know" that he was supposed to provide written disclosures, keep time records, or give wage statements to workers "because he had not been informed by his H-2A agent to do so." (AX 7 at 28.) This position – that he was unaware of the regulatory recordkeeping requirements – directly contradicts Mr. Brady's current position, which is that he abided by the regulatory requirements, paid his H-2A workers the correct wages, and kept records, but a fire destroyed all of his supporting documentation.

Furthermore, even if the Respondent did not know that he was supposed to adhere to the H-2A regulations, ignorance of the law is not a valid defense under the Act and regulations. Each time the ETA certified one of Mr. Brady's Applications, it reminded him that he was required to "comply with all assurances, guarantees and other requirements contained in Departmental regulations at 20 CFR § 655 Subpart B and 20 CFR § 653, Subpart F." (AX 8; AX 10; AX 11; AX 12.) Moreover, the Respondent attested that he would pay the H-2A workers $9.80 in 2013, $10.10 in 2014, and $10.28 in 2015. (AX 8; AX 10; AX 11; AX 12.) In addition, he attested, *inter alia*, that: (1) he anticipated the H-2A workers would work for forty hours per week; (2) he would pay the H-2A workers every Saturday, on a weekly basis; (3) he had workers' compensation insurance; (4) he would provide "no cost or public housing which meets the full set of applicable standards;" (5) he would provide "free and convenient access to cooking facilities or a kitchen" or "furnish meals" for the H-2A workers; and (6) he would "provide transportation, at least once each week[,] to assure that workers have access to stores." Furthermore, in the attachment to each Application, the Respondent guaranteed "to offer" each H-2A "worker employment for at least three-fourths (3/4) of the total hours listed" in the contract; if he failed to do so, he would "pay the worker the amount that the worker would have earned had the worker, in fact, worked the guaranteed number of hours." (AX 8; AX 10; AX 11; AX 12.) The Administrator has advanced ample evidence to demonstrate that the ETA notified the Respondent of the regulatory requirements of the H-2A program.

For all of these reasons, I do not find the Respondent to be credible and I give little probative weight to his position in this case.

In contrast, I find that the H-2A workers who testified in this case were credible. Their deposition testimony was consistent with what they reported to the Southern Migrant Legal Services and to Investigator Martinez. Moreover, the five H-2A workers who testified by deposition offered similar testimony to each other and their assertions were consistent with Investigator Martinez's testimony in this case. I note, once again, that the Respondent has not put forth any witnesses to testify in support of his case or any evidence to contradict the statements made by Investigator Martinez or the H-2A workers.

Violations of 20 C.F.R. § 655.122 and 20 C.F.R. § 655.135

The regulations permit the Administrator to assess a CMP "for each violation of the work contract, or the obligations imposed by 8 U.S.C. 1188, 20 CFR part 655, subpart B, or the

regulations in this part." 29 C.F.R. § 501.19(a). Furthermore, 29 C.F.R. § 501.19(b) permits the Administrator to consider the following mitigating factors when assessing CMPs:

> (1) Previous history of violation(s) of 8 U.S.C. 1188, 20 CFR part 655, subpart B, or the regulations in this part; (2) The number of H-2A workers, workers in corresponding employment, or U.S. workers who were and/or are affected by the violation(s); (3) The gravity of the violation(s); (4) Efforts made in good faith to comply with 8 U.S.C. 1188, 20 CFR part 655, subpart B, and the regulations in this part; (5) Explanation from the person charged with the violation(s); (6) Commitment to future compliance, taking into account the public health, interest or safety, and whether the person has previously violated 8 U.S.C. 1188; (7) The extent to which the violator achieved a financial gain due to the violation, or the potential financial loss or potential injury to the workers.

29 C.F.R. § 501.19(b).

Based on the foregoing, in each instance in which the Administrator assessed a CMP, I will review the Administrator's consideration of the relevant mitigating factors listed in 29 C.F.R. § 501.19(b) and determine whether I find such mitigating factors applicable. In calculating penalties, the Administrator explained that he reduced the maximum penalty by ten percent for each applicable mitigating factor. (Brief at 10 n. 6.) Moreover, as discussed previously, since this matter is a de novo review, I am not bound by the Administrator's assessment of CMPs. *See Administrator, Wage and Hour Div. v. John Peroulis*, 2016 DOL Ad. Rev. Bd. LEXIS 50, ALJ No. 2012-TAE-004 (ARB Sept. 12, 2016).

I. The Respondent Violated 20 C.F.R. § 655.122(e) by Failing to Maintain Workers' Compensation Insurance

The regulation at 20 C.F.R. § 655.122(e)(1) provides that the employer "must provide workers' compensation insurance coverage in compliance with State law covering injury and disease arising out of and in the course of the worker's employment." Furthermore, 20 C.F.R. § 655.122(e)(2) states that before temporary labor certification is issued, the employer must provide the Certifying Officer with proof of workers' compensation insurance coverage.

Investigator Martinez explained that a document from Kentucky Employer's Mutual Insurance showed that the Respondent's workers' compensation insurance had lapsed. (Tr. at 148-149; AX 18.) Consistent with his testimony, a copy of the Respondent's insurance coverage from Kentucky Employers' Mutual Insurance Policy shows that Mr. Brady had workers' compensation coverage beginning on April 1, 2013, but it expired on April 1, 2014. (AX 18 at 1.) Thereafter, he secured insurance beginning on April 1, 2015, but it expired on June 22, 2015. (AX 18 at 2.) On July 18, 2015, the Respondent secured insurance again, but the policy expired on July 18, 2016. (AX 18 at 3.) Because the Respondent employed H-2A workers during the period in 2015 when he did not have insurance coverage, I find that the Administrator properly concluded that the Respondent violated 20 C.F.R. § 655.122(e)(1).

The WHD calculated a CMP of $900.00, after finding that the Respondent had no history of violations (mitigating factor number one), demonstrated a commitment to future compliance (mitigating factor number six), gained little financially from the violation (mitigating factor number seven), and the gravity of the violation was low (mitigating factor number three).[8] (AX 7 at 9-10; AX 20 at 2.) In the Determination Letter, the WHD assessed a CMP of $675.00, even though it calculated a CMP of $900.00. It is unclear from the record why the WHD reduced the CMP further from $900.00 to $675.00. (ALJX 2.)

I agree with the Administrator that mitigating factors one, three, and seven apply. However, the Respondent has not shown any commitment to future compliance, has not made himself available for hearing or deposition, and has not submitted any evidence in conjunction with this case. Moreover, he twice allowed his workers' compensation insurance to lapse. Therefore, I find that 29 C.F.R. § 501.19(b)(6) is an aggravating, rather than a mitigating factor. Having carefully considered all of the mitigating factors, I find that only three mitigating factors are applicable. Consequently, I find that a CMP of $1,050.00[9] is both reasonable and appropriate for Respondent's violation of 20 C.F.R. § 655.122(e).

II. The Respondent Violated 20 C.F.R. § 655.122(q) by Failing to Provide Work Contracts to H-2A Workers and Corresponding Workers

The regulation at 20 C.F.R. § 655.122(q) provides that the employer must provide a copy of the work contract to each H-2A worker and to corresponding workers. Initial conference notes with the Respondent, dated July 17, 2015, document that "[n]o local got contract." (AX 19 at 3.) Moreover, a local worker who provided a statement in conjunction with WHD's investigation stated that he did not receive a copy of the H-2A contract. (AX 13 at 6.) Furthermore, in his written findings of the case, Investigator Martinez wrote that Mr. Brady "stated that he did not know he was supposed to give corresponding workers… a copy of an H-2A contract." (EX 7 at 16; Tr. at 46-47.)

