



Issue Date: 17 March 2021

CASE NO.: 2020-TAE-00006

In the Matter of:

**GRIFFITS AND CODER CUSTOM
CHOPPING, LLC,
H-2A LABOR CONTRACTOR,
*Respondent.***

DECISION AND ORDER

This matter arises under the H-2A 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 Griffiths and Coder Custom Chopping, LLC (the “Respondent” or “Employer”) violated the Act and regulations from June 6, 2016, through March 12, 2018.

PROCEDURAL HISTORY

Following an investigation into the Respondent’s business, the Administrator issued a Notice of Determination of Wages Owed and Assessing Civil Money Penalties (“Determination Letter”) on June 6, 2019. In the Determination Letter, the Administrator assessed against the Respondent (1) \$7,522.65 in unpaid wages owed to five workers; and (2) \$6,990.10 in civil money penalties (“CMP”) calculated in accordance with 29 C.F.R. § 501. (AX 27).¹ The Determination Letter alleged that the Respondent committed these violations during a period from June 6, 2016 through March 12, 2018, when it employed foreign workers under the H-2A program. The Respondent timely requested a hearing pursuant to 29 C.F.R. § 501.33.² (ALJX 4 EX. B).

¹ 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 18-19, 2020.

² The Respondent’s Request for a hearing is dated December 22, 2017, but the parties agreed at the hearing that date was erroneous and that the Respondent timely filed a request for appeal on July 3, 2019. (Tr. at 23-24).

Thereafter, on December 10, 2019, the 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. (ALJX 4).

This case was assigned to me on February 13, 2020. Pursuant to a Notice of Assignment, Notice of Hearing and Pre-Hearing Order dated February 13, 2020, a hearing in this case was set for March 26, 2020. (ALJX 1). In an Order Continuing the Hearing and Setting New Hearing Date issued on March 18, 2020, the hearing for this case was set for November 18, 2020, due to the Respondent's request for an in-person hearing and concerns surrounding the novel coronavirus, COVID-19. (ALJX 2). In an Order Regarding Scheduled Hearing dated June 18, 2020, I informed the parties that the November 18, 2020 hearing in this matter would be heard by telephone. (ALJX 3).

On November 18-19, 2020, I held the telephonic hearing in this case. Both parties were present at the hearing.³ I admitted into evidence ALJX 1 through 8⁴, AX 1 through 32⁵, and RX 1 through 6.⁶ (Tr. at 22-26, 115-118, 169-173, 193). At the hearing, I gave the parties until January 18, 2021 to submit closing briefs. (Tr. at 202). By order dated January 5, 2021, I granted the

³ Tim Coder (Respondent's owner) appeared *pro se* on behalf of the Respondent and the Administrator was represented by counsel.

⁴ I admitted the following Administrative Law Judge's Exhibits into the record at the hearing: Notice of Assignment, Notice of Hearing and Pre-hearing Order dated February 13, 2020 (ALJX 1); Order Continuing Hearing and Setting New Hearing Date dated March 18, 2020 (ALJX 2); Order Regarding Scheduled Hearing dated June 18, 2020 (ALJX 3); Administrator's Order of Reference dated December 10, 2019 with accompanying exhibits A (Notice of Determination of Wages Owed and Assessing Civil Monetary Penalties) and B (Respondent's Request for a Hearing (ALJX 4); Administrator's Prehearing Statement (ALJX 5); Administrator's Amended Prehearing Statement (ALJX 6); Respondent's Prehearing Statement (ALJX 7); and Initial list of Administrator's exhibits (ALJX 8).

⁵ I admitted the following Administrator's Exhibits into the record at the hearing: Wage and Hour Case Diary Entries for the investigation (AX 1); WHISARD Compliance Action Report (AX 2); H-2A Narrative from WH Investigator (AX 3); H-2A Civil Monetary Penalty Computation Sheet (AX 4); H-2A back wages computation (AX 5); E-mail from H-2A employee dated March 29, 2018 [identifying details are redacted] (AX 6); E-mail from H-2A employee dated April 7, 2018 [identifying details are redacted] (AX 7); E-mail from H-2A employee dated April 20, 2018 [identifying details are redacted] (AX 8); E-mail from H-2A employee dated March 29, 2018 [identifying details are redacted] (AX 9); Credit Card Sales Receipt from H-2A employee [identifying details are redacted] (AX 10); Personal Interview Statement of H-2A employee [identifying details are redacted] (AX 11); E-mail from H-2A employee dated October 7, 2017 [identifying details are redacted] (AX 12); Personal Interview Statement of H-2A employee [identifying details are redacted] (AX 13); WHI Initial Conference notes (AX 14); WHI notes regarding employee and pay information (AX 15); Form ETA-9142A for Case No. H-300-16366-783467 (AX 16); ETA Form 790 for Case No. H-300-16366-783467 (AX 17); Form ETA-9142A for Case No. H-300-16012-281702 (AX 18); E-mail correspondence to Mr. Coder dated December 10, 2018 (AX 19); E-mail correspondence to Mr. Coder dated March 22, 2018 (AX 20); E-mail correspondence with Mr. Coder from March 7, 2018 to March 12, 2018 (AX 21); E-mail correspondence with Mr. Coder from March 7, 2018 to March 12, 2018 (AX 22); E-mail correspondence from Mr. Coder dated February 15, 2018 with paystubs attached (AX 23); WH Document Demand Letter dated January 24, 2018 (AX 24); WH Initial Document Request Letter dated October 10, 2017 (AX 25); Employee list and 2017 Pay Record Spreadsheet (AX 26); WHD Notice of Determination dated June 6, 2019 (AX 27); E-mail from Frederick Coetzee (un-redacted copy of AX 7) (AX 28); E-mail from Schalk Coetzee (un-redacted copy of AX 8) (AX 29); E-mail from Leon Van Duyker with attachment (un-redacted copies of AX 9 and AX 10) (AX 30); Personal Interview Statement of Gerrit Vorster taken via telephone (un-redacted copy on AX 11) (AX 31); and Personal Interview Statement of Juanwinn Warden taken via telephone (un-redacted copy on AX 13) (AX 32).

