



**Issue Date: 25 April 2017**

**CASE NO.: 2015-MSP-00001**

**IN THE MATTER OF**

**WYRICK & SONS PINE STRAW  
Respondent**

**APPEARANCES:**

**SHELLY C. ANAND, ESQ.  
On Behalf of the Solicitor**

**RON MOWERY, ESQ.  
REBECCA DAFFIN, ESQ.  
On Behalf of the Respondent**

**Before: PATRICK M. ROSENOW  
Administrative Law Judge**

## **DECISION AND ORDER**

This proceeding arises under the Migrant and Seasonal Agricultural Worker Protection Act (“Act”) and the regulations enacted thereunder.<sup>1</sup> The Act provides employment-related protections to migrant and seasonal agricultural workers and is administered and enforced by the Wage and Hour Division of the U.S. Department of Labor’s Employment Standards Administration.

On 3 May 12, Wage and Hour issued a determination letter to Respondent stating it had violated several provisions of the Act and assessed Respondent civil money penalties totaling \$2,525.<sup>2</sup> To date, Respondent has not paid any amount of the assessed penalties. Respondent filed a request for hearing on 9 May 12. The case was referred to the Office of Administrative Law Judges (OALJ) on 27 April 15. On 11 Jan 16, the Solicitor and Respondent filed cross Motions for Summary Decision. Notwithstanding the extensive stipulation of facts into which the parties were able to enter, I determined

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<sup>1</sup> 29 U.S.C. § 1801, *et. seq.*; 29 C.F.R. § 500.

<sup>2</sup> The investigation period was from 21 Mar 10 to 20 Mar 12.

that significant factual issues remained and the case was not amenable to summary disposition. Consequently, a full hearing was conducted on 28 and 29 Jun 16. Both parties had full opportunities to submit exhibits, call and examine witnesses, and make arguments. My decision is based upon the entire record, which consists of the following:<sup>3</sup>

Witness Testimony of

Wildali DeJesus  
Robert Vaden  
Edward Wyrick  
Amy Johnson  
Joe Leonard

Exhibits<sup>4</sup>

Joint Exhibit (JX) 1  
Administrator Exhibits (AX) 1-19  
Respondent Exhibits (RX) 1-24

My findings and conclusions are based upon the stipulations of counsel, the evidence introduced, my observations of the demeanor of the witness, and the arguments presented.

## **STIPULATIONS<sup>5</sup>**

1. Respondent is a wholesaler of pine straw and sells it to various companies in the southeastern United States.
2. Respondent did not own any real property where the pine straw was collected.
3. Respondent entered oral and written agreements with various landowners granting Respondent permission to access their property during the subject period to rake, load, and bale pine straw.
4. Per these agreements, Respondent would pay the landowner for each bale of pine straw collected.
5. The agreements required Respondent to take care of the property, including the trees and to keep the property free of trash and litter.
6. Prior to harvesting the pine straw, Respondent customarily would enter the landowners' property to mow and clear the area where the crews would be collecting pine straw, apply herbicides to the land where the crews would collect pine straw, and drive their trailers onto the property to allow the crew to load the baled pine straw.

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<sup>3</sup> I have reviewed and considered all testimony and exhibits admitted into the record. Reviewing authorities should not infer from my specific citations to some portions of witness testimony and items of evidence that I did not consider those things not specifically mentioned or cited.

<sup>4</sup>Counsel were cautioned that they must cite during the hearing or in their post-hearing briefs to the specific page of any exhibit in excess of 20 pages for that page to be considered a part of the record upon which the decision would be based. The same rule applies to the deposition transcript of any witness who also testifies in person. Tr. 11.

<sup>5</sup> JX-1; Tr. 13. (The parties incorporated by reference the stipulations into which they had entered for the purposes of their cross summary decision motions.)

7. Respondent entered into a written agreement with both Mr. Selvin Vicente Martinez and Mr. Marco Peralta Martinez whereby they would provide the labor needed to rake, load, and bale pine straw from the various landowners' property during the subject period.
8. Specifically, Marco and Selvin's crews were expected to perform the following tasks: use pitchfork to rake pine needles into piles, use box baler to manually compact the needles, tie needles with twine into bales, and stack the bales into rows for pick up.
9. Respondent provided Marco and Selvin's crew with equipment and tools to harvest the pine straw including balers, string, tractors, trailers, pitchforks, and bug spray. Respondent did not provide the workers with gloves.
10. Once Marco and Selvin's crew loaded the bales onto Respondent's trailers, Respondent would pick up the full trailers.
11. No training or education was required for the migrant and seasonal laborers except a short amount of time to learn to use the manual baler.
12. Selvin and Marco only collected pine straw from properties where Respondent had agreements with the landowners and had obtained express permission to access the property. Selvin and Marco did not talk to the landowners directly.
13. No part of the written agreements with landowners was transferable to Selvin or Marco.
14. The weekly invoices of payment to Marco and Selvin contained different pay rates for individuals loading and baling pine straw, as well as pay rates for the crew chiefs. The pay rate for individuals baling the pine straw was \$.70 per bale, the pay rate for individuals loading the pine straw was \$.10 per bale, and the pay rates to the crew chiefs was \$.10 per bale.
15. Marcos Martinez did not have a certificate of registration to be a farm labor contractor between 2010 and 2012.
16. Selvin Martinez did not have a certificate of registration to be a farm labor contractor between 2010 and 2012.
17. Respondent did not disclose in writing the terms and conditions of employment to the workers harvesting pine straw between 2010 and 2012 as would have been required by 29 U.S.C. § 1821 (a), 1831 (a); 29 C.F.R. § 500.75(b), 500.76 (b), if applicable.
18. Respondent did not provide each worker harvesting pine straw with a wage statement.
19. Respondent did not keep records for each worker harvesting pine straw between 2010 and 2012 of the information contained in 29 U.S.C. § 1821(d)(1), 29 U.S.C. § 1831(c) (1); 29 CFR § 500.80 (a).
20. Respondent did not display an MSPA poster in the fields as would have been required by 29 U.S.C. §§ 1821(b) and 1831(b) and 29 C.F.R. §§ 500.75 (c) and 500.76 (d)(1).
21. Respondent did not immediately bring trailers to the properties after mowing and clearing the area where crews would be collecting pine straw, but only did so when the properties were ready for harvesting.
22. Respondent did not provide transportation or housing to the workers provided by Selvin Martinez or Marcos Martinez.

