UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Washington, DC

Issue Date: 23 March 2023

OALJ Nos.: 2022-MSP-00002
2022-TAE-00004

WHD Nos.: 1861501
1874308

In the Matter of:

ADMINISTRATOR, WAGE AND HOUR DIVISION,
U.S. DEPARTMENT OF LABOR
Plaintiff,

v.

A & M LABOR MANAGEMENT, INC.
H-2A LABOR CONTRACTOR
Respondent,

Appearances:

Richard Latterell, Esq.
Office of the Solicitor
U.S. Department of Labor
Atlanta, Georgia
For the Plaintiff

Shaina Thorpe, Esq.
Thorpe Law, P.A.,
Tampa Florida
For the Respondent

DECISION AND ORDER

These matters arise under the employee protection provisions of the Migrant and Seasonal Agricultural Worker Protection Act ("MSPA")[1] and the H-2A temporary agricultural worker program of the Immigration and Nationality Act, as

[1] 29 U.S.C. § 1801, *et seq.*, and the implementing regulations at 29 C.F.R. Part 500.

amended by the Immigration Reform and Control Act, ("INA").[2] A & M Labor Management seeks review of determinations issued by the Department of Labor's Wage and Hour Division finding several violations of the MSPA and INA and assessing $53,626.36 in back wages, $248,957.40 in civil monetary penalties, and debarment from the labor certification program. As explained in greater detail below, while agreeing that Respondent violated the MSPA and INA, the tribunal reduces the amount of back wages and CMPs owed, and declines to debar Respondent from receiving future labor certifications.

Background and Procedural History

On December 3, 2019, an assistant district director in the West Palm Beach, Florida office of the Department of Labor's Wage and Hour Division ("WHD"), notified A & M Labor Management of his intent to assess civil money penalties ("CMPs") totaling $20,400.00 for an alleged violation of the MSPA.[3] Plaintiff alleged that Respondent failed to obtain required workers' compensation insurance coverage for individuals involved in a November 23, 2018 vehicle accident.

On December 15, 2020, the district director of the WHD's Tampa, Florida office issued a Notice of Determination ("NOD") letter to Respondent for alleged violations of the INA's H-2A non-immigrant worker program,[4] assessing back wages in the amount of $53,626.36 owed to seventeen (17) workers, CMPs in the amount of $228,557.40, and a three-year debarment from the labor certification program.[5]

Respondent disagreed with both determinations and requested a hearing by letters submitted on or about January 16, 2020 and January 14, 2021. 29 C.F.R. § 500.212; 29 C.F.R. § 501.33. On January 26, 2022, counsel for the Plaintiff filed an

[2] 8 U.S.C. §§ 1101(a)(15)(H), 1184(c), 1188, and the implementing regulations at 20 C.F.R. Part 655, and 29 C.F.R. Part 501.

[3] The MSPA protects migrant and seasonal agricultural workers by establishing employment standards related to wages, housing, transportation, disclosures and recordkeeping. *See* https://www.dol.gov/agencies/whd/agriculture/mspa.

[4] The H-2A visa program permits employers to hire foreign workers to perform temporary agricultural work within the United States on a one-time occurrence, seasonal, peak load, or intermittent basis. *See* 29 C.F.R. § 501.3.

[5] Plaintiff alleged that, during the period July 6, 2018 to June 5, 2019, Respondent: (i) offered terms and conditions to U.S. workers less favorable than those offered to H-2A workers, in violation of Section 655.122(a); (ii) unlawfully rejected qualified U.S. workers, in violation of Section 655.135(d); (iii) failed to state actual terms and conditions, in violation of section 655.121(a)(3); (iv) failed to pay the offered/required wage rate, in violation of Section 655.122(l); (v) laid off or displaced U.S. workers, in violation of Section 655.135(g); and (vi) failed to comply with the three-fourths guarantee, in violation of Section 655.122(i). Of the $228,557.40 in total CMPs assessed $206,505.00 was for allegedly laying off or displacing U.S. workers, a violation of Section 655.135(g).

Order of Reference with the Office of Administrative Law Judges ("OALJ") and I issued a *Notice of Docketing And Order of Consolidation* on January 11, 2022.

On June 2, 2022, Plaintiff moved for partial summary decision with respect to Respondent's alleged violation of the MSPA and Respondent filed a response on June 16, 2022, moving to dismiss the MSPA claim. I determined that genuine issues of material fact still existed and issued *Order Denying Plaintiff's Motion for Partial Summary Decision and Respondent's Motion to Dismiss.*

On July 8, 2022, Plaintiff filed *Motion for an Order Compelling Discovery Responses* and Respondent filed its written opposition on July 12, 2022. I found no discovery violation warranting the requested relief and issued *Order Denying Plaintiff's Motion to Compel Discovery Responses.*

I subsequently conducted a video hearing on July 21, 2022, admitting Plaintiff's Exhibits 1-27, Respondent's Exhibits 1-4, and Joint Exhibits 1-9. Four witnesses testified. A supplemental session was held on July 27, 2022 for one of Plaintiff's witnesses to complete his testimony and allow a representative of Respondent to testify.[6]

Counsel for both parties timely filed closing briefs and responses.[7]

Disputed Issues

1. Whether Respondent violated the MSPA and its implementing regulations;

2. If Respondent violated the MSPA, was the penalty assessed by the Administrator appropriate;

3. Whether Respondent violated the INA and its implementing regulations;

4. If Respondent violated the INA, were the penalties assessed by the Administrator appropriate;

5. If Respondent violated the INA, is a three-year debarment appropriate.

[6] Citations to the hearing transcript will be abbreviated as "Tr.".

[7] Citations to Respondent and Administrator's briefs will be abbreviated at "Resp. Br." and "Admin. Br.," respectively.