⁶ I admitted the following Respondent's Exhibits into the record at the hearing: Pay stubs for pay period ending May 1, 2017 (RX 1); Pay stubs for pay period ending April 17, 2017 (RX 2); Pay stubs for pay period ending May 1, 2017 (RX 3) (this exhibit is a duplicate of RX 1); Pay stubs for pay period ending June 1, 2017 (RX 4); Pay stubs for pay period ending September 15, 2017 (RX 5); and Pay stubs for pay period ending October 4, 2017 (RX 6).

Administrator's request for an additional 45 days to submit closing briefs. On February 12, 2021, the Administrator filed a Post-Hearing Brief ("Brief"). The Respondent did not file a post-hearing brief. The record is now closed.

STIPULATIONS⁷

1. The Respondent is a limited liability company that came into existence on September 6, 2013;
2. The Respondent's business address is 4223 Haskell Road, Effingham, Kansas 66023;
3. The Respondent is an agricultural employer primarily engaged in the business of harvesting silage crops throughout Kansas, Texas, and Arizona;
4. As the harvesting season progresses, the Respondent's workers move from state to state harvesting silage for dairies and feedlots, but generally spend weeks or months in the same location at any given time;
5. The Respondent has used the H-2A program since 2014;
6. The 2017 TEC sought certification for 24 foreign, non-immigrant, H-2A agricultural equipment operators from March 1, 2017 through November 15, 2017;
7. The Respondent utilized 24 H-2A workers and 6 U.S. workers in 2017;
8. The AEWR in 2017 was \$13.79 per hour in Kansas, and \$11.59 per hour in Texas;
9. Frederick Coetzee, Schalk Coetzee, Leon Van Duyker, Gerrit Vorster, and Juanwinn Warden were all H-2A workers hired by the Respondent under the 2017 TEC;
10. Wage and Hour Investigator ("WHI") Daniel Baker first notified the Respondent of a pending investigation via letter dated October 10, 2017, with an initial appointment date of October 30, 2017 at 8:00am;
11. The period of the investigation was from June 6, 2016 through March 12, 2018;
12. WHI Baker held an Initial Conference with the Respondent on February 5, 2018 at its principal business address;
13. On March 7, 2018, WHI Baker requested via e-mail that the Respondent "[p]lease send a copy of the bank statements from when your [October 1, 2017] payroll processed through your bank. If the statement shows employees' names that's all I'll need. Otherwise, some document matching the account numbers to names so I can see who got paid which amount";
14. That same day, the Respondent responded, "[t]he bank statement only shows total pay deducted by our accountant via automatic withdraw (*sic*)";

⁷ The parties agreed to the stipulations at the hearing. (Tr. at 9-21). The Administrator proposed additional stipulations that Respondent did not agree with that are not included in this list.

15. On March 12, 2018, the Respondent e-mailed WHI Baker stating one H-2A worker, Gerrit Vorster had been fired, and “[a]ll fired employees receive a handwritten final check from me personally if they show up to get it.” The Respondent further stated he told Mr. Vorster he had “his last check and he refused to come get it”;
16. In response, WHI Baker requested, for the 10 subject H-2A workers, that Respondent “please identify which, if any, of these are handwritten checks that [the Respondent] still holds or [for] “any that you do not still hold with handwritten checks, please provide proof of payment (front and back copy of the cancelled check”;
17. On April 16, 2019, the Wage and Hour Division issued a Notice of Determination of Wages Owed, Assessing Civil Money Penalties seeking the repayment of \$7,522.65 in back wages and assessing \$6,990.10 in civil money penalties related to 2 alleged H-2A Program violations;
18. In its March 6, 2020 Prehearing Statement, the Respondent stated that it “paid all employees their entitled pay upon leaving with the exception of 2 employees who never returned to the job site to pick up their last check”;
19. WHD conducted a prior investigation, with an investigation period of June 9, 2014 through June 5, 2016 (the “Prior Investigation”); and
20. The Prior Investigation disclosed multiple alleged H-2A Program violations, including failure to inspect employee housing, failure to include all required information on employee earning statements, failure to provide work contracts to corresponding U.S. workers, illegal payroll deduction, and failure to provide required information on the Form 9142A.

DISPUTED FACTS⁸

1. Five (5) H-2A workers (Frederick Coetzee, Schalk Coetzee, Leon Van Duyker, Gerrit Vorster, and Juanwinn Warden) did not receive their final paychecks;
2. The Respondent never provided WHI Baker with substantive proof of payment – i.e., cancelled checks or bank statements – to support its position that the five (5) subject H-2A workers had actually received their final paychecks;
3. At the Initial Conference on February 5, 2018, the Respondent stated all employees who had left employment before the end of the 2017 season had received their final paychecks via direct deposit;
4. Subsequent to the Respondent’s statement at the Initial Conference, WHI Baker expressly requested proof of payment for 10 potentially affected employees;

⁸ Tr. at 21-22.

