In the Matter of:

ADMINISTRATOR, WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,	**ARB CASE NO. 12-070**
	ALJ CASE NO. 2011-MSP-003
PROSECUTING PARTY,	**DATE: December 12, 2013**

v.

ROBERT W. ZAHARIE,

and

ALPHA SERVICES, LLC,

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

***For the Respondents*:**
J. Larry Stine, Esq.; Ray Perez, Esq.; and Jeremy Cole, Esq.; *Wimberly Lawson Steckel Schneider & Stine, P.C.*, Atlanta, Georgia

***For the Assistant Secretary of Labor for Occupational Safety and Health*:**
M. Patricia Smith, Esq.; Jennifer S. Brand, Esq.; Paul L. Frieden, Esq.; and Sarah Kay Marcus, Esq.; *United States Department of Labor*, Washington, District of Columbia

BEFORE: Paul M. Igasaki, *Chief Administrative Appeals Judge*; E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; and Luis A. Corchado, *Administrative Appeals Judge*

FINAL DECISION AND ORDER

This case arises under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), 29 U.S.C.A. §§ 1801 et seq., (Thomson Reuters 2009), and its implementing

regulations at 29 C.F.R. Part 500 (2012). The issue identified in the Notice of Intent to Review is "[w]hether the ALJ properly concluded that a truck Respondents modified may be classified as a bus for purposes of determining if, under the MSPA and its implementing regulations, a farm labor contractor [Respondents Robert W. Zaharie and Alpha Services LLC] may transport agricultural workers in the vehicle while a trailer is attached to it." In a Decision and Order issued April 24, 2012 (D. & O.), the presiding Administrative Law Judge (ALJ) concluded that the vehicles in question constitute buses under the applicable regulations. The Administrative Review Board (ARB) reverses the ALJ and orders imposition of the civil money penalties assessed by the Administrator of the Department of Labor's Wage and Hour Division, having concluded, for the reasons that follow, that the vehicles in question are appropriately classified as trucks, and not buses.

BACKGROUND AND PROCEEDINGS BELOW

Alpha Services LLC (Alpha) is a company that engages in tree planting and related services throughout the Southern and Western United States. Robert Zaharie is Alpha's owner. Alpha employs seasonal and migrant workers to perform various tasks and is subject to the MSPA. It acquired pick-up trucks that it modified by attaching passenger compartments (referred to as "crew carriers") to the trucks' beds. The crew carriers were bolted or chained to the truck beds and provided cover, seating, windows, safety belts, and emergency exits. Alpha transported workers in these modified trucks while also towing trailers containing gear and equipment. Respondent's Answers to Plaintiff's First Set of Discovery at 6-7; D. & O. at 4.

Between September 10, 2007, and April 1, 2010, the Wage and Hour Division investigated Alpha's worksites. On August 17, 2010, it determined that Alpha had violated three separate MSPA regulations. Relevant to this case is Wage and Hour's determination that Respondents violated 29 C.F.R. § 500.105(b)(2), which prohibits employers from transporting workers in trucks with an attached trailer. That violation is the only one at issue in this case.[1] Wage and Hour assessed civil money penalties against Alpha totaling $800 for "fail[ing] to provide safe transport vehicles." Alpha objected to Wage and Hour's findings and requested an ALJ hearing.

While the case was pending before the ALJ, the parties stipulated to the structure and function of the vehicles, but disputed whether the vehicles were "trucks" or "buses" for purposes of the MSPA regulations. D. & O. at 2. The parties agreed that if the vehicles were buses,

[1] Wage and Hour also determined that Alpha failed to include its Employer Identification Number on workers' pay stubs and informed workers about jobs to which they might be assigned without advising them of the wage rates for those jobs, in violation of 29 C.F.R. §§ 500.80(d) and 500.75(b), respectively. While the case was pending before the ALJ, the parties stipulated to resolution of the disputes regarding these violations, and the ALJ ordered Respondents to pay $500.00 in civil money penalties for failure to disclose wage rates under 29 C.F.R. § 500.75(b). D. & O. at 3. The ALJ's order that Alpha pay the $500.00 civil money penalty is not challenged on appeal to the ARB.

