ARB No. 2023-0040

ADMINISTRATIVE REVIEW BOARD
UNITED STATES DEPARTMENT OF LABOR

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

v.

LUCERO POOL PLASTER, INC.,
Respondent.

On Appeal from the
Office of Administrative Law Judges
ALJ No. 2019-TNE-00011

ADMINISTRATOR'S REPLY BRIEF

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In her opening brief, the Administrator ("Administrator") of the Wage and Hour Division ("WHD") argued that the Administrative Law Judge ("ALJ") erred in concluding that the preferential treatment of H-2B workers by Lucero Pool Plaster, Inc. ("Lucero"), though willful, was not a significant deviation of the terms and conditions of the H-2B program. The Administrator further argued that the ALJ erred in reducing CMPs for violations for which back wages were owed based on an application of the factors in 29 C.F.R. 503.23(e) and based on the size of Lucero's business. The Administrator raised additional errors in the ALJ's

conclusion that per-location CMPs for Lucero's placement of workers outside the area of intended employment was unreasonable, his reduction of all CMPs on the basis of a lack of a previous history of violations, and his reduction of the period of debarment from three years to the minimum one year.

In its response brief, Lucero raises objections to the Administrator's statement of facts and counterarguments to all of the Administrator's arguments. Lucero's arguments do not defeat the Administrator's arguments, and only a few of them merit further discussion.

I. Lucero Does Not Establish Any Error in the Administrator's Statement of Facts.

Lucero broadly objects to the Administrator's statement of facts as disputed, conclusory, argumentative, and/or incomplete. However, Lucero did not include any statement of facts in either its opening brief or its response brief and specifies only four discrete topics of concern related to the Administrator's statement of facts. Lucero's Resp. Br. at 10-12. None of Lucero's specific arguments establish any error in the Administrator's statement of facts.

First, Lucero objects to the Administrator's discussion of facts regarding Lucero's conduct in 2015. Lucero's Resp. Br. at 11. Lucero does not identify any fact that is incorrect, nor does Lucero point to any conflicting evidence regarding its 2015 conduct. Lucero's objection is in fact an objection to the Administrator's

use of this evidence to argue that Lucero was not entitled to a reduction of CMPs due to a lack of a history of previous violations (discussed below). Lucero does not raise any factual dispute about its conduct in 2015.

Second, Lucero objects to the Administrator's references to Lucero's "knowledge" of the requirements of the H-2B program. *Id.* It is not entirely clear to which facts this objection relates, but the Administrator referred to Lucero's "knowledge" twice in the statement of facts, when reciting that "Guzman signed Appendix B to [Lucero's 2016 and 2017 Applications for Temporary Employment Certification ("TEC")], attesting under penalty of perjury to his knowledge of and compliance with the terms and conditions of the H-2B Program," Adm'r's Opening Br. at 8. Lucero does not dispute that Guzman attested under penalty of perjury to his knowledge of the terms and conditions of the H-2B program in both 2016 and 2017, nor could Lucero dispute this given that the TECs that Guzman signed contained those exact words. JX C at 9-11; JX D at 10-12. Whether Guzman's attestations of knowledge were truthful is another matter.

Third, Lucero objects to the Administrator's discussion of the housing provided to H-2B workers. Lucero's Resp. Br. at 12. Lucero cites to the transcript and asserts that the WHD Investigator assigned to this case "determined that the terms of the arms-length housing transactions were at market rates that were fair

and reasonable." *Id.* (citing Tr. at 339-40). Lucero's contention is nowhere to be found on the cited pages. Lucero is perhaps thinking of the Investigator's determination pursuant to 29 C.F.R. 503.16(c) that the deduction for housing was reasonable. *See* PX M at 19. A finding that the cost of lodging is reasonable to permit a deduction is not equivalent to a finding that the cost is the product of an arms-length transaction at fair market value.[1]

Lucero also implies that the Administrator characterized the housing as "free," Lucero's Resp. Br. at 12, even though the Administrator included the amount that H-2B workers were charged in her statement of facts. Adm'r's Opening Brief at 9. The Investigator fully considered the rate of $200 per person per month for housing in the Chicago metropolitan region when he determined that it was a term of employment that was required to be offered to U.S. workers in job orders and advertisements. PX M at 6. Lucero does not dispute that the offer of housing at a rate of $200 per month was not advertised to U.S. workers. Lucero does not identify any factual error in the Administrator's discussion of the housing provided to H-2B workers.