5. The Respondent refused to provide its availability for a Final Conference with WHI Baker. As a result, no Final Conference ever occurred related to this matter;
6. The direct deposit “receipts” provided by the Respondent to WHI Baker were falsified and inaccurate as the Respondent never paid the five (5) subject H-2A workers the amounts due.

ISSUES

1. Whether the Respondent violated various provisions of 20 C.F.R. § 655.122;⁹
2. Whether the Respondent violated 29 C.F.R. § 501.7; and
3. Whether the unpaid wages penalties and civil money penalties 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 Daniel Baker, Wage and Hour Investigator

Daniel Baker, 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 18-19, 2020. Investigator Baker testified that he has worked as an investigator at Wage and Hour for over 6 years and has performed 13 or 14 investigations involving the H-2A Program and was the lead investigator of 11 of these. (Tr. at 28-29). He began his investigation in this case in October of 2017. As part of his duties he maintains a case diary in which he details the work he performs on a case. He identified AX 1 as the diary report he made in this case. (Tr. at 29-31). He described his initial investigation into the Respondent and reviewed the 2016 and 2017 applications for temporary workers. (AX 16, AX 18). As part of his initial investigation he reviewed any prior violations the Respondent had. (Tr. at 32-36). He mailed an Initial Document Request Letter to the Respondent, which informed the Respondent of the investigation, identified the documents he needed to review to complete the investigation, and set an Initial Conference date of October 30, 2017. (AX 25). (Tr. at 36-37).

Investigator Baker stated that he did not hold the Initial Conference on October 30, 2017 as he had not received any response from the Respondent by that date. He noted he spoke to Mr. Coder by phone a couple weeks later and was informed that Mr. Coder would be in Texas until the end of December. (Tr. at 37-39). He stated that he called Mr. Coder in January to schedule a meeting and then sent a Document Demand Letter, identified as AX 24, which required that

⁹ Specifically, the Administrator alleged that the Respondent violated provisions of 20 C.F.R. §§ 655.122(l) and (m).

documents be produced by February 2, 2018. He stated the Respondent then called him and an initial conference was set for February 5, 2018 at the Respondent's office. (Tr. at 39-40). He stated that on February 5, 2018 he toured the temporary housing for H-2A workers, inspected documents, and interviewed Mr. Coder. He identified AX 14 as his notes regarding the initial conference that he completed based on the information provided by Mr. Coder. (Tr. at 40-42).

Investigator Baker stated that his next contact with the Respondent was a phone call on February 9, 2018, where he requested proof that final paychecks were provided to 10 employees who left Respondent's employment during the 2017 season. He said the Respondent called back a few days later and said he could send the requested documents in a couple days. (Tr. at 42-43). He said that he then received an e-mail from Mr. Coder, which he identified as AX 23, in which Mr. Coder wrote "[a]ttached is the final paystubs of all the employees who left or were terminated." (Tr. at 43-44). He noted that it was regular practice to communicate with people via e-mail. (Tr. at 43). He stated that the e-mail and its attached paystubs did not resolve his questions regarding the employee's final paychecks as he was unable to ascertain from that information if the employees had actually received the wages for the time they had worked. (Tr. at 44).

Investigator Baker testified he sent Mr. Coder an e-mail on March 7, 2018, contained in AX 22, in which he requested that Mr. Coder provide bank statements covering the October 1, 2017 payroll period and showing deposits for the employees in question. He stated he asked for this information in order to ascertain if the employees had actually received their wages. (Tr. at 44-46). He stated that Mr. Coder responded that same day stating that the total pay was deducted from his bank account via automatic withdrawal. (AX 22, Tr. at 46-47). Mr. Baker stated that this response was not sufficient to show the employees received their wages as he typically sees payroll with line item deductions for each employee. He responded on March 7, 2018, asking Mr. Coder to provide a complete payroll breakdown as well as a statement from his bank showing the payroll withdrawal. He stated that Mr. Coder never provided these documents to him. (Tr. at 47-48).

Investigator Baker stated that Mr. Coder responded by email on March 12, 2018 (AX 21) (Tr. at 48-49). He read the e-mail and stated that it contained contradictory information from what he had previously been informed that all employees were paid by direct deposit as Mr. Coder stated in the e-mail that he paid some employees by handwritten check. (Tr. at 49-50). He stated that he interpreted Mr. Coder's statements to mean that an H-2A worker, who is by definition a foreign worker, and who left employment or had been fired and was on their way home would not receive a final paycheck that was handwritten rather than being paid by direct deposit. (Tr. at 51). In response he sent an e-mail on March 12, 2018 (AX 20), asking that Mr. Coder provide copies of the handwritten checks he still had in his possession or copies of canceled checks to demonstrate proof of payment. He said Mr. Coder never provided him with copies on the handwritten checks. He testified he e-mailed Mr. Coder on March 22, 2018 to provide another opportunity for Mr. Coder to supply the requested documents. (AX 20) He stated that Mr. Coder did not respond and did not provide any additional documentation. (Tr. at 51-53).

