



Issue Date: 19 November 2004

CASE NO: 2003-MSP-2

In the Matter of

EVERGREEN FORESTRY SERVICES, INC.,

and

PETER SMITH,

Respondents.

DECISION AND ORDER

Background

This matter arises under the Migrant and Seasonal Agricultural Workers Protection Act, 29 U.S.C. § 1801, *et seq.* (“the MSPA” or “the Act”) and the applicable regulations at 29 C.F.R. § 500, *et seq.* The parties have agreed to submit the case on briefs in lieu of a formal hearing. The parties have submitted a joint stipulation as to the record with stipulated exhibits. Those exhibits are fully incorporated herein and shall be referred to as JX ____.¹

This case arises from a single vehicle accident which occurred in rural Maine on John’s Bridge Road. The accident resulted in the death of fourteen migrant workers, including the driver of the vehicle. Department of Labor Wage and Hour Investigator James Claus conducted

¹ The Respondent objected to Exhibit O, the accident reconstruction report, as well as to portions of Exhibits A, B, C, D, J, K, L, and N. These objections were discussed and overruled in the undersigned’s Order dated February 24, 2004. The Respondent has been given ample opportunity to present contradictory evidence to these exhibits. As such, these exhibits will become part of the record, and the Respondent’s objections will go to the weight given to these exhibits, not to their admissibility. The Respondent also objects to Exhibits U through Z as irrelevant. These exhibits are documents relating to previous MSPA investigations performed on the Respondent by the Department of Labor Wage and Hour Division. These exhibits are admissible; under 29 C.F.R. § 500.143, the Respondent’s previous history of MSPA violations is a factor in determining the reasonableness of the civil money penalty assessed. Therefore, these documents are admissible for this purpose.

an investigation and determined that the Respondent violated numerous provisions of the Act. The Department of Labor seeks \$17,000 in civil money penalties for alleged violations of the Act; the bulk of the penalty involves \$15,000 sought for an alleged violation of 29 C.F.R. §§ 500.105(b)(2)(ii) and 500.105(b)(2)(v) for operating a motor vehicle used to transport workers at speeds in excess of those permitted under the applicable Maine law. The remaining \$2,000 penalty involves alleged violations of 29 C.F.R. §§ 500.40, 500.41, and 500.45(b).

The Respondent objected to these findings and requested a hearing. The case was docketed on March 4, 2003, assigned to the undersigned, and set for hearing. In January 2004, the parties filed motions for summary judgment, which were denied in the undersigned's February 24, 2004 Order Denying Motion for Summary Judgment and Motion in Limine. The undersigned determined that genuine issues of material fact remained and thus denied summary judgment. The parties then filed stipulations as to the record and briefs in lieu of a formal hearing.

Findings of Fact and Conclusions of Law

The MSPA establishes wide-ranging protections and remedies for migrant workers through its requirements for farm labor contractors. The Respondent is charged with violating the statutory provisions that provide for registration of drivers and vehicles under the MSPA, as well as an alleged violation of the obligation to operate a motor vehicle in accordance with applicable laws.

The pertinent facts are essentially undisputed. Respondent Peter Smith, III is the sole owner of Evergreen Forestry Services, Inc., a registered farm labor contractor employer. JX P. Evergreen's corporate headquarters are located in Sandpoint, Idaho. JX R. Evergreen was hired by Pine Belt, Inc. to do pre-commercial thinning on land in Northwest Maine. JX EE. For this project, Evergreen employed fifteen migrant farm workers, who were transported to the jobsite via a fifteen passenger van driven by worker Juan Turcios-Matamoros.² JX C.

² Although there is some issue as to who regularly drove the van, on the day of the accident, Mr. Turcios-Matamoros was identified as the driver. JX S.

On September 12, 2002, a single motor vehicle accident involving the fifteen passenger van occurred on John's Bridge Road in Piscataquis County in Northwest Maine. The van was traveling to the worksite in Piscataquis County, on land which was owned and managed by Seven Islands Land Co. and was part of the North Main Woods. The driver was traveling on a remote logging road in Township 9, Range 13, when he lost control of the van as it traveled across a bridge over the Allagash River. The van plunged into the Allagash River and fourteen of the fifteen passengers drowned. The only survivor, Edilberto Morales-Luis, returned to Guatemala shortly after the accident. Id.