Essential Findings of Fact

MSPA Violation

On March 30, 2016, Respondent entered into a contract with Impact Staff Leasing, LLC ("ISL").[8] Pursuant to the contract, ISL agreed to process Respondent's payroll and obtain and pay for workers' compensation insurance for Respondent's employees that were on ISL's payroll.[9] To be considered on ISL's payroll, and therefore an employee of ISL and eligible for workers' compensation, Respondent was required to submit the employee's application, I-9 form, and other tax forms to ISL prior to the employee starting work.[10]

On December 2, 2016, Respondent entered into a contract with Bruce Hendry Insurance. Karen Hendry, an owner of Bruce Hendry Insurance, provided Respondent with a Progressive bus policy and general liability insurance.[11] Ms. Hendry explained that Respondent signed a form rejecting liability insurance for vehicle passengers, but Respondent provided a form 3111, confirming that Respondent had a workers' compensation policy.

On November 23, 2018, a bus owned and operated by Respondent with 18 individuals onboard was involved in an accident that was not its fault. Respondent had not provided ISL with all of the employee's applications, I-9 forms, and other relevant tax forms before they boarded the bus, as required by the ISL contract. Of the 18 individuals, eight, including the driver, were eventually denied workers' compensation coverage because there was no existing employer-employee relationship between them and ISL at the time of the accident.

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[8] The agreement was in effect on November 23, 2018. Ms. Lynn Brigman, ISL's owner, testified that her company does not require its clients to sign a new agreement each year.

[9] The policy number was WC021-00001-018 for the period of August 15, 2018 to August 18, 2019. (JX-07).

[10] The contract states:

> Client Company agrees to provide ISL with all the required hiring paperwork *prior* to the start of any new staff or uninsured subcontractor. If the required paperwork is not provided prior to start, the individual in question will not become an employee of ISL and *will not* be covered by workers' compensation insurance, and will entitle ISL to terminate this agreement . . . .

(JX-05 at 2) (emphasis in original).

[11] For 2018, Respondent told Bruce Hendry Insurance that they had workers' compensation coverage for group transportation of employees through Impact Staff Leasing and so Bruce Hendry Insurance provided them with $1 million in coverage. Respondent provided Bruce Hendry Insurance with a 3111 form as proof that it had workers' compensation insurance for group transportation.

In May 2019, WHD Investigator Calvin Olds ("Olds") took over the MSPA investigation into the November 2018 bus accident.[12] As part of his investigation, Olds reached out to employees of ISL and confirmed that seven of Respondent's employees and the bus driver had been denied workers' compensation benefits. Olds recommended that WHD cite Respondent for a violation of the MSPA for "fail[ing] to obtain the prescribed insurance coverage" because "the workers' compensation insurance did not cover the bus driver and seven passengers who were seasonal agricultural workers on the day of the vehicle accident." (Tr. at 125). WHD eventually assessed a $20,040.00 CMP for failing to obtain required insurance. WHD applied no mitigating factors, simply multiplying the $2,505.00 maximum CMP by eight (8), one for each of the seven employees and one bus driver denied workers' compensation to arrive at the assessed CMP.[13]

INA Violations

In June 2018, the Department of Labor certified Respondent's Application for Temporary Employment Certification, H-300-18131-141957 ("TEC 1"). TEC 1 authorized Respondent to hire up to 30 foreign workers to harvest and pack corn in Vincennes, Indiana for the period of July 6, 2018 to October 5, 2018. In addition to foreign workers, Respondent also hired U.S. Haitian workers from Belle Glade, Florida to harvest and pack corn in Indiana. Respondent paid approximately $4,500 to charter a bus to transport these U.S. workers of Haitian descent from Florida to Indiana. Gregorio Gonzalez, Sr. went to Indiana to oversee the corn harvest.

Around the third week of the TEC 1 period, it rained heavily in Indiana, creating very muddy conditions. Despite the conditions, foreign and U.S. workers were expected to work throughout the week. However, a group of U.S. workers refused to work due to the ongoing rain and muddy conditions. Mr. Gregorio Gonzalez, Jr., an employee of Respondent, spoke with Jeanot Saint Hilaire, the crew leader for the U.S. workers refusing to work, and said that if his crew did not increase production, they would be subject to termination. Mr. Saint Hilaire told Mr. Gonzalez, Jr. that he would speak to his crew about showing up, however when the bus showed up to the hotel to take the workers to the worksite, Mr. Saint Hilaire's crew was not waiting outside and did not respond when the bus driver knocked on hotel room doors to notify people the bus was leaving.

[12] The investigation was transferred from Investigator Paul Dean.

[13] In its brief, the Administrator stated that Investigator Olds applied a 20% reduction to the CMP for two mitigating factors and cited to pages 92 – 96 of the hearing transcript as support. (Admin. Br. at 4). Pages 92 -96 of the hearing transcript are the testimony of Lynn Brigman, not Investigator Olds. Investigator Olds explicitly stated he gave no credit for mitigating factors when calculating the CMP. (Tr. at 126). Further, $2,505.00 multiplied by eight equals $20,040.00. Therefore, I find no mitigating factors were applied to this CMP.

Respondent decided that it could not afford to pay for hotel rooms for an additional week if the workers refused to report to the worksite. Ultimately, Respondent terminated its contract with 13 U.S. workers. Respondent told the workers that "they were no longer needed," and chartered a bus to return them to Florida. (Tr. at 357). Respondent paid approximately $2,200 for the charter bus. In the subsequent investigation by WHD, four of the U.S. workers sent back to Florida provided statements to the effect that they believed they had been sent home because Respondent preferred to work with H-2A workers, rather than U.S. workers.[14]

Due to the rain and loss of workers, Respondent was behind with the corn harvest. Respondent needed "all hands on deck" and offered the same amount of hours to foreign and domestic workers. (Tr. at 358). However, the rain continued throughout the harvest season and some workers left due to the harsh working conditions.[15] After the TEC 1 period ended, Respondent sent the timekeeping sheets to ISL for preparation of final paychecks.[16]

With respect to the reason U.S. workers were sent home from Indiana, I find credible the version of events offered by Mr. Gonzalez, Jr. who testified that rainy conditions put the corn harvest behind schedule and that Respondent needed as many workers as possible to catch up. Additionally, Respondent paid to transport U.S. workers from Florida to Indiana because it needed help with the harvest. Therefore, it does not follow that Respondent would indiscriminately and unlawfully lay off such a large group of workers at the precise time Respondent needed more work done. As such, I find the evidence does not support that the U.S. workers sent back to Florida were laid off due to Respondent's alleged animus toward Haitians. Rather, I find that the U.S. workers were fired and sent back to Florida because they refused to work in rainy conditions.