Each time the ETA certified one of the Respondent's Applications, it reminded him of his obligation to "comply with all assurances, guarantees and other requirements contained in Departmental regulations at 20 CFR § 655 Subpart B and 20 CFR § 653, Subpart F." (AX 8; AX 10; AX 11; AX 12.) Moreover, as Investigator Martinez testified, and the record shows, Mr. Brady signed these provisions under penalty of perjury. (Tr. at 65.) Thus, I find that the evidence overwhelmingly establishes that Mr. Brady did not provide a copy of the work contract to corresponding workers.

The WHD calculated a CMP of $900.00, after reducing the maximum CMP by four mitigating factors. (AX 7 at 16-17; AX 20 at 4.) Specifically, the WHD found that the Respondent had no history of violations (mitigating factor number one), demonstrated a commitment to future compliance (mitigating factor number six), gained little financially from the violation (mitigating factor number seven), and the gravity of the violation was low (mitigating factor number three). It is unclear from the record why the WHD calculated a CMP of $900.00, but then assessed a CMP of only $675.00. (AJX 2.)

[8] *See* 29 C.F.R. § 501.19(b) for the complete list of mitigating factors.
[9] The maximum CMP of $1,500.00 reduced by thirty percent equals a CMP of $1,050.00.

I agree with the Administrator that mitigating factors one, three, and seven apply. However, the Respondent has not shown any commitment to future compliance or concern for public health or safety. Therefore, I find that 29 C.F.R. § 501.19(b)(6) is an aggravating, rather than a mitigating, factor. Having carefully considered all of the mitigating factors, I find that only three mitigating factors are applicable. Therefore, I find that a CMP of $1,050.00[10] is both reasonable and appropriate for Respondent's violation of 20 C.F.R. § 655.122(q).

III. The Respondent Violated 20 C.F.R. § 655.122(i) by Failing to Guarantee H-2A Workers Three-Fourths of the Contract Hours

The regulation at 20 C.F.R. § 655.122(i) provides that the employer "must guarantee to offer the worker employment for a total number of work hours equal to at least three-fourths of the workdays of the total period beginning with the first workday after the arrival of the worker at the place of employment or the advertised contractual first date of need, whichever is later, and ending on the expiration date specified in the work contract or in its extensions, if any."

At the hearing, Investigator Martinez explained that even if Mr. Brady did not have forty hours' worth of work for the H-2A workers, the contract still required Mr. Brady to pay them for three-fourths of those hours, which would amount to thirty hours per week. (Tr. at 66-74.)

Consistent with the Administrator's findings, all of the H-2A workers who testified by deposition stated that Mr. Brady did not offer or pay them for three-fourths of the hours listed in the contract. For example, Mr. Angel testified that he did not work for three-fourths of the number of hours that he was supposed to work. (AX 1 at 34-35.) Similarly, Mr. Arteaga-Hipolito explained that he only worked for Mr. Brady for one week in 2015, and he testified that Mr. Brady did not pay him for three-fourths of the hours listed in his contract in 2013, 2014, or 2015. (AX 2 at 21, 23, 24.) Furthermore, Antonio testified that he did not work for three-fourths of the hours listed in his contract during any year that he worked for the Respondent, and he only worked for one week in 2015. (AX 3 at 24-26.) Likewise, Eduardo testified that he only worked for fifty-two hours in 2015, for which Mr. Brady paid him approximately $400.00 dollars. (AX 4 at 15.) Finally, Mr. Garcia-Guerrero testified that the Respondent did not guarantee him three-fourths of the hours of work promised by the contracts in any year that he worked for the Respondent. (AX 5 at 24, 25.) Moreover, Mr. Garcia-Guerrero testified that he only worked for fifty-two hours in 2015 because Mr. Brady did not have anything ready for planting. (AX 5 at 26.)

Consistent with this unrefuted testimony, Mr. Brady even admitted to the WHD, at the initial conference, that he did not check to see whether his workers received the three-fourths guarantee. (AX 19 at 3.) Based on the overwhelming evidence showing that the Respondent failed to fulfill the three-fourths guarantee, I find that a preponderance of the evidence supports the Administrator conclusion that the Respondent violated 20 C.F.R. § 655.122(i).

The Administrator identified at least nine workers to whom the Respondent failed to guarantee at least three-fourths of the contract hours. The WHD calculated that the Respondent

[10] The maximum CMP of $1,500.00 reduced by thirty percent equals a CMP of $1,050.00.

owed $17,524.28 in unpaid wages. In his narrative report, Investigator Martinez explained that he computed back wages by dividing the amounts listed in the checks that the H-2A workers cashed by the hourly rate Mr. Brady paid in order to derive the number of hours each H-2A worker worked. (AX 7 at 13.) He then used the reconstructed hours worked to test whether each H-2A worker received the three-fourths guarantee throughout the period of investigation. (*Id*.) Investigator Martinez then calculated three-fourths of the total contract hours, from the first workday upon arrival until the end date on the contract, minus any federal holidays within the contract period, multiplied by the adverse effect wage rate, and minus any payment the Respondent paid. (*Id*.) The resulting amount was the back wages the Respondent owed to each worker. (*Id*.)

I find that Investigator Martinez's method of calculating back wages is reasonable and consistent with the evidence, particularly given that the Respondent did not keep or provide adequate records. Thus, I find that the $17,524.28 unpaid wages penalty the Administrator assessed is appropriate for the Respondent's violation of 20 C.F.R. § 655.122(i).

In addition to the above-mentioned unpaid wages, the Administrator urged the undersigned to increase the back wage determination because Eduardo Robles-del Angel was not originally named in WHD's Computation Summary Sheet. (AX 20 at 2; Brief at 14). The Administrator's argument has merit. In addition to finding that the Respondent failed to guarantee three-fourths of the contract hours to the nine H-2A workers, the evidence shows that he also failed to guarantee Eduardo Robles-del Angel three-fourths of the hours listed in the 2015 contract. (AX 20 at 2.) Eduardo's uncontested deposition testimony indicates that he worked for fifty-two hours 2015, but the Respondent only paid him $400.00 dollars. (AX 4 at 15.) Although it is not entirely clear which day, precisely, Eduardo started working for Mr. Brady, Eduardo testified that he "left for the United States on June 2, [2015]" and then spent a week in Monterrey while he was waiting for his visa to be processed. (AX 4 at 8.) Assuming he was in Monterrey for a week and then travelled to Kentucky, I find it likely that he started working for the Employer on June 15, 2019. Employing the method described by Investigator Martinez, I have calculated unpaid wages from June 15, 2015, through September 18, 2015, which is the end of the period of investigation in this case. (Tr. at 100.) This amounts to fourteen weeks. In the 2015 contracts, the Respondent guaranteed the H-2A workers forty hours of work per week. (AX 8; AX 12.) Three-quarters of forty hours equals thirty hours. Therefore, thirty hours per week multiplied by fourteen weeks equals 420 hours. Subtracting sixteen hours to account for two federal holidays (Fourth of July and Labor Day) equals 404 hours. As the adverse effect wage rate was $10.28 in 2015, the Respondent should have paid Eduardo a total of $4,153.12 (404 hours multiplied by $10.28 per hour = $4,153.12). (AX 8; AX 12.) As Eduardo testified that the Respondent only paid him $400.00, I find that the Respondent owes him $3,753.12 in unpaid wages ($4,153.12 - $400.00 = $3,753.12) for violating 20 C.F.R. § 655.122(i).