The Respondent was charged with multiple violations of the Act and was assessed total civil money penalties of \$17,000. A civil money penalty of \$1,000 was assessed based on an alleged violation of 29 C.F.R. §§ 500.40 and 500.41, requiring drivers who transport workers to be registered as such. A civil money penalty of \$1,000 was assessed based on the Respondent's failure to list the vehicle being used to transport workers on its farm labor contract certificate, in violation of 29 C.F.R. § 500.45(b). The remaining penalties of \$15,000 were assessed for alleged violations of 29 C.F.R. § 500.105(b) for failing to operate a vehicle in accordance with the laws, ordinances, and regulations of the jurisdiction in which it is being operated. A civil money penalty of \$1,000 was assessed for each worker involved in the accident. Id.

Twenty-nine C.F.R. § 500.105(b)(2)(ii) provides that "every motor vehicle shall be driven in accordance with the laws, ordinances, and regulations of the jurisdiction in which it is being operated." Twenty-nine C.F.R. § 500.105(b)(2)(v) states that "no person shall permit nor require the operation of any motor vehicle between points in such period of time as would necessitate the vehicle being operated at speeds greater than those proscribed by the jurisdictions in or through which the vehicle is being operated."

The applicable Maine statute controlling rates of speed is found in the Maine Motor Vehicle Statute, Title 29-A § 2074 of the Maine Revised Statutes. The statute specifies that "an operator shall operate a vehicle at a careful and prudent speed not greater than is reasonable and proper having due regard to the traffic, surface and width of the way and of other conditions then

existing.” Me. Rev. Stat. Ann. tit. 29-A, § 2074. (West 2003). The statute specifically excludes operation of a vehicle “on private land to which the public does not have access when used by or with authorization of the landowner.” Id., § 2074(4)(B). The statute also imposes a maximum speed limit of 45 miles per hour on “public ways unless otherwise posted.” Id., § 2074(1)(D).

The accident occurred in a remote part of the North Maine Woods, a portion of land used primarily for logging and recreational activities. The North Maine Woods, Inc. (“NMW”) is an association of landowners responsible for management and maintenance of a large portion of land in Northern Maine. The NMW consists of private owners, as well as the State of Maine. The members manage roads and staff checkpoints at which fees are collected and permits are issued. There are access gates, where visitors are required to register and pay a usage fee. Certain gates are open twenty-four hours a day, while others require an additional fee to enter during off-peak hours. JX F, H. The land managed by the NMW is used for commercial logging, as well as public camping and recreation. The NMW management group advertises and promotes public use of the land and publishes a brochure explaining and encouraging such use. JX F.

Following the accident, Maine State Trooper Corey Hafford prepared an accident reconstruction report. Trooper Hafford concluded that the cause of the accident was improper speed and driver inattention. Although Trooper Hafford could not determine the exact rate of speed of the van before it left the bridge, a fall speed of 28 mph was determined. The report surmised that the van was traveling at a much greater speed when it struck the side of the bridge and plummeted into the Allagash River. No criminal charges were filed in regard to this accident. JX K, O. Based on Trooper Hafford’s report, the Department of Labor determined that Respondent had violated 29 C.F.R. § 500.105(b) for failing to operate a motor vehicle in accordance with applicable state laws. The Department of Labor investigator alleged that the van was traveling at an excessive rate of speed when the accident occurred. JX A.

The parties are in dispute as to the applicability of speed limits on North Maine Woods property. The NMW does have a speed limit of 45 mph, which is posted in the area and is published in the “Rules of the Road” brochure given to drivers in the area. JX I. The

Respondent disputes that the driver would have seen a posted speed limit sign and asserts that Evergreen never received a copy of the Rules of the Road brochure setting forth the speed limit. The Maine state speed limit statute establishes a 45 mph speed limit, except on private roads to which the public does not have access. The Maine statute also requires a careful and prudent speed. Me. Rev. Stat. Ann. tit. 29-A, § 2074 (West 2003).

