U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

IN THE MATTER OF:

ADMINISTRATOR, WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,

PROSECUTING PARTY,

v.

GOLDSTAR AMUSEMENTS, INC. AND LEE'S CONCESSIONS, INC.,

RESPONDENTS.

ARB CASE NOS. 2024-0033
2024-0046

ALJ CASE NOS. 2021-TNE-00027,
2021-TNE-00028
ALJ STEVEN D. BELL

DATE: August 31, 2026

Appearances:

For the Prosecuting Party:
Seema Nanda, Esq., Jennifer S. Brand, Esq., Sarah K. Marcus, Esq., Rachel Goldberg, Esq., Shelley E. Trautman, Esq.; *United States Department of Labor, Office of the Solicitor*; Washington, District of Columbia

For the Respondents:
R. Wayne Pierce, Esq.; *The Pierce Law Firm, LLC*; Annapolis, Maryland

Before JOHNSON, Chief Administrative Appeals Judge, and BURRELL, Administrative Appeals Judge

DECISION AND ORDER

This case arises under the H-2B provisions of the Immigration and Nationality Act (INA),[1] as amended, and its implementing regulations.[2] On March

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[1] 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b); 1184(c)(14).

[2] 20 C.F.R. Part 655, Subpart A (2026); 29 C.F.R. Part 503 (2026).

13, 2024, an Administrative Law Judge (ALJ) issued a Decision and Order (D. & O.) finding that Respondents GoldStar Amusements, Inc. (GoldStar) and Lee's Concessions, Inc. (Lee's) violated provisions of the INA.[3] Both Respondents and the Administrator for the Wage and Hour Division (WHD) of the U.S. Department of Labor (DOL) appealed to the Administrative Review Board (Board). For the following reasons, we affirm in part, vacate and modify in part, and vacate and remand in part.

BACKGROUND

Respondent GoldStar Amusements, Inc. (GoldStar) is an amusement company that operates carnivals and fairs and is owned by Michael Featherston.[4] Respondent Lee's Concessions, Inc. (Lee's) provides food and games at carnivals and fairs and is owned by Connie Featherston, Michael Featherson's wife.[5] Both have offices in Minnesota.[6]

Respondents operate seasonally.[7] GoldStar and Lee's frequently, but not always, presented at the same shows.[8] The season typically began in February in Texas, moved north to Minnesota for the summer, and then retreated to Louisiana in the fall.[9] Peak attendance was during the summer.[10]

In 2016, GoldStar employed 29 H-2B workers and Lee's employed 34 H-2B workers.[11] In 2017, GoldStar employed 38 H-2B workers and Lee's employed 35

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3 D. & O. at 1.

4 *Id.* at 12.

5 *Id.*

6 *Id.*

7 *Id.*

8 *Id.*

9 *Id.*

10 *Id.* at 12-13.

11 *Id.* at 13.

H-2B workers.[12] Respondents recruited H-2B workers from the Republic of South Africa.[13] Respondents also employed U.S. workers.[14]

During the summer of 2017, the Administrator began investigating Respondents.[15] Six WHD investigators visited Respondents' site on August 2, 2017.[16] They toured the worksite and interviewed approximately half of Respondents' H-2B workers and Melissa Erasmus, who handled payroll.[17] On September 16, 2020, the WHD issued a Determination Letter, finding that during the 2016 and 2017 seasons Respondents committed the following violations:

1. Substantially failed to comply with the prohibition against preferential treatment of foreign workers in violation of Attestation 4;
2. Substantially failed to pay H-2B workers the wages listed on their respective I-129 Petitions in violation of Attestation 5;
3. Substantially failed to comply with their respective statements of temporary need in violation of Attestation 12;
4. Substantially failed to comply with the requirement to provide their workers with accurate earnings statement in violation of Attestation 17;
5. Substantially failed to pay the outbound travel costs of their H-2B workers in violation of Attestations 17 and 18; and
6. Substantially failed to pay the inbound travel costs of their H-2B workers in violation of Attestations 17 and 18.[18]

Respondents requested a hearing before an ALJ with the Office of Administrative Law Judges (OALJ), and the matter was assigned to the ALJ on September 13, 2021.[19] With the ALJ's permission, the Administrator amended the

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[12] *Id.*

[13] *Id.*

[14] *Id.* at 19 n.67.

[15] *Id.* at 3.

[16] *Id.*

[17] *Id.*

[18] *Id.* at 3-4.

[19] *Id.* at 4.

Determination letter on two occasions.[20] On October 25, 2021, the Administrator amended the Determination Letter and reduced back wages related to the alleged overtime violation; recalculated back wages for GoldStar to include August 8, 2017 to November 14, 2017; recalculated back wages for Lee's to include August 8, 2017 to November 13, 2017; recalculated back wages for both Respondents to conform with the Deputy Administrator's policy against providing credits for overpayments in some workweeks to cover underpayments in other workweeks; and increased the Civil Money Penalties (CMPs) due to the increase in back wages associated with removing credits.[21] On October 19, 2022, the Administrator amended the Determination Letter again to recalculate back wages for GoldStar to five workers for 2016 and 2016 to correct prior computational errors; removed Missouri state overtime premiums from the back wages owed under GoldStar's 2016 TEC and Lee's 2017 TEC to correct for instances where nine workers were erroneously double counted as working for both; and reduced CMPs assessed against GoldStar in 2016 and Lee's in 2017 to account for these reductions.[22]

The ALJ held a hearing beginning on January 23, 2023, and resuming on July 5-11, 2023.[23] On March 13, 2024, the ALJ issued a D. & O. finding that Respondents violated the INA.[24] Specifically, the ALJ made the following findings:

1. Respondents did not violate the prohibition against preferential treatment to foreign workers;[25]
2. Respondents failed to pay the prevailing wage in 2016 and 2017;[26]
3. GoldStar did not substantially fail to comply with the periods of temporary need in 2016 and 2017 and Lee's did not substantially fail

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20 *Id.*

21 *Id.* at 4-5.

22 *Id.* at 5.

23 *Id.* at 11.

24 *Id.* at 1, 62-63.

25 *Id.* at 26.

26 *Id.* at 37-38.

to comply with the periods of temporary need in 2016 but substantially failed to comply in 2017,[27]

4. Respondents substantially failed to comply with the requirement to provide their workers with accurate earnings statements;[28]
5. Respondents substantially failed to pay the outbound travel costs of H-2B workers in 2016 and 2017;[29] and
6. Respondents substantially failed to pay the inbound travel costs of H-2B workers in 2016 and 2017.[30]

The ALJ ordered GoldStar to pay $98,254.57 in back wages and $32,516.00 in CMPs and ordered Lee's to pay $47,988.78 in back wages and $31,068.10 in CMPs.[31] The ALJ also directed the parties to confer and create a plan for implementing the ALJ's order.[32]

Both parties petitioned the Board to review the D. & O.