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[14] In the interviews, the U.S. workers stated that Respondent preferred working with Mexican H-2A workers to working with the U.S. Haitian workers. One of the workers stated, "After only two weeks in Indiana, Mr. Gonzalez [Gregorio Gonzalez, Sr.] told us he only wanted his Mexicans. And he sent a bus of us Haitians home. There were only Haitians on the bus." (PX-16; Tr. at 167).

[15] Once Respondent was notified that a worker left, Respondent marked that worker as "abandoned" on timekeeping sheets. (Tr. at 361).

[16] As previously discussed, Respondent's contract with ISL stated that ISL would perform payroll duties for Respondent. Mr. Gonzalez Jr. testified that once Respondent sent ISL the timekeeping sheets showing how many hours each employee worked, ISL then checked to make sure each domestic worker was paid in accordance with the three-fourths guarantee required by 20 C.F.R. § 655.122(i). If, for some reason, a U.S. worker's pay for hours worked did not satisfy the three-fourths guarantee, ISL would ensure the guarantee was met by paying the difference.

In December 2018, the Department of Labor certified Respondent's Application for Temporary Employment Certification, which was assigned number H-300-18313-191684 ("TEC 2").

TEC 2 authorized Respondent to hire up to 30 foreign workers to harvest and pack corn at multiple worksites in Florida, including 5058 E Sugarland Hwy., Clewiston, Florida 33440 and "Florida Other/Miami Canal Road and Rodgers Road, Lake Harbor, Florida, 33430"[17] for the period January 10, 2019 to June 1, 2019. (JX-2a at 4; Tr. at 366). Additionally, H-2A workers hired pursuant to TEC 2 harvested corn at a worksite in Kendall, Florida, approximately 50 miles from Lake Harbor, Florida. Respondent also indicated in TEC 2 that three months of experience was required to perform the job of harvester. As required by H-2A regulations, Respondent posted a job advertisement calling for U.S. workers to apply to harvest and pack corn.[18]

After completing the fourth week of the TEC 2 period, which began on January 27, 2019, four of Respondent's employees stopped working: Emner Ramirez Velazquez, Edibardo Perez Ambrocio, Celia G. Garcia Santiago, and Luis F. Moreno Vazquez. On behalf of Respondent, ISL issued paychecks to these four employees on February 1, 2019. The address on the paychecks for these employees was Respondent's business address because they did not have an address of their own to use. Respondent unsuccessfully attempted to get these four paychecks to the employees by asking coworkers if they knew where the employees had gone.[19]

In the Spring of 2019, Investigator Paul Dean ("Dean") was assigned to investigate Respondent. The investigative period was from about July 6, 2018 to June 5, 2019. As part of his investigation, Dean requested payroll and timesheet data for 2018 and 2019. Upon reviewing Respondent's employment and payroll data, Dean determined that four employees, Mr. Velazquez, Mr. Ambrocio, Ms. Garcia Santiago, and Mr. Vazquez, had been marked "A" for "abandoned." (Tr. at 184). Dean also found four check numbers associated with these employees.

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[17] Mr. Gonzalez, Jr. testified that by listing the area of work as "Florida Other/ Miami Canal Road and Rodgers Road, Lake Harbor, Florida, 33430," he believed that his H-2A employees could work within a 100-mile radius of the Miami Canal Road and Rodgers Road. (Tr. at 367).

[18] Mr. Gonzalez, Jr. testified that he believed Respondent received applications from U.S. workers to work in the TEC 2 position. However, Mr. Gonzalez, Jr. later testified that, generally, "[n]o one ever applies to any of those ads . . . ." (Tr. at 370). Mr. Gonzalez, Jr. also stated that Respondent did not receive applications for the position and time period covered by TEC 2. (*Id.*).

[19] If unable to locate an employee, it is Respondent's practice to file the check so that the employee can pick it up if he or she eventually comes to Respondent's office. Respondent receives an invoice from ISL for the checks that have been issued, and Respondent pays for those checks, even if the employee fails to pick it up.

However, an ISL employee informed Dean "that those checks were not negotiated." (Tr. at 185). Dean later clarified that he was told by ISL that ISL does not distribute paychecks, that is the job of the employer, but he was aware paychecks to the four employees had been cut. Based on this information, Dean believed that Respondent failed to issue final paychecks to the four employees in violation of 20 C.F.R. § 655.122(l) and calculated that Respondent owed those employees $567.62 in back wages.

Dean also concluded that the payroll and timesheet data showed, on average, U.S. workers worked approximately 317 hours during the eight-week period covered by TEC 1 and H-2A workers worked approximately 381 hours during that same period. Due to the difference in average hours worked, Dean believed that Respondent violated 20 C.F.R. § 655.122(a) by offering more hours of work to H-2A workers than to domestic workers. To calculate the penalty, Dean used the maximum CMP of $5,942.00 and applied a 20% reduction for two mitigating factors but did not testify as to what factors he applied. WHD ultimately assessed a $4,753.60 CMP for the violation.

As discussed above, Dean interviewed four U.S. workers who allege they were laid off by Respondent during the third week of the TEC 1 period. Based on these interviews and review of the payroll records, Dean believed that Respondent violated 20 C.F.R. § 655.135(g) by improperly laying off U.S. workers and calculated that Respondent owed $47,098.73 in back wages for violation of the three-fourths guarantee. 20 C.F.R. § 655.122(i). In calculating the CMPs for this violation, Dean multiplied the maximum CMP for this violation, $17,650.00, by 13, the number of affected workers, and then applied a 10% reduction because Respondent had no prior history of H-2A violations. (Tr. at 173). WHD ultimately assessed a $206,505.00 CMP for Respondent's violation of 20 C.F.R. § 655.135(g).

