In the Matter of:

JAMES R. ZAPPALA, JOHN R. ZAPPALA and SAMUEL C. ZAPPALA, individually and as partners in a partnership, d/b/a Zappala Farms	**ARB CASE NOS. 01-054, 01-096, 01-097, 01-098**
and	**ALJ CASE NO. 97-MSPA-9-P**
CLIFFORD J. DeMAY, d/b/a DeMay Labor,	**DATE: August 29, 2001**
and	
NEMIAS PEREZ, a/k/a Nemias Perez-Roblero,	
RESPONDENTS.	

BEFORE: THE ADMINISTRATIVE REVIEW BOARD[1/]

Appearances:
For the Acting Administrator:
Paula Wright Coleman, Esq., Paul L. Frieden, Esq., Steven J. Mandel, Esq., Howard Radzely, Esq., *U.S. Department of Labor, Washington D.C.*

For Respondent Clifford J. DeMay:
Lucinda Odell Lapoff, Esq., *Phillips, Lytle, Hitchcock, Blaine & Huber, LLP, Rochester, New York*

For Respondents James R. Zappala, John R. Zappala and Samuel C. Zappala:
Joseph E. Wallen, Esq., *Amdursky, Pelky, Fennell & Wallen, P.C., Oswego, New York*

For Respondent Nemias Perez:
Steven Ward Williams, Esq., *Smith, Sovik, Kendrick & Sugnet, P.C., Syracuse, New York*

FINAL DECISION AND ORDER

Pursuant to the Migrant and Seasonal Agricultural Worker Protection Act ("MSPA"), 29 U.S.C.A. §§1801-1872 (West 1999), the Wage and Hour Division conducted an investigation into alleged MSPA violations following a 1995 automobile accident in upstate New York in which three migrant farm workers were killed and several others seriously injured. The Division determined that

[1/] This appeal has been assigned to a panel of two Board members, as authorized by Secretary's Order 2-96. 61 Fed. Reg. 19,978 §5 (May 3, 1996).

the MSPA's transportation and housing standards had been violated by the Respondents in this case:

- James R. Zappala, John R. Zappala and Samuel C. Zappala (collectively, "Zappala"), the owners of the farm where the laborers worked;
- Nemias Perez, a crew leader/farm labor contractor who had recruited the laborers; and
- Clifford DeMay, a second farm labor contractor with business ties to Zappala and Perez.

The Division assessed civil money penalties ("CMPs") against each of the Respondents because of the violations.

The Respondents objected to the penalties and requested that the matter be referred to an Administrative Law Judge ("ALJ"). After holding a hearing, the ALJ issued a "Preliminary Decision and Order on Partial Findings – Modifying in Part and Reversing" ("PD&O"), in which the ALJ affirmed the CMP assessments against Perez, modified the assessments against Zappala and reversed entirely the assessments against DeMay. *James R. Zappala,* ALJ No. 1997-MSPA-9-P (Apr. 3, 2001).

Each of the parties to this proceeding – Perez, Zappala, DeMay and the Acting Administrator ("Administrator") – filed petitions asking the Administrative Review Board to issue a notice of intent to modify or vacate the PD&O (pursuant to 29 C.F.R. §500.264), objecting to various aspects of the ALJ's decision.[2/] Exercising its discretion under the MSPA regulations (*see* 29 C.F.R. §500.265), the Board declined to accept the issues raised by the Respondents,[3/] but accepted three issues that had been raised by the Administrator:

> 1. Whether the ALJ erred in dismissing the civil monetary penalty assessment against DeMay based on the ALJ's determination that DeMay did not "cause" migrant workers to be transported in unsafe vehicles in violation of 29 U.S.C.A. §1841(b)(1);
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> 2. Whether the ALJ erred in dismissing the CMP assessment against DeMay because he concluded that DeMay did not "utilize"[4/] an

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[2/] DeMay's petition was docketed as ARB No. 01-054. The other appeals were not issued separate case numbers when they were received; this was an oversight. The Acting Administrator's appeal has now been designated ARB No. 01-096, Zappala's has been designated ARB No. 01-097, and Perez's has been designated ARB No. 01-098.

[3/] Perez's petition was untimely, and therefore was rejected based on timeliness.