## Background

Respondent is in the business of obtaining pine straw from various sources and reselling it to retailers. The Solicitor alleges:

- 1) Respondent utilized the services of two unregistered farm labor contractors;<sup>6</sup>
- 2) Respondent failed to keep records of each worker;<sup>7</sup>
- 3) Respondent failed to provide or post disclosures to workers of employment conditions;<sup>8</sup>
- 4) Respondent failed to provide each worker with a wage statement;<sup>9</sup> and
- 5) Respondent failed to display a MSPA poster in the work fields.<sup>10</sup>

Respondent answers that it is not subject to the Act because 1) the alleged workers were not seasonal workers, 2) the alleged workers were not migrants, 3) the work performed by the alleged “employees” was not agricultural in nature, and 4) Respondent is not, under the definition in the Act, an “employer” of the workers at issue.

## Law

The Act prohibits any person from engaging “in any farm labor contracting activity, unless such person has a certificate of registration from the Secretary specifying which farm labor contracting activities such person is authorized to perform.”<sup>11</sup> It similarly “prohibits any person from utilizing the services of a farm labor contractor (“FLC”) to supply migrant or seasonal agricultural workers without first taking reasonable steps to determine that the FLC possesses a valid Certificate of Registration, issued pursuant to the Act, which authorizes the activity for which the contractor is to be utilized.”<sup>12</sup>

FLC “means 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.<sup>13</sup> “... {F}arm labor contracting activity means recruiting, soliciting, hiring, employing, furnishing, or transporting any migrant or seasonal agricultural worker.<sup>14</sup> An agricultural employer means “any person who owns or operates a farm, ranch, processing establishment, cannery, gin, packing shed or nursery, or who

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<sup>6</sup> 29 U.S.C. § 1842 and 29 C.F.R. § 500.71.

<sup>7</sup> 29 U.S.C. §§ 1821(d), 1831(c), and 29 C.F.R. § 500.80(a).

<sup>8</sup> 29 U.S.C. §§ 1821(a), 1831(a) and 29 C.F.R. §§ 500.75(b), 500.76(b).

<sup>9</sup> 29 U.S.C. §§ 1821(d)(2), 1831(c)(2), and 29 C.F.R. § 500.80(d).

<sup>10</sup> 29 U.S.C. §§ 1821(b), 1831(b) and 29 C.F.R. §§ 500.75(c), 500.76(d)(1).

<sup>11</sup> 29 U.S.C. § 1811(a).

<sup>12</sup> 29 U.S.C. § 1842, 29 C.F.R. § 500.71.

<sup>13</sup> 29 U.S.C. § 1802(7).

<sup>14</sup> 29 U.S.C. § 1802(6).

produces or conditions seed, and who either recruits, solicits, hires, employs, furnishes, or transports any migrant or seasonal agricultural worker.”<sup>15</sup>

Generally, a migrant worker means an individual who is employed in agricultural employment of a seasonal or other temporary nature, and who is required to be absent overnight from his permanent place of residence.<sup>16</sup> A seasonal agricultural worker

“means an individual who is employed in agricultural employment of a seasonal or other temporary nature and is not required to be absent overnight from his permanent place of residence (i) when employed on a farm or ranch performing field work related to planting, cultivating, or harvesting operations; or (ii) when employed in canning, packing, ginning, seed conditioning or related research, or processing operations, and transported, or caused to be transported, to or from the place of employment by means of a day-haul operation.”<sup>17</sup>

The implementing regulation defines seasonal or on other temporary basis:

(1) Labor is performed on a seasonal basis where, ordinarily, the employment pertains to or is of the kind exclusively performed at certain seasons or periods of the year and which, from its nature, may not be continuous or carried on throughout the year. A worker who moves from one seasonal activity to another, while employed in agriculture or performing agricultural labor, is employed on a seasonal basis even though he may continue to be employed during a major portion of the year.

(2) A worker is employed on other temporary basis where he is employed for a limited time only or his performance is contemplated for a particular piece of work, usually of short duration. Generally, employment, which is contemplated to continue indefinitely, is not temporary.

(3) On a seasonal or other temporary basis does not include the employment of any foreman or other supervisory employee who is employed by a specific agricultural employer or agricultural association essentially on a year round basis.

(4) On a seasonal or other temporary basis does not include the employment of any worker who is living at his permanent place of residence, when that worker is employed by a specific agricultural employer or agricultural association on essentially a year round basis to perform a variety of tasks for his employer and is not primarily employed to do field work.<sup>18</sup>

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<sup>15</sup> 29 U.S.C. § 1802(2).

<sup>16</sup> 29 U.S.C. § 1802(8)A.

<sup>17</sup> 29 U.S.C. § 1802(10)A.

<sup>18</sup> 29 C.F.R. § 500.20(s).