As part of his investigation, Dean also interviewed Wilson Michel. Records provided by Respondent showed that Mr. Michel worked for Respondent in the year prior to TEC 2. In the interview, Mr. Michel stated that, in January 2019, he showed up to the usual meeting place in Belle Glade, Florida where U.S. workers go to find work and was told by Mr. Gonzalez, Sr. that Respondent did not have work for him. During the interview, Mr. Michel also told Dean that he does "a lot of work in corn." (PX 11 at 1). Based on the employment records provided by Respondent and the interview with Mr. Michel, Dean found that Respondent unlawfully rejected a U.S. worker in violation of 20 C.F.R. § 655.135(d). For this violation, Dean calculated that Respondent owed Mr. Michel $5,960.01 in back wages and WHD also assessed a $14,120.00 CMP. To calculate the CMP for this violation, Dean

applied a 20 percent reduction to the $17,650.00 maximum CMP for two mitigating factors.[20]

During the investigation, Dean also visited Respondent's housing site in Pahokee, Florida to conduct an inspection and interview workers. At the housing site, Mr. Gonzalez, Jr. told Dean that the workers were "down off of Krome Avenue . . . in Homestead." (Tr. at 188). Dean then went to the worksite in Homestead and interviewed H-2A workers employed pursuant to TEC 2. The H-2A workers told Dean that they had been harvesting corn in Homestead "for quite some time." (Tr. at 189). Some of the workers also told Dean that they had no prior experience harvesting corn, despite TEC 2 listing three months of corn harvesting experience as a requirement. Dean also obtained signed statements from Mr. Gonzalez, Sr. and Mr. Gonzalez, Jr. stating that Respondent does not enforce an experience requirement for corn harvesting workers and that Respondent brought H-2A workers to worksites in Homestead, Florida. For Respondent's failure to enforce the experience requirement in TEC 2 and for bringing workers to a worksite not listed in TEC 2, Dean found two violations of 20 C.F.R. § 655.121(a)(3). Dean multiplied what he believed to be the maximum CMP of $1,766.00 to the two violations and applied a ten percent reduction for no prior H-2A violations. WHD ultimately assessed a $3,178.80 CMP for this violation.

Given the nature of the violations, to include unlawfully laying off U.S. workers and unlawfully rejecting a U.S. worker, Dean determined that debarment was appropriate. A Notice of Debarment was included in the December 15, 2020 Notice of Determination.[21]

In 2019, 2020, and 2021, Respondent earned a profit of about $300,000 to $400,000 each year.

[20] Dean testified that he applied two mitigating factors, the first for Respondent's history of no H-2A violations. Dean did not state the basis for the second mitigating factor, but testified that "in retrospect, none of the other factors actually should have been applied." (Tr. at 178).

[21] In the Notice, the Administrator disclosed four violations supporting debarment: (1) failure to pay or provide the required wages, benefits, or working conditions to the employer's H-2A workers and/or workers in corresponding employment; (2) failure, except for lawful, job related reasons, to offer employment to qualified U.S. workers who applied for the job opportunity for which certification was sought; (3) improper layoff or displacement of U.S. workers in corresponding employment; and (4) Employing an H-2A worker outside the area of intended employment, or in an activity/activities not listed in the job order. 29 C.F.R. § 501.20(l)(i), (ii), (iv), (vii).

Discussion

MSPA Violation

Plaintiff avers that farm labor contractors ("FLCs") that transport migrant or seasonal agricultural workers in a vehicle must obtain insurance for the vehicle and any individuals transported in the vehicle and the December 3, 2019 Notice of Determination contends that Respondent failed to do so, a violation of 29 C.F.R. § 500.120 – 500.128. During the hearing, Investigator Olds was asked what specific section of the MSPA regulations Respondent allegedly violated. He could not point to a specific provision but did state that the assessed CMP was for failure to obtain required insurance. (Tr. at 140). In his closing brief, counsel for the Administrator first states that Respondent violated 29 C.F.R. § 500.104[22] and later that Respondent violated 29 C.F.R. § 500.122. (Admin. Br. at 4, 8). However, neither provision is relevant to the facts of this case.[23]

I find the MSPA provision actually applicable here is 29 C.F.R. § 500.121, which requires that FLCs who have rejected insurance coverage for workers under the FLC's vehicle liability insurance obtain and provide proof that they purchased insurance that covers workers while they are being transported in the FLC's vehicle. *See* 29 C.F.R. § 500.121(a) – (e).

The Administrator argues that Respondent admits it failed to submit hiring paperwork to ISL prior to allowing the employees on the bus and knew that ISL would only provide workers' compensation coverage to employees whose hiring paperwork had actually been submitted to ISL prior to beginning work. (Admin. Br. at 12).

Respondent submits that MSPA and its implementing regulations do "not require farm labor contractors . . . to guarantee that workers' compensation claims be paid by the insurance carrier, only that coverage be provided." (Resp. Br. at 10).

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[22] The Administrator states Investigator Olds testified that Respondent violated 29 C.F.R. § 500.104 and cites to pages 92 - 96 of the hearing transcript as support. However, pages 92 – 96 of the hearing transcript cover the testimony of Lynn Brigman. Further, Olds does not specifically mention 29 C.F.R. § 500.104 in his testimony.

[23] 29 C.F.R. § 500.104 governs vehicle safety standards for passenger automobiles and station wagons used by FLCs. The safety standards of the bus involved in the November 23, 2018 accident are not relevant to this case. 29 C.F.R. § 500.122 governs adjustments to insurance requirements where workers' compensation coverage is provided under State law. No party in this case has argued or indicated that workers' compensation coverage was provided to any of the bus passengers employed by Respondent as required by Florida State Law. The Administrator also cites to 29 C.F.R. § 500.70(c). (Admin. Br. at 16). This regulatory provision states that the burden for compliance with the MPSA motor vehicle regulations "is imposed upon the person or persons using or causing" the vehicle to be used. 29 C.F.R. § 500.70(c). No party in this case is challenging that it was Respondent's burden to comply with the MSPA's motor vehicle regulations.

