

U.S. Department of Labor

Office of Administrative Law Judges
90 Seventh Street, Suite 4-800
San Francisco, CA 94103-1516

(415) 625-2200
(415) 625-2201 (FAX)



Issue Date: 08 May 2014

MSHA CASE NOS: 2011-MSPA-P-00004/00005

CASE NOS.: 2011-MSP-00004/00005

In the Matter of:

BRADLEY YOUNGWIRTH, d/b/a
BOBCAT & EXCAVATION SERVICES,
(Shoshone County Fire Mitigation Services)
Respondent.

DECISION AND ORDER DENYING RESPONDENT'S CLAIM OF EXEMPTION FROM
THE MIGRANT AND SEASONAL AGRICULTURAL WORKER PROTECTION ACT

INTRODUCTION

This matter arises under the Migrant and Seasonal Agricultural Worker Protection Act ("MSPA"), 29 U.S.C. § 1801 *et seq.*, and the regulations issued thereunder at 29 C.F.R. Part 500 *et seq.* The MSPA provides employment-related protections to migrant and seasonal agricultural workers and is administered and enforced by the Wage and Hour Division ("WHD") of the U.S. Department of Labor's Employment Standards Administration. This case was referred for mediation and a settlement agreement was reached and executed by the parties, reserving to the Respondent the right to have this Court rule on his claim for exemption from the requirements of the MSPA.

For the reasons outlined below, I find that Respondent does not meet the requirements for exemption from the MSPA.

PROCEDURAL BACKGROUND

By notice dated January 20, 2011, the WHD ("Plaintiff") notified Bradley Youngwirth d/b/a Bobcat and Excavation Services ("Respondent") of an assessment of civil money penalties in the sums of \$10,650.00 and \$5,900.00. (CMP Assessment, p. 1.) Plaintiff alleged that Respondent violated the MSPA by underpaying migrant workers for labor they performed for his business during August 2009 and from January 5, 2010, to February 12, 2010. (*Id.*) On February 17, 2011, Respondent submitted a letter objecting to the civil money penalties and requesting a hearing on the matter. (Respondent's Objection to Penalty, pp. 1-2.) Accordingly, the matter was referred to the Office of Administrative Law Judges (OALJ) on March 15, 2011. (Order of Reference, pp. 1-6.)

On March 18, 2011, Judge Purcell issued a Notice of Docketing which set forth a number of actions for the parties to perform within 30 days after the filing of Respondent's Statement of Intent to Continue Opposition to the Secretary's Determination. (Notice of Docketing, pp. 1-3.) Respondent filed his Statement on April 19, 2011. (Respondent's Statement of Intent to Continue Opposition, pp. 1-3.) Upon the parties' request, Judge Purcell extended the deadline to file Prehearing Exchange information three times – May 4, 2011, August 17, 2011, and October 13, 2011. Thereafter, Judge Purcell issued an Order to File Status Report on November 30, 2012. After the parties failed to fully comply with the prehearing order, Judge Purcell issued a revised prehearing order on December 28, 2012. The parties submitted their prehearing discovery on January 28, 2013.

On February 4, 2013, this case was referred to the San Francisco District Office of the OALJ and assigned to me. The matter was set for a hearing on June 25, 2013, in Spokane, Washington, and the parties submitted their prehearing statements on June 3, 2013. On June 5, 2013, at the request of the parties, the hearing was continued until August 27, 2013, so that the parties could discuss settlement with the assistance of an OALJ judge. The parties agreed to a settlement conference with Judge Clark on June 12, 2013, in Coeur d'Alene, Idaho. (Order Summarizing Pre-Hearing Conference and Continuing Hearing, p. 1.)

Following the settlement conference, on June 20, 2013, Plaintiff submitted consent findings and indicated that the case had settled. (Consent Findings, pp. 1-3.) As stated in the consent findings and a letter from Respondent filed on June 27, 2013, the sole issue that remains to be resolved in this case is whether Respondent is exempt from the jurisdiction of the MSPA. (Consent Findings, p. 3; Respondent's Letter Dated June 27, 2013.) The parties agreed that I would reach a decision on this issue based solely on written briefs, due to me within 30 days after the consent findings were submitted. (Consent Findings, p. 3.) On July 12, 2013, the Respondent submitted his Brief Regarding Exemption from MSPA, accompanied by several affidavits. On August 12, 2013, Plaintiff filed its Brief in Opposition to Respondent's Claim of Exemption from MSPA, and on September 16, 2013, the Respondent submitted his Responsive Brief Regarding Exemption from MSPA.