The Act defines agricultural employers as:

[A]ny person who owns or operates a farm<sup>19</sup>, 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. Produces seed means the planting, cultivation, growing and harvesting of seeds of agricultural or horticultural commodities.<sup>20</sup>

To be considered agricultural, employment must be:

[E]mployment in any service or activity included within [1] the provisions of section 3(f) of the Fair Labor Standards Act of 1938...[2] section 3121(g) of the Internal Revenue Code of 1954...and [3] the handling, planting, drying, packing, packaging, processing, freezing, or grading prior to delivery for storage of any agricultural or horticultural commodity in its unmanufactured state.<sup>21</sup>

Section 3(f) of the Fair Labor Standards Act provides that

“Agriculture” includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 1141j(g) of Title 12), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.<sup>22</sup>

Section 3121(g) of the Internal Revenue Code of 1954 defines agricultural labor as including all service performed in the employ of any person, in connection with cultivating the soil or in connection with raising or harvesting any agricultural or horticultural commodity.<sup>23</sup>

There are differing interpretations of the term “agricultural or horticultural commodities.” The statutory interpretation of the term refers to commodities resulting from the application of agricultural and horticultural techniques, specifically including

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<sup>19</sup> 29 C.F.R. 500.20(e) provides for three possible definitions of agricultural employment. Both the second and third definitions clarify that the term “agricultural employer” is not limited to those who own or operate a farm but, instead, applies to certain activities regardless of their location. *See* 29 U.S.C. 1802(3) and *Morante-Navarro*, 350 F.3d 1163 (11th Cir. 2003).

<sup>20</sup> 29 C.F.R. § 500.20(d), 29 U.S.C. § 1802(2).

<sup>21</sup> 29 C.F.R. § 500.20(e), 29 U.S.C. § 1802(3).

<sup>22</sup> 29 U.S.C. § 203(g).

<sup>23</sup> 26 U.S.C.A. § 3121(g).

commodities that are planted and cultivated by man.<sup>24</sup> In 2003, the Eleventh Circuit found that pine straw is an agricultural commodity.<sup>25</sup>

To “employ” a worker under the Act means “to suffer or permit work” and it includes the joint employment principles.<sup>26</sup> Whether someone is a joint employer is entirely dependent on the facts of the particular case.<sup>27</sup>

The Eleventh Circuit recognizes

at least eight factors that can be analyzed to determine whether a farmworker furnished by a labor contractor was economically dependent on, and therefore jointly employed by, a grower: (1) the nature and degree of the grower's control of the farmworkers; (2) the degree of the grower's supervision, direct or indirect, of the farmworkers' work; (3) the grower's right, directly or indirectly, to hire, fire, or modify the farmworkers' employment conditions; (4) the grower's power to determine the workers' pay rates or methods of payment; (5) the grower's preparation of payroll and payment of the workers' wages; (6) the grower's ownership of the facilities where the work occurred; (7) the farmworkers' performance of a line-job integral to the harvesting and production of salable vegetables; and (8) the grower's and labor contractor's relative investment in equipment and facilities.<sup>28</sup>

In applying those factors, economic dependence on the independent contractor or the grower is not dispositive. Since a single employee may simultaneously have an employment relationship with an employer and an independent contractor, each relationship should be examined for its nature as employment. The existence of a joint employment relationship depends on “the ‘economic reality’ of all the circumstances and facts in the particular case. The factors are indicators of economic dependence, which in turn, indicates employee status.”<sup>29</sup>

The weight of each factor depends on the light it sheds on the farmworkers' economic dependence on the alleged employer. Joint employment relationship is not determined by a mathematical formula related to the factors or common-law concepts of

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<sup>24</sup> 29 C.F.R. § 780.112.

<sup>25</sup> See *Morante-Navarro, et al. v. T & Y Pine Straw, Inc.*, 350 F.3d 1163, 1172 (11th Cir. 2003), citing *Bracamontes v. Weyerhaeuser Co.*, 840 F.2d 271, 276 (5th Cir.), *cert denied*, 488 U.S. 854, 109 S.Ct. 141, 102 L.Ed.2d 113 (1988)(holding that pine tree seedlings are “agricultural or horticultural commodities” such that the planting of pine trees is “agricultural employment” under the AWPA); *Brescal v. Brock*, 843 F.2d 1163, 1168 (9th Cir. 1987); *Colunga v. Young*, 722 F.Supp. 1479, 1486 (W.D.Mich. 1989), *aff'd*, 914 F.2d 255 (6th Cir. 1990)(unpublished opinion).

<sup>26</sup> 29 U.S.C. § 203(g), 29 C.F.R. § 500.20(h)(5).

<sup>27</sup> 29 C.F.R. § 500.20(h)(5).

<sup>28</sup> *Antenor v. D & S Farms*, 88 F.3d 925, 932–33 (11th Cir. 1996) (citing *Aimable v. Long & Scott Farms, Inc.*, 20 F.3d 434 (11th Cir.), *cert. denied*, 513 U.S. 943, and *Hodgson v. Griffin & Brand of McAllen, Inc.*, 471 F.2d 235 (5th Cir.1973). The regulations apply a similar list. 29 C.F.R. §500.20(h)(5).

<sup>29</sup> *Id.*

employment. The ultimate inquiry looks to all the circumstances concerning whether the putative employee is, in economic reality, dependent upon the alleged employer. Moreover, the Act must be construed broadly to effectuate its humanitarian and remedial purpose.<sup>30</sup>

The Act requires agricultural employers ascertain and disclose in writing the conditions of employment to each worker as well as provide a wage statement to each worker each pay period itemizing the number of hours worked, basis on which wages are paid, total pay period earnings, specific sums withheld and reasons for withholding, and the net pay.<sup>31</sup> Further, the Act requires agricultural employers to keep records of wage statements given to each migrant and seasonal worker.<sup>32</sup> Finally, the Act requires agricultural employers display a MSPA poster in the work fields.<sup>33</sup>

“[T]he Secretary is empowered, among other things, to impose an assessment and to collect a civil money penalty of not more than \$1,000 for each violation . . . .”<sup>34</sup> Factors to consider in determining the amount of penalty include:

- (1) Previous history of violation or violations of this Act and the Farm Labor Contractor Registration Act;
- (2) The number of workers affected by the violation or violations;
- (3) The gravity of the violation or violations;
- (4) Efforts made in good faith to comply with the Act (such as when a joint employer agricultural employer/association provides employment-related benefits which comply with applicable law to agricultural workers, or takes reasonable measures to ensure farm labor contractor compliance with legal obligations);
- (5) Explanation of person charged with the violation or violations;
- (6) Commitment to future compliance, taking into account the public health, interest or safety, and whether the person has previously violated the Act;
- (7) The extent to which the violator achieved a financial gain due to the violation, or the potential financial loss or potential injury to the workers.<sup>35</sup>

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<sup>30</sup> *Id.*

<sup>31</sup> 29 U.S.C. §§ 1821(d)(2), 1831(c)(2), 1821(d)(1)(A)-(F), 1831(c)(1)(A)-(F); 29 C.F.R. § 500.80(d).

<sup>32</sup> 29 U.S.C. § 1821(d); 29 U.S.C. § 1831(c); 29 C.F.R. § 500.80(a).

<sup>33</sup> 29 U.S.C. §§ 1821(b), 1831(b); 29 C.F.R. §§ 500.75(c), 500.76(d)(1).

<sup>34</sup> 29 C.F.R. § 500.1(e) (effective to 31 Jul 16).

<sup>35</sup> 29 C.F.R. § 500.143.

## Evidence

*Edward Wyrick testified at hearing in pertinent part that:*<sup>36</sup>

The pine straw slow season is December, January, and February. However, they have had excellent Decembers along with excellent Januarys and Februarys. Pine straw falls mainly twice a year, but some falls year-round. The two major seasons for falling are December and January, and June and July. It is dependent on weather and the rainy season. Many landscapers like really golden pine straw, which means harvesting in December for purchase and use in January and February. The problem with harvesting pine straw during the rainy season is that it will mold. Otherwise, they can gather at all year long. They can and do use plastic to protect the pine straw from getting wet. Demand does vary by season.

For much of its product, Respondent finds the fields; contacts the landowners; prepares the land; provides the equipment to harvest the pine straw; has contractors collect and bale the pine straw; and, once the pine straw is collected and baled, picks up the pine straw and sells it. Respondent also simply buys pine straw from other companies.

Respondent has four employees, which includes himself, Todd Johnson, Amy Johnson, and Alan Thrasher. From 2010 to 2012 they had Bobby Wyrick, who was the administrator and secretary, Todd Johnson, Mark Johnson, and himself. They had a deputy sheriff who would drive for them when he was off duty, and Todd Johnson's son-in-law worked for them during the summer. He did not do any raking or baling of pine straw. He does not recall when they started working with Marcos.

He was the vice president, but they were all vice presidents because they were all brothers. No one actually went out to rake or bale pine straw. The demand for pine straw is largely for use in gardening or landscaping. Respondent is a pine straw wholesaler and locates fields where pine straw could potentially be harvested. There have to be enough pine trees per acre for a field to be usable. Respondent then contacts the landowner and negotiates agreements with them. He is not aware of Marcos or Selvin doing anything of that nature. The majority of those agreements are verbal, but some are in writing. Respondent makes promises to the landowner to purchase the pine straw they harvest and to keep the field clean of debris. Some of the agreements are open-ended. They always obtain permission before they actually enter the property.

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<sup>36</sup> Tr. 240-370.

Respondent then tries to provide notice to the landowner when their property is going to be harvested. In many cases, they have to prepare the field by applying herbicide with a tractor and sprayer and perhaps mowing. Marcos and Selvin are not involved in that. The pre-treating could sometimes be years or months before harvesting.

Once the land is properly prepared, they tell the crew and show them where to go. If multiple fields are ready, the crew will select where they want to work. They normally do not offer the same field to two crews and it is not common for two crews to be ready to start a new job at the same time. At the time, they were working only with the two crews represented by Marcos and Selvin. Respondent would drive Marcos or Selvin out to the fields and let them select which one they wanted to work on. Sometimes they chose the first and sometimes the second. The most they ever showed was three fields.

They do not hire any of the workers that Marcos or Selvin use, set working hours, or establish production goals. Nor did they have the authority to fire any employees that worked for Marcos and Selvin. They did not tell Marcos or Selvin how much to pay the workers, but simply paid Marcos and Selvin the rate per bale on the truck. They did not go on to the fields during harvesting and oversee, supervise, or direct the workers. They did not prevent Marcos or Selvin from working for any other entity. They do not know how much Marcos or Selvin actually paid any of the workers. Most of the time, Selvin and Marcos only had one crew each. He is not sure how many specific workers they had. The rates on the invoice were suggested industry standards. Marcos and Selvin decided how to pay their workers. They provided Marcos and Selvin 1099 forms for taxes.

However, they did have other brokers or producers from whom they would also purchase pine straw. If they had an agreement with the landowner whose property was ready for harvesting and they did not have a crew free, they might arrange with another company to harvest the field and then promise to buy the pine straw from that company. Occasionally, they will provide that other company equipment. He does not recall the relative percentage of pine straw from Selvin and Marcos and other suppliers, but they were paid the same \$.90 per bale. They would negotiate with other pine straw suppliers and might end up paying more than they paid Marcos and Selvin. He would say something around 45 or 50% of the pine straw came from those two.

They would provide balers, string, pitchforks, and insect repellent to Selvin and Marcos. The baler is a box with a plunger on the top. A fast worker could do a bale in about a minute, but a slow person might take two or three times longer. Sometimes Selvin and Marcos would bring their own pitchforks and boxes, but their boxes did not produce the same size bale. It is important that the bales are

consistently sized. The bales are loaded onto a tractor or trailer by hand. Respondent would leave it up to the crew chief as to whether the bales should be taken to one central location or picked up as they were baled. Infrequently, landowners would call to complain and ask someone to come back and pick up some debris.