To support this assertion, Respondent points to regulatory provisions that simply state an Employer must provide workers' compensation coverage, including 29 C.F.R. §§ 500.120 and 500.122. In other words, Respondent argues it had coverage, even if it was not actually in effect.

I find Respondent's argument unpersuasive. Though the term "provide" is used throughout Sections 500.120 – 500.128, the regulations clearly anticipate coverage of the workers for whom insurance is required. To read the regulations as narrowly as Respondent suggests would lead to incongruous and absurd results. For example, if the regulations merely required FLCs to provide proof of a worker's compensation policy—but did not require FLCs to comply with the terms, conditions, and requirements of that policy—FLCs could avoid liability when an employee is injured by simply ignoring the policy's coverage requirements. Moreover, 29 C.F.R. 500.121(e) explicitly states that FLCs must submit a certificate evidencing "the purchase of liability insurance which *covers* the workers while being transported . . . ." (emphasis added).

Respondent admits that it failed to send the hiring documents for seven of its H-2A workers and the driver to ISL prior to the individuals boarding the bus. Respondent's contract with ISL states that Respondent was required to send hiring documents to ISL prior to the start of work so that Respondent's employees can be added to ISL's payroll and be covered by ISL's workers' compensation policy. The start of work here was boarding the bus on November 23, 2018, and Respondent had not yet sent ISL the requisite hiring paperwork. Therefore, under these facts, I find that Respondent violated the MSPA by not having a workers' compensation policy that actually covered the migrant seasonal agricultural workers and bus driver transported in Respondent's vehicle on November 23, 2018.

INA Violations[24]

Unlawful Layoff or Displacement of U.S. Workers

The Administrator argues that Respondent unlawfully laid off 13 U.S. Haitian workers. The H-2A program does prohibit employers from laying off U.S. workers employed in the position that is the subject of the Application for

[24] The December 15, 2020 NOD stated that WHD found that Respondent committed six additional violations of four provisions of the INA, for which no CMPs or back wages were assessed. The violations included: (1) failure to provide a copy of the work contract to employees for TEC 1 and 2, as required by 20 C.F.R. § 655.122(q); (2) failure to record why the hours worked were less than the hours offered, as required by 20 C.F.R. § 655.122(j)(3); (3) failure to make records available for TEC 1 and TEC 2, as required by 20 C.F.R. § 655.122(j)(2); and (4) failure to provide information relative to each fixed site of agricultural business to which the H-2ALC expects to provide H-2A workers, as required by 20 C.F.R. § 655.132(b)(1). As the Administrator has provided no evidence to support a finding that Respondent violated these provisions, they are dismissed.

Temporary Labor Employment Certification, "except for lawful, job-related reasons within 60 days of the first date of need." 20 C.F.R § 655.135(g). If an employer has laid off a U.S. worker in the occupation and area of intended employment the employer is required to consider the laid off worker for the job opportunity that is the subject of the TEC. *Id.* If, after receiving an offer for the job opportunity, the U.S. worker is hired, rejects the opportunity, or is denied the opportunity for lawful reasons, the employer has not violated the requirements of the H-2A program. (*Id.*).

Here, Respondent argues that it did not violate 20 C.F.R § 655.135(g) because the 13 U.S. workers that were sent back to Florida during TEC 1 were fired for lawful, job-related reasons. (Resp. Br. 26-28). Conversely, the Administrator argues that Respondent improperly laid off 13 U.S. workers in the third week of TEC 1 because they were of Haitian descent.[25]

I previously found that the 13 U.S. workers were not laid off because of their background or ethnicity. Rather, I found that the 13 U.S. workers did not want to work in the rain and mud and Respondent fired them for their refusal to do so and that their race, ethnicity, or heritage played no role in that decision. Given that Respondent fired the U.S. workers for lawful, job-related reasons, I find no violation of 20 C.F.R § 655.135(g).

Failure to Comply with the Three-Fourths Guarantee

The H-2A program requires employers to "guarantee to offer the worker employment for a total number of work hours equal to at least three-fourths of the workdays" covered by the TEC period. 20 C.F.R. § 655.122(i).

Here, the Administrator argues that by improperly laying off 13 U.S. workers during the third week of TEC 1, Respondent also failed to comply with the Act's three-fourths guarantee. (Admin. Br. at 19, 21). Respondent argues that, because it fired the U.S. workers, rather than laying them off, it was not required to comply with the three-fourths guarantee. (Resp. Br. at 29).

Because I previously found that Respondent did not improperly lay off U.S. workers, it cannot serve as the factual basis for the allegation that Respondent did not comply with the three-fourths guarantee. As such, I find that Respondent did not violate 20 C.F.R. § 655.122(i).

[25] Apparently one of the U.S. workers was not of Haitian descent. As the Administrator does not offer an explanation for why this worker was allegedly laid off by Respondent, it supports the conclusion that these workers were fired for lawful reasons, and not because of their background.

Preferential Treatment of H-2A Workers

The H-2A program prohibits Employers from giving preferential treatment to H-2A workers and must offer U.S. workers the same benefits, wages, and working conditions that the Employer is offering to H-2A workers. 20 C.F.R. § 655.122(a).

Here, the Administrator essentially argues that because H-2A workers worked approximately 64 hours more, on average, than U.S. workers during TEC 1, that Respondent must have offered H-2A workers more hours than U.S. workers. (Admin. Br. at 18). In its brief, Respondent criticizes Dean's method for calculating average hours worked by H-2A and U.S. workers, stating that Dean left some U.S. workers out of his calculation altogether, counted U.S. workers that did not complete TEC 1, and did not consider the amount of hours U.S. workers failed to show up to the worksite, compared to H-2A workers. (Resp. Br. at 22-26). Respondent also asserts that statements Dean obtained regarding the amount of hours Respondent actually offered were from the 13 U.S. workers that went back to Florida during the third week of TEC 1, and therefore those workers cannot speak to the hours offered throughout TEC 1. (Resp. Br. at 26).