Investigator Baker testified that he conducted interviews with some of the Respondent's former H-2A employees. He identified AX 11 and AX 13 as interview statements that he obtained from prior employees. (Tr. at 53-54). He stated he conducted the interviews over the phone and transcribed them. (Tr. at 55-56). He identified AX 6, AX 7, AX 8, AX 9, and AX 12 as e-mails he

received from former H-2A employees. (Tr. at 56-57). He stated that these statements indicated that 5 five prior employees had not received their final paychecks. (Tr. at 57). He described AX 5 as a spreadsheet he created of the employees missing their final paychecks and the amount of the missing wages he calculated based on the record and was an accounting of the back wages that were owed in this case. (Tr. at 57-59).

Investigator Baker identified AX 19 as an e-mail he sent to Mr. Coder on December 10, 2018 to try to schedule a final conference in the case. He stated that a final conference was never held in this case because he never received a response from Mr. Coder. (Tr. at 59-60). He testified that after he completed his investigation he drafted a narrative report, a civil monetary penalty report, a case activity report, and completed his case diary. He said he identified two violations against the Respondent: failing to pay five employees their final paycheck and failing to cooperate with the investigation. He assessed a civil monetary penalty of \$1,735.00 for failing to pay employees their final wages. He stated the amount of the penalty was determined by statute and he found no mitigating factors applied. He also assessed a civil monetary penalty of \$5,839.00 for failing to cooperate with the investigation. He stated that he found one mitigating factor applied to this violation, that the amount of back wages compared to the gross wages resulted in a minimal gain for the employer so he applied a 10% reduction to this violation. (Tr. at 60-65).

Investigator Baker identified AX 4 as the civil monetary penalty report he prepared. (Tr. at 66-67). He stated that the Assistant District Director signed off on the monetary penalties assessed in this case. He stated that Wage and Hour usually informs employers about violation and civil monetary penalties at the final conference and then in a Notice of Determination. He identified AX 27 as the Notice of Determination prepared in this case. He stated the Notice of Determination was sent to the Respondent on June 6, 2019 and was received on June 7, 2019 according to the tracking data provided by UPS. (Tr. at 67-69). Investigator Baker addressed the initial paystubs provided by the Respondent in AX 23 and said that page 13 showed that Gerrit Vorster was paid via direct deposit. (Tr. at 69). He said that there is no evidence Mr. Vorster ever received that direct deposit. *Id.*

Upon cross examination, Investigator Baker identified the place on the paystub where it was noted Mr. Vorster received money via direct deposit. (Tr. at 70). In response, Mr. Coder stated that was “obviously a mistake by the accountant.” (Tr. at 70-71). Mr. Baker stated that when he first spoke to Mr. Coder around October of 2017, Mr. Coder told him he was in Texas and Mr. Baker agreed that the initial document request letter was not sent via certified mail so he had no proof the document was received in the mail. (Tr. at 71-72). He agreed that the Respondent replied to the January 24, 2018 demand letter. (Tr. at 72-73). He testified that he was informed at the initial conference that the Respondent paid his employees electronically. (Tr. at 76-77). Asked what proof he had that the employees did not receive their paychecks, he said that he had affirmative statements from the employees and nothing from the Respondent to show the wages were paid. (Tr. at 79). He stated the statements he had from the employees were not signed affidavits. (Tr. at 80-82).

On redirect examination, Investigator Baker discussed the statements he received from Respondent’s former H-2A workers. He stated that he identified 10 employees that he felt may have not received their final paycheck and attempted to contact them. He asked those who

responded if they had received their wages from their final paycheck. He said five former employees indicated they had not received their final paychecks. He identified the individuals who provided each statement and un-redacted copies of these statements were identified as AX 28, AX 29, AX 30, AX 31, and AX 32.¹⁰ He noted the e-mails contained the former employees' e-mail addresses and some telephone numbers. (Tr. at 91-97).

On re-cross examination, Investigator Baker stated he felt the former employees were being truthful when they provided their statements. Asked by Mr. Coder if all the facts in the telephone statements provided by Mr. Vorster and Mr. Warden were true, he stated he transcribed what he was told over the phone by those two individuals. (Tr. at 98-104). He stated that he had no affirmative proof, such as read receipts, that Mr. Coder received every e-mail he was sent but noted that Mr. Coder was initially responsive to e-mails he sent. (Tr. at 105-107). He stated that he calculated the back wages based on the paystubs the Respondent provided. (Tr. at 107-112). Asked what evidence he had to show the Respondent provided false proof of payment, he referenced information from the initial conference that all employees were paid with direct deposit and paystubs purporting to show direct deposit payments but then Mr. Coder provided contradictory statement in his e-mails that some employees had been paid via handwritten checks. (Tr. at 113-115).

On redirect examination, Investigator Baker discussed the unredacted statements from former H-2A employees and stated he contacted them at the e-mail addresses provided by the Respondent. He said that he believed the e-mails were sent from the employees who signed them and noted they all stated they had not received their final paycheck. (Tr. at 163-167). Investigator Baker reviewed the paystubs provided by Mr. Coder at the hearing, and stated that they did not contain any additional information to support the Respondent's assertion that the employees in question actually received their wages because there were no accompanying bank statements. He stated the documents did not contain any information that would cause him to change his conclusions or findings. (Tr. at 173-188). He stated that paystubs he initially received from the Respondent contained several inaccuracies as they purported to show that employees were paid via direct deposit and in fact they were not. (Tr. at 197-198). He stated that in his experience as an investigator he had often seen employers write paystubs that were not provided to employees, bounced when the funds are withdrawn, or processed but never withdrawn from the employer's bank account so the employees never receive their wages. (Tr. at 199-200).