AX-1 shows \$.70 per bale for baling and \$.10 per bale for loading. It was prepared based on information provided to Respondent by the crew chiefs. Based on that information, respondent paid Selvin and Marcos every Friday. He does not know anything about the loans of \$1080 in August 2010 and January 2011 or \$4500 in October 2010. He also does not know anything about installment payments on a loan. It appears that there was a Christmas bonus of \$1000.

\$.70 for baling and \$.10 for loading and crew chief was the industry standard and is what the majority of people were paying for pine straw. Respondent was suggesting that distribution, but paid by the trailer and invoice.

He is not sure if AX-2 shows bales that were sold or harvested. The records seem to indicate that March and April are the busiest months.

If a bale was nonconforming, Respondent would take a deduction in a later invoice. It could be months later that they charged back for the bad bale. Respondent would verbally tell the crew chief about the problem. They did not go back and talk to the workers. They also used a chargeback process for bad pine straw they purchased from other suppliers.

He has no idea if Marcos or Selvin had any specific business structure or was registered with the State of Florida. They did have their own vehicles and sometimes would use pickup trucks to load pine straw. Most of the time they use Respondent's tractor and haul out wagons. Respondent preferred that the contractors not use their own vehicles, because they would damage the trees.

Respondent maintained general liability insurance. He does not know if Marcos or Selvin did. Respondent did not require them to do so. They never told the landowners that independent contractors without insurance would be working on the property. RX-23 indicates that they were supposed to have liability insurance.

AX-9 is an ETA 40914. He signed it on 12 Feb 13 on behalf of Respondent. They completed it after they were investigated. It described the work being done by Selvin and Marcos's crews. It also describes their seasonal work load and explains that they were unable to hire domestic workers who were willing to accept seasonal jobs. Because they could only use H-2B workers part of the year, they had to describe the work as having peak loads and not year-round. They had been

using the H-2B application process for years, but decided to use contractors instead for 2010, 2011, and 2012. After the investigation, they went back to the H-2B process. They use about 40 H-2B workers.

They also dealt with other contractors, including Nancy Alfaro and Dewey Clark. The setup was largely the same as with Selvin and Marcos, except they had formalized structured businesses. Clark would approach landowners and obtain permission on his own. Clark would also ask them if they had any property available. Sometimes he would harvest properties they had prepared and sometimes he would use some of their balers.

***Wildali DeJesus testified at hearing in pertinent part that:***<sup>37</sup>

He has worked with the Department of Labor since 2007. From 2007 until 2013, he was a wage and hour investigator. During that time he investigated several hundred cases. He is now a supervisor and has several hundred cases under his supervision. His office enforces a number of acts to include the Migrant and Seasonal Worker Protection Act. He has probably investigated about 100 of those cases and reviewed 80 as a supervisor. He specifically investigated 35 to 40 pine straw cases and reviewed another 40 as a supervisor.

He is familiar with Respondent's business, Graves Creek, doing business as Wyrick and Sons. He was the lead investigator on this case. The investigation began in 2012 and the retroactive period of documentary investigation was March 2010 to March 2012. They had spent about a year and a half looking at the pine straw industry in the Lake City and Live Oak, Florida area and decided to also look in the Florida Panhandle.

They began their field investigation of Respondent on 21 Mar 12 when they were driving down the highway and spotted a semi-tractor trailer with some pine straw in it. They also saw a baler close to the road in front of the semi-tractor trailer. That was usually an indication that there were workers in the area. They could not see much from the road, so they got out and walked into the field, where there was a worker raking and baling. He introduced himself to her, but does not recall if he showed her his badge. She said they were working for Respondent. He took a statement from one of the workers. Within ten minutes one of Respondent's representatives arrived and said he was trying to make sure no one would be stealing their workers. There was no landowner or farm labor contractor.

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<sup>37</sup> Tr. 28 - 184.

On 9 April 12 they had a meeting with Respondent, who provided them with invoices. They talked about ways to comply with the regulations and gave them a package of information on the regulations. They were then taken to two other fields to conduct interviews. There were no landowners and they did not meet the farm labor contractors. He never spoke to any of the landowners. They asked for copies of the contracts with the landowners, but were told the agreements were all verbal. Any written agreements were provided after the investigation.

Some of the workers were proficient in English, but Spanish was their native language. He is a native Spanish speaker and was able to conduct the interviews in Spanish. He is not a certified interpreter or Notary Public. He does not have the authority to administer oaths. One of the first things he does on an interview is to explain that the interview is confidential. None of the interviewees responded to that. When he interviewed the workers, they took contact information from those who were able to provide it. The workers they interviewed told them that they were being paid \$.70 a bale for baling with \$.10 a bale for loading and an additional \$.10 to the crew chief. AX-1 reflects the payments made. Respondent were present for the interviews and maintained that those were suggested pay rates. AX-18 is the interview of the workers. He took down their exact words and then read them back at the end to ensure accuracy. He then translated the statements into English. The workers indicated they were paid in cash, but not given pay stubs.

He did Nancy Alfaro's interview at 0845 on 21 Mar 12. He does not recall how long the interview took. They typically do not ask for a driver's license or social security numbers. He did ask for a street address, but she did not give him one. When he asked her who she was raking for, she said Wyrick and Sons is the head company. Those were her exact words. When asked who she was employed by, she said her crew leader was Selvin Martinez. She did not mention which field she worked in, but said she was paid by Selvin Martinez and in turn paid the workers for him. He does not know where she is now, and when he called her contact number it was out of service. He has never seen RX-23.