I find that the Administrator has not proven Respondent offered more hours to H-2A workers than to U.S. workers. Although he testified he removed extreme outliers, the average hours worked calculations by Dean paint an incomplete picture, such as some workers completing only one week of work and not accounting for the fact that significantly more U.S. workers left before the end of TEC 1 than H-2A workers.[26] Moreover, Respondent was behind on work and offered H-2A and U.S. workers the same amount of hours in the hope of making up for time lost to poor weather conditions. I find credible the testimony of Mr. Gonzalez, Jr. that the rainy conditions persisted throughout TEC 1 and that more U.S. workers left before the end of the period, a fact corroborated by Respondent's payroll data. In sum, I find Dean failed to consider the entire context before wrongfully concluding that the reason for the discrepancy in the hours worked by H-2A workers and U.S. workers was Respondent giving H-2A workers preferential treatment.

For these reasons, I find that Respondent has not violated 20 C.F.R. § 655.122(a).

[26] According to the timesheets provided by Respondent, and relied on by Investigator Dean, 21 U.S. workers did not work all eight weeks of the TEC 1 period. (PX-16 at 1). In comparison, only five H-2A workers did not work all eight weeks of the TEC 1, and, of those workers, just one left in the first four weeks of the period. (*Id.* at 2).

Unlawful Rejection of a Qualified U.S. Worker

The H-2A program requires that employers provide "employment to any qualified, eligible U.S. worker who applies to the employer" during the first half of the contract period. 20 C.F.R. § 655.135(d).

Tech 2 ran from January 10, 2019 to June 1, 2019. The Administrator argues that Wilson Michel met the qualifications required for the occupation subject to TEC 2, that he went to see Respondent in January 2019 about a job and was told he would not be hired because Respondent had already hired H-2A workers. (Admin. Br. at 23). In contrast, Respondent argues that there is no evidence that Michel submitted an actual application that Respondent rejected. (Resp. Br. at 30).

Respondent implicitly argues that a written application is required to be considered for employment. I disagree. Though Michel did not submit a written application, he showed up to the location where farm labor contractors pick up workers seeking employment and told Mr. Gonzalez, Sr. that he was available and willing to work. Under the circumstances, I find Michel "applied" for and was denied employment. Further, Respondent's own records show that Michel had previously worked for Respondent (JX-08 at 6) and Mr. Michel had experience harvesting corn. Therefore, Respondent was required to provide Wilson Michel employment when he sought work in January 2019, and did not. As such, I find that Respondent violated 20 C.F.R. § 655.135(d).

Failure to Satisfy Requirements of the Job Order

In the Notice of Determination, the Administrator alleges that Respondent violated **20 C.F.R. § 655.121(a)(3)** by failing "to satisfy requirements of the job order by not stating actual terms and conditions" of employment. (PX-19 at 8) (emphasis added). Specifically, WHD alleges Respondent placed workers at worksites not "listed on the certified H-2A contract" and listed "false experience requirements in the job orde[r] that were not actually considered when hiring H2[-]A workers." (*Id.*). In its brief, the Administrator also argues "[t]he evidence supports the Administrator's Determination that Respondent violated H-2A regulation **20 C.F.R. § 655.121(a)(3)**".[27] (Admin Br. at 26) (emphasis added).

[27] In its brief, the Administrator states "Pertinent to this violation, a job order must also state the actual working conditions and terms of employment, as required by § 655.121(a)(3), which states:

'(a) Area of intended employment. [ ] (3) The job order submitted . . . must satisfy the requirement for agricultural clearance orders in 20 CFR part 653, subpart F and the requirements set forth in § 655.122 ('Contents of job order').'"

(Admin. Br. at 36). However, the language quoted by the Administrator does not appear in Section 655.121(a)(3). Instead, it appears in Section 655.121(a)(4).

However, 20 C.F.R. § 655.121(a)(3) states:

> Where the job order is being placed in connection with a future application to be jointly filed by two or more employers seeking to jointly employ a worker(s) (but is not a master application), any one of the employers may submit a single job order to be placed on behalf of all joint employers named on the job order and the future *Application for Temporary Employment Certification.*

The Administrator did not charge Respondent with a general violation of Section 655.121(a), instead choosing to charge Respondent with a specific violation of Section 655.121(a)(3). Section 655.121(a)(3) instructs one of two employers filing a temporary labor application to jointly employ a worker to submit a single job order along with the jointly filed application. However, the facts do not support a finding that Respondent filed a temporary labor application with another employer in order to jointly employ an H-2A worker.

Accordingly, even if the facts do suggest that Respondent did not comply with the requirements of the job order by failing to enforce the experience requirement, that would be a violation of Section 655.121(a)(4) and not (a)(3), the violation Respondent was actually charged with and put on notice to defend against. As such, I find that the Administrator has not proven Respondent violated 20 C.F.R. § 655.121(a)(3).[28]

Failure to Pay the Required Wage Rate

The Administrator alleged that Respondent violated 20 C.F.R. § 655.122(l) by failing to pay the offered/required wage rate by not providing final paychecks to four (4) employees, a violation of Section 655.122(l). (PX-19 at 8). 20 C.F.R. § 655.122(l) states:

> Except for occupations covered by §§ 655.200 through 655.235, the employer must pay the worker at least the AEWR; a prevailing wage if the OFLC Administrator has approved a prevailing wage survey for the applicable crop activity or agricultural activity and, if applicable, a distinct work task or tasks performed in that activity, meeting the requirements of § 655.120(c); the agreed-upon collective bargaining rate; the Federal minimum wage; or the State minimum wage rate, whichever is highest, for every hour or portion thereof worked during a pay period.

[28] The Administrator did not move to amend the NOD prior to the close of the record, and to allow a change now would be a material variance.

The Administrator argues that Respondent violated 20 C.F.R. § 655.122(l) by failing to mail final paychecks to Emner Ramirez Velazquez, Edibardo Perez Ambrocio, Celia G. Garcia Santiago, and Luis F. Moreno Vazquez and that by failing to issue them, Respondent did not comply with the rate of pay requirements. (Admin. Br. at 25). Respondent argues that it has paid ISL for the checks and saved the checks for each of the four employees but has no last known address to which it can send them the checks. (Resp. Br. at 34).