Alpha would be allowed to transport workers in the vehicles with an attached trailer. The parties agreed to forego a hearing, and the ALJ directed the parties to submit briefs because "there remained no disputed facts" and "the issues could be decided as a matter of law." *Id*. at 3. On April 24, 2012, the ALJ issued a D. & O. in which he concluded that "[t]he vehicles Respondents used to transport workers were buses under the applicable regulations," and therefore "Respondents could lawfully use them with an attached trailer." *Id*. at 5. The Wage and Hour Administrator petitioned the ARB to review the ALJ's ruling.

JURISDICTION AND STANDARD OF REVIEW

The Administrative Review Board (ARB) has jurisdiction over this appeal pursuant to the MSPA and its implementing regulations. *See* 29 C.F.R. § 500.263, and Secretary's Order No. 2-2012, Delegation of Authority and Assignment of Responsibility to the Administrative Review Board, 77 Fed. Reg. 69378 (Nov. 16, 2012) (delegating to the ARB the Secretary's authority to issue final orders under, inter alia, the MSPA). In addressing the legal issues before us, under the Administrative Procedure Act, the ARB has plenary power to review an ALJ's legal conclusions de novo. *Gonzales v. Administrator*, ARB No. 04-178, ALJ No. 2002-MSP-005 R&P, slip op. at 2 (ARB Mar. 29, 2007); *In re Zappala Farms*, ARB No. 01-054, ALJ No. 1997-MSPA-009-P, slip op. at 6 (ARB Aug. 29, 2001). *See* 5 U.S.C.A. § 557(b) (Thomson/West Supp. 2013).

DISCUSSION

The MSPA requires farm labor contractors, agricultural employers, and agricultural associations, who recruit, solicit, hire, employ, furnish, transport, or house migrant and seasonal agricultural workers, as well as providers of migrant housing, to meet certain minimum requirements designed to assure the health and safety of those workers. The MSPA further requires that any vehicle used by a farm labor contractor, agricultural employer, or agricultural association to transport migrant or seasonal agricultural workers comply with regulations promulgated by the Secretary of Labor. *See* 29 U.S.C.A. § 1841(b). Those regulations include restrictions on the vehicles that may be used to transport such workers. The Secretary's regulations state, in relevant part, that "[w]orkers may be transported in or on only . . . [a] bus, [or] a truck with no trailer attached . . . ." 29 C.F.R. § 500.105(b)(2)(ix). The MSPA regulations do not define the terms "bus" or "truck." Nevertheless, as we explain below, we find that the undisputed fact that the vehicles are trucks with passenger compartments ("crew carriers") attached is determinative in resolving the question whether the vehicles in question constitute "buses" or "trucks" within the meaning of the MSPA regulations.[2]

[2] D. & O. at 4. *See also* Declaration of Robert Zaharie in Support of Respondents' Brief on the Pleadings, and Respondents' Answers to Plaintiff's First Set of Discovery, Answer to Interrogatory Number 7 (Plaintiff's Trial Exhibit 10, pp. 93-94).

The ALJ held that Alpha's vehicles were buses under the MSPA because the company "modified the vehicles precisely to convert their primary use from transporting property to transporting passengers." D. & O. at 4. According to the ALJ, determinative of the classification is the purpose and primary use of the vehicle as currently configured. Citing the definitions of "bus" and "truck" found in the Department of Transportation (DOT) regulations published at 49 C.F.R. Part 398,[3] the ALJ concluded that "[t]he definitions focus on whether the purpose of the vehicle is to transport passengers on one hand or property on the other." *Id*.

Challenging the ALJ's decision on appeal to the ARB, the Administrator argues that it is "the purpose of a vehicle as initially designed and constructed, not as modified or actually used," that is controlling. Administrator's Opening Brief at 6. Based on the regulatory definition of bus and truck found in the DOT regulations, at 49 C.F.R. § 398.1(e) and (f), the Administrator argues that "the ALJ's focus on how Alpha Services modified and used the vehicles rather than the use for which they were intended was misplaced." *Id*. at 6-7. In support, the Administrator cites a Wage and Hour advisory memorandum interpreting "designed" to mean "actions taken by the original manufacturer of the vehicle" rather than "[a]ftermarket modifications or alterations." *Id*. at 7-8 (citing Wage & Hour Advisory Memorandum No. 2006-1, *Guidance on MSPA Vehicle Safety Standards*, at 4 (Mar. 1, 2006)). Given that the vehicles in question were originally designed and constructed as pick-up trucks meant primarily to transport property, and only later altered to transport passengers, the Administrator argues that the ALJ committed reversible error in holding that the vehicles were buses.