He took a statement from Manuel Lopez on 9 Apr 12. The interview lasted maybe ten minutes or so. They do not typically verify identification of the worker making the statement. He asked for a phone number but did not get one. He did get an address. Lopez said he had found his own housing. Lopez did not specifically say that Selvin Martinez was a farm labor contractor. He also took a statement from Luis Martinez on 9 Apr 12. The Spanish term he used for an address essentially means trailer park. He said he lived in a trailer park in Blountstown.

He does not know who made the decisions about where to go to gather pine straw. The final conference of the investigation was on 25 Apr 12. During that investigation, they discovered that Respondent was an agricultural employer that had failed to display the requisite posters, failed to provide workers with the disclosure of working conditions, failed to keep accurate time and payroll records, failed to provide pay stubs, and was using the services of two unregistered farm labor contractors.

Under the Act, pine straw is an agricultural commodity. It is not an agricultural commodity under the Fair Labor Standards Act, because they have different definitions. RX-18 is the handbook under the Fair Labor Standards Act. There is a distinctive season for harvesting pine straw. The spring is the busiest time, although there is another significant peak in the fall. Pine straw is harvested more in the spring because it is needed to use as mulch on flowerbeds. Pine straw cannot be baled when it is wet, and Florida has a rainy summer climate.

The invoices provided by Respondent during investigation and litigation reflected a significant difference between the number of bales that were raked and baled during peak season compared to the rest of the year.<sup>38</sup> The invoices also showed that Selvin Martinez baled pine straw for Respondent from Feb 2012 until April 2012. He used the invoices to create a spread sheet.<sup>39</sup> AX - 14 is a similar spreadsheet showing bales raked and loaded by Marcos Martinez's crew.

He created AX-15 based on the invoices. The red bars reflect production by Marcos Martinez's crew and the green bars show production by Selvin Martinez's crew. The peaks he observed in Respondent's invoices are similar to what he has seen from other pine straw growers. AX-2 was provided by Respondent and shows a monthly summary of the number of bales they sold from 1996 until 2013. He created AX-16 based on AX-2. It shows the seasonal variance in pine straw. Typically, golf courses want fall pine straw because of the color. Workers can find full-time, year-round work in pine straw. He did not ask any of the workers if they worked pine straw full-time.

A farm labor contractor is a person who furnishes, recruits, employees, hires, pays, and may house migrant or seasonal workers to work in agriculture for a fee. Under the Act, farm labor contractors must register with the Department of Labor and obtain a certificate. The certification process includes filling out an application that explains what they will be doing. They may also need to furnish a doctor's certificate, provide a driver's license, or get fingerprinted. There are specific requirements that apply if a contractor is going to transport or house workers.

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<sup>38</sup> AX-1.

<sup>39</sup> AX-13.

When they interviewed workers during the investigation, the workers identified either Marcos or Selvin Martinez as the person who would hire them or pay them. In the initial meeting, Respondent indicated that they use the Martinez's services as farm labor contractors. Respondent provided documents that showed what was paid to the Martinezes and what they in turn paid the individual workers. Neither of the Martinezes was registered as a farm labor contractor.

Respondent indicated that they did purchase pre-baled pine straw from a third party at a \$1.75 per bale. Charts showing how much pine straw was sold for doesn't necessary reflect that all of that pine straw was obtained from Marcos and Selvin Martinez. Some of the sold pine straw may have been collected by third parties.

They never actually met either of the contractors in the course of their investigation. Respondent provided addresses, but neither address had an occupied residence. They were unable to get a phone number for either Martinez, and when they sent letters, the letters came back as undeliverable. They also tried to be present on a Friday when the Martinezes were paid, but then the meeting was canceled. AX-3 is the letters they exchanged with Respondent to try to schedule a meeting with the farm labor contractors and discuss the investigation findings. They subsequently tried to locate Selvin and Marcos Martinez. One is supposed to be in California and the other one is supposed to be in Virginia. They tried to contact them by phone and mail, but had no success.

Both Jerry and Edward Wyrick had indicated that they had served as registered farm labor contractors. He looked in Department of Labor records<sup>40</sup> and found that both had been certified as farm labor contractors at some point. Jerry Wyrick was certified as a farm labor contractor in 2001. He was certified to provide housing or transportation to workers. Edward Wyrick was certified in October 2001. He was certified to hire and recruit seasonal agricultural workers.

The maximum penalty for a violation of the act is \$1000. In determining the penalty to assess, they consider the severity of the violation; the impact the violation had on health, safety, and welfare; the number of people involved; any history of violations; the reasons for the violations; any good-faith efforts to comply; and the extent of financial gain or loss resulting from the violations. He assessed a \$1000 penalty for each of the unregistered farm labor contractors. They considered the unregistered farm labor contractor violation to be aggravated because there were two. They found the recordkeeping failure to be aggravated because there were absolutely no employment records for the workers. He

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<sup>40</sup> AX-17

assessed \$50 penalties for failing to disclose working conditions and provide pay stubs and \$400 for the failure to keep required records. The final penalty was \$25 for failing to display a poster. The total penalties were \$2525.

***Robert Vaden testified at hearing in pertinent part that:***<sup>41</sup>

He has been a wage and hour investigator for the Department of Labor since 2009. Before that he was a Spanish linguist in the Air Force. As a wage and hour investigator he has had hundreds of cases, of which over 100 involved this act. Of those, 30 to 40 involved pine straw. Pine straw harvesting does go on year-round, but slows dramatically when it rains. The peak demand for pine straw is typically when the weather warms up during the spring.

He is familiar with Respondent's business and assisted in the 2012 investigation. They were conducting field checks for compliance and came upon Respondent. He sat in on the initial interviews.