JURISDICTION AND STANDARD OF REVIEW

This Board has jurisdiction to hear appeals concerning questions of law or fact from the Administrator's final determinations under the H-2B program.[33] The Board reviews an ALJ's decision de novo[34] and acts with "all the powers [the Secretary] would have in making the initial decision."[35]

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27 *Id.* at 50.

28 *Id.* at 54-56.

29 *Id.* at 61.

30 *Id.*

31 *Id.* at 62-63.

32 *Id.* at 63.

33 Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 85 Fed. Reg. 13186 (Mar. 6, 2020).

34 *Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Ace Amusements*, ARB Nos. 2024-0019, -0036, ALJ Nos. 2022-TNE-00015, -00016, slip op. at 4 (ARB June 9, 2026) (citations omitted).

35 *Id.* (citing 5 U.S.C. § 557(b)); *see Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Am. Truss*, ARB No. 2005-0032, ALJ No. 2004-LCA-00012, slip op. at 2-3 (ARB Feb. 28, 2007)

DISCUSSION

Upon review of the D. & O., the parties' arguments, and the record, the Board: (1) affirms the ALJ's findings on all violations; (2) affirms the ALJ's determination that Respondents are liable to pay back wages for the failure to pay the prevailing wage in 2016 and 2017, but vacates the ALJ's computation and remands to recalculate the amount of back wages and CMPs Respondents owe; and (3) modifies the CMPs for Respondents' substantial failure to provide workers with accurate earnings statement and increase the CMPs by an additional $4,000.[36]

1. Legal Standard

The H-2B program permits employers to hire temporary foreign workers to perform nonagricultural services or labor in the United States. Employers may only hire foreign workers under the H-2B program if (1) there are not sufficient U.S. workers who are qualified and available to perform the temporary services or labor, and (2) the employment of foreign workers will not adversely affect the wages and working conditions of U.S. workers similarly employed.[37]

(citing *Talukdar v. U.S. Dep't of Veterans Affairs*, ARB No. 2004-0100, ALJ No. 2002-LCA-00025, slip op. at 8 (Jan. 31, 2007) (the Board applies de novo review in INA cases)).

[36] In addition to the arguments set forth below, Respondents make two additional arguments. Neither of the arguments alter our conclusion. First, Respondents contend that the ALJ improperly excluded portions of testimony from their advisor, Kathy Pierce, arguing that her testimony was relevant to her state of mind. Respondents' (Resp.) Opening Brief (Br.) at 36. However, we agree with the Administrator that the ALJ did not abuse his discretion in determining that Pierce's testimony was not necessary and that he wanted to make determinations on Respondents' states of mind based on testimony of their employees. Administrator's (Adm'r) Response Br. at 48. Second, Respondents raise constitutional arguments regarding the Department of Labor's authority to enforce the H-2B regulations. *Id.* at 40. However, the Board does not have the authority to rule on Respondents' constitutional arguments regarding the validity of the H-2B regulations and the Department of Labor's enforcement. *Ace Amusements*, ARB Nos. 2024-0019, -0036, slip op. at 5 n.25.

[37] 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 29 C.F.R. § 503.1(a).

Under the H-2B program's regulations, employers seeking to employ H-2B workers must obtain a certification from the DOL.[38] To obtain a certification, the employer must file the ETA Form 9142B, Application for Temporary Employment Certification (TEC) with the DOL's Office of Foreign Labor Certification (OFLC).[39] The employer must sign the TEC under penalty of perjury, attesting to their knowledge of, and agreeing to comply with, the terms and conditions of the H-2B program.[40] The regulations require an employer to abide by conditions that relate to, among other things, non-discriminatory hiring practices, prohibitions against preferential treatment of foreign workers, rates of pay, area of intended employment, transportation and visa fees, transportation from the place of employment, disclosure of the Job Order, contracts with third parties, and retention of documents and records.[41]

As part of the certification process, the employer must make an effort to recruit U.S. workers to ensure that there are no qualified U.S. workers available for the position it intends to fill with H-2B workers.[42] The employer must submit a Job Order to the State Workforce Agency (SWA) serving each geographical area of intended employment listed in the TEC.[43] A Job Order is a document containing all the material terms and conditions of employment for the position(s) for which H-2B workers are sought.[44] The employer must also advertise the position(s) to U.S. workers, and the advertisements must describe the geographical area of intended employment "with enough specificity to apprise applicants of any travel requirements and where applicants will likely have to reside to perform the services or labor."[45] The employer must offer the same wage and other benefits and terms and conditions of employments to U.S. workers that it will offer H-2B workers.[46]

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[38] 29 C.F.R. § 503.1; 20 C.F.R. § 655.1.

[39] *Id.* § 655.15.

[40] *Id.* § 655.18; 29 C.F.R. § 503.19(d).

[41] 20 C.F.R. § 655.20; 29 C.F.R. §§ 503.16, 503.17.

[42] 20 C.F.R. § 655.40(a).

[43] *Id.* § 655.16(a)(1).

[44] *Id.* § 655.5.

[45] *Id.* § 655.41(b)(2).

[46] *Id.* § 655.18.

2. Violations

An employer violates the H-2B program requirements when it substantially fails to comply with any of the terms and conditions of the H-2B registration, application for prevailing wage determination, TEC, or the H-2B petition (H-2B Forms).[47] To be "substantial," the employer's failure must be both (1) "willful," and (2) "a significant deviation from the terms and conditions of [the H-2B Forms]."[48]

A willful violation "occurs when the employer, attorney, or agent knows its statement is false or that its conduct is in violation, or shows reckless disregard for the truthfulness of its representation or for whether its conduct satisfies the required conditions."[49] In determining whether a violation is significant, the regulations identify a non-exhaustive list of factors that the Administrator may consider, including: (1) the employer's previous history of violation(s) under the H-2B program; (2) the number of H-2B workers, workers in corresponding employment, or U.S. workers who were and/or are affected by the violation(s); (3) the gravity of the violation(s); (4) the extent to which the violator achieved a financial gain due to the violation(s), or the potential financial loss or potential injury to the worker(s); and (5) whether U.S. workers have been harmed by the violation.[50]

The ALJ found that Respondents committed the following violations: (1) Respondents substantially failed to pay the prevailing wages in 2016 and 2017;[51] (2) Lee's substantially failed to comply with the periods of temporary need in 2017 for a portion of its H-2B workers;[52] (3) Respondents substantially failed to comply with the requirement to provide their workers with accurate earnings statements;[53] (4) Respondents substantially failed to pay the inbound transportation costs of their

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[47] 8 U.S.C. § 1184(c)(14)(A); 29 C.F.R. § 503.19(a)(2).

