ARB No. 2023-0025

ADMINISTRATIVE REVIEW BOARD
UNITED STATES DEPARTMENT OF LABOR

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

v.

A&M LABOR MANAGEMENT, INC.
Respondent.

On Appeal from the
Office of Administrative Law Judges
ALJ Nos. 2022-MSP-00002 & 2022-TAE-00004

ADMINISTRATOR'S REPLY BRIEF

ELENA GOLDSTEIN
Deputy Solicitor of Labor

JENNIFER S. BRAND
Associate Solicitor

SARAH KAY MARCUS
Deputy Associate Solicitor

RACHEL GOLDBERG
Counsel for Appellate Litigation

SEJAL SINGH
Attorney
U.S. Department of Labor
Office of the Solicitor
200 Constitution Ave., N.W.
Room N-2716
Washington, D.C., 20210
(202) 693-4122

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ADMINISTRATOR'S REPLY BRIEF

In her opening brief, the Principal Deputy Administrator ("Administrator") explained that the Migrant and Seasonal Agricultural Worker Protection Act's ("MSPA") statutory and regulatory text, structure, and purpose all demonstrate that a farm labor contractor commits a separate violation of law for each worker whom the contractor transports without first obtaining legally-mandated insurance coverage. Opening Br. at 11−17. In its reply, A&M Labor Management, Inc. ("A&M") concedes the foundational principles of the Administrator's argument.

A&M does not dispute that separate violations of law warrant separate penalties, *see* Opening Br. at 11−12, and A&M acknowledges that what constitutes a separate violation is a matter of statutory or regulatory interpretation, Resp. Br. at 6−7. A&M also declined to defend the ALJ's novel "single mistake" theory: A&M's brief does not dispute that an employer may commit separate violations of law, meriting separate penalties, through a single unlawful act or omission. *See* Opening Br. at 17−23 (explaining why this theory is out-of-step with Board precedent).

Because A&M did not take issue with these well-settled principles of law, only one question remains: whether MSPA's transportation insurance requirement and its implementing regulations permit per-worker violations and corresponding civil money penalties ("CMPs"). As explained in the Administrator's opening brief, MSPA's insurance scheme, read as a whole, creates an independent legal duty that A&M owed to each of its individual workers. A&M's failure to satisfy that legal duty gave rise to an independent violation of law for each worker whose rights were violated. None of the arguments that A&M advances allow it to escape the plain language of the statute and regulations.

1. A&M focuses narrowly on 29 C.F.R. § 500.121(a) to argue that this regulation creates a discrete legal duty to obtain insurance for each vehicle, rather than a legal duty to provide insurance to each worker. Resp. Br. at 6−7. Read in

isolation, 29 C.F.R. § 500.121(a)'s requirement that employers "obtain a policy of vehicle liability insurance" might reasonably bear that meaning. But A&M's proposed construction of 29 C.F.R. § 500.121(a) overlooks key pieces of the statutory and regulatory text, ignores the rest of the very regulation on which A&M exclusively relies, and is inconsistent with MSPA's statutory scheme and regulatory structure.

First, A&M's construction of 29 C.F.R. § 500.121(a)−(b) is untenable when read in light of MSPA's text and overall scheme. A&M's initial mistake is overlooking the statutory language. *See Bartenwerfer v. Buckley*, 143 S. Ct. 665, 671 (2023) ("[W]e start where we always do: with the text of the statute"). As the Administrator explained in her opening brief, Opening Br. at 12−14, the statute requires farm labor contractors, agricultural employers, and agricultural associations to provide safe motor vehicle transportation—including by securing insurance coverage for passengers—for "any migrant or seasonal worker" whom an employer transports in an employer-controlled vehicle. 29 U.S.C. § 1841(a)(1); *see also id.* at § 1841(b)(1)(C) (requiring farm labor contractors to obtain insurance against liability for injury to "persons").[1] 29 C.F.R. § 500.120 implements section 1841 by requiring a farm labor contractor to obtain insurance for "any migrant or

[1] Because A&M is a farm labor contractor, the rest of this reply references MSPA's requirements in terms of farm labor contractors only.

seasonal agricultural worker" before transporting them in a vehicle. It is undisputed that A&M violated that legal duty for eight separate workers who were in a 2018 vehicle accident.