Respondents' primary argument is that the vehicles in question are buses, and not trucks, within the meaning of MSPA's regulation at 29 C.F.R. § 500.105(b)(2)(ix).[4] Respondents admit

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[3] In turning to the DOT regulations found at 49 C.F.R. Part 398, the ALJ correctly noted that the Department of Labor has adopted these regulations in key respects. *See* 29 C.F.R. §§ 500.101(d), 500.105(b); *see also* 48 Fed. Reg. 15800, 15802 (Apr. 12, 1983). Under the DOT regulations, the following definitions relied upon by the ALJ are found:

> "Bus" means any motor vehicle designed, constructed, and used for the transportation of passengers: Except passenger automobiles or station wagons other than taxicabs.
>
> "Truck" means any self-propelled motor vehicle except a truck tractor, designed and constructed primarily for the transportation of property.

49 C.F.R. § 398.1(e), (f).

[4] On appeal Respondents raise for the first time the argument that if the vehicle in question is not found to be a bus, it nevertheless should be treated as a station wagon which Respondent argues is not prohibited under the MSPA regulations from pulling a trailer while transporting workers. Given that the issue before us is exclusively whether the vehicle that Respondents modified constitutes a truck or a bus, we do not address this argument. We consider another argument raised by Respondents, that endorsing the Administrator's position could lead to the legally sanctioned

that the vehicles in dispute were not originally designed to transport passengers. According to Respondents, "[t]he motor vehicles utilized were originally designed as trucks, meaning a self-propelled motor vehicle, except a truck tractor, designed and constructed primarily for the transportation of property, and was modified through construction into a bus, meaning a motor vehicle used for the transportation of passengers . . . . " Respondents' Answers to Plaintiff's First Set of Discovery, Answer to Interrogatory No. 7. Acknowledging the applicability of the DOT's definitions found at 49 C.F.R. § 398.1 in light of the lack of definition under the MSPA regulations, Respondents nevertheless argue, "nowhere in [the definitions at 49 C.F.R. § 398.1] does it exclude a truck from the potential of being characterized as a bus where the truck in fact is being used to transport passengers." Respondent's Responsive Brief at 10. Respondent further argues that "[a] clear reading of these unambiguous definitions demonstrate that a truck falls under the definition of a motor vehicle whether it transports passengers or property, and qualifies as a bus any motor vehicle when it is being used for the transportation of passengers." *Id*.

As previously noted, 29 C.F.R. § 500.105(b)(2)(ix) provides, in relevant part, that migrant and seasonal agricultural workers "may be transported in or on only . . . [a] bus, [or] a truck with no trailer attached . . . ." In light of the fact that the MSPA regulations do not expressly define the terms "bus" and "truck," it is reasonable to turn to the DOT regulation definitions of "bus" and "truck" as useful guidance in interpreting the terms as used in the regulations implementing the MSPA. Nevertheless, canons of statutory construction require that we first examine the MSPA regulations for definitional meaning before turning to the DOT definitions.

We begin with the statutory canon of construction that statutory context matters.[5] We note that in regulating the transportation of migrant agricultural workers to specific types of motor vehicles the MSPA regulations expressly require that "[e]very motor vehicle transporting passengers, other than a bus, shall have a passenger compartment meeting the requirements [specified in the subsection]." 29 C.F.R. § 500.105(b)(3)(vi).[6] Construing "bus" as used in

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practice of hauling workers in buses with roofs and seating removed, speculative and unsupportable under the safety regulations governing this case. Furthermore, to be clear, we do not address whether it would have been lawful to transport workers in the modified truck in this case if the trailer was not attached. (*See, e.g.,* 49 C.F.R. § 500.105(3)(vi) (minimum passenger compartment compliance requirements for vehicles other than buses)).