ISSUES

The sole issue to be addressed is:

1. Whether the Respondent is exempt from the jurisdiction of the MSPA.

FACTUAL BACKGROUND

Respondent and his wife have operated B & L Bobcat and Excavation Services ("B & L") for nine years. (Aff. of Brad Youngwirth, p. 2.) The business focuses on small excavation jobs, trenching, foundations, septic leach fields, and construction site preparation. (*Id.*) At some point, Respondent began bidding on Forest Service contracts wherein he would use the business's equipment to gather and pile up forest debris into piles in the woods of northern Idaho

to reduce the risk of fire.¹ (*Id.*) Around this time, B & L had four employees, including Respondent. (*Id.*)

Idaho Department of Lands Contract

In 2009, Respondent bid on a contract with the Idaho Department of Lands (“Department of Lands contract”) under which B & L would pile slash in the woods. (Aff. of Brad Youngwirth, p. 2.) B & L was awarded the contract, and it was the first contract where B & L would attempt to do the thinning and pruning of trees in the forest in addition to slash piling. (*Id.*; Aff. of Ronald Durham, p. 2.) While Respondent mostly wanted the slash piling work, he “had to also agree to do the thinning and pruning work to get the contract.” (Aff. of Brad Youngwirth, p. 2.) Respondent planned at the time to subcontract out the thinning and pruning portion of the contract because he did not have a crew to perform that type of work. (*Id.*, pp. 2–3.) According to Respondent, this contract was the first and only contract where B & L attempted to perform thinning and pruning work through the use of manual laborers. (*Id.*, p. 3.)

Once B & L was awarded the Department of Lands contract, Respondent learned that another company that had unsuccessfully bid on the contract had brought “a crew of Hispanic workers” to North Idaho to perform the thinning and pruning work, assuming that it would be awarded the contract. (Aff. of Brad Youngwirth, p. 3.) When the company did not get the contract, the workers “were simply abandoned and left to fend for themselves [sic].” (*Id.*) Respondent then asked one of his Spanish-speaking workers to talk to the crew of “abandoned” workers to find out if they would be interested in working for B & L to perform the thinning and pruning required by the contract. (*Id.*) Respondent hired the workers as well as some other Hispanic workers, and informed them that the work would be done in a remote portion of Northern Idaho so they would probably want to camp out in the woods rather than commute to and from work. (*Id.*) Three of the workers Respondent hired were from North Idaho, and five were from the “abandoned” crew. (*Id.*) Respondent gave the workers an advance on their pay so that they could purchase tents to live in and told them that they would earn “at least” Idaho minimum wage (\$7.25 per hour) but could earn more depending on the quality, quantity, and difficulty of their work. (*Id.*) According to Respondent, this was the first and only time B & L ever hired seasonal or temporary workers, and he did not know at the time that the workers were migrant or seasonal workers. (*Id.*)

Once he hired the workers, Respondent obtained a camp permit for the crew to camp in the woods. (Aff. of Brad Youngwirth, p. 4.) The workers set up a camp and began working in the forest in late June 2009. (*Id.*) In July 2009, the camp was raided by the U.S. Border Patrol. (*Id.*) Most of the workers scattered and Respondent has not heard from them since, and the only workers who remained were the three North Idaho residents. (*Id.*) Shortly after the raid, Respondent received a call from Lupe Rivera of the WHD. (*Id.*) Ms. Rivera informed him that she was auditing his payroll records because she suspected he was in violation of the MSPA. (*Id.*)

¹ Mr. Youngwirth’s affidavit states that he began bidding on Forest Service contracts in 2010, but later states that Mr. Youngwirth obtained his first Forest Service contract in 2004.

Plaintiff's Investigation of Respondent's Compliance with the MSPA

Ms. Rivera, along with another WHD investigator, David Miljoner, conducted a “compliance review” of Respondent’s business from August 11, 2008, to September 18, 2009. (Aff. of Lupe Rivera, p. 2; Aff. of David Miljoner, p. 2.) During the investigation, Ms. Rivera sought to “establish whether or not the Respondent’s business activities were covered under the MSPA and/or the Fair Labor Standards Act and to ascertain whether any exemptions from either act applied.” (*Id.*) According to Ms. Rivera and Mr. Miljoner, the U.S. Department of Labor was not aware of the U.S. Border Patrol’s raid on Respondent’s work camp, nor did the U.S. Department of Labor play any role in the raid. (Aff. of Lupe Rivera, p. 2; Aff. of David Miljoner, p. 3.) As a result of the investigation, WHD found that Respondent had recruited and hired migrant and seasonal workers to perform contract services. (Aff. of Lupe Rivera, pp. 2–3.) Ms. Rivera and Mr. Miljoner believed that Respondent was subject to the MSPA because his contracting activities were being performed more than 25 miles from Respondent’s home, the workers were from outside the United States, and the workers camped out overnight and did not return to their homes or permanent places of residence. (*Id.*, p. 3; Aff. of David Miljoner, pp. 3–4.) For his contracting activities on the Department of Lands contract, Mr. Youngwirth was paid \$57,260.00. (Aff. of Lupe Rivera, p. 3; Aff. of David Miljoner, p. 4.)