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[1] In pertinent part, unlike an arms-length transaction between landlord and tenant, the reasonable cost of a deduction does not include a profit to the employer. 29 C.F.R. 531.3(b); *see* 29 C.F.R. 503.16(b) (citing 29 C.F.R. Part 531 for the permissibility of deductions). Here, the Investigator considered the fair market rent for the entire house in which H-2B workers lived. PX M at 19. The record contains no analysis of the fair market rent for each worker's share of the house.

Fourth and finally, Lucero objects to the Administrator's conclusion that Lucero failed to pay its H-2B workers for all hours worked. Lucero's Resp. Br. at 12. The Administrator's response brief provided a supplemental statement of facts relevant to this subject and rebutted Lucero's arguments regarding its worker affidavits, the different tasks performed by its U.S. workers, and the ALJ's allocation of the burdens of proof. Adm'r's Resp. Br. at 3-10, 19-28.

None of Lucero's objections show that the Administrator's statement of facts contains disputed, argumentative, incorrect, incomplete, or otherwise improper material.

II. The Evidence Demonstrates that Lucero Provided Preferential Treatment to Its H-2B Workers and that this Preferential Treatment Was a Significant Deviation.

Lucero's argument that it did not violate the prohibition against preferential treatment rests on several flawed premises. Regarding housing, Lucero contends that there is no evidence that Lucero did not offer housing to U.S. workers. Lucero's Resp. Br. at 12. But whether Lucero did or did not offer housing to the U.S. workers it employed is not the violation. The violation is that it did not indicate that it would offer housing (at whatever rate it offered) to the U.S. workers it was required to recruit as a precondition to being granted the right to hire foreign H-2B workers. *See* 29 C.F.R. 503.16(q); *Adm'r v. C.S. Lawn & Landscape, Inc.*, ARB No. 2020-0005, 2022 WL 1469015, at *6 (Apr. 4, 2022) (failure to

accurately disclose terms and conditions of job is a violation). It is undisputed that the job orders Lucero submitted to the State Workforce Agency did not indicate that it would provide housing (at $200 per person per month, or any other rate) and in fact affirmatively stated in those recruitment materials aimed at U.S. workers that housing assistance was not available. It is also undisputed that Lucero provided housing to its H-2B workers in 2016 and 2017 and charged them $200 per person per month.

Lucero argues that because it did not provide free or reduced rent housing but instead what it asserts was market rate housing, it was not inaccurate in its recruitment materials in which it stated that it would not provide housing assistance. Lucero's Resp. Br. at 19-20. There is nothing in the record to suggest that $200 per person is the market rate in the Chicago area. Even if there were, Lucero's argument rests on the proposition that its statement that it would not provide housing assistance necessarily means only that it would not provide free or reduced-rent housing. There is no basis to interpret "housing assistance" as narrowly as Lucero contends.[2] On the contrary, providing a place to live and

[2] Lucero cites several statutes relating to governmental housing assistance programs. Lucero's Resp. Br. at 19 (citing 15 U.S.C. § 2227(a)(5); 34 U.S.C. §§ 12291(a)(20), 12473(1); 42 U.S.C. §§ 1437f, 1437bbb-2, 5174). The "broadest sense," *id.*, of the term "housing assistance" extends far beyond the government's power to subsidize housing.

charging rent, even if it is market rate rent, can be a significant benefit to a worker. For example, the worker does not need to devote time to finding a rental and does not need to have money for a security deposit. And here, for 2016, the house was located next to the shop where the workers began their workday, relieving the workers of the expense, time, and inconvenience of transporting themselves between home and shop each day. Lucero's attempt to downplay the benefit that its provision of housing provided to workers rings hollow.

Lucero also argues that the opportunity to earn a higher hourly wage working even just one union job per season is not enough to matter to most workers and therefore its failure to advertise this to U.S. workers was not a significant deviation. Lucero's Resp. Br. at 20-22. As with its housing argument, the argument that additional wages are somehow not enough to be significant to many workers if the wages are in the hundreds of dollars rather than thousands rings hollow. The hourly rate associated with these union jobs was nearly three times higher than the H-2B workers' regular hourly rate. Adm'r's Opening Br. at 9, 26. Even just one day of work at $75 per hour is a significant benefit to workers who normally earn less than $28 per hour.