[4/] With regard to issues #2 and #3, the text of our May 3 Order referred to "using" an improperly registered farm labor contractor, rather than the term "utilize" found in the MSPA. *See* 29 U.S.C.A. §1842.
(continued...)

> improperly registered farm labor contractor in violation of 29 U.S.C.A. §1842; and
>
> 3. Whether the ALJ erred in dismissing the CMP assessment against Zappala because he concluded that Zappala did not "utilize" an improperly registered farm labor contractor in violation of 29 U.S.C.A. §1842.

See Notice of Intent to Modify (May 3, 2001). The Administrator subsequently advised the Board that it would not pursue the third issue, *i.e.*, whether the ALJ erred in partially dismissing the CMP assessments against Zappala. Acting Administrator's Brief at n.1. Thus, the issues argued to the Board involved only the ALJ's decision not to assess penalties against DeMay.

Briefs were received from the Administrator, DeMay and Zappala. For the reasons set forth below, we conclude that it is unnecessary to modify or vacate the PD&O, and therefore we affirm the ALJ's order regarding penalties. *See* PD&O at 58.

BACKGROUND

The MSPA requires that all farm labor contractors be registered by the Secretary of Labor, with the Secretary specifying the range of activities the farm labor contractor is authorized to perform. 29 U.S.C.A. §1811(a). The "activity" of transporting migrant or seasonal agricultural workers explicitly is recognized under the MSPA regulations, and a farm labor contractor who seeks to transport workers specifically must apply for certification to provide transportation, supporting the application with documentation concerning vehicles, insurance, etc. *See, e.g.*, 29 C.F.R. §500.48.

The MSPA also provides that:

> (1) When *using, or causing to be used*, any vehicle for providing transportation . . . each agricultural employer, agricultural association and *farm labor contractor* shall –
>
> (A) ensure that such vehicle conforms to the standards prescribed by the Secretary [of Labor] under paragraph (2) of this subsection and other applicable Federal and state safety standards.

29 U.S.C.A. §1841(b)(1) (emphasis added). The statute does not define the terms "using" or "causing to be used." Under the MSPA regulations, carpooling that is arranged by migrant farm workers themselves ordinarily *does not* impose vehicle safety obligations on employers or farm labor contractors; however, "any transportation arrangement in which a farm labor contractor *participates*" is considered to fall within the "using or causing to be used" formulation, and therefore subject to the Act's transportation standards. 29 C.F.R. §§500.100(c), 500.103(c). *See generally* 29 C.F.R.

[4/](...continued)
We do not find the difference in language to be material, and it is clear from the briefs that it created no confusion among the parties. In this decision, we revert to the terminology used in the statute.

§500 Subpart D. These standards include minimum qualifications for drivers and vehicles, including specifically fixed seating for all passengers. 29 C.F.R. §500.104.

In addition, the MSPA requires that facilities used to house migrant farm workers be inspected and certified for compliance with health and safety standards. 29 U.S.C.A. §1823; 29 C.F.R. §§500.130-500.135.

The relevant facts are not in dispute.[5/] Respondent Zappala owns Zappala Farms, an agricultural business located in upstate New York. The business consists of onion fields that are separated by long stretches of public road in areas without public transportation. Zappala Farms employs migrant workers to farm the fields.

Respondent DeMay owns DeMay Labor, a business that obtains migrant farm workers for agricultural employers. DeMay is certified as a farm labor contractor.

Respondent Perez came to this country in 1990 as a migrant farm worker. Between 1994 and 1995, Perez lived on DeMay's property and worked in fields owned by DeMay. After working for DeMay as a migrant farm worker, Perez informed DeMay that he wanted to be a crew leader. In order to become a crew leader, Perez had to be certified as a farm labor contractor. Because Perez could not read English, DeMay assisted him in completing an application for a Federal Farm Labor Contractor Certificate. The Department of Labor approved the application in August of 1994 and authorized Perez to recruit, solicit, hire, employ, furnish, and pay migrant workers. The certificate expressly provided that Perez was "not authorized" to house, transport, or drive migrant farm workers.