According to Ms. Rivera and Mr. Miljoner, Respondent “resisted” WHD’s attempts to interview his workers, “suggesting that it was too far to go, that [they] would get lost and not be able to find them.” (Aff. of Lupe Rivera, p. 3.) Eventually, however, Respondent told the investigators where the workers could be found. (*Id.*) Respondent claims he cooperated fully with the investigation, supplying Ms. Rivera with all payroll and other records, giving her directions to the camp, and permitting her to interview the workers. (Aff. of Brad Youngwirth, p. 4.) Respondent also states that he acquiesced to an interview with Ms. Rivera but denied all of her allegations of wrongdoing. (*Id.*)

Lupe Rivera and David Miljoner found that Respondent’s payroll records were “very deficient,” so they had to rely on interviews with Respondent’s workers in order to establish the wages that were due. (Aff. of Lupe Rivera, p. 5; Aff. of David Miljoner, p. 6.) When Ms. Rivera interviewed Respondent’s workers, they claimed that they had not been paid for the hours they worked and that when they did get paid, they did not receive wage statements or pay stubs. (Aff. of Lupe Rivera, p. 4.) Ms. Rivera and Mr. Miljoner also noticed several compliance issues at Respondent’s work site, including not displaying the MSPA poster, lack of disclosure of working conditions to the workers, and that the workers had not been given other information required by the MSPA. (*Id.*, p. 4; Aff. of David Miljoner, p. 5.) Ms. Rivera and Mr. Miljoner also noticed multiple Occupational Safety and Health Administration (“OSHA”) violations at Respondent’s work site as well. (Aff. of Lupe Rivera, p. 4; Aff. of David Miljoner, p. 5.) According to Ms. Rivera, Respondent was “not pleasant regarding his deficient records and the suggestion that he had not paid workers properly.” (Aff. of Lupe Rivera, p. 5.) Ms. Rivera also sensed “hostility” from Respondent and worried that she “might feel threatened by him” when they met to discuss the results of the investigation.² (*Id.*)

² Respondent denies any allegations that he was unpleasant and uncooperative towards Lupe Rivera, stating that he met with Lupe Rivera on short notice, opened his payroll records to her on demand, and made his bookkeeper

Following the investigation, Respondent met with Ms. Rivera and Mr. Miljoner in Yakima, Washington. (Aff. of Brad Youngwirth, p. 5; Aff. of Lupe Rivera, p. 5; Aff. of David Miljoner, p. 6.) After Ms. Rivera and Mr. Miljoner explained every “item of the MSPA” to Respondent, he became “upset” that no one had informed him about the MSPA. (Aff. of Lupe Rivera, p. 5; Aff. of David Miljoner, p. 6.) Respondent “wanted the investigation started over again” and insisted that Ms. Rivera “investigate the workers” because they were “illegal.” (Aff. of Lupe Rivera, p. 5; Aff. of David Miljoner, p. 7.) Respondent stated that he “didn’t owe any of the workers anything” and “stormed out” of the meeting. (Aff. of Lupe Rivera, p. 6.) During the final conference, Respondent told Ms. Rivera and Mr. Miljoner that “he would never work with Mexicans again” because “they were too much trouble” and that he would not do any more forestation work. (*Id.*; Aff. of David Miljoner, p. 7.) Based on those comments, Ms. Rivera reported that Respondent would agree to comply in the future and would never engage migrant and seasonal workers again. (*Id.*)

Respondent says that after this meeting, he believed that he would not be prosecuted for the alleged MSPA violations if he had no further violations of the MSPA and that the matter was behind him.³ (Aff. of Brad Youngwirth, p. 5.) Respondent completed the Department of Lands contract work with his own permanent employees and using his own efforts. (*Id.*) Respondent claims that he also subcontracted out a portion of the work to a man named Charley Estes and his foreman Jesus Rogel. (*Id.*) Respondent also states that he informed Ms. Rivera of his plans to use Charley Estes and his crew to finish the contract, and Ms. Rivera authorized him to do so. (*Id.*) According to Respondent, Mr. Estes and his crew completed the work, and when Respondent asked Mr. Rogel to whom he should address the check, he was told to leave the name line on the check blank. (*Id.*) Respondent allegedly gave the check to Mr. Rogel, the check was cashed, and Respondent states that he did not hear anything about the issue again. (*Id.*) On the other hand, Charley Estes states that he never agreed to work with Respondent because he “didn’t know him and didn’t know how he worked.” (Aff. of Charley Estes, p. 2.) Mr. Estes unequivocally denies ever working with Respondent, stating, “I have never agreed to do any work for Mr. Youngwirth or B & L Bobcat Excavation Services under any circumstances.” (*Id.*) Mr. Estes does state that some of his employees worked for Respondent, but denies any personal involvement with Respondent or his company. (*Id.*)

Shoshone County Fire Mitigation Contracts

In early 2010, Respondent bid on two fire mitigation contracts for Shoshone County (“Shoshone County contracts”). (Aff. of Brad Youngwirth, p. 6.) These contracts required work to be done to mitigate fire risks in the woods of Shoshone County; most of the work would consist of slash piling of forest debris, but also included thinning and pruning work. (*Id.*) When Respondent bid on the contracts, he planned to hire a subcontractor (Mr. Estes and his crew, led by Mr. Rogel) for the thinning and pruning. (*Id.*) Respondent claims that he believed that this plan would be acceptable because Lupe Rivera had previously known of his work with Mr. Estes’s crew. (Aff. of Brad Youngwirth, p. 7.) According to Respondent, he and Mr. Estes

available to her. (Responsive Aff. of Brad Youngwirth, pp. 3–4.) He goes on to say that he was courteous and diligent towards Ms. Rivera and that any allegations to the contrary were “drummed up” by Plaintiff to counter her assertions that Lupe Rivera was hostile to him due to his religious beliefs. (*Id.*, p. 4.)