In sum, Lucero focuses solely on the low cost that it incurred due to these benefits and minimizes the value that these benefits provided to individual

workers. Viewed from the workers' perspective, the gravity of Lucero's preferential treatment is great enough to establish a significant deviation.

III. The Text and Structure of 29 C.F.R. 503.23 Make Clear that Paragraph (e) Applies to CMPs for Violations that Do Not Involve Back Wages.

A textualist reading of 29 C.F.R. 503.23 confirms that the factors set forth in paragraph (e) do not apply to CMPs for violations for which back wages and expenses are owed. In arguing otherwise, Lucero's Resp Br. at 22-25, Lucero ignores the overall structure of section 503.23 and the plain meaning of each paragraph within it. Textualism requires considering not just the meaning of each individual sentence in a regulation but its overall structure. *Territory of Guam v. United States*, 593 U.S. 310, 317 (2021) (analyzing the "interlocking language and structure of the relevant text" to determine its meaning); *Johnson v. Guzman Chavez*, 594 U.S. --, 141 S. Ct. 2271, 2289-90 (2021) (analyzing the statutory structure of the Immigration and Nationality Act to confirm the correct textual reading). The plain meaning of a text cannot be ascertained by examining isolated sentences. *Beecham v. United States*, 511 U.S. 368, 372 (1994) ("The plain meaning that we seek to discern is the plain meaning of the whole statute, not of isolated sentences.").

Paragraph (a) of 29 C.F.R. 503.23 authorizes the Administrator to assess CMPs for each violation found under 29 C.F.R. 503.19. It further clarifies that

each instance of a violation involving "the failure to pay an individual worker properly or to honor the terms or conditions of a worker's employment" constitutes a separate violation. Finally, it states that CMP amounts will be determined according to paragraphs (b) through (e). *Id.* 503.23(a).

Paragraph (b) of 29 C.F.R. 503.23 states that CMP amounts for violations related to wages, impermissible deductions, or prohibited fees and expenses, when assessed, "are equal to the difference between the amount that should have been paid and the amount that actually was paid to such worker(s)," (i.e., equal to the back wages assessed pursuant to 29 C.F.R. 503.20(a)), subject to the maximum allowed per violation. Paragraph (c) similarly provides that CMP amounts for violations relating to layoffs or failures to hire or retain U.S. workers, when assessed, are equal to the back wages assessed, subject to the maximum allowed per violation. *Id.* 503.23(c).

Paragraph (d) of 29 C.F.R. 503.23 states that CMP amounts for "any other violation" may be assessed "in an amount not to exceed" the maximum allowed per violation, and paragraph (e) sets out a non-mandatory list of factors that may be relevant when assessing CMPs under paragraph (d). Following paragraphs (b) and (c), "any other violation" in paragraph (d) must mean any violation other than

those covered by paragraphs (b) and (c). Thus, paragraph (e)'s factors are only for CMPs for violations other than those involving back wages and expenses.[3]

In short, the structure of section 503.23 is quite clear: paragraph (a) authorizes the assessment of CMPs; paragraphs (b) and (c) address CMPs for violations for which back wages, deductions, and expenses are assessed; and paragraphs (d) and (e) address CMPs for all other violations.[4]

The gist of Lucero's textual argument is that, even though the first sentence of paragraph (e) is explicitly limited to CMPs assessed under paragraph (d), the remaining sentences are not so limited and must therefore apply to all CMPs. Lucero's Resp. Br. at 23-24. This reading is not consistent with textualist

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[3] Before setting forth the non-mandatory factors, paragraph (e) notes that, "[i]n determining the level of penalties to be assessed, the highest penalties will be reserved for willful failures to meet any of the conditions of the *Application for Temporary Employment Certification* and *H-2B Petition* that involve harm to U.S. workers." 29 C.F.R. 503.23(e). Lucero interprets this sentence to mean that paragraph (e) applies to all violations that are substantial failures to comply with the terms and conditions attested to on the TEC or the H-2B petition (including those that involve back wages). Lucero's Resp. Br. at 24-25. Rather than an instruction to apply paragraph (e) to all willful failures, this sentence in paragraph (e) is a reminder of the statutory dictate that "the highest penalties shall be reserved for willful failures to meet any of the conditions of the petition that involve harm to United States workers," 8 U.S.C. 1184(c)(14)(C).