On re-cross examination, Investigator Baker testified that he reviewed the Respondent's records on February 5, 2018 at the initial conference but did not receive copies to be placed in the case file. He stated that after the initial conference he determined he needed to see the Respondent's bank information and requested those documents but they were never provided to him. He stated the paystubs provided by the Respondent did not demonstrate to him that the employees actually received the wages they were owed. (Tr. at 189-197).

Hearing Testimony of Tim Coder

¹⁰ Redacted copies of these statements had been admitted to the record as AX 7, AX 8, AX 9, AX 11, and AX 13.

Tim Coder also testified at the hearing on November 18, 2020 on behalf of the Respondent.¹¹ He stated that three of the former employees, Frederick Coetzee, Schalk Coetzee, and Leon Van Duyker all received their final paychecks via direct deposit. He stated that his accountant made an error when making paystubs for Gerrit Vorster and Juanwinn Warden as he had those two checks in his possession. He stated that Mr. Warden left in the middle of the night and that he had no obligation to give him his money via direct deposit because doing so cost him money. He stated that Mr. Vorster was fired after he stole and crashed a company vehicle. He stated that he did not respond to e-mails because he never received them. He stated that he spoke to Investigator Baker several times by phone but stated he never brought up the subject of a final conference. He stated that he generally paid his H-2A employees via direct deposit and when they come over they are provided \$100 so they can open a bank account. He stated if employees were fired or left than he would write a handwritten check because direct deposit was simply a convenience and it cost money to make the transactions. (Tr. at 118-121).

On cross-examination, Mr. Coder stated that the paystubs in the record were generated by a third-party accounting firm. He stated that only two paychecks were “incorrect” as Gerrit Vorster and Juanwinn Warden had not been paid via direct deposit but asserted the remaining paystubs were accurate. He stated that he received the e-mail Investigator Baker sent at 3:45 pm on March 7, 2018 and responded at 4:56pm. He stated he received the e-mail sent by Investigator Baker in response on March 7, 2018 at 4:58 pm and responded on March 12, 2018. He stated that he did not receive the e-mail Investigator Baker sent to him at the same e-mail address previously used on March 12, 2018 at 1:34 pm. He stated that he did not receive the e-mail sent on March 22, 2018. He stated that he did not have cancelled checks for Frederick Coetzee, Schalk Coetzee, and Leon Van Duyker because they were paid via direct deposit. He stated that all the documents he provided came from his accountant and agreed that he had not provided any statements from his bank. (Tr. at 123-133).

Respondent’s Applications for Temporary Labor Certification

The record contains two Applications for temporary labor certification filed by the Respondent. (AX 16, AX 18). Specifically, the ETA approved the Respondent’s Application for 24 H-2A workers from March 15, 2016 to November 15, 2016. (AX 18). The ETA also approved the Respondent’s Application for 24 H-2A workers from March 1, 2017 to November 15, 2017. (AX 16).

Wage and Hour Investigation Documents

The record contains several documents created during the course of Investigator Baker’s inspection of the Respondent. The Respondent was sent an Initial Document Request Letter on October 10, 2017 to the address listed on the ETA Applications. (AX 25). A Document Demand Letter was sent to the same address on January 24, 2018. (AX 24). An initial conference occurred on February 5, 2018. Investigator Baker prepared notes in connection with this conference. (AX 14). Investigator Baker indicated the H-2A workers were paid semi-monthly and their hours worked were logged by Mr. Coder on a daily time sheet. (AX 14 at 3-4). He noted that workers were paid electronically, that the payroll was prepared by Mr. Coder, and that the workers received

¹¹ Investigator Baker’s initial conference notes that Mr. Coder is one the Respondent’s owners. (AX 14).

a written pay statement that included hours and earnings. (*Id.* at 4). He noted that “many” employees were terminated early before the end of the contract period. (*Id.* at 7). In a document entitled ‘Employee and Pay Information,’ it was noted that workers were paid semi-monthly based on daily hours worked and that the employees were paid via direct deposit. (AX 15 at 2-3).

After completing his investigation, Investigator Baker drafted an H-2A Narrative Report (AX 3), completed a WHISARD Compliance Action Report (AX 2), completed a H-2A Civil Monetary Penalty Computation Sheet (AX 4), and computed the H-2A back wages that were due. (AX 5). Throughout the investigation, Investigator Baker kept a Case Diary, which documents his actions on the case from October 4, 2017 to December 17, 2018, including his communications or attempts to communicate with Mr. Coder. (AX 1). A Notice of Determination was sent to the Respondent via certified mail on June 6, 2019. (AX 27).

Employee Personal Interview Statements and E-Mails

The record contains various Employee Personal Interview Statements and e-mail statements from H-2A workers who worked for the Respondent. An e-mail received from Frederick Coetzee on April 7, 2018 stated “I didnt (*sic*) receive my final pay check” and that he had 40 hours of work that he did not get paid for. (AX 7, AX 28). Schalk Coetzee sent an e-mail on April 20, 2018 and wrote “I did not receive my last payment” after he returned home early. (AX 8, AX 29). An e-mail sent by Leon Van Duyker on March 29, 2018 said “I did not receive my last paycheck.” (AX 9, AX 30). Investigator Baker took a personal interview statement from Gerrit Vorster on October 10, 2017, in which Mr. Vorster stated that he was fired and that Tim Coder refused to give him his final pay. (AX 11, AX 31). Investigator Baker took a personal interview statement from Juanwinn Warden on June 29, 2018, in which Mr. Warden stated that left before the contract period and was unable to receive his pay for his last two weeks of work. (AX 13, AX 32). Both Mr. Vorster and Mr. Warden stated there were other employees who did not receive a final paycheck. (AX 31, AX 32).