Department of Labor's Arguments

The Department of Labor charges that the Respondent violated 29 C.F.R. § 500.105(b) by failing to abide by state law while operating a motor vehicle in connection with the Act. The applicable statute defines rates of speed for various roadways. The Department contends that this statute imposes a duty to drive at a "careful and prudent speed," regardless of the maximum speed set for certain types of roads. The Department further argues that the private road exception to this section does not apply, as the public has access to these roads, despite the system of checkpoints and gates used by NMW, Inc. Accordingly, the Department asserts that section 2074 is the governing authority, imposing a duty to drive at a careful and prudent speed.

The Department claims that the Respondent failed to drive at a careful and prudent speed, as demonstrated in the accident reconstruction report prepared by Maine State Trooper Corey Hafford. The Department contends that the report conclusively establishes that the van was traveling at an imprudent speed, regardless of the exact rate of speed. As such, the Respondent is charged with a violation of 29 C.F.R. § 500.105(b); the Department assessed \$15,000 in civil money penalties, given the severity of the violation and the resulting accident and the Respondent's history with respect to MSPA violations.

Respondent's Arguments

The Respondent argues that the Department has failed to prove the speeding violation. The Respondent asserts that the land on which the accident occurred is privately owned and is not accessible to the public, thereby excluding it from the Maine statute at issue. The Respondent

states that the public does not have access to this land and is only granted limited permission to use the land for recreational purposes.

Further, the Respondent argues that the Department failed to prove that the van was being driven at an imprudent speed. The Respondent attacks the accident reconstruction report, stating that it is inconsistent and does not take a number of factors other than speed and driver inattention into account. Citing the statement of the sole survivor of the accident, the Respondent asserts that the rate of speed of the van cannot be determined and therefore, it cannot be shown to be imprudent. The Respondent also argues that there was no knowledge of a violation and thus, they should not be held accountable.

Discussion

The purpose of the MSPA is to ensure necessary protections for migrant and seasonal agricultural workers. 29 C.F.R. § 500.1(a). The Secretary is empowered under the Act to conduct investigations, make findings, enforce the provisions of the MSPA, and impose sanctions where necessary, not to exceed \$1,000 per violation. 29 C.F.R. § 500.7. Upon appeal of the initial findings, an administrative law judge may conduct a hearing in the matter and make determinations as to whether the Respondent violated the Act, and the reasonableness of the remedies imposed by the Secretary. 29 C.F.R. § 500.262(c).

The MSPA applies to this matter because the Respondent was a registered farm labor contractor under the Act at the time of this accident. JX AA. Respondent Evergreen Forestry is controlled and solely owned by President Peter Smith. JX P. The Respondent is a forestry contractor; at the time of the accident, the Respondent was engaged in precommercial thinning on land owned by Seven Islands Company. JX DD, EE. When the accident occurred, the migrant farm workers were being transported from their residences in Caribou, Maine to the worksite in the North Maine Woods.

A farm labor contractor is responsible for the actions of his farm labor contractor employees. 29 C.F.R. § 500.41. When transporting workers, the farm labor contractor is

required to comply with the MSPA; the MSPA motor vehicle standards apply and are imposed upon a person using, or causing to be used, any vehicle for transportation of workers. 29 C.F.R. § 500.70(a), (c). The person using the vehicle to transport workers is required to operate the vehicle in accordance with the laws, ordinances, and regulations of the jurisdiction in which it is being operated. 29 C.F.R. § 500.105(b)(2)(ii).

Operation of vehicle in accordance with state laws - 29 C.F.R. § 500.105(b)(2)(ii)

The alleged violation is grounded in the Maine state law governing rates of speed; Maine regulations require that

[a]n operator shall operate a vehicle at a careful and prudent speed not greater than is reasonable and proper having due regard to the traffic, surface and width of the way and of other conditions then existing.

Me. Rev. Stat. Ann. tit. 29-A § 2074. (West 2003). The statute specifically excludes operation of a vehicle “on private land to which the public does not have access when used by or with authorization of the landowner.” Id., § 2074(4)(B). The statute also imposes a maximum speed limit of 45 miles per hour on “public ways unless otherwise posted.” Id., § 2074(1)(D).