A&M's blinkered focus on 29 C.F.R. § 500.121(a) is also inconsistent with the regulatory structure and MSPA's overall scheme. MSPA's insurance provisions provide contractors with options to satisfy the insurance requirement. A farm labor contractor may satisfy MSPA's insurance requirement by obtaining vehicle liability insurance which "covers the workers while being transported." 29 C.F.R. § 500.121(a), (e); *see also* 29 U.S.C. § 1841(b)(1)(C). Alternatively, a contractor may satisfy its obligation to any one of its MPSA-covered workers by providing "workers' compensation coverage for such worker." 29 U.S.C. § 1841(c); *see also* 29 C.F.R. § 500.122(a). Thus, the 29 C.F.R. § 500.121(a) vehicle insurance requirement is not an standalone duty: it is one of multiple options that flows from a contractor's legal duty to obtain insurance for each individual worker transported in its vehicles. These interlocking provisions must be read together, rather than in isolation. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132−33 (2000) (explaining that statutory and regulatory language "must be read in their context" and "with a view to their place in the overall statutory scheme.") As the Administrator's opening brief details, all of these provisions speak consistently in terms of obligations owed to individual

workers. Opening Br. at 12−14. The text of the insurance regulations, read together, shows that MSPA imposes a duty on each covered contractor to provide insurance for the benefit of *any* individual worker being transported in that contractor's vehicle. *Id.* A&M does not contend with any of these statutory or regulatory provisions, or even cite them in its brief.

Second, A&M's argument focuses entirely on 29 C.F.R § 500.121(a), but ignores other text in that very same regulation showing that MSPA's insurance requirement creates separate duties owed to each covered worker. Paragraph (e) explains that vehicle liability insurance must "cover[] the workers while being transported," *id.* at § 500.121(e), and paragraph (d) makes clear that the vehicle liability insurance must insure against liability for "personal injury to employees whose transportation is not covered by worker's compensation," *id.* at § 500.121(d); *see also* 29 U.S.C. § 1841(b)(1)(C) (requiring farm labor contractors to obtain insurance against liability for injury to "persons").[2]

[2] Although A&M argues that language in paragraph (b) of section 500.121 as supporting its argument, that paragraph also supports the Administrator's position. Paragraph (b) sets the amount of vehicle liability coverage a contractor must have per seat in the vehicle. A&M seems to suggest that this per-seat requirement somehow supports its argument that its legal duty to obtain insurance is only for each vehicle rather than each worker. Resp. Br. at 6. But, as the Administrator explained in her opening brief, this requirement shows that the duty to provide insurance is tied to the individual workers being transported (*i.e.*, the contractor must provide insurance to cover the individual workers who would sit in an individual seat in the vehicle). Opening Br. at 13−14.

Third, A&M's argument that the relevant duty is merely to insure "each *vehicle*," rather than each worker, Resp. Br. at 6, cannot be squared with MSPA's workers' compensation option. 29 U.S.C. § 1841(c); 29 C.F.R. § 500.122(a). Congress expressly provided that farm labor contractors could meet their insurance obligations by securing workers' compensation coverage, rather than vehicle insurance. To the extent that A&M is arguing that its only obligation was only to obtain vehicle liability insurance, then MSPA's workers' compensation provision would do no work. *See Torres v. Lynch*, 578 U.S. 452, 462 n.8 (2016) (explaining that statutory language "cannot be meaningless, else they would not have been used."). The Administrator's reading of the statute gives both provisions meaning: A&M's primary legal obligation to provide insurance for all workers being transported in a motor vehicle, 29 C.F.R. § 500.120, and the regulations provide several options that allow A&M to meet that duty owed to each worker.