E-Mail Correspondence with Mr. Coder

The record contains copies of several e-mails between Investigator Baker and Mr. Coder dating from February 15, 2018 to December 10, 2018. (AX 19, AX 20, AX 21, AX 22, AX 23). These e-mails were discussed at the hearing.

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.

Violations of 20 C.F.R. § 655.122 and 29 C.F.R. § 501.7

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.

I. The Respondent Violated 20 C.F.R. § 655.122(l) and (m) by Failing to Pay Five Worker’s Final Paychecks

Under the regulations, the employer is required to “pay the worker at least the AEW, 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.”¹² Additionally, employers must pay wages when due.¹³

The record shows that the Respondent failed to pay five workers for the work they performed in their final two weeks and failed to provide wages to the workers on a bi-weekly basis. Investigator Baker explained that when he held an initial conference with Mr. Coder, he was informed that H-2A workers received their pay electronically via direct deposit on a bi-weekly basis. (Tr. at 76-77, AX 14, AX 15). The Respondent then provided paystubs indicating that Frederick Coetzee, Schalk Coetzee, Leon Van Duyker, Gerrit Vorster, and Juanwinn Warden all received their final pay via direct deposit. (AX 23). Investigator Baker testified that he e-mailed the Respondent on March 7, 2018 to ask for bank statements and a complete payroll accounting to show that money had been withdrawn from the Respondent’s account and deposited into the employee’s accounts. (AX 22, AX 21). Mr. Coder responded on March 12, 2018 at which time he stated that he had a handwritten check for Mr. Vorster because “[a]ll fired employees receive a hand written final check from me personally if they show up to get it.” (AX 21). Investigator Baker testified that this e-mail contained contradictory information from what he had previously been told. (Tr. at 48-50). He then asked the Respondent for an accounting of the handwritten checks, but received no response. (AX 22). Investigator Baker testified that the Respondent never provided any additional documentation. (Tr. at 52-53). He testified that he also conducted interviews with some of the Respondent’s former H-2A employees and stated that five former H-2A workers informed him they had not received their final paycheck. (Tr. at 53-57, AX 28, AX 29, AX 30, AX 31, AX 32).

At the hearing, Mr. Coder testified that Frederick Coetzee, Schalk Coetzee, and Leon Van Duyker all received their final paychecks via direct deposit but stated that his accountant made an error when making paystubs for Gerrit Vorster and Juanwinn Warden as he had those two checks in his possession. He stated that he generally paid his H-2A employees via direct deposit but if employees were fired or left then he would write a handwritten check because direct deposit was simply a convenience and it cost money to make the transactions. (Tr. at 118-121). He stated that only two paychecks were “incorrect” as Gerrit Vorster and Juanwinn Warden had not been paid via direct deposit but asserted the remaining paystubs were accurate. He provided additional paystubs at the hearing and stated that all the documents he provided came from his accountant and acknowledged that he had not provided any statements from his bank. (Tr. at 123-133).

Investigator Baker reviewed the paystubs provided by Mr. Coder at the hearing, and stated that they did not contain any additional information to support the Respondent’s assertion that the employees in question actually received their wages because there were no accompanying bank statements. He stated the documents did not contain any information that would cause him to change his conclusions or findings. (Tr. at 173-188). He stated that paystubs he initially received from the Respondent contained several inaccuracies as they purported to show that employees were paid via direct deposit and in fact they were not. (Tr. at 197-198). He stated that in his

¹² 20 C.F.R. § 655.122(l).

¹³ 20 C.F.R. § 655.122(m).

experience as an investigator he had often seen employers write paystubs that are not provided to employees, or bounce when the funds are withdrawn, or processed but never withdrawn from the employer's bank account so the employees never receive their wages. (Tr. at 199-200).

In reviewing this evidence, I find that the Administrator properly concluded that five employees did not receive their final pay. The Administrator provided statements from five former H-2A workers who all stated they did not receive their final paycheck from the Respondent. The Respondent has provided contradictory statements regarding how H-2A workers received their pay. Mr. Coder initially stated they were all paid via direct deposit and provided paystubs that indicated all employees who left before the contract period ended received their pay via direct deposit. However, Mr. Coder stated in his March 12, 2018 e-mail that employees who were fired were not paid via direct deposit and had to pick up a handwritten check. At the hearing he testified that he wrote handwritten checks for all employees who were fired or left.

Further, Mr. Coder acknowledged at the hearing that two paystubs for Gerrit Vorster and Juanwinn Warden were "incorrect" as those two employees were not paid via direct deposit because he wrote them handwritten checks. He stated the error in the paystubs was made by a third-party accounting firm. Mr. Coder's acknowledgement supports the statements from Mr. Vorster and Mr. Warden that they did not receive their final wages.