[48] 29 C.F.R. § 503.19(a)(2).

[49] *Id.* § 503.19(b).

[50] *Id.* § 503.19(c).

[51] D. & O. at 37-38.

[52] *Id.* at 50-51.

[53] *Id.* at 54-56.

H-2B workers in 2016 and 2017;[54] and (5) Respondents substantially failed to pay the outbound transportation costs of their H-2B workers in 2016 and 2017.[55] The ALJ found that Respondents did not give preferential treatment to foreign workers for truck driving or for the two workers who started late[56] and that GoldStar did not substantially fail to comply with their respective statements of temporary need.[57]

A. <u>*Respondents Violated Five Provisions of the TEC*</u>

Respondents contend that the ALJ erred in finding that they substantially failed to comply with the H-2B program's requirements pertaining to the violations listed above.[58] Respondents argue that the willfulness standard set forth in *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988) (*Richland Shoe Co.)* requires the Administrator to prove an employer's specific and subjective knowledge of legal issues or violations, and that the ALJ erred in finding Respondents' actions were willful.[59] Respondents contend that an employer must possess actual knowledge or awareness of a violation, citing the 2017 Davis Bacon and Related Acts definition of "willfulness."[60] Respondents further argue that a violation cannot be willful when an employer complied in good faith, repeatedly citing to the Fair Labor Standards Act (FLSA), and contend that they acted in good faith and had a reasonable basis for their actions.[61]

We disagree. The Board recently addressed this precise issue in *Ace Amusements* and observed that, pursuant to *Richland Shoe Co.*, a violation of the

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54 *Id.* at 61.

55 *Id.*

56 *Id.* at 25-26.

57 *Id.* at 46-51.

58 Resp. Opening Br. at 14-28.

59 *Id.* at 14-15.

60 *Id.* (citing *J.D. Eckman, Inc.*, ARB No. 2017-0023, ALJ No. 2015-DBA-00030, slip op. at 6 (ARB July 9, 2019) (*"In re Disputes Concerning the Payment of Prevailing Wages and Overtime Pay"*).

61 *Id.* at 17-22.

FLSA is willful when "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by statute."[62] The H-2B regulations define a "willful" violation as one that "occurs when the employer, attorney, or agent knows its statement is false or that its conduct is in violation, or shows reckless disregard for the truthfulness of its representation or for whether its conduct satisfies the required conditions."[63] This definition is consistent with the longstanding definition in *Richland Shoe Co.*[64]

Respondents' reliance on the FLSA also bears little relevance here.[65] One critical factor in the willfulness analysis under the H-2B regulations is "the fact that employers submit a signed [TEC] attesting under penalty of perjury that that they know and accept the obligations of the program, which are clearly listed in Appendix B of the [TEC]."[66] Here, the ALJ found violations based on provisions of the INA and Respondents' agreement to abide by the Attestations in Appendix B of the TEC, not on the FLSA.[67]

Likewise, Respondents' reliance on the 2017 DBRA regulations also bears little relevance.[68] The 2017 DBRA regulations applied an "aggravated or willful" standard, which was defined as "voluntary, deliberate, intentional, and not negligent."[69] Unlike the 2017 DBRA regulations, the H-2B's definition of

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62 *Ace Amusements*, ARB Nos. 2024-0019, -0036, slip op. at 8 (citing *Richland Shoe Co.*, 486 U.S. at 133).

63 29 C.F.R. § 503.19(b).

64 *See Temporary Non-Agricultural Employment of H-2B Aliens in the United States*, 80 Fed. Reg. 24042, 24086 (Apr. 29, 2015) (section 503.19(b)'s definition of willfulness "is consistent with the longstanding definition of willfulness" in *Richland Shoe Co.*).

65 *See Ace Amusements*, ARB Nos. 2024-0019, -0036, slip op. at 8.

66 80 Fed. Reg. at 24086-87.

67 *See Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Deggeller Attractions, Inc.*, ARB No. 2020-0004, ALJ No. 2018-TNE-00008, slip op. at 6 (ARB Jan. 25, 2022) (whether the FLSA applied was irrelevant because the employer had violated its obligation based on provisions of the INA, rather than the FLSA, as well as that employer's agreement to the attestations in the TEC).

68 Respondents' Opening Br. at 15 (citing *J.D. Eckman, Inc.*, ARB No. 2017-0023, slip op. at 6).

69 29 C.F.R. § 5.12(a)(1). We note that the DBRA regulations have since been amended.

"willfulness" includes a showing of "reckless disregard for the truthfulness of its representation or for whether its conduct satisfies the required conditions."[70] Under the H-2B regulations, "reckless disregard" does not require specific intent.[71]

After a thorough review of the record, we agree with the ALJ that Respondents acted with reckless disregard as to whether their conduct satisfied the required conditions and that Respondents significantly deviated from the terms and conditions of their TECs for the reasons stated by the ALJ as it pertains to the following violations: (1) Respondents substantially failed to pay the prevailing wages in 2016 and 2017; (2) Lee's substantially failed to comply with the periods of temporary need in 2017 by staggering the arrival of eleven of their H-2B workers; (3) Respondents substantially failed to comply with the requirement to provide their workers with accurate earnings statements; (4) Respondents substantially failed to pay the inbound transportation costs of their H-2B workers in 2016 and 2017; and (5) Respondents substantially failed to pay the outbound transportation costs of their H-2B workers in 2016 and 2017.[72]

B. Respondents Did Not Give H-2B Workers Preferential Treatment

Attestation 4 of the TEC and 29 C.F.R. § 503.16(q) prohibits employers from offering terms, wages, and working conditions to U.S. workers that are less favorable than those that the employer is offering, intends to offer, or will offer to H-2B workers or impose restrictions or obligations on U.S. workers that are not also imposed on foreign workers.

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[70] 29 C.F.R. § 503.19(b).

[71] *Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Butler Amusements*, ARB No. 2021-0007, ALJ No. 2018-TNE-00019, slip op. at 15 (ARB July 28, 2023) (the "H-2B's definition of 'willful' includes reckless disregard, which does not equate to specific intent") (citation omitted).