[4] In addition to being textually clear, the preamble to the regulations confirms that this is the intended reading. *Temporary Non-Agricultural Employment of H-2B Aliens in the United States*, 80 Fed. Reg. 24,042, 24,088 (Apr. 29, 2015) ("Section 503.23(e) sets forth the factors WHD will consider in determining the level of penalties to assess for all violations but wage violations ....").

principles. Where a party seeks to rely on the absence of limiting words in one sentence, the surrounding sentences provide relevant context that cannot be ignored. *See, e.g., Cannon v. Watermark Ret. Communities, Inc.*, 45 F.4th 137, 146 (D.C. Cir. 2022) (reading a limitation into a statutory provision where "an initial provision serves as an anchor for the ensuing provisions, identifying the class of cases relevant to them all even where the disputed provision does not reiterate the limitation"). Instead of looking to the first sentence of paragraph (e) to ascertain that the subject of paragraph (e) is CMPs assessed under paragraph (d), Lucero asks the Board to go all the way back to paragraph (a) to infer that the subject of paragraph (e) is all CMPs. Lucero's Resp. Br. at 24 (asserting that reading paragraph (e) as restricted "would contradict paragraph (a)'s language"). The reference in paragraph (a) to all of the subsequent paragraphs does not constitute any sort of command with respect to paragraph (e). The more natural reading is that paragraph (a) is generally applicable while each subsequent paragraph applies to CMPs for a specific type of violation.

Placed within the context of the overall structure of 29 C.F.R. 503.23, the plain meaning of paragraph (e) is that it permits the consideration of relevant factors for CMPs for violations other than those for which back wages are owed.

IV. Lucero's Arguments Regarding the ALJ's Consideration of Business Size as a Basis to Reduce CMPs Illustrate the ALJ's Error.

Lucero disagrees with the Administrator that the size of its business is an improper basis to reduce CMPs. However, it has raised its own objection to the ALJ's consideration of business size. Lucero's Opening Br. at 47-48. Lucero's arguments highlight why the ALJ's consideration of business size at all to reduce CMPs was problematic. Lucero complains that the ALJ should have considered its *net* revenue instead of gross but does not point to any evidence of its net revenue in the record. *Id.*; Lucero's Resp. Br. at 27-28. No such evidence was submitted because neither party anticipated that the ALJ would rely in this way on the brief mention of Lucero's gross revenue in an e-mail communication between the WHD Investigator and Lucero's attorney, JX P at 2. The ALJ's consideration of business size—whether measured by gross revenue, net revenue, capital investment, assets, number of employees, or any other dimension—was a surprise to all parties.

As the Administrator explained in her opening brief, nothing in the statute or regulations warrants reducing CMPs on the basis of business size. Adm'r's Opening Br. at 31. For this reason, the two cases on which Lucero relies are inapposite. Lucero's Resp. Br. at 26-27 (citing *Moser v. United States*, 166 F.3d 1214, 1998 WL 833714 (6th Cir. 1998) (unpublished table decision); *R&W Tech. Servs. Ltd. v. Commodity Futures Trading Comm'n*, 205 F.3d 165, 178 (5th Cir.

2000)). In *R&W*, the court noted that the Commodity Futures Trading Commission had previously concluded that, when considering sanctions for violating the Commodities and Exchange Act, the financial benefit to the violator or the loss suffered by customers were pertinent factors and that the proper measure of financial benefit to the violator was net profits, not gross revenues. 205 F.3d at 178 & nn.70, 71 (citing decisions of the Commodity Futures Trading Commission). *Moser* is even further afield. The Sixth Circuit concluded that the government's two-percent tax on money earned from illegal betting was not an excessive fine prohibited by the Eighth Amendment. 1998 WL 833714 at *1-2. Neither case has any bearing on assessing CMPs for violating a program that permits employers to import foreign workers as long as the employers promise to adhere to certain requirements.

Lucero further contends that consideration of revenue is necessary to ensure that a business can bear the full amount of the penalty. Lucero's Resp. Br. at 26-27.[5] Critically, however, Lucero does not contend that it cannot bear the full CMP.