In January 1995, Zappala contacted DeMay for the purpose of obtaining 15 laborers to work the Zappala Farms onion fields during the 1995 growing season. Zappala and DeMay met on March 8, 1995, to discuss the matter and DeMay brought Perez with him to the meeting. By the end of the meeting, it was understood that: (1) Perez would work for Zappala; (2) Perez would be the crew leader; (3) Perez was to recruit and furnish 20 workers for Zappala; (4) the workers would be responsible for their own transportation; and (5) DeMay would take care of the necessary paperwork.

On March 9, 1995, DeMay sent Zappala a memorandum memorializing the terms of their agreement. In addition to the terms discussed at the meeting, the memorandum provided that DeMay would help Perez "replenish/replace workers when necessary." It also stated that Perez "will be responsible to make sure the workers have a means to get to work, if [Perez] has to supply transportation, he will become properly licensed and the vehicle properly licensed to do this activity." The memorandum was signed by DeMay and Zappala. For these services, Zappala paid Perez a wage equal to 13% of the workers' total wages, and DeMay received a fee equal to 3% of the total wages for its administrative work.

Most of the workers recruited by Perez to work for Zappala did not own vehicles or have driver's licenses, and there was no public transportation available for them to get to Zappala's fields.

[5/] The PD&O reviews the testimony of the witnesses at length, and includes detailed Findings of Fact. *See particularly* PD&O at 34-40.

Perez decided that he would provide transportation for the workers, and went to DeMay for assistance in filling out an application for a Federal Farm Labor Contractor Automobile Liability Certificate so that he lawfully could transport the workers in his van. However, when DeMay observed the poor condition of the van Perez intended to use, he discontinued helping Perez with the application. Although DeMay advised Perez not to transport the workers, Perez ignored that advice because he knew the workers had no other way to get to the fields.

Perez also decided to move closer to the work site so he rented a trailer from Zappala. Although Perez's certification did not authorize him to provide housing to migrant farm workers, and the trailer itself had not been certified (*see* 29 C.F.R. §500.135), Perez allowed eight migrant workers to move in with him. Zappala advised Perez that the trailer was not authorized to house migrant farm workers. When Perez did nothing to correct the situation, Zappala increased Perez's rent by $5 for each worker in an effort to force him to evict them.

In addition to the housing problem, Perez found that providing transportation for the workers was becoming increasingly more difficult. Shortly after he began working for Zappala, his van broke down. He tried using his personal vehicle, but that broke down as well. He also tried using two of his brother's vehicles, but one broke down and the other was damaged in an automobile accident.[6/]

As Perez's transportation difficulties grew more severe, he turned to Zappala and DeMay for help. They suggested that Perez might purchase a van at auction; however, they expressed no concern over the workers' transportation problems. In June of 1995, Perez bought another van. The vehicle did not have any rear seats, so the workers – as many as 18 or 19 at a time – rode on overturned buckets and the spare tire in the rear of the van.

On the afternoon of July 5, 1995, 19 workers piled into a van driven by Perez's brother, Amilcar Roblero. Roblero, who only had a learner's driving permit, lost control of the vehicle and slammed into a tree. Three of the farm workers were killed and several others suffered serious injuries.

The Wage and Hour Division investigated conditions at Zappala Farms, including the living arrangements in Perez's trailer. As a result of the investigation, Perez was fined $21,400; James R. Zappala, John R. Zappala, and Samuel C. Zappala (individually and as partners in the Zappala Farms partnership) were fined $20,000; and DeMay was fined $20,200. All parties contested the fines and the matter was referred to an Administrative Law Judge ("ALJ") for disposition.

After holding a hearing, the ALJ concluded that both Perez and DeMay were farm labor contractors under the MSPA. PD&O at 42. The ALJ upheld the CMPs that had been assessed by the Administrator against Perez for:

- housing migrant farm workers in violation of his Farm Labor Contractor certification (which specifically did *not* authorize him to be a housing provider), and housing workers in facilities that had not been properly certified by a state or local housing authority (*id.* at 42);

[6/] The accident occurred on June 23, 1995.