Mr. Coder stated that Frederick Coetzee, Schalk Coetzee, and Leon Van Duyker all received their final paychecks via direct deposit but provided no evidence to support this statement. Like Mr. Vorster and Mr. Warden, these three employees also left before the period of employment ended.¹⁴ Despite his statement that employees who left received hand written checks, Mr. Coder continued to maintain that these three employees received their final paycheck via direct deposit. Mr. Coder never provided any accounting of the checks he wrote by hand and never provided any banking or accounting documentation sufficient to refute these worker's statements and show that wages were in fact provided to them when they were due to be paid.

Mr. Coder suggested at the hearing that the statements from the former workers were fraudulent, either because their identity could not be verified or because their statements contained other inaccuracies. Investigator Baker testified that he contacted the former workers at the e-mail addresses provided by the Respondent. He said that he believed the e-mails were sent from the employees who signed them and noted the e-mails contained the former employees e-mail addresses and some telephone numbers. (Tr. at 91-97, 163-167). He stated that he believed the former employees were being truthful when they provided their statements. Asked by Mr. Coder if all the facts in the telephone statements provided by Mr. Vorster and Mr. Warden were true, Mr. Baker stated he transcribed what he was told over the phone by those two individuals. (Tr. at 98-104).

Investigator Baker testified that he has been a Wage and Hour Investigator for at least 6 years and has conducted numerous investigations, including 13 or 14 investigations involving the

¹⁴ The H-2A Application documents an employment period until November 15, 2017. (AX 16). Frederick Coetzee's last check was dated September 15, 2017; Schalk Coetzee's last check was dated October 4, 2017; Leon Van Duyker's last check was dated May 1, 2017; Gerrit Vorster's last check was dated October 1, 2017; and Juanwinn Warden's last check was dated August 1, 2017. (AX 23).

H-2A program. Investigator Baker testified credibly regarding the scope of this investigation, the facts developed during the investigation, at times referencing particular documents he gathered or produced, and his recommendations at the conclusion of the investigation. He presented as knowledgeable regarding the applicable regulatory framework as well as the details of the investigation, and his statements were consistent with documentary evidence in the record. Therefore, I find that he has sufficient experience evaluating statements made by former H-2A workers and the ability to determine which statements are truthful and credible. Thus, I give his assertion that the former employees in this case were being truthful when they provided their statements probative weight. I also credit his determination that these statements are sufficient to show that these workers did not receive their final wages. The Respondent has provided no proof that the workers in question did not in fact supply these statements or were being untruthful when they said they did not receive their final paychecks. Therefore, for the reasons discussed above, I find that the Administrator properly concluded that the Respondent violated 20 C.F.R. § 655.122(l) and (m).

Investigator Baker stated that he calculated the unpaid back wages based on the evidence provided by the Respondent and provided his back wage calculations at AX 5. I find that Investigator Baker's method of calculating back wages is reasonable and consistent with the evidence. Thus, I find that the \$7,522.65 unpaid wages penalty the Administrator assessed is appropriate for the Respondent's violation of 20 C.F.R. § 655.122(l) and (m).

The WHD calculated a CMP of \$1,735.00, after finding that the Respondent was not entitled to any mitigating factors. (AX 2, AX 4, AX 5, AX 27). I agree with the Administrator that mitigating factors one through six do not apply. However, I find that the gains the Respondent received from failing to pay these five employees their final wages is minimal when compared to the total wages he paid. (RX, 2, RX 3, RX 4, RX 5, RX 6). Therefore, I find that 29 C.F.R. § 501.19(b)(7) is a mitigating factor. Having carefully considered all of the mitigating factors, I find that one mitigating factor is applicable. Consequently, I find that a CMP of \$1,651.50¹⁵ is both reasonable and appropriate for Respondent's violations of 20 C.F.R. § 655.122(1) and (m).

II. The Respondent Violated 29 C.F.R. § 501.7 by Failing to Cooperate with the Investigation

The regulation at 29 C.F.R. § 501.7 provides that the employer "must cooperate with any Federal officials assigned to perform an investigation, inspection, or law enforcement function pursuant to 8 U.S.C. 1188 and the regulations in this part during the performance of such duties."

Investigator Baker found that the Respondent failed to cooperate with the investigation as he provided false statements, was unresponsive to requests for documentation, and failed to respond to requests to schedule a final conference. (ALJX 4 EX. A). The evidence supports the WHD's conclusion that the Respondent failed to cooperate with this investigation. Throughout the investigation, Mr. Coder provided conflicting statements to Investigator Baker about how his workers were paid. At the hearing, Mr. Coder testified that at least two of the paystubs he provided were "inaccurate" and contained errors. As Investigator Baker testified, he failed to provide

¹⁵ The maximum CMP of \$1,735.00 reduced by ten percent (\$173.50), which equals a CMP of \$1,561.50.

additional bank information and accounting of handwritten checks while the investigation was pending.

The Respondent also failed to respond to the initial document request letter for over a month. (AX 1). He failed to appear at an initial conference and provide the initially requested documents until he received a Document Demand Letter in January of 2018. (AX 24). He failed to provide additional requested documents and then failed to respond to attempts to contact him to schedule a final conference. The case diary prepared by Investigator Baker shows he called the Respondent on December 7, 2018 to set up a final conference and left a message, followed-up via e-mail on December 10, 2018 (AX 19), and finally attempted a “drop-in” final conference on December 12, 2018 where he left his card for the Respondent. (AX 1). There is no evidence in the record that the Respondent replied to any of these attempts.