Workers' compensation coverage is, by its nature, per-worker coverage. It would be non-sensical for Congress to provide employers with two options for satisfying the same obligation, but provide that one option protects individual workers (the workers' compensation option) while the other does not (the vehicle policy option). The more sensible interpretation is that MSPA's insurance scheme consistently requires farm labor contractors to obtain insurance to cover each individual worker who is being transported, and thereby creates legal duties owed

to workers regardless of which option a contractor uses to satisfy the obligation. *See Brown & Williamson*, 529 U.S. at 133 (explaining that statutes should be interpreted "as a symmetrical and coherent regulatory scheme," fitting "all parts into an harmonious whole.") [3]

A&M's cramped reading of the regulation is especially incongruous with the facts of this case. A&M's argument relies exclusively on the vehicle liability option at 29 C.F.R. § 500.121—when it is undisputed that A&M chose not to meet its MSPA insurance requirements by using that option. Rather, A&M chose to use the workers' compensation option at 29 C.F.R. § 500.122, then failed to obtain workers' compensation for eight of its MSPA-covered workers. D.O. at 5, 11. Notably, A&M does not even attempt to argue that MSPA's workers' compensation option does not create legal duties owed to each MSPA-covered worker. Nor could they: 29 C.F.R. § 500.122's text speaks in terms of duties owed to individual people, requiring a contractor who employs "a" MSPA-covered worker to obtain workers' compensation coverage for each "such worker."

2. Contrary to A&M's argument, Resp. Br. at 7−8, *Bittner v. United States*, 143 S. Ct. 713, 719−20 (2023), does not dictate the plain language meaning

[3] Additionally, A&M's construction does not contend with other sections of MSPA and its regulations which consistently speak in terms of legal duties owed to individual workers. *See* Opening Br. at 14−15.

of MSPA and its regulations. As the Administrator's Opening Brief explains, *Bittner* stands for two unremarkable principles: (1) that an entity commits a separate violation, incurring a separate penalty, each time it violates the "'relevant legal duty'" created by a statute or regulation, and (2) that defining the relevant duty is a matter of textual interpretation. Opening Br. at 21−23 (quoting *Bittner*, 143 S. Ct. at 719). In *Bittner*, the Court applied standard tools of statutory construction to identify the relevant legal duty created by a law regulating disclosure of foreign banking transactions. 143 S. Ct. at 719−20. The Court concluded that the statute created a binary legal duty to file timely reports of foreign banking transactions (rather than an independent legal duty to file accurate statements for each individual account listed in a report) because the relevant statute "does not speak of accounts or their number" and "[t]he word 'account' does not even appear" in the relevant statute. *Id.* at 719.

By contrast, MSPA's insurance provisions at 29 U.S.C. § 1841 and 29 C.F.R. §§ 500.120−.122 consistently speak in terms of duties a farm labor contractor owes to each of its covered workers. *See* Opening Br. at 14−17. As before, A&M misunderstands MSPA's statutory obligations because it overlooks the statutory and regulatory language and scheme as a whole. Here, the relevant binary duty was to provide insurance for every MSPA-covered worker while that worker was being transported in a vehicle. A&M committed a separate violation of

that statutory obligation for each worker it failed to insure. Thus, while *Bittner* is relevant in reminding us to look to the text to determine the legal duty from which separate violations and corresponding penalties flow, the language of MSPA and its regulations dictates the outcome here.[4]

Finally, A&M seeks refuge in the rule of lenity. Resp. Br. at 9. But the rule of lenity does not apply to unambiguous statutes and regulations, *see, e.g.*, *Scarborough v. United States*, 431 U.S. 563, 577 (1977), and therefore does not apply to the clear text of MSPA's insurance provision and regulations. As the federal courts have long held, appellate bodies "'should not go to extreme lengths to characterize … statutes as ambiguous when they can be read as relatively well-defined.'" *United States v. Fitzgerald*, 435 F.3d 484, 486 (4th Cir. 2006) (quoting *United States v. Benson*, 134 F.3d 787, 788 (6th Cir. 1998)). Because MSPA unambiguously required A&M to provide insurance for each of the workers that it transported, the rule of lenity does not apply here.