Based on the foregoing, I find that the Respondent owes a total of $21,277.40[11] in unpaid wages for violating 20 C.F.R. § 655.122(i).

[11] $17,524.28 + $3,753.12 = $21,277.40.

In addition to calculating unpaid wages, the WHD calculated a CMP of $1,200.00, after reducing the maximum CMP by two mitigating factors. (ALJX 2 at 7.) Specifically, the WHD found that the Respondent had no history of violations (mitigating factor number one) and he demonstrated a commitment to future compliance (mitigating factor number six). The WHD ultimately assessed a CMP of $900.00, but it is unclear from the record why the WHD reduced the CMP further from $1,200.00 to $900.00. (AJX 2.) The Administrator explained that because the H-2A workers were affected by other wage-related violations for which WHD assessed CMPs, it chose not to calculate separate CMPs for each violation of 20 C.F.R. § 655.122(i). (AX 7 at 14.)

I agree with the Administrator that the mitigating factor at 29 C.F.R. § 501.19(b)(1) applies, as the Respondent has no history of H-2A violations. However, the Respondent has not shown any commitment to future compliance. In fact, he has shown complete disregard for the work contract and applicable laws and regulations. Mr. Garcia-Guerrero, Mr. Angel, Mr. Arteaga-Hipolito, Antonio, and Mr. Garcia-Guerrero all testified that once Mr. Brady had no tobacco-related work for them to perform, he asked them to work with marijuana crops. (AX 5 at 28; AX 1 at 34-35; AX 2 at 26; AX 3 at 27; AX 4 at 14; AX 5 at 28.) Moreover, all of them testified that they refused to perform work outside of their contract. (*Id*.) Because of the Respondent's egregious behavior, I find that 29 C.F.R. § 501.19(b)(6) is an aggravating, rather than a mitigating, factor. Having carefully considered all of the mitigating factors, I conclude that only one mitigating factor is applicable. Therefore, I find that a CMP of $1,350.00[12] is both reasonable and appropriate for Respondent's violation of 20 C.F.R. § 655.122(i).

IV. The Respondent Violated 20 C.F.R. § 655.122(l) by Failing to Pay the Required Hourly Wage Rate

Under the regulations, the employer is required to "pay the worker at least the AEWR, the prevailing hourly wage rate, the prevailing piece rate, the agreed-upon collective bargaining rate, or the Federal or State minimum wage rate, in effect at the time work is performed, whichever is highest, for every hour or portion thereof worked during a pay period." 20 C.F.R. § 655.122(l).

Investigator Martinez testified that when he interviewed the H-2A workers, they reported that they did not receive the hourly pay rate listed in the contract. (Tr. at 104, 109.) Rather, many reported receiving approximately $8.00 per hour and stated that the Respondent did not pay them for all of the hours they worked. (Tr. at 104-105; Tr. at 112.) He further stated that some H-2A workers were paid rates of $8.29, $8.58, $9.67, $9.72, and $10.10. (Tr. at 112.)

Consistent with Investigator Martinez's testimony, Mr. Angel testified that the Respondent paid him $8.00 per hour. (AX 1 at 33-34.) Similarly, in discussing his wages, Mr. Arteaga-Hipolito testified that he was paid $8.00 per hour in 2013. (AX 2 at 21.) In 2014, Mr. Brady paid him the contract rate for one week, but the rest of the time Mr. Brady paid him less than the contract rate. (AX 2 at 22-23.) Mr. Arteaga-Hipolito explained that he only worked for Mr. Brady for one week in 2015, but Mr. Brady did not pay him the contract rate for that week. (AX 2 at 23-24.) Similarly, Antonio testified that Mr. Brady paid him $8.00 per hour in 2013,

[12] The maximum CMP of $1,500.00 reduced by ten percent equals a CMP of $1,350.00.

2014, and 2015. (AX 3 at 24-26.) Moreover, Eduardo could not exactly recall the pay rate listed in his contract, but he thought it was $10.00 per hour and he thought the Respondent paid him less than that amount. (AX 4 at 15-16.) Mr. Garcia-Guerrero testified that other than one week in 2014, when the Respondent did pay him the contract rate, the Respondent paid him only $8.00 per hour in 2013, 2014, and 2015. (AX 5 at 24-26.) The limited hours and earnings statements of record support this testimony, as they document that the Respondent paid multiple H-2A workers only $8.00 per hour. (AX 16.)

The Respondent has not put forth any evidence demonstrating that he paid the contract rates in 2013, 2014, or 2015. In his written findings of this case, Investigator Martinez wrote that the Respondent acknowledged that his records would "show workers were paid at $8.00 per hour or somewhat above," but stated that the Respondent claimed that "he had paid workers at least what the contract showed in cash." (AX 7 at 18.) There is not documentary or testimonial evidence to support the Respondent's assertion that he gave the H-2A workers cash payments up to and equaling the contract rates. Moreover, as discussed above, I have found that the H-2A workers are far more credible than Mr. Brady is.

Based on the foregoing, I find that the evidence of record overwhelming shows that the Respondent failed to pay H-2A workers the respective contract rates in 2013, 2014, and 2015. The WHD concluded that the Respondent failed to pay forty-two employees the rate he was contractually obligated to pay. (AX 20.) The contracts show that Mr. Brady was required to pay the H-2A workers $9.80 in 2013, $10.10 in 2014, and $10.28 in 2015. (AX 8; AX 10; AX 11; AX 12.)

In the Determination Letter, the WHD concluded that the Respondent owed $62,199.45 in unpaid wages. (ALJX 2 at 7.) Investigator Martinez explained that he used checks, bank statements, employee interviews, and records provided by the Respondent to compute back wages. (AX 7 at 18.) He explained that he divided the recorded payments made to workers by $8.00 to determine how many hours each worker worked. (*Id*.) He then calculated the difference between the average weekly wage rate and what the Respondent actually paid to calculate the total unpaid wages due to each worker. (*Id*.) I find that Investigator Martinez's calculation is reasonable and consistent with the evidence, particularly given that the Respondent did not maintain adequate records. Moreover, the Respondent has not put forth any evidence to rebut these calculations. Therefore, I find that the Respondent owes a total of $62,199.45 in unpaid wages to forty-two workers.

In addition to finding that the Respondent owed unpaid wages to forty-two workers, the WHD assessed a CMP of $37,800.00. (ALJX 2 at 7.) The Administrator explained that WHD actually calculated a CMP of $50,400.00 (forty-two violations multiplied by $1,500.00 per violation), but reduced it after applying two mitigating factors. (AX 7 at 18-19; AX 20 at 2-4.) Specifically, the WHD concluded that because the Respondent had no history of violations and showed a commitment to future compliance, it reduced each CMP by the mitigating factors at 29 C.F.R. § 501.19(b)(1) and (b)(6). However, by post-hearing brief, the Administrator urged the undersigned "to modify the CMP amount upward to reflect Brady's bad faith, continued excuses, and lack of true commitment to future compliance." (Brief at 15-16.)