[72] The Administrator also contends that the ALJ erred in finding that GoldStar did not substantially fail to comply with its stated period of temporary need in 2017. Adm'r Opening Br. at 34-38. However, we find that the ALJ's analysis is well-reasoned and supported by the record. As the ALJ found, visa delays contributed in part to the delayed ability of Respondent's H-2B workers to begin employment, and all GoldStar's H-2B employees were on the job by March 24, 2017, which was during the slower part of their season. D. & O. at 43-49. Thus, we affirm the ALJ's conclusion that GoldStar did not substantially fail to comply with their stated period of temporary need in 2017.

i. Respondents Did Not Substantially Fail to Comply with the Prohibition Against Giving H-2B Workers Preferential Treatment for the Failure to Disclose the Potential to Earn Extra Pay for Driving Trucks

In 2016 and 2017, Respondents sought to hire H-2B workers for one job title: traveling carnival attendant.[73] Respondents had approximately ten trucks for which they needed drivers.[74] Neither the recruitment ads nor the Job Orders indicated that driving was a potential job duty.[75] Respondents did not recruit any workers, U.S. or foreign, whose job was to primarily drive trucks; they only hired traveling carnival attendants.[76] In 2016, eighteen employees had CDLs, of which seven were H-2B workers and eleven were U.S. workers.[77] The record does not indicate what percentage of trucks were driven by U.S. workers as compared to H-2B workers.[78] Michael Featherston testified that workers could earn extra wages per week for driving[79] and some workers testified that they were told they would receive a driving bonus at the end of the season.[80] However, the record does not show that any worker received extra weekly wages for driving, and shows that only two workers received a driving bonus at the end of the season amounting to $1,250 and $1,850.[81]

The ALJ determined that Respondents did not substantially violate the prohibition against preferential treatment of foreign workers. The ALJ determined that Attestation 4 does not define the point in time at which the "job offer" of the wages or terms of employment is made.[82] The ALJ found that the Administrator did

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73 D. & O. at 23.

74 *Id.*

75 *Id.* at 24.

76 *Id.*

77 *Id.* at 19-20.

78 *Id.* at 23.

79 *Id.* at 19.

80 *Id.* at 15-16, 21.

81 Joint Exhibit (JX) 17 at 7, 78.

82 D. & O. at 20.

not prove that there were actually any U.S. workers who did not pursue the minimum wage traveling carnival attendant position because of the failure to disclose the possible extra pay for driving duties in the Job Order.[83] He was not persuaded that a more accurate description would have caused any U.S. worker to be enticed by the position given that commercial truck drivers typically earn more than minimum wage.[84] The ALJ found that payroll records did not show that drivers earned a higher hourly wage or received any additional compensation on a weekly basis.[85] Lastly, since only ten percent of workers drove trucks, the ALJ found that this failure was not a substantial violation.[86]

The Administrator contends that the ALJ erred in concluding that Respondents did not violate this provision.[87] The Administrator asserts that drivers earned an extra $20-45 per week and up to a $1,850 bonus at the end of the season for driving.[88] The Administrator acknowledges that once Respondents hired H-2B and U.S. workers, they offered both groups of workers with driver's license the opportunity to drive and earn extra money.[89] However, the Administrator contends that Respondents were required to offer this benefit to U.S. workers during recruitment, and that by not doing so, Respondents frustrated the requirement that employers demonstrate that there were not sufficient qualified U.S. workers available to do the job.[90] The Administrator further contends that the ALJ's reasoning that U.S. workers would not have been enticed by the opportunity even if Respondents had disclosed the potential to earn extra in the recruitment materials was speculative.[91] The Administrator also contends that the ALJ erred in reasoning that WHD must procure a U.S. worker who was actually harmed because the

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83 *Id.* at 22.

84 *Id.*

85 *Id.* at 23-24.

86 *Id.* at 25.

87 Adm'r Opening Br. at 27-31.

88 *Id.* at 29.

89 *Id.*

90 *Id.* at 30.

91 *Id.* at 30-31.

prohibition against preferential treatment presumes that U.S. workers are harmed when H-2B workers are offered better pay and benefits.[92]

Respondents counter that the Administrator failed to show that they substantially failed to comply with this provision.[93] Respondents contend that the regulations do not specify what constitutes a job offer, state where and when a job offer must be disclosed, or indicate to whom the job offer must be provided.[94] Respondents also assert that they disclosed that "[h]ours . . . vary . . . [w]ork needs (i.e. hours . . .) vary. Work needs subject to industry practice . . . extra hours as required" in the Job Orders.[95] Respondents state that the Administrator has not cited to a requirement to itemize each and every reason why "extra hours" may be available, and contend that they could not anticipate every such reason.[96] Respondents also contend that stating "extra hours" were available sufficiently conveyed that extra money was available for additional tasks, including driving.[97] Respondents further contend that, even if they were required to disclose driving as one of the reasons for "extra hours," the omission was not significant because it is speculative to assume U.S. workers would have applied, driving is industry practice for a traveling carnival, the driving time was insignificant, the number of workers affected was low, and the additional wages were insubstantial.[98]

The regulations require that all the material terms and conditions of employment, including wages, working conditions, and benefits that are required to be in the Job Order also be placed in the Job Order.[99] The regulations further

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92 *Id.* at 31.

93 Resp. Response Br. at 2-7.

94 *Id.* at 2.

95 *Id.* at 4.

96 *Id.*

97 *Id.*

98 *Id.* at 5-6.

99 *See* 29 C.F.R. §503.4; 20 C.F.R. § 655.5 (defining the "job offer" as an "offer made by an employer or potential employer of H-2B workers to both U.S. and H-2B workers describing all the material terms and conditions of employment, including those relating to wages, working conditions, and other benefits" and the "Job Order" as "the document containing the material terms and conditions of employment relating to wages, hours,

require that all recruitment efforts "contain terms and conditions of employment that are not less favorable than those offered to the H-2B workers and, at a minimum, must comply with the assurances applicable to Job Orders."[100]

Here, Respondents failed to disclose the potential to earn extra wages for driving in the Job Order, as well as the recruitment materials.[101] Michael and Connie Featherston signed the 2016 and 2017 TECs under penalty of perjury, attesting to their knowledge of, and agreeing to comply with, the terms and conditions of the H-2B program.[102]

We agree with the Administrator that the ALJ erred in his reasoning that the Administrator must prove that there were U.S. workers who were deterred from applying for the position because of Respondents' failure to include the driving bonus in the Job Order and recruitment materials to establish harm. The Board has held that U.S. workers are harmed when H-2B workers are offered better pay and/or benefits than U.S. workers.[103] In addition, the ALJ's opinion that U.S. truck drivers were unlikely to be interested in the job opportunity is both speculative and contrary to his finding that eleven of Respondents' U.S. workers had CDLs.[104]

However, while we disagree with the ALJ's reasoning, we agree with his conclusion that Respondents' failure was not substantial. Recently, in *Ace Amusements*, the Board held that the employer, who also operated a traveling carnival, substantially failed to comply with the H-2B program's requirements for

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working conditions, worksite and other benefits, including obligations and assurances" required under the H-2B program).