3. Finally, A&M proposes a novel distinction between this case and the many cases in which this Board and the federal courts have upheld per-worker

[4] A&M also takes issue with the Administrator's citation in her opening brief to several non-MSPA cases. Resp. Br. at 9−10. Of course, none of those cases is dispositive of the outcome here and the Administrator never suggested they were. Rather, they contain general principles of statutory interpretation that guide courts and this Board in determining how a statute defines a violation warranting a separate penalty.

penalties for agricultural employers. Resp. Br. at 11−15. Specifically, A&M proposes that per-worker penalties are only appropriate when a statute or regulation includes rights-creating language for workers, rather than "just duties to the employer." Resp. Br. at 12. A&M provides no authority for this claim, and its argument fails for several reasons. As explained above, MSPA's insurance provisions *do* mandate protections for individual migrant and seasonal agricultural workers. *See also* Opening Br. 12−16. And, as explained in the Administrator's Opening Brief, even MSPA provisions that do not specifically refer to legal duties owed to each individual covered worker (such as MSPA's other transportation worker-safety requirements) can involve per-worker violations when read in the context of MSPA's holistic scheme. Opening Br. at 16−17.

In any case, A&M's argument rests on an illusory distinction between laws that create new rights for workers and those that direct employers to act for the benefit of workers. The very cases that A&M relies on illustrate that statutory language imposing obligations on employers often gives rise to per-worker duties, violations, and penalties. Take, for example, federal court cases unanimously holding that MSPA's other protections for workers permit per-worker penalties. In *Fanette v. Steven Davis Farms, LLC*, 28 F. Supp. 3d 1243, 1263 (N.D. Fla. 2014), the district court assessed separate statutory penalties for each separate violation of MSPA's recordkeeping, housing, and wage payment violations per harvest season

per worker. Each statutory provision implicated in that case imposes duties on farm labor contractors using language that mirrors MSPA's insurance requirement. For example: 29 U.S.C. § 1821 requires farm labor contractors to "disclose in writing" certain information to "each [migrant agricultural] worker" it recruits; 29 U.S.C. § 1821(d)(1) requires farm labor contractors to keep certain records "with respect to each [migrant agricultural] worker" and provide them to "each [migrant agricultural] worker"; 29 U.S.C. § 1822(a) requires farm labor contractors to pay the wages owed to "any migrant agricultural worker" when due; and 29 U.S.C. § 1823(b)(1) prohibits people who own or control housing properties from allowing "any migrant agricultural worker" to live there until the property has been certified of occupancy by a state or local health authority. Each of these statutory provisions imposes legal duties on employers—but because those obligations are owed to each of the workers who MSPA protects, federal courts routinely hold that they authorize separate per-worker penalties. *See Fanette*, 28 F. Supp. 3d at 1264; *see also Castillo v. Case Farms of Ohio, Inc.*, 96 F. Supp. 2d 578, 633−36 (W.D. Tex. 1999) (assessing separate statutory penalties for each plaintiff injured by the same or similar MSPA protections); *Garcia Gutierrez v. Puentes*, 437 F. Supp. 3d 1035, 1040−41 (D.N.M. 2020) (same); *Avila v. A. Sam & Sons*, 856 F. Supp. 763, 774 (W.D.N.Y. 1994) (same). Indeed, A&M concedes that each of these provisions

creates "personal guarantees to each of the worker[s]" employed by any given contractor. Resp. Br. at 11.

MSPA's insurance provisions are no different: they provide that farm labor contractors "shall not transport any migrant or seasonal agricultural worker" in vehicles controlled or owned by the contractor without first obtaining required insurance. 29 C.F.R. § 500.120; *see also* 29 U.S.C. § 1841(a)(1), (b)(1)(C) (when transporting "any migrant or seasonal agricultural worker" in a farm labor contractor's vehicle, the contractor shall have an insurance policy against liability for damage to "persons"); 29 U.S.C. § 1841(c) (permitting contractors to secure workers' compensation coverage for "such [migrant or seasonal agricultural] worker" instead of vehicle insurance); 29 C.F.R. § 500.121(e) (requiring contractors to have insurance "which covers the workers while being transported").