Here, Dean testified that the violation was based on Respondent's failure to mail the final paychecks to the four employees, and not a dispute with the rate of pay used to calculate the amount of the paychecks. If the Administrator is arguing that Respondent violated the regulation by employing individuals that had no forwarding mailing address, that is not a requirement imposed by the regulations. Assuming, but not deciding, that the H-2A regulations do require an employer to obtain a mailing address from workers in order to send them paychecks, that is not what the Administrator has charged. The facts demonstrate that Respondent made a concerted effort to provide these four transient employees with their final paychecks, paychecks that complied with the rate of pay requirements, and that Respondent has kept those paychecks on file so that the employees can eventually pick them up. Based on the foregoing, I find that Respondent has not violated 20 C.F.R. § 655.122(l).

Back Wages

The Administrator calculated that Respondent owes $53,626.36 in back wages for various violations of the INA. I previously found that Respondent did not violate 20 C.F.R. § 655.122(i) for failure to comply with the three-fourths guarantee, therefore Respondent does not owe the $47,098.73 in assessed back wages. Additionally, I also found that Respondent did not violate 20 C.F.R. § 655.122(l) for failure to pay the offered/required wage rate, therefore Respondent does not owe $567.62 in assessed back wages. However, because I found that Respondent unlawfully rejected a U.S. worker, I must determine whether $5,960.01 in back wages are appropriate.

Dean calculated the back wages owed to Wilson Michel by adding the days and hours of work during TEC 2 for a total of 707 hours. Dean then multiplied the total hours by 0.75, as required by the three-fourths guarantee, for a total of 530.25 hours. Finally, Dean multiplied the three-fourths hours by the adverse effect wage rate in effect at the start of TEC 2, $11.24, for a total of $5,960.01. (PX-04). I find this is an appropriate, correct, and reasonable approach and agree that Respondent owes Wilson Michel $5,960.01 in back wages.

Civil Money Penalties

MSPA Violation

Having found that Respondent violated the MSPA, I must determine whether the violation warrants imposition of a $20,040.00 CMP. *See* 29 C.F.R. § 500.262(c).[29]

The MSPA allows the Department of Labor to assess CMPs for violations of the Act. *See* 29 U.S.C. § 1853. The parties appear to agree that the maximum CMP for a violation in this case is $2,505.00.[30] However, the parties do not agree as to what constitutes a "violation," with the Administrator arguing that each employee denied workers compensation coverage is a separate violation of the regulation. I disagree.

As previously discussed, Respondent violated the Act when it failed to provide the required information to ISL before the workers boarded the bus, and a CMP is appropriate. However, under the circumstances, the penalty cannot be multiplied by the number of mistakes made where a single mistake is sufficient to violate the relevant statute or regulation. In other words, I find the gravamen of this offense is the failure to provide workers' compensation coverage. While the number of affected workers is certainly an aggravating factor, and I find such here, the Administrator has not offered any compelling legal authority to support assessing a separate penalty for each individual denied workers compensation

[29] The implementing regulations of the MSPA state: "The decision of the Administrative Law Judge shall be limited to a determination whether the respondent has violated the Act or these regulations, and the appropriateness of the remedy or remedies imposed by the Secretary." 29 C.F.R. § 500.262(c).

[30] Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, the Department of Labor is required annually to adjust for inflation the maximum amount of CMPs that may be assessed for violations of its regulations. *See* Pub. L. 114-74, Sec. 701; 28 U.S.C. § 2461 (note). Section 6 of the statutory note states that "[a]ny increase under this Act in a civil monetary penalty shall apply only to civil monetary penalties, including those whose associated violation predated such increase, which are assessed after the date the increase takes effect." (*Id.*).

The violation in this case occurred on November 23, 2018, and the CMP was assessed on December 3, 2019. The Department of Labor promulgated its adjustments for 2019 on January 23, 2019, which provides that for violations occurring after November 2, 2015 and penalties assessed after January 2, 2019, the January 2, 2019 penalty level applies, which is $2,505.00. *See* Department of Labor Federal Civil Penalties Inflation Adjustment Act Annual Adjustments for 2019, 84 Fed. Reg. 213, 218 (Jan. 23, 2019).

coverage.[31] As such, the penalty for this violation is modified and reduced to $2,505.00.

INA Violations

Civil money penalties may be assessed for violating the INA. *See* 8 U.S.C § 1188(g)(2); 20 C.F.R. § 501.19. In determining the amount of the penalty, several non-exclusive factors may be considered, including any history of noncompliance, the number of affected workers, the seriousness of the violations, the explanation for noncompliance, a commitment to future compliance, and any financial gain from the violations.[32] The Administrator assessed a total of $228,557.40 in CMPs in this case and I must determine whether that amount is appropriate for the violations actually proven.[33]

As noted above, the Administrator assessed a $4,753.60 CMP for a violation of 20 C.F.R. § 655.122(a), $206,505.00 for a violation of 20 C.F.R. § 655.135(g), $3,178.80 for a violation of 20 C.F.R. § 655.121(a)(3), and $14,120.00 for a violation of 20 C.F.R. § 655.135(d). However, because I previously concluded that Respondent did not give preferential treatment to H-2A workers, did not unlawfully displace U.S. workers, and did not fail to satisfy job order requirements, the $214,437.40 in penalties associated with these violations are reversed.

The remaining proven INA violation is for improperly rejecting a U.S. worker in violation of 20 C.F.R. § 655.135(d). Investigator Dean started with $17,650.00 as the maximum CMP. But $17,650.00 is the maximum CMP for 2020, not 2019. In other words, the maximum CMP for improperly rejecting a U.S. worker under the

[31] *Cf. Bittner v. U.S.*, 598 U.S. ____ (2023) (when the legal duty imposed by a statute is violated regardless of the number of errors made, it is not appropriate to multiply the resulting penalty by the number of errors that were actually made).

[32] 29 C.F.R. § 501.19(b)(1)-(7).