- causing the transportation of migrant farm workers by a driver without a valid driver's license, and transporting migrant farm workers without a valid certification (*id.* at 43-44);

- engaging the services of Amilcar and Freddy Roblero to perform the farm labor contractor activity of transporting migrant farm workers without first determining whether they were registered either as farm labor contractors or farm labor contractor employees performing a function based on Perez's certificate of registration (*id.* at 45-46); and

- failing to provide safe transport vehicles in violation of the MSPA (*id.* at 46-47).

The ALJ also upheld the CMPs that the Administrator had assessed against Zappala for:

- causing the transportation of migrant farm workers in vehicles which did not comply with the MSPA vehicle safety regulations (*id.* at 49-55);

- using an improperly registered farm labor contractor (*i.e.*, Perez) for the purposes of housing, transporting and driving migrant farm workers without determining whether he possessed a certificate of registration authorizing such activity (*id.* at 56-57); and

- owning a facility used to house migrant workers that did not comply with Federal and state safety and health standards (*id.* at 57-58).

However, the ALJ did not uphold the CMPs that the Administrator had assessed against DeMay for (a) causing migrant farm workers to be transported in vehicles that did not meet safety standards, or (b) using an improperly registered farm labor contractor (Perez) to house, transport or drive migrant farm workers. *Id.* at 47-49, 54-55. In addition, the ALJ found that Zappala did not "utilize" Perez to house migrant farm workers and therefore denied this aspect of the CMPs assessed against Zappala.

As noted above, all parties appealed to this Board seeking modification of various aspects of the ALJ's decision.

JURISDICTION

We have jurisdiction over this appeal pursuant to the MSPA and its implementing regulations (*see* 29 C.F.R. §500.264), as well as Secretary's Order 2-96. 61 Fed. Reg. 19,978 §4(c)(25).

SCOPE OF REVIEW

Under the Administrative Procedure Act, we have plenary power to review an ALJ's factual and legal conclusions *de novo*. See 5 U.S.C.A. §557 (b) (West 1996); *Masek v. Cadle Co.*, ARB No. 97-069, ALJ No. 95-WPC-1, slip op. at 7 (ARB Apr. 28, 2000).

DISCUSSION

As noted above, the only two issues before the Board for review are:

(1) whether the ALJ erred in finding that DeMay did not "cause" migrant workers to be transported in unsafe vehicles in violation of 29 U.S.C.A. §1841(b)(1); and

(2) whether the ALJ erred in finding that DeMay did not "utilize" an improperly registered farm labor contractor in violation of 29 U.S.C.A. §1842.

1. Whether DeMay caused migrant workers to be transported in unsafe vehicles.

The Administrator notes that DeMay is a "farm labor contractor" bound by 29 U.S.C.A. §1841(b)(1), which requires that "[w]hen using, or *causing to be used*, any vehicle for providing transportation to which this section applies, each . . . farm labor contractor shall . . . ensure that such vehicle conforms to the standards prescribed by the Secretary . . . and other applicable Federal and state safety standards." Emphasis added. On appeal, the Administrator argues that DeMay "caused" Perez's unsafe vehicles to be used to transport migrant farm workers, pointing out that (1) DeMay knew that the workers could not get to the fields unless someone transported them; (2) DeMay entered into an agreement with Zappala that made Perez responsible for transporting the workers and expressly provided that, if Perez had to transport the workers, he would become properly licensed and the vehicle properly licensed to do this activity; (3) DeMay initiated paperwork to obtain transportation authorization for Perez (but discontinued his efforts when he observed the condition of Perez's van); and (4) DeMay knew that Perez's van had broken down and suggested that he obtain another one through an auction. The Administrator asserts that these facts suggest that DeMay knew, or should have known, that Perez was transporting workers without proper authorization. In addition, the Administrator also points out that DeMay was prepared to help Perez "furnish" workers to Zappala if it became necessary.[7/]

In his Preliminary Decision and Order, the ALJ declined to find that DeMay caused the transportation of the workers, based on the following reasoning:

> In their March 1995 meeting, DeMay Labor, Zappala Farms, and Mr. Nemias Perez agreed that the workers would be responsible for their own transportation and Mr. Perez would be responsible for getting the workers to the onion fields if they didn't have their own means of transportation. When the growing season started, the migrant workers met their transportation obligation through the use of Mr. Freddy Roblero's passenger van and Mr. Nemias Perez's Bronco. However, once the transportation situation deteriorated, Mr. Perez approached Mr. DeMay about the transportation difficulties. Mr. DeMay suggested Mr. Perez consider obtaining a van at an auction but did nothing further in regards to the workers' transportation shortfall.