³ According to Ms. Rivera, this is “simply false” and she never told him he would not be prosecuted if he had no further violations. (Aff. of Lupe Rivera, p. 8.)

agreed that Mr. Estes's crew would do the subcontract work for \$4,500.00, and Mr. Rogel would be the foreman and bring a crew to do the labor. (*Id.*) Charley Estes, however, denies ever working with or agreeing to work with Respondent. (Aff. of Charley Estes, pp. 1–2; Aff. of Lupe Rivera, pp. 8–9.)

Respondent states that he informed Mr. Rogel that certain documentation was required by Shoshone County for fire mitigation contracts (proof of registration with the state as a contractor, proof of liability insurance, and proof of workers compensation insurance), and asked Mr. Rogel to supply the documents showing compliance. (Aff. of Brad Youngwirth, p. 7.) Respondent allowed Mr. Rogel to begin work on the contracts before receiving the documents, and states that he repeatedly asked Mr. Rogel to supply the documentation. (*Id.*) The third time that Respondent asked Mr. Rogel for the documentation, Mr. Rogel allegedly stated that he had formed his own company and was running his own crew independently of Mr. Estes. (*Id.*) Respondent claims this was the first he had heard of this and he tried to help Mr. Rogel obtain insurance through his own broker. (*Id.*)

Approximately one week into the Shoshone County contracts, Respondent gave Mr. Rogel a check for \$4,500.00 as partial payment on the work, but again left the payee line blank because he “did not know the name of Rogel’s new company.” (Aff. of Brad Youngwirth, p. 7.) At some point, according to Respondent, Mr. Rogel failed to provide the requested proof of registration as a contractor and proof of insurance, and Respondent “threw him and his crew off the job.” (*Id.*) Respondent felt the \$4,500.00 check was sufficient to cover the work that had already been completed. (*Id.*) A few days later, Respondent was informed that Mr. Rogel and his crew had gone back to performing the fire mitigation work. (*Id.*) Respondent claims he had not authorized Rogel or his crew to return to work on the contracts. (*Id.*, p. 8.) When Respondent learned of this, he “again threw [Mr. Rogel] off the job for failure to provide proof of registration as a contractor and proof of insurance.” (*Id.*) The next day, Respondent received a call from the Idaho Department of Labor informing him that Mr. Rogel had tried to file a wage claim against B & L, claiming that he was an employee. (*Id.*)

Respondent denies that Mr. Rogel or any member of his crew was ever hired as an employee of B & L. (Aff. of Brad Youngwirth, p. 8.) Respondent states that Mr. Estes was hired as a subcontractor whose foreman, Mr. Rogel, brought a crew out to perform the subcontracting work. (*Id.*) Shortly after the call from the Idaho Department of Labor, Respondent received a call from Ms. Rivera, informing him that he was again being investigated by the WHD, this time for failing to pay Mr. Rogel and his crew for the work they did on the Shoshone County contracts. (*Id.*; Aff. of Lupe Rivera, p. 6.) Ms. Rivera began investigating Mr. Rogel’s complaint and requested that Respondent send her pay stubs and payroll records and any other information that could be helpful. (Aff. of Lupe Rivera, p. 6.) Respondent complied and sent the information through the mail, and Ms. Rivera returned to Idaho to interview the workers who worked on the Shoshone County contracts. (*Id.*) Respondent’s workers indicated to Ms. Rivera that they had not been paid for their work. (*Id.*, p. 7.) The workers believed that Respondent was their employer and that they had been recruited by Mr. Rogel to work for Respondent. (*Id.*) Ms. Rivera states that the workers told her they had gone to Respondent’s house to request their unpaid wages, and Respondent intimidated them and threatened to call immigration officials. (*Id.*)

Plaintiff's Second Investigation of Respondent's Compliance with MSPA

When Ms. Rivera spoke to Respondent, she reminded him of his promise not to hire any more Mexican workers or engage in reforestation work. (Aff. of Lupe Rivera, p. 7.) She also told him that some of his violations were the same as in his first case, and that he had now become a repeat offender. (*Id.*) According to Ms. Rivera, Respondent agreed that he owed some of the workers back wages, but said that Dawn McLees, an employee of the Idaho Department of Labor, had advised him not to pay Jesus Rogel. (*Id.*) Respondent stated that he paid some of the workers, but had also taken deductions for “advances” and other things like bus fare. (*Id.*) The workers stated to Ms. Rivera that Respondent had never advanced them any money. (*Id.*) Mr. Estes also says that it was reported to him that Respondent had used some of his employees to perform work on his forestry contracts and that he had not paid them. (Aff. of Charley Estes, p. 2.) Mr. Estes states that he “felt very sorry for the workers,” as they had been his employees and were “good, conscientious workers.” (*Id.*) According to Mr. Estes, he called Respondent to inquire about this issue and Respondent told him, “Why should I have to pay them? They are Mexicans.” (*Id.*) After another investigation, the WHD concluded that Respondent was again in violation of the MSPA. (Aff. of Lupe Rivera, p. 7.)