This section applies to the matter at hand and the road in question does not fall under the exception. The statute requires that drivers exercise a careful and prudent speed, with concern for the conditions of the roadway. The exception for privately owned roads to which the public does not have access is inapplicable in this matter. The exception has three parts: to be exempt from this section, the road must be privately owned, the public must not have access to this road, and the road must be used by or with the permission of the landowner. Id. There is no relevant case law interpreting this provision; this is a novel question which must be answered specifically as relating to these facts under the MSPA.

The first prong of this exception is satisfied: the road is privately owned. The road where the accident occurred, John’s Bridge Road, is located in a remote part of Maine in the area referred to as the North Maine Woods. JX F. The NMW is a privately owned portion of land in which the roadways are primarily used for the purposes of commercial logging. The roads in the

NMW are privately owned and maintained; the state does not control these roads or otherwise deal with enforcement on these roads. JX G, M.

The third prong of the exception is also satisfied: the Respondent was using this road by or with the permission of the landowner. At the time the accident occurred, the workers were traveling to the worksite within the NMW. Evergreen was a subcontractor of Pine Belt Inc., who had contracted with Seven Islands Land Co., the managers of the land on which the worksite was located. JX EE. To reach the worksite, the workers had to enter a NMW checkpoint, thus receiving the permission of the owners to use the roadways. JX EE, FF.

However, this road does not fit under the second prong of the exception because the record shows that the public does have access to the road. Even though the NMW is privately owned, the public is granted access to the land and the road system on a regular and routine basis. JX F. In order to travel on the roads within the NMW, drivers must stop at the vehicle checkpoints and complete a land use permit, consisting of information about the vehicles, passengers, and the intended activity. JX H. Fees are also collected for use of the land and campsites. The permit includes a liability waiver and an agreement to abide by all state and local laws while in the NMW. Id. Although the Respondent has argued that the access points to NMW property are like a “Berlin Wall,” information required to obtain the permit does not rise to the level of exclusivity that the Respondent suggests.

NMW, Inc. states in the “Experience the Tradition” brochure that “travel is possible throughout the entire area with only a few restrictions.” JX F. The brochure lists the hours and names of checkpoints through which “recreationists traveling by vehicle will pass.” Id. Some checkpoints are open twenty-four hours per day. It is noted that passage through checkpoints after designated hours requires an additional fee. Included in the brochure is a list of fees for camping in the NMW; fees range from \$4.00 per day for Maine residents to \$140.00 for annual unlimited camping. Id.

The public clearly has access to this land and these roadways, despite the system of checkpoints established. The checkpoints function as tollbooths where fees are collected and

visitors are recorded. The material published by NMW, Inc. does not suggest that the public is prohibited from visiting the area or restricted in access to and use of the roads. On the contrary, the “Experience the Tradition” brochure essentially invites the public onto the land for recreational purposes and notes that fees are collected only to help maintain the land.³ Accordingly, the public has access to this land such that it is not excluded from the Maine statute requiring a careful and prudent speed. Section 2074 of the Maine motor vehicle code applies, establishing that the Respondent had a duty to operate the motor vehicle at a careful and prudent speed.⁴

The next issue is whether the Respondent violated this duty to operate his vehicle at a careful and prudent speed. The accident reconstruction report prepared by Maine State Trooper Corey Hafford⁵ concluded that imprudent speed and driver inattention were the primary causes of the accident. JX O. Trooper Hafford stated that “the operator was traveling at a high and imprudent speed,” even though the exact rate of speed at the time of the accident could not be determined. The report describes the bridge on which the accident occurred as a “one lane bridge, consisting of two rows of planks for traveling.” Id. Although Trooper Hafford could not determine a rate of speed for the van as it entered the bridge, he was able to determine the fall speed, which was found to be 28 mph. Id. Trooper Hafford examined the tire tracks and noted that they indicated rolling tires, showing that the van did not brake on the bridge.

The report also found that the van’s tires had not gone flat prior to impacting the bolts on the bridge, meaning that the flat tire on the van was a result, not a cause, of the accident. Trooper Hafford therefore ruled out a tire blow-off as a cause of the accident. This

³ NMW, Inc. is a non-profit corporation. The revenue collected from camping fees is used solely for maintenance and operation costs. JX F.