[7/] There is no indication in the record that this contingency ever materialized.

* * *

Since no provision of the Act required either DeMay Labor or Zappala Farms to provide transportation for the workers, their March 1995 agreement with Mr. Perez that the workers provide their own transportation did not violate the Act or attempt to relieve them of any statutory responsibilities associated with their respective statuses. To the contrary, the three parties included a provision in the agreement that in the event the workers did not have vehicles and Mr. Perez had to furnish transportation, he would comply with the appropriate licensing and vehicle safety requirements under the Act. The March 1995 agreement did not cross any statutory boundaries; and, according to its terms, it did not amount to a direction or request by DeMay Labor sufficient to cause unsafe vehicles to be used by Mr. Perez for the transportation of migrant workers. Likewise, DeMay Labor's status as a party to the March 1995 agreement does not amount to DeMay Labor's participation in migrant workers' transportation arrangement.

DeMay Labor's subsequent suggestion to Mr. Perez about obtaining a vehicle at an auction also falls well short of being a direction to, or request of, Mr. Perez to use [a] van without sufficient seating for his crew's transportation. Similarly, the auction suggestion, standing alone, does rise to the level of "participation" by DeMay Labor in Mr. Perez's transportation arrangement. Despite its compensation arrangement with Zappala Farms, DeMay Labor did nothing further to resolve [the] transportation woes of the workers and Mr. Perez.

I also note that rather than avoid its obligations as a farm labor contractor, DeMay Labor further demonstrated its sensitivity to the statutory transportation registration and safety requirements in other dealings with Mr. Perez. Just before the start of the growing season, after observing the poor condition of Mr. Perez's brown van, Mr. DeMay refused to assist Mr. Perez in obtaining authorization to transport migrant workers. In addition, he specifically instructed Mr. Perez not to transport workers in the brown van and told him that the workers should use their own vehicles for transportation.

DeMay Labor neither directed nor requested the transportation that Mr. Perez chose to provide to his crew. And, DeMay Labor, as a farm labor contractor, did not participate in any manner in the transportation arrangement for Mr. Perez's work crew. Absent any direction, request or participation by DeMay Labor in the travel arrangements, the preponderance of the evidence is insufficient to support the charge that DeMay Labor caused the unsafe vehicles to be used to transport the Zappala Farms migrant workers.

PD&O at 47-49 (footnotes and record citations omitted).

The MSPA was enacted to better protect migrant and seasonal workers. As the court in *Antenor v. D&S Farms*, 88 F.3d 925, 930 (11th Cir. 1993) noted:

> Previous legislative efforts to protect farmworkers had focused on regulating the crewleaders who recruited, managed and paid the farmworkers. Those efforts, however, had failed to "reverse the historical pattern of abuse of migrant and seasonal farmworkers," primarily because crew leaders were transient and often insolvent. Thus, in designing the MSPA, Congress took a completely new approach, making agricultural entities directly responsible for farmworkers who, as a matter of economic reality, depended upon them, even if the workers were hired or employed by a middleman or independent contractor.

(Citations to the legislative history omitted). As a remedial act, the MSPA must be construed broadly to effectuate its humanitarian and remedial purpose. *Antenor*, at 933.

In this case, there is no question that DeMay played a central role in facilitating Perez's relationship with Zappala, and both DeMay and Perez had on-going responsibilities to Zappala to provide labor through the growing season. Perez had a limited knowledge of English and government regulations and was heavily dependent on DeMay in setting himself up as a farm labor contractor. In addition, just as Perez was paid a fee based on a percentage of the total payroll, so was DeMay – suggesting that DeMay's expected role in the labor contract extended beyond merely completing forms for the migrant workers. Thus, the Administrator's theory has an element of plausibility to it, and might succeed if there were stronger evidence supporting it.[8/]