[33] The decision of the ALJ shall include a statement of the findings and conclusions, with reasons and basis therefor, upon each material issue presented. The decision shall also include an appropriate order which may affirm, deny, reverse, or modify, in whole or in part, the determination of the WHD Administrator. 29 C.F.R. § 501.41(b).

facts of this case is $17,344,[34] and not $17,650.[35] However, I do agree with Dean that the CMP should be reduced given Respondent has no previous H-2A violations. But I further modify the CMP in light of the small size of Respondent's business and that only one worker was affected. As such, I apply a 20 percent reduction and find that the appropriate CMP for violating 20 C.F.R. § 655.135(d) is $13,875.20.[36]

Debarment

An employer may be barred from receiving future labor certifications for up to three years if the employer has "substantially violated a material term or condition of its temporary labor certification, with respect to H-2A workers, . . . U.S. workers improperly rejected for employment, or U.S workers improperly laid off or displaced . . . ." 29 C.F.R. § 501.20(a). The Notice of Debarment must be issued no more than two years after the occurrence of the violation. 29 C.F.R § 501.20(b). The Notice of Debarment was issued in this case on December 15, 2020.

The Administrator argues that debarment is appropriate due to the severe nature of the violations. (Admin. Br. at 32). Respondent submits that the only violation that may properly be considered as a basis for debarment is the violation for unlawfully rejecting a U.S. worker and that violation alone does not warrant debarment. (Resp. Br. at 38-39).[37] For the following reasons, I find that debarment is not warranted.

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[34] The violation in this case occurred in January 2019 when Wilson Michel was rejected, and the CMP was assessed on December 15, 2019. The Department of Labor promulgated its adjustments for 2019 on January 23, 2019, which provides that for violations occurring after November 2, 2015 and penalties assessed after January 2, 2019, the January 2, 2019 penalty level applies, which is $17,344.00. *See* Department of Labor Federal Civil Penalties Inflation Adjustment Act Annual Adjustments for 2019, 84 Fed. Reg. 213, 218 (Jan. 23, 2019). If the CMP had been assessed after January 15, 2020, then the penalty level for unlawfully rejecting a U.S. worker would have been the $17,650.00 used by Dean. *See* Department of Labor Federal Civil Penalties Inflation Adjustment Act Annual Adjustments for 2020, 85 Fed. Reg. 2292, 2302 (Jan. 15, 2020).

[35] The Department of Labor adjustments for 2020 were promulgated on January 15, 2020 and provide that violations occurring after November 2, 2015 and penalties assessed after January 15, 2020, the January 15, 2020 penalty level applies. The January 15, 2020 penalty level for unlawfully rejecting a U.S. worker is $17,650.00. *See* Department of Labor Federal Civil Penalties Inflation Adjustment Act Annual Adjustments for 2020, 85 Fed. Reg. 2292, 2302 (Jan. 15, 2020).

[36] $17,344 X (0.8) = $13,875.20.

[37] Because the Notice of Debarment was not issued until December 15, 2020, some two years and two months after the latest possible TEC 1 violation, Respondent argues the other alleged violations cannot be used as a basis to support debarment. (Resp. Br. at 38).

During the hearing, Dean testified that the violation for improperly laying off U.S. workers went to "the heart of the regulation" and warranted debarment. (Tr. at 195). I previously found that Respondent did not improperly lay off U.S. workers, therefore that violation cannot support debarment. I further found that other violations contemplated by the Administrator, including failure to pay the required wage rate and preferential treatment of H-2A workers, were not present in this case, and therefore also cannot support debarment. 29 C.F.R. 501.20(d)(1).

Finally, debarment is a severe punishment. While the tribunal does not minimize the seriousness of rejecting U.S. workers, I find that Respondent's unlawful rejection of one U.S. worker in January 2019 is not a "substantial" violation of the regulation and does not support Employer's debarment in this case. Back wages have been ordered to make the single U.S. worker whole and there is no evidence that Respondent has a history of otherwise rejecting qualified U.S. workers. Considering the factors set forth in Section 501.19, I find that debarment is not warranted under the circumstances. *See* 29 C.F.R. § 501.20(d)(2).[38]

ORDER

IT IS ORDERED that Respondent, A & M Labor Management, pay $22,340.21[39] to the United States Department of Labor for violations of the Migrant and Seasonal Agricultural Workers' Protection Act and the Immigration and Nationality Act, with such payment to be received by the Wage and Hour Division no later than 30 days from the date this Decision and Order is final.

SO ORDERED:

STEPHEN R. HENLEY
Chief Administrative Law Judge

[38] Regarding Respondent's statute of limitations argument, I note the Notice of Debarment was issued on December 15, 2020. Respondent rejected Mr. Michel in January 2019, within the two-year period contemplated by the regulations. Accordingly, I find no violation of the limitations period.

[39] Of the total amount owed, $16,380.20 is for civil money penalties and $5,960.01 is for back wages owed to Wilson Michel.

NOTICE OF APPEAL RIGHTS: To appeal that part of the decision involving the MSP, you must file a Petition for Issuance of a Notice of Intent to modify or vacate that is received by the Administrative Review Board ("Board") within twenty (20) days of the date of this decision. *See* 29 C.F.R. §§ 500.263 and 500.264. Any party seeking review of that part of the decision involving the INA, including judicial review, must file a Petition for Review with the Board within thirty **(**30) days of the date of this decision. 29 C.F.R. §§ 501.42.

At the time you file the Petition(s) with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges. *See* 29 C.F.R. § 500.264(b).

If the Board declines to modify or vacate the administrative law judge's decision, then the decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 500.262(g). 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 has become mandatory for parties represented by counsel. Parties represented by counsel must file an appeal by accessing the eFile/eServe system (EFS) at https://efile.dol.gov/ EFILE.DOL.GOV.

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 with the Board.

<u>You are still responsible for serving the notice of appeal on the other parties to the case and for attaching a certificate of service to your filing.</u> If the other parties are registered in the EFS system, then the filing of your document through EFS will constitute filing of your document on those registered parties. Non-registered parties must be served using other means. Include a certificate of service showing how you have completed service whether through the EFS system or otherwise.

Filing Your Appeal by Mail

Self-represented (pro se) litigants 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.