⁴ There has been argument over whether the road involved constitutes a public way, thus falling under § 2074(1)(D), establishing a 45 mph maximum speed. Although it has been determined that the public had access to this road, the road is privately owned and maintained and is thus excluded from the definition of public way found in § 101(59) of the Maine motor vehicle statute. Therefore, the 45 mph public way speed limit is inapplicable to the facts presented in this matter.

⁵ Trooper Hafford has almost ten years of experience as a Maine state trooper. He was certified as an accident reconstruction specialist in 1999 and has performed over 65 reconstructions. Trooper Hafford has received annual training in accident reconstruction. JX BB.

determination is bolstered by the vehicle forensic report, which found that the tear in the right rear tire was caused by the accident. JX T. The conclusion was reached based on the scuffs found on the tire, which were found to be caused by the tire scraping the side of the bridge. Trooper Hafford noted that the “tire marks were consistent with rolling tires.” JX O. According to the accident reconstruction report, when the van entered the bridge, the tires were not squarely lined on the crossboards of the bridge. Trooper Hafford stated that at a low speed, this would not have caused the accident; however, an attempt to correct this could have produced the loss of control. Although the exact speed of the van is not known, it was noted that the vehicle would have encountered tremendous friction from the sides of the planks and bridge, greatly slowing the speed of the van. It was Trooper Hafford’s conclusion that if the driver was traveling at a prudent speed, the accident would not have occurred. No criminal or traffic charges were filed with respect to the accident. Id.

The Respondent has attacked the accident reconstruction report as inconsistent and unreliable. The Respondent’s main objection is that Trooper Hafford did not take certain factors into account, such as the crosswinds, the propensity for rollover in this model of van, and the fact that the exact rate of speed could not be determined. However, the Respondent’s argument that the report is inconsistent because it concluded that imprudent speed was a primary cause of the accident is without merit. Trooper Hafford noted other factors in the report. He included the direction and speed of the winds. He explained the failure to determine the exact rate of speed due to the fact that the van did not brake while it was on the bridge. Trooper Hafford described in detail how the fall speed of 28 mph was determined. He also discussed the tire markings and conclusively noted that the cuts in the tire were a result of the accident and did not contribute to the accident. JX O.

The Respondent has argued that the sole survivor of the accident, Edilberto Morales-Luis, stated that he heard a loud explosion when the van entered the bridge. JX S.⁶ The Respondent attributed this to a tire blow-out, arguing that the reconstruction report should be discredited because it did not take the survivor’s statement into account. However, there is no evidence that

⁶ Mr. Morales-Luis also stated that Mr. Turcios-Matamoros, the driver, drove fast when he was in a hurry and he drove faster than Mr. Carlos Izaguirre, the foreman of the crew, who shared driving duties with Mr. Turcios-Matamoros. JX S.

a tire blow-out occurred; the accident reconstruction report and the vehicle forensic report establish that a tire blow-out did not occur and the tire damage was a result of the van skidding and sliding on the bridge. JX O, T.

The only evidence in the record supports the conclusion that the cause of the accident was imprudent speed. The Respondent has argued that the accident reconstruction report was unreliable, but aside from bare assertions that the report is inconsistent, the Respondent has offered no evidence to discredit the report or otherwise contradict the findings. As such, the evidence demonstrates that the accident was caused by the imprudent speed. Although an exact rate of speed could not be determined, the conclusion of imprudent speed supports a finding that a violation of the MSPA occurred. As discussed above, the MSPA imposes a duty to comply with state laws regarding the operation of motor vehicles. The applicable Maine state law requires a careful and prudent speed; the evidence of record demonstrates that the cause of the accident was imprudent speed. Therefore, the Respondent failed to operate a motor vehicle in accordance with the laws, ordinances and regulations of the jurisdiction in which it was being operated, in violation of 29 U.S.C. § 1841(b)(2) and the implementing regulation, 29 C.F.R. § 500.105(b)(2)(ii).

The civil money penalty assessed by the Department of Labor was \$15,000; this represents a \$1,000 civil money penalty for each worker involved in the accident. Analysis of whether a civil money penalty is appropriately assessed must consider several factors. These factors include the Respondent's previous history of MSPA violations, the number of workers affected by the violation, the gravity of the violation, any good faith efforts to comply with the Act, the explanation of the person charged with the violation, the commitment to future compliance, and the extent of financial gain as a result of the violation. 29 C.F.R. § 500.143(b)(1-7).