100 *Id.* at § 655.41.

101 D. & O. at 24.

102 *Id.*

103 *Ace Amusements*, ARB Nos. 2024-0019, -0036, slip op. at 13, 13 n.85; *Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Lucero Pool Plaster, Inc.,* ARB Nos. 2023-0040, -0045, ALJ No. 2019-TNE-00011, slip op. at 11-12 (ARB Feb. 27, 2025); *see also* 80 Fed. Reg. at 24062 ("So long as the employer offers U.S. workers at least the same level of benefits, wages, and working conditions as will be provided to the H-2B workers, the employer will be in compliance with [the prohibition against preferential treatment].").

104 D. & O. at 22.

failing to disclose driving as a job duty and the potential to earn more.[105] There, the employer paid every driver an extra $50 per week, the employer had specifically recruited foreign workers with CDLs, at least one H-2B worker was under the impression that he was hired exclusively as a driver, and drivers spent approximately twenty to thirty percent of their time driving.[106] Thus, the Board concluded that the employer's failure to disclose the potential to earn extra from driving was a substantial failure.[107]

The present matter differs from *Ace Amusements* for several reasons. The record here does not show that any driver received extra pay on a weekly basis for driving in either 2016 or 2017. As for bonuses, in 2016, only two out of the eighteen workers with CDLs[108] received a driving bonus at the end of the season.[109] No worker received a driving bonus in 2017. In addition, Respondents did not recruit any H-2B worker to work exclusively as a driver and there is no evidence that Respondents directed driving opportunities, and therefore a potential bonus, toward H-2B workers over U.S. workers.[110] Further, the record does not demonstrate the amount of time workers spent driving. Workers who drove trucks also performed other duties of a traveling carnival attendant.[111] Unlike in *Ace Amusements*, where driving duties were routine and represented a more significant portion of workers' overall job duties,[112] here, the Administrator has not shown that driving duties were routine and significant enough that Respondents were obligated to include it in the advertisements. While there is some testimony from workers who drove, driving also included convenience travel for trips to

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105 *Ace Amusements*, ARB Nos. 2024-0019, -0036, slip op. at 11-14.

106 *Id.*

107 *Id.* at 14.

108 Eleven of the employees with CDLs were U.S. workers, while the remaining seven were H-2B workers. D. & O. at 19-20.

109 JX 17 at 7, 78.

110 D. & O. at 25.

111 *Id.* at 24.

112 *See Ace Amusements*, ARB Nos. 2024-0019, -0036, slip op. at 11.

grocery stores and laundromats.[113] As such, the gravity of the violation is low. In addition, Respondents have no previous history of violations under the H-2B program and did not achieve a financial gain.

Thus, we conclude that Respondents' failure to disclose the potential to earn extra pay from driving was not a significant deviation from the terms and condition of the H-2B program's requirements. Therefore, we affirm the ALJ's conclusion that Respondents did not substantially fail to comply with the prohibition against giving H-2B workers preferential treatment for the failure to disclose the potential to earn extra pay for driving trucks.

ii. Respondents Did Not Substantially Fail to Comply with the Prohibition Against Giving H-2B Workers Preferential Treatment by Beginning Work Later in the Season

In 2017, Respondents allowed two H-2B workers to start working in July despite the season beginning in February.[114] Neither of these workers received any pay from Respondents for the months in which they did not work.[115] The ALJ determined that H-2B and U.S. workers were only paid for weeks they worked, and that the two H-2B workers in question did not receive any benefit by their late arrival.[116] Thus, the ALJ determined that Respondents did not substantially fail to comply with the prohibition against preferential treatment by permitting two H-2B workers to arrive late.[117]

The Administrator contends that the ALJ erred, and that this special arrangement for H-2B workers was not offered to U.S. workers.[118]
The Administrator asserts that those who worked during Respondents' peak season

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113 D. & O. at 15-16, 18-21, Hearing Transcript (Tr.) at 93, 150, 201, 247, 272, 302-03, 362, 445, 453, 714, 1007, 1262.

114 *Id.* at 22-23, 25.

115 *Id.* at 25.

116 *Id.* at 25-26.

117 *Id.* at 26.

118 Adm'r Opening Br. at 31.

had the potential to earn more because Respondents paid a higher fixed weekly amount, and that U.S. workers may have applied for the job had they been aware of the opportunity to work for a shorter period of time.[119] The Administrator contends that when U.S. workers are unaware of the true nature of a job opportunity, they cannot accurately evaluate whether to apply for it, which hampers the Department of Labor's (DOL) ability to determine whether the employment of H-2B workers adversely affects the employment of U.S. workers.[120]

Respondents counter that they did not give preferential treatment to these two workers by allowing them to start late.[121] Respondents assert that these two H-2B workers were very inexperienced and had to complete a prior employment contract before they could start working for Respondents.[122] Respondents contend that this did not mean that flexibility was a term or condition of employment.[123] Respondents also contend that they did not willfully attempt to discourage U.S. applicants from applying, and that allowing these two workers to start late was within their discretion.[124] Respondents further assert that, even if this did run contrary to the H-2B program's requirements, the failure to comply is not substantial because it did not benefit these workers.[125]

Respondents' job ad states that employees must be available to work all season.[126] Despite this, Respondents permitted two H-2B workers to start late.[127] There is nothing in the record to show that they also offered a late start date to prospective U.S. workers. Although these two H-2B workers earned less overall than those who worked all season, U.S. workers cannot accurately determine whether to apply for a job opportunity if they are not aware of all pay, benefit, and

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[119] *Id.* at 32-33.

[120] *Id.* at 33-34.

[121] Resp. Response Br. at 7-8.

[122] *Id.* at 7.

[123] *Id.*

[124] *Id.* at 7-8.

[125] *Id.* at 8.

[126] JX 2, JX 3, JX 4.

[127] D. & O. at 22-23, 25.

terms of the job opportunity, and, thus, the DOL is unable to accurately determine whether there are no qualified U.S. workers available to work.