I agree with the Administrator and find that the Respondent's violation of 20 C.F.R. § 655.122(l) affected a large number of workers and enriched Mr. Brady substantially. When questioned about whether the Respondent paid him the contract rate, Mr. Angel testified that Mr. Brady stated that he "would do whatever he wanted and those papers meant nothing to him," referring to the contract. (AX 1 at 34.) Moreover, Mr. Angel stated that Mr. Brady and his son "got angry" when he talked to them about his incorrect pay rate. (AX 1 at 33.) Evidence further suggests that Mr. Brady knew that he was not paying the contract rate and used it as a means to get H-2A workers back to his farm in subsequent years. For example, both Antonio and Mr. Arteaga-Hipolito testified that they returned to work for Mr. Brady in 2015, despite the fact that he had not previously paid them the contract rates, because Mr. Brady "promised" to pay them back wages from 2013 through 2015. (AX 3 at 17-18; AX 2 at 14.)

Based on the unrefuted evidence and testimony of record, I find that the Respondent acted with complete disregard for the law. As his conduct was egregious, I find that none of the mitigating factors applies under these circumstances. Consequently, I find that a CMP of $63,000.00[13] is both reasonable and appropriate for the Respondent's failure to pay the hourly wage rates listed in the contracts, in violation of 20 C.F.R. § 655.122(l).

V. The Respondent violated 20 C.F.R. § 655.122(a) by Giving Preferential Treatment to H-2A Workers

The regulation at 20 C.F.R. § 655.122(a) prohibits the employer from offering preferential treatment to aliens. Specifically, it states, *inter alia*, that the employer's "job offer must offer to U.S. workers no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H-2A workers."

The WHD concluded that the Respondent paid corresponding U.S. workers $8.00 per hour, which was less than the H-2A contract rate for every year. (AX 7 at 3.) The record reveals that Mr. Brady was contractually obligated to pay workers $9.80 in 2013, $10.10 in 2014, and $10.28 in 2015. (AX 8; AX 10; AX 11; AX 12.) At the hearing, Investigator Martinez testified that through interviews and other information, he discovered that the Respondent employed corresponding workers and gave preferential treatment to H-2A workers over corresponding workers in contract year 2014. (Tr. at 112; AX 7 at 17.) Specifically, he testified that corresponding workers were paid $8.00 per hour, while some H-2A workers were paid anywhere from $8.29 to $10.10 per hour. (*Id*.) Thus, he concluded that "corresponding workers were paid less than adverse effect wage rates." (Tr. at 113.)

Moreover, initial conference notes with Mr. Brady, dated July 17, 2015, reveal that he said that he did not want to hire local workers because he did not "want to mess up his Mexicans." (AX 19 at 3.) Deposition testimony from H-2A workers shows that the Respondent paid some H-2A workers more than $8.00 per hour, even if he only did so for very brief periods. (AX 2 at 22-23; AX 3 at 25-26; AX 5 at 24-26.) An employee statement shows that the Respondent paid one U.S. worker $10.00 per hour, which was still below the contract rates for 2014 and 2015. (AX 13 at 6.)

[13] The maximum CMP of $1,500.00 multiplied by forty-two equals $63,000.00.

Based on the foregoing, I find that the Administrator has put forth substantial and unrebutted evidence to demonstrate that the Respondent paid corresponding workers less than H-2A workers for the same work, during the same timeframe, in violation of 20 C.F.R. § 655.122(a). After applying mitigating factors one and six, the WHD reduced the CMP to $1,200.00, but assessed a CMP of only $900.00. (AX 7 at 3-4; AX 20 at 4.)

I agree with the Administrator that mitigating factor at 29 C.F.R. § 501.19(b)(1) applies, as the Respondent has no history of violations. However, the Respondent has not shown any commitment to future compliance with the H-2A program. Therefore, I find that 29 C.F.R. § 501.19(b)(6) is an aggravating, rather than a mitigating factor. Having carefully considered all of the mitigating factors, I find that only one mitigating factors applies. Therefore, I find that a CMP of $1,350.00[14] is both reasonable and appropriate for Respondent's preferential treatment to aliens, in violation 20 C.F.R. § 655.122(a).

VI. The Respondent Violated 20 C.F.R. § 655.122(d)(1) by Unlawfully Charging Rent and Failing to Adhere to Health and Safety Requirements

a) The Respondent Unlawfully Charged Rent

Under the regulations, an employer who receives certification to employ H-2A workers must "provide housing at no cost to the H-2A workers and those workers in corresponding employment who are not reasonably able to return to their residence within the same day." 20 C.F.R. § 655.122(d)(1).

The WHD concluded that four H-2A workers paid the Respondent $60.00 for rent. (AX 20 at 2; AX 7 at 8.) Investigator Martinez's investigative report documents that in 2014, at least four H-2A workers lived in an apartment where they were required to pay $60.00 in rent to someone named "O.J.," but not to the Respondent. (AX 13 at 1; AX 7 at 8.) For example, one employee stated that he "paid $60.00 but the boss paid O.J. for our rent." (AX 13 at 1.) In the investigative report, Investigator Martinez wrote that Mr. Brady stated that he "did not know" that "O.J." had been charging rent, but "explained that he had later started paying the rent knowing that rent was supposed to be free and clear." (AX 7 at 8.) The Respondent has not put forth any evidence to rebut the Administrator's evidence that four H-2A workers paid $60.00 in rent. As the Respondent was required to provide housing at no cost to H-2A workers, and four H-2A workers paid rent, I find that a preponderance of the evidence establishes that the Respondent violated 20 C.F.R. § 655.122(d)(1).

By multiplying each $60.00 rent payment by the four H-2A workers who paid rent, the WHD assessed $240.00 in unpaid wages. (AX 7 at 8; AX 20 at 2.) I find that Investigator Martinez's calculation is reasonable and consistent with the evidence. Thus, I find the $240.00 unpaid wages penalty the Administrator assessed is appropriate for the Respondent's violation of 20 C.F.R. § 655.122(d)(1).

Moreover, the WHD calculated a CMP of $750.00, after applying mitigating factors numbers one, two, three, six, and seven. Specifically, the WHD concluded that the Respondent

[14] The maximum CMP of $1,500.00 reduced by ten percent equals a CMP of $1,350.00.

had no history of violations (mitigating factor number one), demonstrated a commitment to future compliance (mitigating factor number six), gained little financially from the violation (mitigating factor number seven), and the gravity of the violation was low (mitigating factor number three). (AX 7 at 8-9.) The WHD then reduced the calculated CMP and assessed a CMP of $562.50. (ALJX 2.) By post-hearing brief, the Administrator explained that because the amount the Respondent charged for rent was only $60.00, the CMP it assessed was minimal. (AX 7 at 8-9; Brief at 11.)

I agree with the Administrator that mitigating factors one, two, three, and seven apply. However, the Respondent has not shown any commitment to future compliance. Therefore, I find that 29 C.F.R. § 501.19(b)(6) is an aggravating, rather than a mitigating, factor. Having carefully considered all of the mitigating factors, I find that only four mitigating factors are applicable. Consequently, I find that a CMP of $900.00[15] is both reasonable and appropriate for Respondent's violation of 20 C.F.R. § 655.122(d)(1).

b) The Respondent Failed to Adhere to Housing Health and Safety Regulations

The regulation at 20 C.F.R. § 655.122 further provides that if an employer provides housing, it "must meet the full set of DOL Occupational Safety and Health Administration (OSHA) standards set forth at 29 CFR 1910.142, or the full set of standards at §§654.404 through 654.417 of this chapter, whichever are applicable under §654.401 of this chapter." 20 C.F.R. § 655.122(d)(1).