The Board has also recognized that language imposing duties on employers can give rise to per-worker penalties in the H-2A context. For example, in *Sun Valley Orchards, LLC*, ARB No. 2020-0018, 2021 WL 2407468, at *7−*8 (May 27, 2021), the Board considered an appeal from an employer that failed to disclose in a job order that it intended to deduct meal charges from H-2A workers' wages. The H-2A regulation at issue, 20 C.F.R. § 655.122(p), provides that the employer "must specify all deductions not required by law" in the job order and may only take "reasonable" deductions. If A&M's argument were correct, regulatory

language imposing a disclosure duty on the employer would only permit one violation and one CMP. But the Board squarely rejected that argument, holding that the farm committed a separate violation of the H-2A regulations for each of the 147 workers who was not informed properly of the deduction the employer took for meal charges. *Sun Valley*, 2021 WL 2407468, at *7−*8. Because the H-2A regulations impose a duty on H-2A employers to "pay each worker properly," the employer committed a separate violation of that legal duty for each worker from whom it took unlawful deductions. *Id.* at *8. Similarly, 20 C.F.R. § 655.122(a), the regulation at issue in *Washington Farm Labor Ass'n*, ARB Case No. 2021-0069, 2023 WL 3042232 (March 31, 2023), prohibits an H-2A employer from providing preferential treatment to H-2A workers over domestic workers. There, the Board upheld separate penalties for each of 207 domestic workers who was affected by a farm contractor's policy of charging housing deposits to domestic workers, but not to H-2A workers. *Id.* at *19.

Like the MSPA insurance regulation, the H-2A regulations impose duties on employers—and because employers owe those duties to their individual workers, an employer commits a separate violation each time it violates its duty to each of those workers. In fact, in 2008, the H-2A regulations were explicitly amended to codify the Administrator's practice and clarify that an employer incurs separate, per-worker penalties when it violates duties it owes to workers under the H-2A

regulations. Temporary Agricultural Employment of H-2A Aliens in the United States, 75 Fed. Reg. 6884, 6944 (Feb. 12, 2010).

Thus, A&M relies on a distinction without a difference: regulations that impose obligations on employers can and do create duties owed to each individual worker, giving rise to per-worker violations and penalties.

CONCLUSION

MSPA's text, structure, and purpose all demonstrate that an employer commits a separate violation of MSPA's insurance regulation for each worker it fails to insure before transporting them in a vehicle. Here, A&M violated its legal duties to eight separate workers, all of whom were left without coverage after a vehicle accident. The Administrator respectfully requests that the Board reverse the ALJ's Decision and Order regarding Respondents' civil money penalties assessment and reinstate the Administrator's assessment of eight separate penalties for each of A&M's eight violations.

ELENA GOLDSTEIN
Deputy Solicitor of Labor
JENNIFER S. BRAND
Associate Solicitor
SARAH KAY MARCUS
Deputy Associate Solicitor
RACHEL GOLDBERG
Counsel for Appellate Litigation

/s/ Sejal Singh
Sejal Singh
Attorney
U.S. Department of Labor
200 Constitution Avenue, N.W.
Room N-2716
Washington, D.C. 20210
(202) 693-5485
Singh.Sejal@dol.gov

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CERTIFICATE OF SERVICE

I certify that this Brief was filed using the Administrative Review Board's eFile/eServe system and that a copy was sent by email to the following individual on June 15, 2023. Counsel has consented to service by email.

Shaina Thorpe
ThorpeLaw, P.A.
shaina@thorpelaw.net
1228 E. 7th Ave., Suite 200
Tampa, Florida 33605

/s/ Sejal Singh
Sejal Singh
Attorney

U.S. Department of Labor
Fair Labor Standards Division
200 Constitution Avenue, N.W.
Room N-2716
Washington, D.C. 20210
(202) 693-5485
Singh.Sejal@dol.gov