However, Respondents' allowing two H-2B workers to start late does not arise to a significant deviation. As noted above, Respondents do not have a previous history of violating the H-2B program's requirements. In addition, only two workers were affected, and they did not financially benefit by arriving late. Given these factors, the gravity of the violation is low. Thus, we find that Respondents' failure to disclose the possibility of a late start date does not amount to a significant deviation from the terms and conditions of the H-2B program. Therefore, we affirm the ALJ's conclusion that Respondents did not substantially fail to comply with the prohibition against giving H-2B workers preferential treatment for allowing two workers to begin working later in the season.

3. Remedies

If the Administrator determines an employer has violated the requirements of the H-2B program, the Administrator may assess remedies, including the recovery of unpaid wages and the imposition of CMPs.[128]

A. <u>Respondents are Liable for Back Wages</u>

Based on the above violations, the ALJ determined that Respondents were liable and owed back wages and CMPs. For Respondents' substantial failure to pay the prevailing wage, the ALJ ordered GoldStar to pay $12,397.17 in back wages for 2016 and $80,107.44 for 2017, and Lee's to pay $8,210.10 in back wages for 2016 and $33,053.68 for 2017.[129] For Respondents' failure to pay inbound transportation costs, the ALJ ordered GoldStar to pay $608 in back wages for 2016 and $843 for 2017, and ordered Lee's to pay $714 in back wages for 2016 and $1,127 for 2017.[130] For Respondents' failure to pay outbound transportation costs, the ALJ ordered

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[128] 29 C.F.R. § 503.20(a).

[129] D. & O. at 61-62.

[130] *Id.*

GoldStar to pay $1,770 in back wages for 2016 and $2,529 for 2017, and ordered Lee's to pay $1,503 in back wages for 2016 and $3,381 for 2017.[131]

Respondents contend that the ALJ erred in determining that they are liable for back wages.[132] For the failure to pay the prevailing wage, Respondents contend that the ALJ failed to address overpayments and credits.[133] Respondents contend that they overpaid workers in some weeks for underpayments that they made in other weeks, and that the ALJ should have offset these overpayments from the back wages owed to workers.[134] Respondents also contend that the WHD's reconstruction improperly added an extra day of work to every worker as well as an extra week of work, the ALJ failed to credit the costs Respondents paid for local convenience travel and mobile housing for their workers, and that the ALJ failed to address improperly applied Minnesota state law regarding overtime pay.[135] Lastly, Respondents argue that the ALJ should not have found them liable for back wages for the failure to pay the prevailing wage and the failure to pay inbound travel expenses and outbound travel expenses because Respondents did not knowingly and willfully violate these provisions.[136]

As the ALJ found, Respondents failed to keep accurate records.[137] When an employer fails to keep and maintain accurate records, an ALJ may use the two-step burden-shifting framework articulated in *Mt. Clemens Pottery Co.*[138] Under the *Mt. Clemens Pottery Co.* framework, if the employer's records are "inaccurate or inadequate," the Administrator must show that the workers "in fact performed work for which [they were] improperly compensated" by producing "sufficient evidence to show the amount and extent of that work as a matter of just and reasonable

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[131] *Id.*

[132] Respondents' Opening Br. at 1.

[133] *Id.* at 9-13.

[134] *Id.* at 9-11.

[135] *Id.* at 12-13.

[136] *Id.* at 14-28.

[137] D. & O. at 16, 36.

[138] *Lucero Pool Plaster, Inc.*, ARB Nos. 2023-0040, -0045, slip op. at 18.

inference."[139] If the Administrator meets its burden, then the burden shifts to the employer to produce evidence of the precise amount owed.[140] If the employer fails to do so, the court may award damages "even though the result may be only approximate."[141]

The Administrator showed that Respondents' H-2B workers performed work for which they were improperly compensated, and we agree with the ALJ that the Administrator's methodology for calculating back wages was reasonable and reliable given Respondents' lack of accurate records. As such, the burden shifts to Respondents to produce evidence of the precise amount shown. Respondents argue that the ALJ failed to consider several factors. First, Respondents contend that the ALJ failed to address overpayments and credits.[142] Respondents contend that they overpaid workers in some weeks to make up for the underpayments in other weeks, and that the ALJ should have offset these overpayments from the back wages owed to workers.[143] As the ALJ found, Respondents did not submit any record of a "prepayment plan."[144] Respondents failed to provide documentation that any overpayments were made. Thus, we find that Respondents are not entitled to these offsets.[145]

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139 *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946).

140 *Id.* at 687-88.

141 *Id.* at 688.

142 Resp. Opening Br. at 9-13.

143 *Id.* at 9-11.

144 D. & O. at 29.

145 Respondents cite to *Singer v. City of Waco, Tex.*, 324 F.3d 813, 828 (5th Cir. 2003), in which the Fifth Circuit Court of Appeals found that the employer's "overpayments" amounted to "pre-payments" of the employer's obligation. Resp. Opening Br. at 11. However, *Singer* has limited value here. First, *Singer* concerned overtime payment obligations under the FLSA. *Singer*, 324 F.3d at 816. Here, Respondents' obligations are governed by the INA. Second, the wages at issue in *Singer* were overtime wages, not the minimum wage. Third, the Fifth Circuit later clarified that *Singer* was a "narrow exception" to the rule that set offs are impermissible under the FLSA and was due to the uniqueness of that case. *Martin v. PepsiAmericas, Inc.*, 628 F.3d 738, 742 (5th Cir. 2010).

Second, Respondents contend that the ALJ failed to credit the costs Respondents paid for mobile housing for their workers.[146] We disagree. Costs incurred for facilities that are primarily for the benefit or convenience of an employer will not be recognized and may not be charged to workers.[147] As the preamble to the 2015 Rule states, "housing that is provided by employers with a need for a mobile workforce, such as those in the *carnival* or forestry industries where workers are in an area for a short period of time, need to be available to work immediately, and may not be able to procure temporary housing easily, is primarily for the employer's benefit and convenience and cannot be charged to the workers."[148] Thus, Respondents are not entitled to credits for their mobile housing.

Third, Respondents contend that the ALJ failed to credit the costs Respondents paid for local convenience travel.[149] We disagree. Even if this travel primarily benefited workers, an employer is required to maintain records showing the wage deductions on a workweek basis.[150] Here, Respondents did not keep any records of who took convenience travel, where they went, or how many trips they took.[151] Thus, we find that Respondents are not entitled to credits for the cost of local convenience travel.