Inspector Martinez discussed the housing violations he uncovered through his interviews with the H-2A workers and through his inspection of the living accommodations the Respondent provided. (Tr. at 88, 115.) He discussed the photos identified in AX 14, which he took in July 2015. (Tr. at 117-133.) Moreover, the WHD documented the trailer deficiencies on the Housing Safety and Health Checklist. (AX 15.)

A preponderance of the evidence supports the WHD's finding that Mr. Brady violated 20 C.F.R. § 655.122(d)(1) by failing to provide or secure housing that complied with the applicable housing safety and health standards. For example, 29 C.F.R. § 1910.142(a)(3) requires that the "grounds and open areas surrounding the shelters shall be maintained in a clean and sanitary condition free from rubbish, debris, waste paper, garbage, or other refuse." Evidence shows that the trailer had rubbish in it and the trash can did not have a lid on it. (Tr. at 120, 124; AX 14 at 1, 6).

Moreover, the WHD found that the windows did not have a screens on them, which is a violation of 29 C.F.R. § 1910.142 (b)(8) that provides that all "exterior openings shall be effectively screened with 16-mesh material" and "screen doors shall be equipped with self-closing devices. (Tr. 118-121; AX 14 at 1-2). Consistent with WHD's finding, many of the H-2A workers testified that the windows and doors did not have screens. (AX 5 at 18; AX 3 at 19-20; AX 4 at 12.)

[15] The maximum CMP of $1,500.00 reduced by forty percent equals a CMP of $900.00.

Furthermore, the trailer did not protect against the elements, as required by 29 C.F.R. § 1910.142(b)(1). (Tr. at 121-122; AX 14 at 3). The kitchen and trailer walls had holes in them and the floor was not structurally sound, in violation of 29 C.F.R. § 1910.142(b)(4), which requires floors to be "kept in good repair." (Tr. at 123, 133, 128-132; AX 14 at 5, 11-12, 19-20.) Consistent with this evidence, Mr. Angel stated that floors and walls had "rat holes" in them. (AX 1 at 28-29.) Similarly, Mr. Arteaga-Hipolito testified that there were holes in the floor of the trailer through which rats would crawl. (AX 2 at 20.)

Furthermore, as alluded to in the testimony above, Inspector Martinez also concluded that the trailer had insects. (Tr. at 122, 130; AX 14 at 15-16, 20). All of the H-2A workers testified that their living quarters had bed bugs and/or rats. (AX 5 at 16; AX 3 at 19-20; AX 2 at 20; AX 4 at 12.) Therefore, I find that a preponderance of the evidence shows that the Respondent violated 29 C.F.R. § 1910.142(b)(j), which required him to take effective measures "to prevent infestation by and harborage of animal or insect vectors or pests."

Additionally, ample evidence exists to show that Mr. Brady did not provide housing that afforded each occupant at least fifty feet of floor space in the sleeping rooms, as required by 29 C.F.R. § 1910.142(b)(2). (Tr. at 124-125, 129; AX 14 at 7-8, 13-14). In addition, he did not provide beds, cots, or bunks spaced not closer than thirty-six inches, both laterally and end-to-end, and elevated at least twelve inches from the floor, as required by 29 C.F.R. § 1910.142(b)(3). Consistent with the WHD's conclusion, multiple H-2A workers testified that they slept on mattresses on the floor. (AX 4 at 12; AX 5 at 13-14; AX 2 at 20.)

Finally, Mr. Brady did not offer separate toilet facilities for men and women, as required by 29 C.F.R. § 654.411(d), which provides that separate toilet rooms shall be provided for each sex. Inspector Martinez testified that men and women were living in the same housing facility. (Tr. at 117.) Consistent with this finding, Miseal Arteaga-del Angel testified that in 2014, Mr. Brady provided an apartment for six workers in which a woman shared one bathroom with five men. (AX 2 at 16.)

Based on the above-mentioned evidence, which the Respondent has not challenged with evidence of his own, I agree with the WHD that the Respondent violated 20 C.F.R. § 655.122(d)(1). The WHD calculated a CMP of $7,200.00, which it calculated by multiplying $1,500.00 by six affected H-2A workers, for a total of $9,000.000, and reducing the calculated amount by applying mitigating factors one and six. In the Determination Letter, the WHD assessed a CMP of only $5,400.00. (ALJX 2.) It is unclear why the WHD reduced the CMP further from $7,200.00 to $5,400.00, but the Administrator explained that the WHD "demonstrated reasonableness in choosing not to calculate CMPs for every violation laid out above." (Brief at 20.) By post-hearing brief, the Administrator urged the undersigned to assess the full calculated CMP amount or greater given Mr. Brady's failure to address these various housing concerns.

I agree with the Administrator and find that the Respondent is not entitled to the benefit of any mitigating factors. Although Mr. Brady had no history of violations prior to this investigative period, he could have fixed the housing concerns raised by the H-2A workers. Various H-2A workers testified that when they brought the housing conditions to the attention of

Mr. Brady or Mr. Brady's son, Mr. Brady failed to address their concerns or make repairs. (AX 5 at 16-17; AX 2 at 20.) Once again, Mr. Brady has neither shown regret for the way he treated the H-2A workers nor a willingness to comply with the law and regulations. Consequently, I find that a CMP of $9,000.00[16] is both reasonable and appropriate for Respondent's failure to comply with housing safety and health standards.

VII. The Respondent Violated 20 C.F.R. § 655.122(m) by Not Paying H-2A Workers on Time

The regulations require that the employer "must state in the job offer the frequency with which the worker will be paid, which must be at least twice monthly or according to the prevailing practice in the area of intended employment, whichever is more frequent." 20 C.F.R. § 655.122(m). Furthermore, they provide that the employer "must pay wages when due." (*Id*.) Moreover, in the contract, Mr. Brady attested that he would pay the H-2A workers on a weekly basis. (AX 8; AX 10; AX 11; AX 12.)

The WHD found that the Respondent failed to pay some workers for at least a month in 2015. (EX 7 at 20.) Evidence supports the WHD's conclusion that the Respondent did not pay the H-2A workers at least twice per month. (AX 7; AX 13.) The H-2A workers also consistently testified that Mr. Brady delayed their pay, which, ultimately, required them to go to the consulate for food, water, money, and assistance. (AX 1-5.) For example, Antonio testified that Mr. Brady took a month and a half to pay him in 2015. (AX 3 at 17.) Similarly, Eduardo stated that although Mr. Brady eventually paid him, he was housed for "a month and a half with no food or water." (AX 4 at 16-17.) I find that a preponderance of the evidence supports the WHD's finding that the Respondent violated 20 C.F.R. § 655.122(m).

The WHD applied mitigating factors one, six, and seven, and reduced the CMP from $1,500.00 to $1,050.00. (ALJX 2; AX 20 at 1; AX 7 at 20-21.) In its Determination Letter, the WHD explained that it only assessed a CMP of $787.50 for this violation. (ALX 2.) By post-hearing brief, however, the Administrator urged the undersigned to modify the CMP upward, to assess the full calculated CMP amount for each of the five H-2A workers who were individually harmed by the Respondent's violation of this regulation. (Brief at 17.)