However, on the record developed in this case, we agree with the ALJ that the Administrator has not proven that DeMay "caused" migrant workers to be transported in unsafe vehicles. There is no evidence to suggest that any of the vehicles were under DeMay's control, either directly or indirectly. To the extent that the matter of transporting workers was presented to DeMay, the evidence suggests that DeMay actively discouraged Perez's involvement in transportation activities. And even if the Administrator were correct that DeMay "knew or should have known" that Perez was transporting farm workers improperly, we fail to see how such knowledge alone can be deemed to be "causing" migrant workers to be transported improperly. Although the MSPA is to be interpreted broadly, the statutory text is not so elastic that it can encompass the result urged by the

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[8/] We note that nowhere does the Administrator argue that Perez acted as DeMay's agent, which under the MSPA would be governed by common law agency principles. *See Cardenas v. Benter Farms*, 2000 WL 1372848 (S.D. Ind. 2000). Nor does the Administrator contend that Perez and DeMay somehow were in partnership or joint employers or alter egos.

Administrator.[9/] We therefore conclude that the ALJ did not err in concluding that the Administrator did not sustain his burden of proof on this issue.

2. Whether DeMay utilized the services of a improperly certified farm labor contractor.

Under 29 U.S.C.A. §1842,

> No person shall utilize the services of any farm labor contractor to supply any migrant or seasonal agricultural worker unless the person first takes reasonable steps to determine that the farm labor contractor possesses a certificate of registration which is valid and authorizes the activity for which the contractor is utilized.

The Administrator asserts that DeMay improperly "utilized" the services of Perez to transport migrant agricultural workers in violation of 29 U.S.C. §1842 because DeMay relied on Perez to transport, house and drive migrant farm workers without determining that he possessed a certificate of registration for these activities. The ALJ rejected this argument:

> DeMay Labor is liable for the cited violation only if it in some manner utilized Mr. Perez to house, drive, and transport migrant workers. Since as a farm labor contractor for Zappala Farms, DeMay Labor agreed to furnish a work crew, an argument exists that it relied on Mr. Perez and his housing and transportation arrangements to meet its contractual obligation of providing a steady work force to the onion fields. And, DeMay's fee arrangement was tied to the number of hours the workers were employed.
>
> On the other hand, I find more persuasive the fact that DeMay Labor's essential interaction with Mr. Perez occurred when Mr. Perez solicited and recruited the migrant workers. After Mr. Perez assembled his crew, DeMay Labor facilitated their ability to work on the Zappala Farm by completing the necessary paper work. Completion of the administrative processing and the assembly of a work crew for Zappala Farms at its labor camps by Mr. Perez, for which he had proper authorization, essentially met DeMay Labor's obligation under the contract for furnishing labor to Zappala Farms. Under the parties' agreement, DeMay Labor was not responsible for actually housing, delivering, and transporting the workers to the fields. While the fee arrangement was linked to the workers' pay, this arrangement made some sense [in] light of DeMay Labor's continuing commitment to assist Mr. Perez in replacing workers. And, over the course of the growing season, DeMay Labor did administratively process additional workers on Mr. Perez's crew.

[9/] On a different record showing substantial involvement by DeMay in Perez's operation, we might reach a different result. However, our task is to judge this case based on the evidence that is before us.

> But, DeMay Labor had no involvement with the migrant workers in any other employment aspect, including housing and transportation, after they moved to the Zappala Farms labor camps.

PD&O at 55.

In construing §1842, the Eleventh Circuit has determined that a person cannot be held liable for failing to verify a farm labor contractor's registration where he neither directed, controlled, or supervised the workers nor hired the contractor. *Charles v. Burton*, 169 F.3d 1322 (11th Cir.), *reh'g denied*, 182 F.3d 938 (11th Cir.), *cert. denied*, *Burton v. Charles*, 528 U.S. 879 (1999). We accept *Charles* as guidance in this matter. The record in this case does not demonstrate that DeMay directed, controlled, or supervised the workers, nor did DeMay "hire" Perez – Zappala did. As with the transportation issue, *supra*, we find that the ALJ's conclusion is correct based on the record developed in this case. Therefore, we conclude that the Administrator has not proved that DeMay violated §1842.

CONCLUSION

For the reasons stated, the ALJ's decision is **AFFIRMED**.

SO ORDERED.

PAUL GREENBERG
Chair

RICHARD A. BEVERLY
Alternate Member