[5] The statutory canon of construction *noscitur a sociis*, or "it is known by its associates," instructs "that the meaning of an unclear word or phrase should be determined by the words immediately surrounding it." Black's Law Dictionary 1087 (8th ed.2004); *see also Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1014 (6th Cir.1997). "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989).

[6] The passenger compartment requirements of subsection 500.105(b)(3)(vi) encompass, among other things, standards governing compartment flooring, siding, seating, protection from weather,

subsection 500.105(b)(2)(ix) with the term as used in subsection 500.105(b)(3)(vi), logic and common sense dictate that the term "bus" must refer to one category of vehicles in both subsections that differs from a "truck" in those same subsections. A motor vehicle that has been modified by the addition of a passenger compartment to transport passengers is not a bus; for if it were a bus, it would not need to add a passenger compartment as contemplated by 29 C.F.R. § 500.105(b)(3)(vi).

There is no dispute but that the vehicles at issue are trucks that Respondents have modified by adding a "crew carrier" passenger compartment for the specific purpose of transporting migrant workers. Presumably, Respondents added the passenger compartment in compliance with subsection 500.105(b)(3)(vi), which does not apply to buses but does require that a truck have a passenger compartment meeting specific standards if it is used to transport passengers. It is illogical to say that adding a passenger compartment to comply with subsection 500.105(b)(3)(vi) then transforms Respondents' pickup truck into a "bus" for purposes of subsection 500.105(b)(2)(ix). Accepting this rationale would make 29 C.F.R. § 500.105 unmanageable and absurdly cyclical. Because a bus would not need to comply with the passenger compartment requirements of subsection 500.105(b)(3)(vi), we consider the conclusion inescapable that the vehicles at issue are not buses, but trucks. We thus reject Respondents' argument that adding the passenger compartment transformed its pickup trucks into buses within the meaning of the MSPA regulations.

This cyclical result of Respondents' rationale demonstrates that the Administrator's focus on the original design of the vehicle makes sense when enforcing the provisions of 29 C.F.R. § 500.105. As previously noted, in urging that the vehicles at issue are trucks, and not buses, the Administrator relies upon a Wage and Hour Advisory Memorandum interpreting "designed" as used in 49 C.F.R. §§ 398.1(e) and (f) to mean "actions taken by the original manufacturer of the vehicle" rather than "[a]ftermarket modifications or alterations." We find this interpretation is both reasonable and necessary to sensibly enforce the expressed and implied provisions of the MSPA regulations governing the transportation of migrant and seasonal agricultural workers.

The DOT definitions of "bus" and "truck" found at 29 C.F.R. §§ 398.1(e) and (f), the Administrator asserts, indicate that it is not the current use of a vehicle or the purpose to which it is employed that determines its classification. Rather, it is the purpose and use for which the vehicle was originally designed that is controlling. The fundamental canon of statutory construction dictating that "unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning,"[7] supports the Administrator's position.

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gates, doors, hand holds, ladders, steps, emergency exits, and means for enabling passengers to communicate with the driver.

[7] *Perrin v. United States*, 444 U.S. 37, 42 (1979). *See also Crawford v. Metro. Gov't of Nashville & Davidson Cnty.*, 555 U.S. 271, 276 (2009); *Russello v. United States*, 464 U.S. 16, 21 (1983).

The operative words in the definitions of both "bus" and "truck" found at 29 C.F.R. § 398.1(e) and (f) are "*designed and constructed.*" Since neither term is defined under 29 C.F.R. Part 398, we turn to dictionary definitions to determine their "ordinary, contemporary, common meaning."[8] The definition of "design" found in Webster's Unabridged Dictionary (2nd ed. 2001) includes: "to prepare the preliminary plans for (a work to be executed), esp. to plan for the form and structure of," "to intend for a definite purpose," "to plan and fashion the form and structure of an object." Webster's Third New Int'l Dictionary (1993) defines "design" as "to conceive and plan out," "to plan or have in mind as a purpose," "to devise or propose for a specific function," "to create, plan, or calculate for serving a predetermined end." The Oxford English Dictionary (2nd ed. 1989) defines "design" to include, inter alia, "a plan . . . conceived . . . and intended for subsequent execution." Correspondingly, "construct" is defined in Webster's Unabridged Dictionary as "to build or form by putting together parts." The relevant definition of "construct" found in Webster's Third New Int'l Dictionary includes "to form, make, or create by combining parts or elements." The Oxford English Dictionary is to the same effect: "to make or form by fitting the parts together; to frame, build, erect."