The Respondent stated at the hearing that he did not provide the requested documents or respond to the request for a final conference because he did not receive the investigator’s e-mails. Federal common law has long recognized an evidentiary presumption that a properly addressed object placed in the postal system ultimately reached its destination “and was received by the person to whom it was addressed.” *Rosenthal v. Walker*, 111 U.S. 185, 193 (1884). The presumption constitutes an “inference of fact founded on the probability that the officers of the government will do their duty and the usual course of business.” *Id.* In *American Boat Co., Inc. v. Unknown Sunken Barge*, 418 F.3d 910, 914 (8th Cir. 2005), the court held “the presumption of delivery should [also] apply to e-mails.” The court further held e-mail communication is a reliable form of communication, and therefore, a jury could infer receipt. *Id.* (citing *Kennell v. Gates*, 215 F.3d 825, 829 (8th Cir. 2000)). In order to rebut the presumption, more than a mere denial of receipt is required. *In re Longardner & Assocs., Inc.*, 855 F.2d 455, 459 (7th Cir. 1988).

Here, Investigator Baker sent Mr. Coder several e-mails from March 7, 2018 to December 10, 2018 that Mr. Coder received as demonstrated by the fact that Mr. Coder responded to several of the initial e-mails. (AX 19, AX 20, AX 21, AX 22). Thus, I find that there was proper delivery of all the e-mails in this case. As noted, Mr. Coder was initially responsive to the e-mails but then failed to respond as WHD required additional documentation or requests for his time. Given the circumstances in this case, I find that Mr. Coder’s denial of receipt is not sufficient to rebut the presumption that he did receive the e-mail correspondence from Investigator Baker. Further, when he was attempting to set up a final conference, Investigator Baker attempted to contact the Respondent by phone and in person in addition to an e-mail. The Respondent failed to respond to these attempts to contact him as well. Overall, I find that the evidence supports the WHD’s finding that the Respondent failed to cooperate with this investigation and violated 29 C.F.R. § 501.7.

The WHD applied mitigating factor seven and assessed a CMP of \$5,255.10. (AX 2, AX 3, AX 4, AX 27). I agree with the Administrator that mitigating factors one through six do not apply and agree with his application of mitigating factor seven. Having carefully considered all of the mitigating factors, I find that one mitigating factor is applicable. Consequently, I find that a CMP of \$5,255.10 is both reasonable and appropriate for Respondent’s violation of 29 C.F.R. § 501.7.

ORDER

1. The assessed violations under 20 C.F.R. § 655.122 and 29 C.F.R. § 501.7 are affirmed;
2. The Respondent is hereby ordered to pay unpaid back wages totaling \$7,522.65 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 \$6,816.60 for failing to comply with 20 C.F.R. § 655.122 and 29 C.F.R. § 501.7.

LARRY A. TEMIN
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 (“ARB”) within 30 days of the date of this decision. 29 C.F.R. § 501.42.

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).

IMPORTANT NOTICE ABOUT FILING APPEALS:

The Notice of Appeal Rights has changed because the system for online filing will become mandatory for parties represented by counsel on April 12, 2021. Parties represented by counsel after this date must file an appeal by accessing the eFile/eServe system (EFS) at <https://efile.dol.gov/> **EFILE.DOL.GOV. Before April 12, 2021, all parties may elect to file by mail rather than by efileing.**

Filing Your Appeal Online

Information regarding registration for access to the new EFS, as well as user guides, video tutorials, and answers to FAQs are found at <https://efile.dol.gov/support/>.

Registration with EFS is a two-step process. First, all users, including those who are registered users of the former EFSR system, will need first create an account at login.gov (if they do not have one already). Second, if you have not previously registered with the EFSR system, you will then have to create an account with EFS using your login.gov username and password. Once you have set up your EFS account, you can learn how to file an appeal to the Board using the written guide at <https://efile.dol.gov/system/files/2020-10/file-new-appeal-arb.pdf> and/or the video tutorial at <https://efile.dol.gov/support/boards/new-appeal-arb>. Existing EFSR system users will not have to create a new EFS profile.

Establishing an EFS account should take less than an hour, but you will need additional time to review the user guides and training materials. If you experience difficulty establishing your account, you can find contact information for login.gov and EFS at <https://efile.dol.gov/contact>.

If you file your appeal online, no paper copies need be filed. During this transition period, **you are still responsible for serving the notice of appeal on the other parties to the case.**

Filing Your Appeal by Mail

Self-represented litigants (and all litigants prior to April 12, 2021) may, in the alternative, file appeals using regular mail to this address:

Administrative Review Board
U.S. Department of Labor
200 Constitution Avenue, N.W., Room S-5220,
Washington, D.C., 20210

Access to EFS for Other Parties

If you are a party other than the party that is appealing, you may request access to the appeal by obtaining a login.gov account and EFS account, and then following the written directions and/or via the video tutorial located at: <https://efile.dol.gov/support/boards/request-access-an-appeal>

After An Appeal Is Filed

After an appeal is filed, all inquiries and correspondence should be directed to the Board.

Service by the Board

Registered e-filers will be e-served with Board-issued documents via EFS; they will not be served by regular mail. If you file your appeal by regular mail, you will be served with Board-issued

documents by regular mail; however, you may opt into e-service by establishing an EFS account, even if you initially filed your appeal by regular mail.