Respondent operates on land used in the cultivation and harvesting of pine straw, which is recognized as agriculture under the Act. Respondent hires a crew leader. Whether they call the crew leader an independent contractor or farm labor contractor, if they hire a crew leader to furnish, recruit, employ, solicit, hire, or transport workers for a fee, that crew leader is a farm labor contractor.

Respondent runs its business year-round and has year-round employees. He does not know of any land owned by Respondent and used for pine straw operation during the investigation period. Respondent would prepare the land for harvesting. He does not know who specifically did the preparation, but the crew leaders and workers did not perform this work. He does not have any information that would allow him to determine whether or not the two crew leaders were required to pay a specific amount to the workers.

The actual raking, baling, and loading of pine straw does not require much supervision. It is not a very complicated process and, once they are trained, it does not require much oversight by the crew chief.

Most of the workers were limited in their English proficiency. They were all native Spanish speakers. Typically, he takes the workers' statements in Spanish and reads it back to them or has them read it. Once they agree it is accurate, they sign the bottom. Later, he translates it from Spanish to English. He interviewed Lazaro Gonzalez Torres and Romero Perez Ramos. The workers never specifically mentioned Respondent. He put Respondent in the form so they could identify

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<sup>41</sup> Tr. 191-239.

which investigation was involved. Torres gave his address as “trailer park.” Ramos gave a specific address in Marianna, Florida. They tried to contact Torres and Ramos later, but were unable to do so.

He had just completed the second interview when the other investigator told him to stop, because a representative from Respondent had come onto the field. He believes the representative was Mark Johnson. They never saw a landowner or farm labor contractor, although they did eventually talk to a couple of landowners. He does not recall anyone claiming to be a supervisor.

When they did talk to the landowners, the landowners indicated that they had written agreements with Respondent. Some of the landowners required advance notice before they would allow anyone to enter their land. The landowners did not deal with the crew chiefs. They only dealt with Respondent.

Based on the interviews, it appears that the workers were paid the amounts reflected in the invoices. From what he could tell, Respondent set the pay rates. He saw a number of the invoices reflected in AX-1 during the investigation. He was there when the other investigator received them from Respondent. On the first page of the invoice for Marcos Martinez, the reference to Tio as a loader is probably a nickname. It appears that Alex was the loader for Selvin Martinez’s crew. He never found either of the loaders. He does not recall any workers saying that they had been hired by Respondent. Typically, the loader drives either a tractor or truck and goes from worker to worker to collect bales that have been made. The trailers and flatbeds belonged to Respondents.

It also appeared that if a customer complained to Respondent about a bad bale, Respondent would back charge against Marcos and Selvin for that bale. It also looked like at some point Respondent loaned money to Marcos and Selvin.

They concluded that Respondent had hired Marcos and Selvin to recruit, employ, hire, and pay migrant and seasonal workers to bale pine straw that Respondent in turn sold.

***Amy Johnson testified at hearing in pertinent part that:*<sup>42</sup>**

She is Respondent’s office administrator. RX-24 is a chart that she prepared during the hearing. She took the landowner payments from RX-5 for the years of 2010, 2011, and 2012 and place them in a spreadsheet sorted by date and then calculated percentages. The information would not include straw purchased from other harvesters, but would include contractors other than Selvin and Marcos who

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<sup>42</sup> Tr. 386-400.

went on to land and harvested pine straw for which Respondent paid the landowner.

***Joe Leonard testified at hearing in pertinent part that:***<sup>43</sup>

He is a retired teacher and now farms trees. He and his brother own a number of properties. For about 10 or 12 years he has had a verbal agreement with Respondent to sell them his pine straw. It is a year-to-year arrangement and he would hesitate to call it a long-term contract. Respondent comes onto the land and sprays a year or so in advance. Then they clean the land before straw harvesting. Respondent would call to ask permission to do the prep work and then to do the harvesting. There would be times he did not want anyone on his land. Occasionally, he would see people raking and baling straw on his property. He does not know who they worked for specifically. He never saw anyone from Respondent supervising those workers. He did not consider the relationship with Respondent to be a lease. He was paid per bale of pine straw by Respondent. He never talked to anybody by the name of Selvin or Marcos.

***Nancy Alfaro stated in pertinent part that:***<sup>44</sup>

Respondent is the head company and has a few crew chiefs that work under them and run the crews. At first, she wanted to be a crew chief, but realized it was too much, so she works under Selvin. During the time she was a crew chief, they had 3 or 4 crew chiefs. She does not know anything else. She does not know who the pine straw belongs to and mostly loads the bales into the truck, keeping track of the number of bales.

Selvin hires the guys. They get paid \$.70 per bale. The loader gets \$.10 per bale and they get paid every Friday. They get paid by the bale and not the number of hours. She gives the bale count to Selvin and he gives her the money in cash to pay the workers. She has 9 people working with her. They come and go as they want. They usually work until about 5:00 PM. They load a trailer that holds 1160 bales of straw. They do 2 or 3 trailers per week. Their schedule varies.

***Manuel Lopez stated in pertinent part that:***<sup>45</sup>

He rakes and bales pine straw. He gets paid \$.70 per bale every Friday. The pay is in cash. He makes anywhere from 300 to 400 bales per week and works up to 7 days per week. Selvin hired him and pays him. He does not know where Selvin

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<sup>43</sup> Tr. 371-386.

<sup>44</sup> AX-18; RX-22.

<sup>45</sup> AX-18; RX-22.

lives. He gets to the field with his own transportation. He has lived in Marianna, Florida for three years. He has also picked tomatoes and squash in Quincy, Florida.

***Luis Martinez stated in pertinent part that:***<sup>46</sup>

He rakes and bales pine straw. He makes about 500 bales per week and works 5 or 6 days per week. He gets paid \$.70 per bale in cash on Fridays. Marcos pays him. The loader gives Marcos the tickets with the number of bales he made. Marcos hired him and comes to the field occasionally. He gets to the field in a van owned by Marcos, but sometimes driven by someone else. They chip in for gas. He only picks pine straw and does not work in any other crops.