Under the foregoing definitions, Respondents' argument that their vehicles are "designed and constructed" as buses because of the modifications they made to the vehicles is unavailing. Webster's Third New Int'l Dictionary defines "modify" as "to make minor changes in the form or structure . . . without transforming," "to change the form or properties of for a definite purpose."[9] Under the foregoing definitions the modifications Respondents made upon which they rely can at best be equated with the common definition of the term "constructed." Yet, it is not enough that the vehicles in question be "constructed" for a particular purpose or use. To meet the definition of a "truck" or a "bus," the DOT regulations expressly require that the vehicles also be "designed" for that same particular purpose or use. The conjunction "and" as used in the DOT definitions of "bus" and "truck," rather than "or," defeats any argument that the word "constructed" within the terms' definitions can be considered separate and apart from the word "designed." Thus, based on the "ordinary, contemporary, common meaning" of the terms cited above, we find that the words "designed and constructed" suggest a unity of action related to the vehicles in question and logically point to the vehicle's original conception, design, and construction. Consequently, in construing together the two operative terms "designed and constructed" within the DOT definitions found at 49 C.F.R. §§ 398.1(e) and (f) to determine the terms' "ordinary, contemporary, common meaning," we necessarily must consider what was

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[8] Where no statutory or regulatory definitions exist, courts will refer to dictionary definitions for guidance in discerning the meaning of a statute's or regulation's language. *See, e.g., Cler v. Ill. Educ. Ass'n*, 423 F.3d 726, 731 (7th Cir. 2005); *Cleveland v. City of L.A.*, 420 F.3d 981, 989 (9th Cir. 2005); *United States v. Edward Rose & Sons*, 384 F.3d 258, 263 (6th Cir. 2004).

[9] Webster's Unabridged Dictionary is to the same effect: "to change somewhat the form or quality of; alter partially; amend." Similarly, The Oxford English Dictionary defines "modify" as "to make partial changes in; to change (an object) in respect of some of its qualities; to alter or vary without radical transformation."

contemplated at the time the vehicle was originally conceived and manufactured, and not any modifications made afterwards.[10]

The DOT regulations indicate that to qualify as a bus, a vehicle must be "designed, constructed, and used for the transportation of passengers." 49 C.F.R. § 398.1(e). A vehicle that is only used, but not originally designed and constructed, to transport passengers does not meet this DOT definition. Here, the vehicles were originally conceived of, planned for use as, and manufactured as trucks. The record indicates that Respondents' vehicles were originally designed and constructed primarily for the transportation of property. On this point there is no dispute. Respondents' subsequent modification of the vehicles does not change this fundamental fact. The vehicles were originally "designed and constructed" as trucks within the meaning of the DOT regulations. Thus, to the extent the DOT definitions provide guidance in interpreting the terms "truck" and "bus" as used in 29 C.F.R. § 500.105(b)(2)(ix), they support both the Administrator's reliance upon the Wage and Hour Advisory Memorandum interpretation of the DOT's definitions found at 49 C.F.R. §§ 398.1(e) and (f) and our conclusion that Respondents' vehicles are trucks within the meaning of the MSPA regulations. The ALJ thus erred as a matter of law by concluding that Respondents' vehicles are buses.

CONCLUSION

Based on the record before us, we conclude that Respondents' vehicles at issue constitute trucks under the MSPA within the meaning of 29 C.F.R. § 500.105(b)(2)(ix). We therefore **REVERSE** the ALJ's Decision and Order, and reinstate the Wage and Hour Administrator's assessment of civil money penalties against Respondents in the amount of $800.00.

SO ORDERED.

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge

[10] *Accord U.S. v. Gravel*, 645 F.3d 549, 551 (2d Cir. 2011) (interpreting the term "designed" as found in 26 U.S.C. § 5845(b) by applying its ordinary and common meaning in the absence of statutory definition).