Fourth, Respondents contend that the ALJ failed to address state law regarding Minnesota overtime pay.[152] Respondents take issue with the Administrator amending the Determination Letter to allege the failure to pay overtime pursuant to Minnesota law.[153] However, an ALJ may allow parties to

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146 Resp. Opening Br. at 12-13.

147 29 C.F.R. § 531.3(d)(1); *see also* 29 C.F.R. 503.16(b) (incorporating the deduction principles set forth in C.F.R. Part 531).

148 80 Fed. Reg. at 24063 (emphasis added).

149 Resp. Opening Br. at 12.

150 *See* 29 C.F.R. § 531.28 (special recordkeeping requirements must be met for employers to claim deductions from wages); 29 C.F.R. § 516.27(b)(2) (an employer must maintain records showing weekly wage deductions).

151 Tr. at 1336.

152 Resp. Opening Br. at 13-14.

153 *Id.* at 13.

amend their filings.[154] Here, the ALJ operated within his discretion to allow the Administrator to amend the Determination Letter after consulting with the State of Minnesota.

Respondents also contend that the WHD did not accurately calculate Minnesota's overtime law, and that if they do owe any overtime, credit from providing bunkhouses covers their obligation.[155] We disagree. As discussed above, Respondents are not entitled to credit from housing. In addition, after consulting with Minnesota officials, the Administrator determined that under Minnesota law Respondents owed overtime.[156] H-2B employers are required to comply with all applicable federal, state, and local employment-related laws during the period of employment.[157] H-2B employers are also required to pay at least the offered wage, which is defined as equaling or exceeding the highest of the prevailing wage, or the applicable federal, state, or local minimum wage.[158] Respondents counter that they did not employ workers in Minnesota for thirty weeks and thus did not owe overtime under Minnesota law.[159] In support, Respondents cite testimony by the WHD investigator.[160] The Administrator answers that Respondents misunderstand both the WHD investigator's testimony and Minnesota law.[161]

Respondents have failed to persuade us that the Administrator and ALJ erred in finding Respondents liable for Minnesota overtime. Respondents cite interpretations of the WHD investigator's testimony as to the status of Minnesota law. Thus, we are not persuaded by Respondents' argument.

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[154] 29 C.F.R. § 18.36 (OALJ Rule of Practice and Procedure stating that "[t]he judge may allow parties to amend and supplement their filings.").

[155] Resp. Opening Br. at 13-14.

[156] Adm'r Response Br. at 31-33.

[157] 29 C.F.R. § 503.16(z).

[158] *Id.* at § 503.4.

[159] Resp. Opening Br. at 13.

[160] *Id.*

[161] Adm'r Response Br. at 31-33.

Fifth, Respondents contend that the WHD's reconstruction of back wages improperly added an extra day of work to every worker as well as an extra week of work, citing testimony from Melissa Erasmus and WHD Investigator Matt Jones.[162] Erasmus testified that auditors wrongly listed the payday as being at the end of the week when their schedule ran from Monday through Sunday with payment being made the following Monday.[163] Erasmus contended that, because of this error, auditors counted Monday twice, wrongly adding an extra day of wages.[164] Erasmus also testified that auditors also added a week where most workers had off.[165] WHD Investigator Jones acknowledged that the calculations were inadvertently one day off for nearly all workers.[166] Jones also acknowledged that the back wages should have changed for the week where workers did not work.[167] The ALJ did not address these errors when adopting the WHD's calculations.[168] On appeal, the Administrator does not dispute Respondents' argument. Accordingly, we find that the WHD's back wages computation failed to account for these errors. Thus, we affirm the ALJ's determination that Respondents are liable to pay H-2B workers back wages, but vacate the ALJ's calculation and remand to the ALJ to recalculate the amount of back wages in accordance with this evidence.

B. CMPs

The Administrator may assess a CMP for each violation that is either a willful misrepresentation of a material fact; a substantial failure to meet any of the terms and conditions of the H-2B forms; or a willful misrepresentation of a material fact to the Department of State during the H-2B nonimmigrant visa application process.[169] "Each such violation involving the failure to pay an individual worker

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162 Resp. Opening Br. at 12.

163 Tr. at 1242.

164 *Id.*

165 *Id.* at 1243-47.

166 *Id.* at 1443-45.

167 *Id.* at 1445.

168 *See* D. & O. at 37-38.

169 29 C.F.R. at §§ 503.19, 503.23(a).

properly or to honor the terms or conditions of [the aforementioned H-2B forms] constitutes a separate violation."[170]

For violations related to wages, impermissible deductions, or prohibited fees and expenses, Section 503.23(b) provides that the Administrator may assess CMPs "that are equal to the difference between the amount that should have been paid and the amount that actually was paid to such worker(s)," subject to a maximum of $12,383.[171] Back wages also "further the purposes of the H-2B program by reducing the employer's incentive to bypass U.S. workers in order to hire H-2B workers who are more easily exploited."[172]

For all other violations, Section 503.23(d) provides that the Administrator may assess CMPs up to the maximum of $12,383 per violation.[173] Section 503.23(e) provides that, when assessing CMPs pursuant to paragraph (d), the Administrator may consider the following factors: (1) any previous history of H-2B violations by the employer; (2) the number of workers affected by the violation; (3) the gravity of the violation; (4) the good-faith efforts by the employer to comply; (5) the employer's explanation for the violation; (6) the employer's commitment to future compliance; and (7) the extent to which the employer achieved a financial gain or workers suffered a potential financial loss.[174] The highest penalties are reserved for willful failures to meet any of the conditions in the TEC and H-2B petition that "involve harm to U.S. workers."[175]

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[170] *Id.* § 503.23(a).

[171] *Id.* § 503.23(b). This maximum is adjusted by regulation. Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Pub. L. No. 114-74, § 701, 129 Stat 584, 599 (2015). The maximum in effect in the present case was $12,383. *See Department of Labor Federal Civil Penalties Inflation Adjustment Act Annual Adjustments for 2018*, 83 Fed. Reg. 7-01, 12 (Jan. 2, 2018).

[172] *Butler Amusements*, ARB No. 2021-0007, slip op. at 31.

[173] 29 C.F.R. § 503.23(d).

[174] *Id.* § 503.23(e).

[175] 8 U.S.C. § 1184(c)(14)(C); 29 C.F.R. § 503.23(e).