Respondent argues that he has already paid Mr. Rogel for the work he performed and does not owe any further wages. (Aff. of Brad Youngwirth, p. 8.) Respondent submitted copies of the checks he wrote to Mr. Rogel as exhibits to his affidavit. (Aff. of Brad Youngwirth, Ex. B, C.) In addition, Respondent believes that Mr. Rogel “misrepresented facts” to him and obtained work “under false statements of fact”; according to Respondent, Mr. Rogel led him to believe that he was simply the foreman of Mr. Estes’s crew and only later revealed that he had formed his own crew without any of the proper registrations or insurance. (*Id.*) Respondent informed Ms. Rivera of these facts “to no avail.” (*Id.*) Respondent also believes that he has been “persecuted” by Ms. Rivera and that she has “abused her power” and used the U.S. Department of Labor to “try to collect money for her friend (and maybe confidential informant) Jesus Rogel.”⁴ (Aff. of Brad Youngwirth, pp. 9–10.)

In addition to his affidavit, Respondent submitted the affidavits of Ronald Durham, Lands Resource Supervisor for the Idaho Department of Lands, Priest Lake Supervisory Area,⁵ Leo Quintero, former B & L employee,⁶ Dawn McLees, an employee of the Idaho Department of

⁴ Ms. Rivera refers to these allegations as “ridiculous,” stating that all of her work was assigned by superiors and she had no power to decide who to investigate. (Aff. of Lupe Rivera, p. 9.) She also states that Mr. Rogel, along with all of the unpaid workers, was an informant and that having workers inform the Department of Labor of MSPA violations is very common. (*Id.*)

⁵ Mr. Durham describes relevant rules and regulations for Department of Lands contracts and reports that B&L was in compliance with those regulations. (Aff. of Ronald Durham, pp. 1–3.) Specifically, B&L complied with the camping permit requirements at all relevant times, and while the camp and the work being performed by the crew were regularly monitored and evaluated, none of the reports ever made comment about a messy or disorderly camp. (Aff. of Ronald Durham, pp. 2–3.) According to Mr. Durham, the Border Patrol raid on B&L’s camp occurred after an “off-duty Idaho Fish and Game employee” entered the campsite and searched it without a warrant or permission, which “caused a Border Patrol airplane to fly over the campsite” and the camp to be subsequently raided by Border Patrol. (Aff. of Ronald Durham, p. 2.)

⁶ Mr. Quintero describes his experiences working for Mr. Youngwirth and states that the company did not hire migrant or seasonal workers or perform thinning and pruning work during his employment in 2007 and 2008. (Aff. of Leo Quintero, pp. 1–2.) Mr. Quintero also discusses the camping permits obtained by B&L and the setup of the camp during the Priest Lake contract. (*Id.*, p. 2.) According to Mr. Quintero, he became the foreman of the crew in

Labor,⁷ and Henry Nipp, Shoshone County Fire Mitigation Supervisor.⁸ These affidavits are largely irrelevant to the sole remaining issue in this case, so they will not be discussed in detail. Plaintiff, in addition to the affidavits of Lupe Rivera, David Miljoner, and Charley Estes, has also submitted copies of the contracts awarded to Respondent and photographs of the site where Respondent's workers camped out.

ANALYSIS AND FINDINGS

Applicable Law

The MSPA, 29 U.S.C. § 1801 *et seq.*, and its implementing regulations, 29 C.F.R. § 500 *et seq.*, were enacted in order to “assure necessary protections for migrant and seasonal agricultural workers, agricultural associations, and agricultural employers.” 29 C.F.R. § 500.1. This legislation was designed “to protect agricultural workers whose employment had been historically characterized by low wages, long hours and poor working conditions.” *Castillo v. Case Farms of Ohio, Inc.*, 96 F.Supp.2d 578, 587 (W.D. Tex. 1999)(citations omitted). At the time the MSPA was passed, Congress was concerned that despite previous Congressional efforts, “many migrant and seasonal agricultural workers remain[ed] . . . the most abused of all workers in the United States.” *Id.* at 588 (citations omitted). The MSPA protects migrant and seasonal agricultural workers in their dealings with farm labor contractors and other covered persons, and requires those regulated entities to observe certain labor, health, and safety standards when recruiting, soliciting, hiring, employing, furnishing, transporting, or housing farmworkers. *See* 29 U.S.C. § 1801, 1802.

Farm labor contractors are explicitly covered by the MSPA and required to register with the Department of Labor. 29 C.F.R. § 500.40. Under the MSPA, farm labor contractors are also responsible for meeting numerous other requirements, including keeping records in a certain manner, ensuring that wages are paid appropriately, and meeting specific standards for safety and housing. 29 C.F.R. § 500.70 *et seq.* The regulations define “farm labor contractor” as “any person – other than an agricultural employer, an agricultural association, or an employee of an agricultural employer or agricultural association – who, for any money or other valuable consideration paid or promised to be paid, performs any farm labor contracting activity.”⁹ 29

late July 2009. (*Id.*) Under his supervision, all workers received at least minimum wage but also often earned more if they chose to be paid per acre of work. (*Id.*, p. 3.) Mr. Quintero also confirms that Jesus Rogel was a foreman for Charley Estes in 2009 and 2010. (*Id.*)

⁷ Ms. McLees describes the events that occurred when Jesus Rogel came to the Idaho Department of Labor to file a wage complaint against Respondent. (Aff. of Dawn McLees, pp. 1–3.) Her affidavit is unsigned. (*Id.*, p. 3.)