I agree with the Administrator that the Respondent's actions caused significant hardship to all five H-2A workers that he failed to pay on time. In weighing the mitigating factors at 29 C.F.R. § 501.19(b), I find that only the first one applies, as the Respondent had no history of violations. However, because the Respondent has not shown any inclination toward future compliance, the sixth factor is aggravating, rather than mitigating. 29 C.F.R. § 501.19(b)(6). Furthermore, the Respondent gained much financially by withholding and delaying pay to the H-2A workers. Thus, factor number seven is also aggravating, rather than mitigating. 29 C.F.R. § 501.19(b)(7).

Based on the foregoing, I find that a CMP of $1,350.00,[17] assessed for each of the five H-2A workers affected, is reasonable for the Respondent's failure to pay the H-2A workers on

[16] The maximum CMP of $1,500.00 multiplied by six affected workers equals $9,000.00.
[17] The maximum CMP of $1,500.00 reduced by ten percent equals a CMP of $1,350.00.

time. Therefore, a total CMP of $6,750.00[18] is both reasonable and appropriate for Respondent's egregious violation of 20 C.F.R. § 655.122(m).

VIII. The Respondent Violated 20 C.F.R. § 655.122(j)(1) by Failing to Maintain Earnings Records

The Regulation at 20 C.F.R. § 655.122(j)(1) mandates that the employer must "keep accurate and adequate records with respect to the workers' earnings." Specifically, the regulation requires the employer to keep payroll records showing: (1) the nature and amount of work performed; (2) the number of hours of work offered each day (broken out by hours offered both in accordance with and over and above the three-fourths guarantee); (3) the hours the worker actually worked each day; (4) daily start and stop times; (5) the rate of pay; (6) the worker's earnings per pay period; (7) the worker's home address; and (8) the amount of and reasons for deductions taken from the worker's wages. 20 C.F.R. § 655.122(j)(1).

The WHD found that the Respondent failed to keep required records regarding the nature and amount of work the H-2A workers performed, the number of hours Mr. Brady offered the H-2A workers each day, the number of hours the H-2A workers actually worked each day, and how much Mr. Brady paid H-2A workers. The initial conference notes show that the H2-A workers wrote "down their own hours" and gave them "to Mr. Brady whenever they" wanted "their money." It further documents that Mr. Brady paid them by check, but there is no evidence that the H-2A workers received pay statements. (AX 1-5; AX 13.) At the initial conference, the Respondent seemed to concede that he failed to abide by these requirements, as he "stated that he did not keep a record of any or some of the explained requirements of this H-2A section even though his H-2A agent provided him with all the documentation(s) of what was needed to comply with the earnings and hours records." (AX 7 at 15.) The Respondent generated and submitted very few records in this case. However, it is evident that those he did provide did not include all of the information required by C.F.R. § 655.122(j)(1). (AX 16; AX 17.)

In the Determination Letter, the WHD calculated a CMP of $6,300.00 (seven violations multiplied by $900.00 per violation), but only assessed a CMP of $4,725.00. (ALX 2 at 7-8.) The WHD found that the Respondent had no history of violations (mitigating factor number one), demonstrated a commitment to future compliance (mitigating factor number six), gained little financially from the violation (mitigating factor number seven), and the gravity of the violation was low (mitigating factor number three). (AX 7 at 15.) Therefore, the WHD calculated a CMP of $6,300.00 (seven violations multiplied by $900.00 per violation). By post-hearing brief, the Administrator explained that the "WHD demonstrated reasonableness in choosing not to calculate separate CMPs for each violation, i.e., for each of the 42 employees owed back wages in this case." (Brief at 18.) However, the Administrator urged the undersigned to consider the full CMP that WHD calculated, rather than the reduced amount, to account for the unreliability of the Respondent's claim that he was unaware of the regulatory requirements and the fact that the WHD only calculated the CMP for seven, as opposed to forty-two, H-2A workers. (*Id.*)

I agree with the Administrator that given the Respondent's gross disregard for the law and regulations, the calculated rate is far more appropriate than the assessed rate. Moreover, I

[18] A CMP of $1,350.00 multiplied by five affected H-2A workers equals $6,750.00.

agree with the WHD that the first mitigating factor applies, as this is the first time the Respondent has committed violations. However, his actions affected forty-two workers who had little to no documentation showing that they had not been paid the contract rate. Because the Respondent's actions were grave, the third factor at 29 C.F.R. § 501.19(b) is a mitigating, rather than an aggravating, factor. Moreover, I find that the Respondent gained a great deal financially by failing to pay the H-2A workers. Thus, 29 C.F.R. § 501.19(b)(7) is also aggravating, rather than mitigating. Finally, as discussed numerous times, the Respondent has not shown any willingness to participate in this proceeding, present evidence, or make himself available for the hearing or a deposition. Thus, the sixth factor 29 C.F.R. § 501.19(b) is also aggravating, rather than mitigating.

Consequently, I find that a CMP of $1,350.00[19] assessed for seven affected H-2A workers is reasonable for the Respondent's failure to maintain earnings records for forty-two H-2A workers. Therefore, a total CMP of $9,450.00[20] is both reasonable and appropriate for Respondent's blatant violation of the recordkeeping requirements at 20 C.F.R. § 655.122(j).

IX. The Respondent Violated 20 C.F.R. § 655.122(k) by Failing to Give Workers Hours and Earnings Statements

Coinciding with the previous violation, the WHD concluded that the Respondent failed to furnish hours and earnings statements to the H-2A workers. The regulation at 20 C.F.R. § 655.122(k) requires the employer to "furnish to the worker on or before each payday in one or more written statements," which include information regarding the worker's earnings, hourly rates, hours of employment offered, actual hours worked, and itemized wage deductions, among other things. 20 C.F.R. § 655.122(k).

The evidence of record shows that the Respondent did not provide wage statements to H-2A workers. Moreover, as discussed in the section concerning the violation of 20 C.F.R. § 655.122(j), the Respondent did not maintain accurate records. (AX 13.) Initial conference notes show that the H-2A workers "were not given a copy of their pay stubs or time cards." (AX 19 at 4.) The WHD explained that because the Respondent's "failure to make/provide wage statements" was a "direct result" of the Respondent's "failure to make and maintain time and payroll records," it did not assess a separate CMP for this violation. (AX 7 at 16.) However, by post-hearing brief, the Administrator requested that the undersigned modify its previous determination and assess a CMP considering that the Respondent "took advantage of vulnerable employees by failing to pay them as required, year after year." (Brief at 19.) The Administrator further explained that the Respondent "compounded that malfeasance by failing to provide the employees with the required documentation of wages, hours, and deductions, making it more difficult for the employees to assert their rights and demand the specific sums they were owed for each current contract and also for their work performed in previous years." (*Id*.) The Administrator urged the undersigned to impose the same CMP as imposed for the Respondent's violation of 20 C.F.R. § 655.122(j).

[19] The maximum CMP of $1,500.00 reduced by ten percent equals a CMP of $1,350.00.
[20] A CMP of $1,350.00 multiplied by seven affected H-2A workers equals $9,450.00.

I find that the Administrator's reasoning has merit. The Respondent failed to provide earnings statements to the H-2A workers, which made it more difficult for the H-2A workers to assert their rights, demand their pay, and prove their losses. The Respondent is not entitled to avoid paying a CMP for this regulatory subsection merely because he also violated a similar, though distinct, recordkeeping requirement.

Therefore, for the same reasons articulated above, I find that a CMP of $1,350.00[21] assessed for seven H-2A workers is reasonable for the Respondent's failure to provide forty-two H-2A workers with hours and earnings records. Therefore, a total CMP of $9,450.00[22] is both reasonable and appropriate for Respondent's complete disregard for the recordkeeping requirements at 20 C.F.R. § 655.122(k).