The ALJ determined that Respondents were liable to pay CMPs.[176] For Respondents' substantial failure to pay the prevailing wage in 2016 and 2017, the ALJ ordered GoldStar to pay $12,383 for 2016 and 2017, and Lee's to pay $8,210.10 for 2016 and $12,383 for 2017.[177] For Lee's substantial failure to comply with the period of temporary need, the ALJ ordered Lee's to pay $1,750.[178] For the substantial failure to provide workers with accurate earnings statements, the ALJ reduced the CMPs to $1,000 per year for GoldStar and $1,000 per year for Lee's due to the overlap between the failure to provide earnings statements and the failure to pay H-2B workers the offered hourly wage.[179] The ALJ reasoned that he did not want to punish Respondents "twice for the same or allied conduct" given the overlap between the two violations.[180] For the failure to pay inbound transportation costs, the ALJ ordered GoldStar to pay $608 for their 2016 violation and $843 for 2017, and Lee's to pay $714 for 2016 and $1,127 for 2017.[181] For the failure to pay outbound transportation costs, the ALJ ordered GoldStar to pay $1,770 for their 2016 violation and $2,529 for 2017, and ordered Lee's to pay $1,503 for 2016 and $3,381 for 2017.[182]

The Administrator contends that the ALJ erred in reducing the CMPs for Respondents' failure to provide accurate earnings statements.[183] The ALJ reasoned that a reduction in CMPs was warranted because Respondents were already punished for their failure to pay workers the offered hourly wage, and there as overlap between the two violations.[184] The Administrator argues that the ALJ's reasoning is flawed because the failure to pay the offered wage and the failure to provide workers with accurate earning statements are distinct violations that

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176 D. & O. at 61.

177 *Id.* at 61-62.

178 *Id.* at 62.

179 *Id.* at 54-56.

180 *Id.*

181 *Id.* at 61-62.

182 *Id.*

183 Adm'r Opening Br. at 40-43.

184 D. & O. at 54-55.

warrant separate CMP assessments independent of each other.[185] The Administrator asserts that Respondents' failure to provide workers with an accurate earnings statement occurred independently of Respondents' failure to properly compensate workers even if both of these violations stem from poor and inaccurate record keeping.[186]

We agree that the ALJ erred in reducing the CMPs. Although workers' payroll cards were inaccurate because Respondents substantially failed to pay their H-2B workers all the wages owed and Respondents showed the payroll cards to their respective H-2B employees, Respondents failed to give copies of the payroll cards to their H-2B employees.[187] The Section 503.23(e) factors weigh against Respondents. Although Respondents have no history of prior violations of the H-2B program and implemented a system to accurately record workers' hours, all workers were affected, it played a significant role in workers' underpayment, allowed Respondents to realize a financial gain, and the gravity of the violation is substantial. As such, we amend the ALJ's CMP by adding an additional $1,000 per Respondent per year for a total increase of $4,000 in CMPs. We find that this figure is reasonable given Respondents' violations and application of mitigating factors.

The Administrator also contends that the ALJ erred in reducing the CMPs for Lee's substantial failure to comply with its stated period of temporary need in 2017.[188] The Administrator argues that the ALJ reduced the CMP on a per worker basis and erred by assuming the Administrator originally calculated the CMP on a per worker basis.[189] Rather, the Administrator contends that they calculated the CMP based on a single violation, not a per worker basis.[190] The Administrator further contends that the ALJ failed to properly consider the gravity of the

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[185] Adm'r Opening Br. at 41-42.

[186] *Id.* at 43.

[187] D. & O. at 53-54.

[188] Adm'r Opening Br. at 38-40.

[189] *Id.* at 39.

[190] *Id.*

violation.[191] For these reasons, the Administrator requests that the Board reinstate their original CMP of $5,572.35.[192]

Respondents counter that the ALJ rubberstamped the Administrator's calculations for all CMPs, and that these calculations were arbitrary.[193] Respondents also contend that the ALJ failed to consider the Section 503.23(e) factors.[194]

The ALJ's determination that Lee's pay $1,750 in CMPs is reasonable given that Lee's does not have a previous history of violating the H-2B program, Lee's staggered only eleven out of thirty-five workers' arrival, the gravity of the violation is moderate, and Lee's has demonstrated their commitment to future compliance based on other actions they have taken to address the violations. As such, we affirm the ALJ's order that Lee's pay $1,750 in CMPs for their substantial failure to comply with their stated period of temporary need in 2017.

We also find that the amount of CMPs that the ALJ ordered for Respondents' failure to pay inbound and outbound transportation costs in 2016 and 2017 is reasonable. Respondents have not made any specific arguments pertaining to the amount of CMPs for the substantial failure to pay inbound and outbound transportation costs, aside from their general argument that the Administrator's methodology is arbitrary and that the ALJ failed to consider the Section 503.23(e).[195] However, the Section 503.23(e) factors do not apply to CMPs for violations pertaining to wages, impermissible deductions, or prohibited fees and expenses. Rather, Section 503.23(b) provides that the Administrator may assess CMPs "that are equal to the difference between the amount that should have been paid and the amount that actually was paid to such worker(s)," subject to a maximum of $12,383.[196] Here, the amount of CMPs that ALJ ordered Respondents

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191 *Id.*

192 *Id.* at 40.

193 Resp. Opening Br. at 28-31.

194 *Id.* at 31-34.

195 *See id.* at 28-34.

196 29 C.F.R. § 503.23(b). This maximum is adjusted by regulation. Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Pub. L. No. 114-74, § 701,

to pay directly correlated with the back wages that are owed for these violations.[197] Thus, we affirm the ALJ's order.

Lastly, the ALJ determined that Respondents were liable to pay CMPs for their substantial failure to pay the prevailing wage in 2016 and 2017.[198] We agree with the ALJ's finding that Respondents are liable to pay CMPs. However, because we vacate and remand the ALJ's calculation of back wages, we also vacate and remand the ALJ's calculation of CMPs for Respondents' substantial failure to pay the prevailing wage in 2016 and 2017. On remand, the ALJ is instructed to recalculate the amount of CMPs to account for the recalculation of back wages.

CONCLUSION

Accordingly, we **AFFIRM** the ALJ's Decision and Order in part, **VACATE** and **MODIFY** in part, and **VACATE** and **REMAND** in part.

SO ORDERED.

RANDEL K. JOHNSON
Chief Administrative Appeals Judge

THOMAS H. BURRELL
Administrative Appeals Judge

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129 Stat 584, 599 (2015). The maximum in effect in the present case was $12,383. *See Department of Labor Federal Civil Penalties Inflation Adjustment Act Annual Adjustments for 2018*, 83 Fed. Reg. 7-01, 12 (Jan. 2, 2018).

[197] D. & O. at 61-62.

[198] *Id.* at 37-38.