⁸ Mr. Nipp supervised Respondent's work on the Shoshone county contracts. (Aff. of Henry Nipp, p. 2.) His affidavit describes the requirements of the Shoshone county contracts and Shoshone County's requirements that all contractors and subcontractors on fire mitigation contracts supply proof of registration, proof of liability insurance, and proof of workers compensation insurance. (*Id.*) When Mr. Nipp learned of Jesus Rogel's work as a subcontractor on these contracts and the fact that Mr. Rogel lacked the necessary registration and insurance, he informed Respondent that Mr. Rogel could no longer work on the contract. (*Id.*) According to Mr. Nipp, Mr. Rogel and his crew “did a poor job on the work they performed” and “caused damage to one of the roads at the worksite” after being thrown off the job. (*Id.*, p. 3.)

⁹ “Agricultural employer” is defined as “any person who owns or operates a farm, ranch, processing establishment, cannery, gin, packing shed or nursery, or who produces or conditions seed, and who either recruits, solicits, hires, employs, furnishes, or transports any migrant or seasonal agricultural worker.” 29 C.F.R. § 500.20(d). “Agricultural association” is defined as “any nonprofit or cooperative association of farmers, growers, or ranchers, incorporated or

C.F.R. § 500.20(j). It defines “farm labor contracting activity” as “recruiting, soliciting, hiring, employing, furnishing, or transporting any migrant or seasonal agricultural worker.” 29 C.F.R. § 500.20(i).

The MSPA contains several exemptions for persons and entities not subject to the Act. 29 C.F.R. § 500.30 *et seq.* One of these, the “small business exemption,” is granted to “[a]ny person, *other than a farm labor contractor*, for whom the man-days exemption for agricultural labor provided under section 13(a)(6)(A) of the Fair Labor Standards Act [“FLSA”] ... is applicable.” 29 C.F.R. § 500.30(b) (emphasis added). The man-days exemption of the FLSA applies to “any employee employed in agriculture ... if such employee is employed by an employer who did not, during any calendar quarter during the preceding calendar year, use more than five hundred man-days of agricultural labor ...” 29 U.S.C. § 213(a)(6)(A). A “man-day” is “any day during which an employee performs any agricultural labor for not less than one hour.” 29 U.S.C. § 203(u).

Respondent Does Not Meet the Requirements for the MSPA’s Small Business Exemption

In this case, the parties have entered into a consent decree, and the only remaining issue to be decided is whether Respondent is exempt from the MSPA by virtue of the small business exemption contained in 29 C.F.R. § 500.30(b). Respondent argues that he meets the requirements for the small business exemption from the MSPA “because he had *never* used migrant or seasonal workers previously” and “was prosecuted for violations of MSPA the very first time he used any migrant or seasonal workers.” (Respondent’s Brief Regarding Exemption from MSPA, p. 3 (emphasis in original).) Respondent further argues that he has never registered as a farm labor contractor or engaged in farm labor contracting activity for payment. (*Id.*, p. 14.) On the other side, Plaintiff argues that Respondent does not meet the requirements for the small business exemption from the MSPA because Respondent is a farm labor contractor, and the MSPA’s small business exemption specifically does not apply to farm labor contractors. (Plaintiff’s Opposition to Claim of Exemption, p. 6.) I will examine each of the contracts at issue in this case, the Department of Lands contract and the Shoshone County contracts, in turn.

Department of Lands Contract

Though Respondent acknowledges that the thinning and pruning work that his crew performed on the Department of Lands contract “has been identified as an agricultural pursuit falling within MSPA,” he argues that the small business exemption applies to him and removes him from the MSPA’s coverage. (Respondent’s Brief Regarding Exemption from MSPA, p. 10.) Respondent’s main argument that the small business exemption applies to him is that he is not a farm labor contractor and did not use any migrant or seasonal workers during the year before he worked on the Department of Lands contract, and therefore meets the requirement of not using more than 500 man-days of migrant or seasonal labor in any quarter in the preceding year. (*Id.*) Plaintiff, on the other hand, argues that “[f]or the Department of Lands contract, there can be no dispute that Mr. Youngwirth was a Farm Labor Contractor” because he “engaged in recruiting, hiring[,] and furnishing migrant and seasonal reforestation workers to carry out the terms of his

qualified under applicable State law, which recruits, solicits, hires, employs, furnishes, or transports any migrant or seasonal agricultural worker.” 29 C.F.R. § 500.20(c).

contract with the state agencies to perform forestry work.” (Plaintiff’s Opposition to Claim of Exemption, p. 6.) Further, according to the Plaintiff, “As a result of his recruitment efforts through his Spanish-speaking foreman, [Respondent] furnished migrant and seasonal reforestation workers to live and work in the forests of Idaho under the contract.” (*Id.*) Respondent concedes that farm labor contractors are not subject to the MSPA’s small business exemption, saying, “It is obvious that [Plaintiff] can simply refuse to recognize the small business exemption by characterizing Brad Youngwirth and B & L as a farm labor contractor.” (Respondent’s Brief Regarding Exemption from MSPA, p. 14.)