Given the severity of the violation and the number of workers affected, the civil money penalty is reasonable. This accident involved the death of fourteen migrant workers. The gravity of the violation and the number of workers affected favor a weighty penalty. The Department of Labor introduced multiple documents relating to previous MSPA inspections

from 1992 to 1998. JX U through Z. These documents establish a lengthy history of MPSA violations by the Respondent and can be used as a factor in determining the reasonableness of the penalty assessed. Given the Respondent's history, the penalty is reasonable. The Respondent argues that he instructed the driver to drive safely and good faith efforts were made to comply with the Act. JX S. The Respondent has not realized financial gain from this accident. Even accounting for these mitigating factors, the severity of the violation warrants the highest penalty. Accordingly, the Respondent is assessed a civil money penalty of \$15,000 (\$1,000 per worker) for the violation of 29 C.F.R. § 500.105(b)(2)(ii).

Driver of vehicle not registered driver under MPSA - 29 C.F.R. §§ 500.40, 500.41

The Respondent is also charged with a violation of 29 C.F.R. §§ 500.40 and 500.41 for failure to register the driver of the vehicle for the activity of driving and transporting workers. The driver of the vehicle was Juan Turcios-Matamoros. JX O. The Respondent has asserted that it believed that the foreman, Carlos Izaguirre, was driving and that Peter Smith had instructed Mr. Izaguirre not to let Mr. Turcios-Matamoros drive.

The payroll records indicate that Mr. Turcios-Matamoros was often paid for driving. For certain pay periods, he was paid for up to 116 hours. Further, he was listed as a driver on these payroll records. Mr. Izaguirre was not listed as a driver and was not paid overtime for driving. The statement from Mr. Morales-Luis, the sole survivor of the accident, states that "the driver that day was Juan Turcios." JX S. The survivor goes on to state that Mr. Izaguirre and Mr. Turcios-Matamoros shared driving duties.

The Respondent has argued that they had told Mr. Turcios-Matamoros not to drive and were not aware that he continued to drive the crew. The payroll records clearly contradict this argument; the Respondent had paid Mr. Turcios-Matamoros for driving throughout the course of the summer. The Respondent's statement that he had told Mr. Turcios-Matamoros not to drive is directly contradicted by his payment of wages to the worker for this very activity.

The Complainant was assessed a civil money penalty of \$1,000 for this violation. Given the severity of the accident occurring in conjunction with this violation, the maximum penalty is reasonable.

Vehicle not registered vehicle under MSPA - 29 C.F.R. §§ 500.45(b), 500.55

The vehicle, a 2002 Dodge Van, was not listed on the Respondent's farm labor contractor certificate. JX AA. The Respondent argued that this was a de minimus violation and should not be assessed a penalty. The Respondent claimed that Peter Smith relied on a statement from a MSPA program manager that registration of a rental van was not necessary. JX C. The manager could not remember this conversation and the certificate was never amended to include the vehicle. Id.

The Complainant was assessed a civil money penalty of \$1,000 for this violation. Once again, given the circumstances of the violation, the maximum penalty is warranted.

ORDER

Accordingly, it is hereby **ORDERED** that determination of the civil money penalty assessed against the Respondent as a result of the September 12, 2002 accident be affirmed. The Respondent is **ORDERED** to promptly remit \$17,000.00 to the U.S. Department of Labor for these violations.

SO ORDERED.

A

JOHN M. VITTON
Chief Administrative Law Judge

NOTICE: Any party may petition the Administrative Review Board for issuance of a Notice of Intent to modify or vacate this decision as described in 29 C.F.R. § 500.263. The petition must be filed within twenty days of the date of this decision with the Administrative Review Board, U.S. Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington D.C. 20210. *See* 29 C.F.R. §§ 500.263, 500.264. The Administrative Review Board has been delegated authority and assigned responsibility to act for the Secretary of Labor in issuing final agency decisions on questions of law and fact arising in review or on appeal of ALJ decisions under the Migrant and Seasonal Agricultural Workers Protection Act. *See* Secretary's Order 2-96, 61 Fed. Reg. 19978 (1996).