[5] Lucero's citation here is inapposite. Lucero's Resp. Br. at 27 (citing *ECIMOS, LLC v. Carrier Corp.,* 479 F. Supp. 3d 730, 736 (W.D. Tenn. 2020)). *ECIMOS* concerned a civil contempt sanction, which is not punitive but coercive. 479 F. Supp. 3d at 736. Where a contempt sanction is in the form of a fine, the contemnor's financial resources are a necessary consideration to ensure that the amount of the fine achieves the intended effect of coercing compliance. *Id.* (citing *United States v. United Mine Workers of Am.*, 330 U.S. 258, 304 (1947)).

Equally critical, Lucero never argued to the ALJ that its revenue or any other measure of its business size was relevant to the CMP assessments. *See Adm'r v. Am. Truss*, ARB Case No. 05-032, 2007 WL 626711, at *4 (Feb. 28, 2007) (argument not raised before ALJ is waived).

Lastly, Lucero contends that business size is covered by the regulation at 29 C.F.R. 503.23(e)(7), which allows consideration of 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." Lucero's Resp. Br. at 27. Although section 503.23(e) does not apply to CMPs for wage-related violations, and nothing in any of the paragraphs in section 503.23 indicate that business size is a relevant favor, the Administrator observes that Lucero would fare poorly under this analysis. Lucero's financial gain from retaining the wages it should have paid to its H-2B workers—over $300,000—was significant.

Lucero's arguments only illustrate that business size was an improper consideration here, and the Board should reverse the ALJ's 50 percent reduction of the CMP assessed for Lucero's failure to pay the offered wage for all hours worked.

V. Lucero Misunderstands the Administrator's Arguments Regarding the Relevance of Its Conduct in 2015 as a Basis for Reducing the CMP Assessments.

To counter the Administrator's argument that the ALJ erred in reducing CMPs for a lack of history of violations, Lucero contends that the Administrator argued in her opening brief that "evidence of mere conduct is evidence of a history of violations." Lucero's Resp. Br. at 35. But that is not the Administrator's argument. The Administrator argued that there is no basis to reduce CMPs for a lack of history violations because a lack of history of violations does not necessarily mean that the employer was in compliance. The lack of history of violations in this case shows only that WHD did not investigate the employer before. Adm'r's Opening Brief at 41. By contrast, for example, a reduction might be warranted if WHD had previously investigated the employer and found no violations. But that is not the case here.

The Administrator pointed to Lucero's conduct in 2015 because it illustrates this point. While WHD's investigation into Lucero's conduct in 2016 and 2017 did not determine whether Lucero committed H-2B violations in 2015, the facts revealed that Lucero engaged in the same violative practices in 2015. Adm'r's Opening Br. at 39-40. These facts, which Lucero does not dispute, undermine the ALJ's conclusion that CMPs should be decreased for a lack of history of violations.

VI. Lucero's Arguments that the Administrator's Notice of Determination Was Insufficient Are No More Convincing in Its Response Brief than in Its Opening Brief.

As in its opening brief, Lucero contends that various findings were missing and required to be included in the Administrator's Notice of Determination pursuant to 29 C.F.R. 503.42(a)(5) and due process requirements. Lucero's Resp. Br. at 11, 13, 24, 31, 32, 38. As the Administrator has previously explained, a notice of violations is sufficient when it apprises the employer of the issues in controversy without being misleading. Adm'r's Resp. Br. at 47. And due process is satisfied when the employer has the opportunity to defend itself at the ALJ hearing without any prejudice in the proceeding due to the allegedly deficient notice. *Id.*

As in its opening brief, Lucero's arguments on notice do not provide a basis to undermine the Administrator's position. The Administrator's Notice adequately informed Lucero of the reasons for finding violations and imposing debarment. JX A at 2-3. Lucero had every opportunity to contest those reasons and present the evidence in its favor at the hearing.

CONCLUSION

For the foregoing reasons, the Administrator respectfully requests that the Board reject Lucero's arguments and grant all relief requested in the Administrator's opening and response briefs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Administrator's Reply Brief was served on February 1, 2024, via email and via the Department's eFile/eServe system on each attorney who has appeared in this case and is registered for electronic filing.

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