It is clear that Respondent was a farm labor contractor within the meaning of the MSPA while working on the Department of Lands contract. In his affidavit, Respondent describes a “crew of Hispanic workers” that had been brought to North Idaho and “abandoned” after the company that brought them was not awarded the Department of Lands contract. (Aff. of Brad Youngwirth, p. 3.) Respondent admits that he asked a Spanish-speaking employee to “talk to the workers to find out if they wanted to work for B & L to perform the [Department of Lands] Priest Lake Thin and Prune Contract.” (*Id.*) Respondent continues, “I hired the workers, along with some other Hispanic workers (the Beltrans) who lived in North Idaho.” (*Id.*) These activities obviously qualify as a “farm labor contracting activity” as defined in the MSPA; the definition includes “recruiting, soliciting, hiring, employing, furnishing, or transporting any migrant or seasonal agricultural worker.” 29 C.F.R. § 500.20(i). In an affidavit filed with his responsive paperwork, Respondent tries to clarify that he did not seek out the workers, but instead they contacted him initially about looking for work and that was when he hired them. (Responsive Aff. of Brad Youngwirth, p. 4.) This does not change the analysis. The MSPA does not say anything about which party has to make the initial contact in order to qualify as a farm labor contracting activity; the fact that Respondent hired them clearly meets the requirements of the MSPA, as “hiring” is one of the activities listed. 29 C.F.R. § 500.20(i). Finally, the fact that Respondent has never registered as a farm labor contractor is also irrelevant; the definition of “farm labor contractor” does not include registration as a farm labor contractor, it merely includes the acts of recruiting, soliciting, hiring, employing, furnishing, or transporting migrant or seasonal agricultural workers. (*Id.*)

Respondent focuses much of his argument on the fact that he used less than 500 man-days of migrant and seasonal labor per quarter in the year before he was awarded the Department of Lands contract. (Respondent’s Brief Regarding Exemption from MSPA, p. 10.) Though this may be the case, the small business exemption of the MSPA explicitly excludes farm labor contractors, stating that it is available to any person *other than a farm labor contractor* for whom the FLSA’s man-days exemption is applicable. 29 C.F.R. § 500.30(b). Therefore it is unnecessary to reach the issue of whether or not Respondent meets the criteria for FLSA’s man-days exemption, because he has already been specifically excluded from the MSPA’s small business exemption. Respondent’s argument that “Congress created the small business exemption for both MSPA and FLSA to give small business a competitive edge” is irrelevant; while that may have been Congress’s purpose in creating the small business exemption, Congress explicitly chose to exclude farm labor contractors from this exemption. Accordingly, I find that concerning the Department of Lands contract, Respondent does not meet the criteria for the small business exemption from the MSPA and is therefore a covered farm labor contractor.

Having determined that Respondent performed a farm labor contracting activity while completing the Department of Lands contract, the only remaining determination is whether he did so “for any money or other valuable consideration paid or promised to be paid” for pay as required by the MSPA’s regulations. 29 C.F.R. § 500.20(j). Plaintiff alleges and Respondent does not dispute that he was paid \$57,260.00 for his work on the Department of Lands contract. (Aff. of Lupe Rivera, p. 3; Aff. of David Miljoner, p. 4.) Therefore he performed a farm labor contracting activity for money, and is a farm labor contractor covered by the MSPA.

Shoshone County Contracts

Regarding the Shoshone County contracts, Respondent argues that he never engaged in a “farm labor contracting activity” because he did not recruit, solicit, hire, employ, furnish, or transport any migrant or seasonal worker. (Respondent’s Brief Regarding Exemption from MSPA, p. 11.) According to Respondent, he believed that he was hiring Charley Estes’s crew, and Charley Estes was a farm labor contractor. (*Id.*) Respondent also repeats his argument that he qualifies for the MSPA’s small business exemption by virtue of meeting the criteria for the FLSA’s man-days exception. (*Id.*, p. 12.) In response, Plaintiff argues that there were no written contracts or agreements that would evidence such a subcontract between Respondent and Charley Estes, and cites the affidavit of Charley Estes in which he denies having any contract or arrangement with Respondent. (Plaintiff’s Opposition to Claim of Exemption, p. 8.) Plaintiff also claims that Respondent “tried to unload his responsibilities onto the shoulders of Mr. Rogel” by having him “recruit more migrants to work for him” and “allow[ing] the migrants to do the work on that contract and then fir[ing] them without paying for that work.” (*Id.*)

Respondent was also a farm labor contractor on the Shoshone County contracts. While Respondent argues that he hired Charley Estes, a registered farm labor contractor, as a subcontractor, and that Charley Estes was responsible for hiring the migrant workers, there is no evidence of any subcontract relationship between Respondent and Charley Estes aside from Respondent’s own affidavit. Respondent has not submitted a copy of any contract between him and Charley Estes, and Charley Estes has denied ever agreeing to work with Respondent. (Aff. of Charley Estes, p. 2.) Without any evidence beyond Respondent’s own assertions, it is difficult to conclude that Charley Estes agreed to do the subcontract work for Respondent and acted as a farm labor contractor.