X. The Respondent Violated 20 C.F.R. §§ 655.122(h)(1)-(2) by Failing to Pay Inbound and Outbound Transportation Costs

The regulation at 20 C.F.R. § 655.122(h)(1) pertains to transportation of workers to their place of employment. It provides that if the employer "has not previously advanced such transportation and subsistence costs to the worker or otherwise provided such transportation or subsistence directly to the worker by other means and if the worker completes 50 percent of the work contract period, the employer must pay the worker for reasonable costs incurred by the worker for transportation and daily subsistence from the place from which the worker has come to work for the employer, whether in the U.S. or abroad to the place of employment." In addition to requiring the employer to pay inbound transportation costs, the regulation at 20 C.F.R. § 655.122(h)(2) requires the employer to pay outbound transportation costs. Specifically, it provides that if "the worker completes the work contract period, or if the employee is terminated without cause, and the worker has no immediate subsequent H-2A employment, the employer must provide or pay for the worker's transportation and daily subsistence from the place of employment to the place from which the worker, disregarding intervening employment, departed to work for the employer." 20 C.F.R. § 655.122(h)(2).

The WHD found that Mr. Brady failed to advance the transportation and related subsistence costs necessary for each H-2A worker to travel to and from the place of employment, or, alternatively, reimburse each worker for said costs when the worker completed fifty percent of the work contract period. The WHD identified at least three H-2A workers who did not receive reimbursement for their inbound and outbound transportation and subsistence costs. (AX 20 at 2.) Moreover, all five H-2A workers who testified by deposition and H-2A workers interviewed by the WHD stated that Mr. Brady never reimbursed them for their inbound transportation costs. (AX 13 at 1, AX 1-5, AX 7.) Although Mr. Brady reported to Investigator Martinez that he paid the workers in cash, he has not advanced any evidence to support his statements. (AX 7 at 10.) I find that a preponderance of the evidence supports the WHD's conclusion that Mr. Brady failed to repay H-2A workers for inbound and outbound transportation costs.

[21] The maximum CMP of $1,500.00 reduced by ten percent equals a CMP of $1,350.00.
[22] A CMP of $1,350.00 multiplied by seven affected H-2A workers equals $9,450.00.

In its Determination Letter, the WHD found that the Respondent owed three H-2A workers $2,902.92 in unpaid wages for violating 20 C.F.R. § 655.122(h)(1) (inbound transportation costs) and $1,658.40 in unpaid wages for violating 20 C.F.R. § 655.122(h)(2) (outbound transportation costs). (ALJX 2; AX 7 at 10-11.) By post-hearing brief, the Administrator requested that the undersigned modify the back wage determination upward and assess additional back wages for Reynaldo Arteaga-del Angel and Eduardo Robles-del Angel, who were not named under this violation in the H-2A CMP Computation Summary Sheet. (AX 20 at 2; Brief at 12-13.) I agree with the Administrator that because the WHD did not initially calculate unpaid wages for Reynaldo Arteaga-del Angel and Eduardo Robles-del Angel under 20 C.F.R. § 655.122(h), the Respondent owes them back wages for inbound and outbound transportation costs.

Reynaldo Arteaga-del Angel testified that he paid approximately 6,000 Mexican pesos to travel from Mexico to Lebanon, Kentucky. (AX 1 at 15-19.) In addition, he estimated that he paid $300.00 to return to his home in Mexico from Lebanon, Kentucky. (AX 1 at 19.) He testified that Mr. Brady never reimbursed him for these expenses. (AX 1 at 19-20.) Although the record does not establish exactly how much Arteaga-del Angel spent, I credit his testimony that it cost him approximately $300.00 each way. Therefore, I find that the Respondent owes $600.00 in additional back wages to Mr. Arteaga-del Angel for violating 20 C.F.R. § 655.122(h)(1) and (h)(2).

Similarly, Eduardo Robles-del Angel testified that he paid out of pocket for his visa and all related expenses, but Mr. Brady never reimbursed him for any of the expenses he incurred. (AX 4 at 9-11, 17.) He estimated that he spent between 14,000 and 15,000 Mexican pesos in total. (AX 4 at 10.) Although the record does not establish exactly how much Eduardo spent in U.S. dollars, I assume that, like Mr. Arteaga-del Angel, he spent approximately $300.00 each way. Therefore, I find that the Respondent also owes $600.00 in additional back wages to Eduardo Robles-del Angel for violating 20 C.F.R. § 655.122(h)(1) and (h)(2).

Based on the foregoing, I find that the Respondent owes $3,502.92 ($2,902.92 + $300.00 to Mr. Angel + $300.00 to Eduardo) in unpaid wages for violating 20 C.F.R. § 655.122(h)(1), and $2,258.40 ($1,658.40 + $300.00 to Mr. Angel + $300.00 to Eduardo) in unpaid wages for violating 20 C.F.R. § 655.122(h)(2).

The WHD also calculated a CMP of $1,050.00 for the Respondent's violation of 20 C.F.R. § 655.122(h)(1), and a separate CMP of $1,050.00 for the Respondent's violation of 20 C.F.R. § 655.122(h)(2). In both instances, the WHD found that the Respondent had no history of violations (mitigating factor number one), the Respondent was committed to future compliance (mitigating factor number six), and few H-2A workers were affected by the violation (mitigating factor number two). AX 7 at 10-11; AX 20 at 1-2. Thereafter, the WHD assessed a CMP of only $787.50 for the violation of 20 C.F.R. § 655.122(h)(1) and $787.50 for the violation of 20 C.F.R. § 655.122(h)(2).

I agree with the Administrator that the Respondent had no history of violations; therefore, I have reduced the CMP by ten percent after applying the first mitigating factor at 29 C.F.R. § 501.19(b)(1). However, the Respondent harmed at least five individuals when he failed to pay

inbound and outbound transportation costs. Therefore, I find that 29 C.F.R. § 501.19(b)(2) is an aggravating, rather than a mitigating, factor. Moreover, the Respondent has failed to show any commitment to future compliance with the H-2A program. Consequently, 29 C.F.R. § 501.19(b)(6) is also an aggravating, rather than a mitigating, factor. Therefore, I have assessed a CMP of $1,350.00[23] for the Respondent's violation of 20 C.F.R. § 655.122(h)(1) and a CMP of $1,350.00[24] for the Respondent's violation of 20 C.F.R. § 655.122(h)(2).

XI. The Respondent Violated 20 C.F.R. § 655.122(p) by Failing to Adhere to the Deductions Requirements

The regulation at 20 C.F.R. § 655.122(p) mandates that the employer must "make all deductions from the worker's paycheck required by law" and "specify all deductions not required by law which the employer will make from the worker's paycheck." Furthermore, all deductions must be "reasonable." A "deduction is not reasonable if it includes a profit to the employer" or if it is "primarily for the benefit or convenience of the employer." The regulation also provides that the "employer may deduct the cost of the worker's transportation and daily subsistence expenses to the place of employment which were borne directly by the employer. In such circumstances, the job offer must state that the worker will be reimbursed the full amount of such deduction upon the worker's completion of 50 percent of the work contract period." 20 C.F.R. § 655.122(p).