Additionally, it should have been clear to Respondent that Mr. Estes was not involved in the subcontract work when all of Respondent’s negotiations and dealings were with Jesus Rogel. Respondent’s affidavit describes asking Mr. Rogel for proof of registration and proof of insurance repeatedly, working out an “agreed price” with Mr. Rogel, and giving Mr. Rogel a check with the name of the payee blank. (Aff. of Brad Youngwirth, p. 7.) Presumably, if Charley Estes had actually been involved with the subcontract, he would have been present for at least some of these discussions. Respondent also allowed the subcontract crew to begin work on the contract before Jesus Rogel submitted the necessary documentation for compliance with the Shoshone County contracts. (*Id.*) All of these activities should have shown Respondent that he was not working through Charley Estes, but instead Mr. Rogel. As Plaintiff says, Respondent “took no steps, prior to bringing Rogel to the job, to assure himself ... that Rogel was ever licensed or registered to recruit migrant workers” or to determine whether Mr. Rogel had a legitimate business of his own. (Plaintiff’s Opposition to Claim of Exemption, p. 9.) Prior to

allowing Mr. Rogel's crew to begin working, Respondent should have taken the necessary steps to determine who the subcontractor was and whether the subcontractor had the necessary credentials for compliance with the law.

Even if Respondent believed that Charley Estes was involved in the contract from the beginning, he admits that Jesus Rogel told him that he had formed his own company and was "running his own crew independent of Charlie [sic] Estes" after beginning work on the contract. (Aff. of Brad Youngwirth, p. 7.) At this point, Respondent admittedly allowed Mr. Rogel to continue doing the work for a period of time until Respondent eventually threw Mr. Rogel off the job for not having the documentation required by the contract. (*Id.*) Again, at some point Respondent was on notice that he was not working with Charley Estes, and rather than halting the work immediately, he allowed Jesus Rogel and his crew to continue work on the contract. Respondent had already been investigated by WHD for violating the MSPA on the Department of Lands contract, so he had at least some knowledge of the law's requirements and the consequences for not abiding by them. Respondent has not shown that he had a valid subcontract with a farm labor contractor, and therefore Respondent was doing a farm labor contracting activity when he hired Jesus Rogel and his crew to work on the Shoshone County contracts.

Finally, though neither party has provided the exact amount of money Respondent was paid for his work on the Shoshone County contracts, Plaintiff has submitted copies of the contracts. One of the Shoshone County contracts lists compensation to Respondent as a sum "not to exceed \$10,500.00," and the other lists compensation to Respondent as a sum "not to exceed \$47,000.00." (Plaintiff's Opposition to Claim of Exemption, Ex. D.) Clearly, Respondent undertook the farm labor contracting activities described above for payment, so he was a farm labor contractor while working on the Shoshone County contracts. As I discussed above, farm labor contractors are not eligible for the MSPA's small business exemption, so Respondent is therefore covered by the MSPA.

CONCLUSION

I find that Respondent is not exempt from the MSPA's coverage and therefore the parties are now subject to the consent findings they submitted on June 20, 2013. Having reviewed the submitted documentation, I find that the submitted consent findings are appropriate in form and substance and clearly detail the respective duties and obligations of the parties pursuant to the agreement.

In conclusion, I find that Respondent does not meet the criteria for the MSPA's small business exemption and is therefore covered by the MSPA. During all relevant time periods, Respondent was a farm labor contractor, and farm labor contractors are explicitly excluded from the MSPA's small business exemption. Therefore, Plaintiff and Respondent are subject to the terms of the settlement agreement they reached during mediation.

ORDER

Accordingly, the Consent Findings filed on June 20, 2013, are hereby adopted and APPROVED. The parties are ORDERED to implement the terms of the approved consent findings which are incorporated by reference into this Decision and Order.

It is specifically ORDERED that:

1. Respondent Bradley Youngwirth d/b/a Bobcat & Excavation Services shall pay a total of \$12,413.00 in civil money penalties. Of this amount, \$2,000.00 shall be applied to the civil money penalties assessed in this case, and the remaining balance shall be paid to Respondent's employees in the sole discretion of the U.S. Department of Labor.

JENNIFER GEE
Administrative Law Judge

NOTICE OF REVIEW

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Issuance of a Notice of Intent ("Petition") to modify or vacate that is received by the Administrative Review Board ("Board") within twenty (20) days of the date of issuance of the administrative law judge's decision. *See* 29 C.F.R. §§ 500.263 and 500.264; Secretary's Order 1-2002, 67 Fed. Reg. 64272 (2002). The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. A copy of the administrative law judge's decision must be attached to the Petition that is filed with the Board. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. *See* 29 C.F.R. § 500.264(b).

If the Board declines to modify or vacate the administrative law judge's decision, then the decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 500.262(g).