In this case, many H-2A workers testified that they paid $6.00 to get to and from work. For example, Antonio testified that every year that he worked for Mr. Brady, he paid for gasoline and $6.00 per day to use a van to get to work. (AX 3 at 23-24.) Moreover, Mr. Garcia-Guerrero stated that he paid to have the trash taken out, paid for food, paid to do laundry, and paid $6.00 for gasoline to get to and from work. (AX 5 at 14, 19-22.) He testified that he paid $6.00 every other day in 2013, and $6.00 every three days in 2014 and 2015. (AX 5 at 21-23.) Similarly, Mr. Angel testified that he paid $50.00 for his own mattress and $6.00 per day to use a van. (AX 1 at 29.) Finally, Mr. Arteaga-Hipolito testified that he paid for the gas to get to and from work in 2013 and 2014. (AX 2 at 15-16.) All of these H-2A workers testified that the Respondent did not reimburse them for these out-of-pocket expenses. (AX 1-5.) Furthermore, two H-2A workers, Reynaldo Arteaga-del Angel and Eduardo, testified that they paid for their own mattresses. (AX 1 at 29; AX 4 at 12.) Based on this unrefuted evidence, I agree with the Administrator that the fees the Respondent charged the H-2A workers were primarily for his own benefit or convenience, in violation of § 655.122(p).

Through interviews and other evidence, the Administrator concluded that the Respondent owed $2,300.00 in unpaid wages to five workers, which I find entirely reasonable. (AX 7 at 19; ALJX 2 at 7.) The Respondent has not put forth any evidence to challenge the Administrator's calculations.

Moreover, the WHD calculated a CMP of $900.00, after concluding that mitigating factors one, two, six, and seven applied. (AX 7 at 19-20; AX 20 at 1.) While I agree that the first mitigating factor applies, as Mr. Brady has no prior history of violations, I find that the other

[23] The maximum CMP of $1,500.00 reduced by ten percent equals a CMP of $1,350.00.
[24] The maximum CMP of $1,500.00 reduced by ten percent equals a CMP of $1,350.00.

mitigating factors do not apply. Five individuals were unlawfully charged; therefore, the second factor is aggravating, not mitigating. 29 C.F.R. § 501.19(b)(2). Moreover, some H-2A workers testified that they did not have sufficient money for food and water. For example, Eduardo testified that he went without food and water and the consulate gave him $100.00 so he could "survive." (AX 4 at 16-17.) Similarly, Mr. Garcia-Guerrero testified that he did not "have food and water" until he spoke with someone at the consulate. (AX 5 at 29.) While $6.00 may seem like a minimal amount at first glance, it is evident that not having that money had a significant impact on the H-2A workers who were required to make unlawful payments to the Respondent. Consequently, 29 C.F.R. § 501.19(b)(7) is also an aggravating, rather than a mitigating, factor. Finally, as stated numerous times previously, Mr. Brady failed appear at the hearing, testify at his scheduled deposition, or otherwise participate in this proceeding. As he has not shown any regard for the regulations or the health and safety of the H-2A workers, I find that 29 C.F.R. § 501.19(b)(6) is also an aggravating, rather than a mitigating, factor.

Moreover, the WHD only calculated a CMP for one H-2A worker because the affected H-2A workers were also affected by other wage-related violations for which WHD assessed CMPs. (AX 7 at 20.) However, given the gravity of this violation, I find it more appropriate to multiply the penalty by the five H-2A workers affected by Mr. Brady's egregious actions. Therefore, I find that a CMP of $6,750.00[25] is both reasonable and appropriate for Respondent's violation of 20 C.F.R. § 655.122(p).

XII. The Respondent violated 20 C.F.R. § 655.135(e) by Failing to Maintain Records Required under the FLSA and MSPA

Finally, the WHD assessed CMPs for the Respondent's violation of 20 C.F.R. § 655.135(e), which provides that during the period of employment that is the subject of the Application, "the employer must comply with all applicable Federal, State and local laws and regulations, including health and safety laws." 20 C.F.R. § 655.135(e). Furthermore, the regulation states that the employer "may not hold or confiscate workers' passports, visas, or other immigration documents." In addition, the regulation provides that H-2A employers may also be subject to the FLSA.

The Administrator explained that in addition to violating the H-2A regulations, the Respondent "did not maintain records as independently required under the Fair Labor Standards Act (FLSA) and under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA)." (Brief at 22; AX 7 at 26-29; 32-34.) The MSPA Narrative Report (AX 7 at 26-29) and the FLSA Narrative Report (AX 7 at 32-34) document the WHD's findings.

The WHD concluded that the Respondent failed to keep accurate records of the hours the H-2A workers worked and failed to provide wage statements to the H-2A workers. (AX 7 at 27-28.) The record confirms these findings. Similarly, the WHD concluded that the Respondent failed to keep accurate records of all hours worked, as required by the FLSA. (AX 7 at 33.) The Respondent has failed to submit into evidence records showing the name of each worker, pay rates, number of hours worked, sums withheld, net pay, total earnings, hours offered, or hours

[25] A CMP of $1,350.00 multiplied by five affected H-2A workers equals $6,750.00.

worked. Therefore, I find that a preponderance of the evidence supports the WHD's conclusion that the Respondent violated the recordkeeping requirements of the MSPA and the FLSA.

The WHD calculated a CMP of $1,800.00, but assessed a CMP of only $1,350.00. The WHD started with the maximum CMP of $1,500.00, multiplied by two (one for violating the FLSA and the other for violating the MSPA), and reduced each CMP by mitigating factors one, three, six, and seven. (AX 7 at 21-22; AX 20 at 2.) While I agree that the first and seventh mitigating factors apply, as the Respondent has no history of violations and had little to gain financially from failing to keep records, I find that his failure to adhere to 20 C.F.R. § 655.135(e) was grave, as it prevented the H-2A workers from having access to their earnings records. Therefore, I find that 29 C.F.R. § 501.19(b)(3) is an aggravating, rather than a mitigating, factor. Similarly, the Respondent has expressed no commitment to comply with the regulations in the future or participate in these proceedings. Therefore, I find that 29 C.F.R. § 501.19(b)(6) is also an aggravating, rather than a mitigating, factor.

Based on the foregoing, I find that a CMP of $2,400.00[26] is both reasonable and appropriate for Respondent's violation of 20 C.F.R. § 655.135(e).

ORDER

1. The assessed violations under 20 C.F.R. § 655.122 and 20 C.F.R. § 655.135 are affirmed;

2. The Respondent is hereby ordered to pay unpaid back wages totaling $91,778.17 for failing to comply with 20 C.F.R. § 655.122; and

3. The Respondent is hereby ordered to pay the Administrator civil money penalties totaling $115,200.00 for failing to comply with 20 C.F.R. § 655.122 and 20 C.F.R. § 655.135.

JOHN P. SELLERS, III
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Any party seeking review of this decision, including judicial review, shall file a Petition for Review (§Petition§) with the Administrative Review Board

[26] A CMP of $1,200.00 multiplied by two equals $2,400.00.

(§ARB§) within 30 days of the date of this decision. 29 C.F.R. § 501.42. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: https://dol-appeals.entellitrak.com. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov.

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. If you e-File your petition, only one copy need be uploaded.

Copies of the Petition should be served on all parties and on the undersigned Administrative Law Judge. If the ARB does not receive the Petition within 30 days of the date of this decision, or if the ARB does not issue a notice accepting a timely filed Petition within 30 days of its receipt of the Petition, this decision shall be deemed the final agency action. 29 C.F.R. §501.42(a).