***Lazaro Torres stated in pertinent part that:***<sup>47</sup>

He is paid \$.10 per bale to load. When there are no bales to load, he bales and is paid \$.70 per bale. They start work around 7:00 AM, take an hour or however long they want for lunch, and work 5 or 6 days per week. He gets to work in his own car. He is paid in cash every Friday based on a ticket with the number of bales.

***Romeo Ramos stated in pertinent part that:***<sup>48</sup>

He can make about 15 bales per hour. They work from around 7:00 AM to 5:00 PM with an hour for lunch. He earned \$.70 per bale and gets paid in cash. He found out about the job through a sign at Walmart. He does not know who the owner is and is paid by Nancy.

***Various contracts show in pertinent part that:***<sup>49</sup>

Respondent entered into contractual relationships with various landowners. Many contracts called the landowners “lessor” and Respondent “lessee.” At least one identified Respondent as “buyer.” The contracts obligated the landowners to allow Respondent to enter onto their property, prepare the land, collect pine needles, and sell the pine needles. Respondent was obligated to pay the landowners either a specified price per bale or per harvestable acre, maintain general liability insurance, and keep the property free of debris. The landowners reserved their rights of way across the property. The contracts continued until pine needle production diminished or the landowner harvested the needle-bearing trees. In some cases, Respondent paid an initial binder.

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<sup>46</sup> AX-18; RX-22.

<sup>47</sup> AX-19; RX-22.

<sup>48</sup> AX-19; RX-22.

<sup>49</sup> AX-4; RX-2, 23.

Marcos Martinez, Selvin Martinez, and Nancy Alfaro completed contracts with Respondent as independent contractors. The contracts provided that they were responsible for all taxes and withholding and were totally independent from Respondent and therefore not covered by any insurance, unemployment laws, or workers' compensation. They agreed that they would be responsible for all of their expenses and were sole proprietors of their own businesses performing a specified service for a specified pay rate. They agreed that they had sole control over the means in which they provided their service as long as the service provided met product specifications set forth by Respondent.

***Respondent's pay records show in pertinent part that:***<sup>50</sup>

Respondent paid Marcos, Nancy, Selvin, Lucio Torres and Panhandle Pinestraw per bale of pine straw. It also paid Tio, Pedro, Alejos, and Miguel. Respondent paid landowners per bale of pine straw. It paid its shareholders a flat rate and combined the amounts paid to themselves and the laborers as total payroll. Marcos Martinez, Selvin Martinez, and Nancy Alfaro filed IRS W-9 forms as independent contractors.

## **Discussion**

Notwithstanding the extensive evidence submitted by the parties, there is not much uncertainty about the factual matters involved in this case. There is little dispute about the fundamental facts that relate to Respondent's relationship with the various landowners, the two contractors, and the nature and timing of the work being done. Indeed, the presentation of evidence was marked by efforts to go beyond facts and argue the appropriate legal characterization of the relationships and work as described by the facts.

For example, the parties do not have any serious dispute as to the degree of variation in work over time. They do disagree over whether or not that variation results in the work being properly characterized under the act as seasonal. Similarly, there is no real dispute over the nature of pine straw or how it was collected. There is, however, a dispute over whether or not that work was agricultural in nature under the Act. Finally, there was no real conflict in the evidence as to the roles played by Respondent, Marcos and Selvin, and the other workers in the process of collecting the pine straw. There is a significant disagreement over the legal significance of those roles.

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<sup>50</sup> AX-5-8; RX-3-5, 10-13, 20-21.

### *Pine Straw Harvesting as Agricultural Employment*

The Solicitor relies heavily on *Morante-Navarro*,<sup>51</sup> suggesting that that case is essentially dispositive on this issue. Indeed, there is no significant difference between the work done in that case and the work done in furtherance of Respondent's business. Respondent argues that the procedural setting of *Morante-Navarro* is such that it robs the case of any precedential value. While it is true that the parties settled the lawsuit pursuant to a consent agreement, the district court expressly retained jurisdiction to determine whether the work being done was agricultural employment. Consequently, I do not find that the holding lacks authority as binding precedent. Even if that were the case, it would still be highly persuasive.<sup>52</sup> Thus, I find that the work being done qualifies under the Act as agricultural employment.

### *Pine Straw Harvesting as Seasonal*

The Solicitor largely concedes that although there were seasonal variations in the workload, and peak months occurred in spring and fall, pine straw harvesting was a year-round undertaking.<sup>53</sup> He also acknowledges that the existence of year-round work would seem to be contrary to a characterization of the work as seasonal, but then invokes the humanitarian purpose of the Act and encourages broad interpretation, ultimately arguing that the statutory and regulatory construction includes fieldwork, even if year-round, in the definition of seasonal.

In reaching the fieldwork argument, the Solicitor looks to the regulatory language providing that

[o]n a seasonal or other temporary basis does not include the employment of any worker who is living at his permanent place of residence, when that worker is employed by a specific agricultural employer or agricultural association on essentially a year round basis to perform a variety of tasks for his employer and is not primarily employed to do field work.<sup>54</sup>

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<sup>51</sup> See n. 24.

<sup>52</sup> Respondent also argued that the opinion in *Morante-Navarro* incorrectly found that the workers had cultivated the land. However, that suggestion is actually one of legal error rather than any citation to factual distinctions between their operations and the work done in *Morante-Navarro*.

<sup>53</sup> The Administrator cited Respondent's previous H-2B applications that certified straw harvesting as seasonal in nature, with a peak load and slow season. However, given the absence of any factual dispute I did not find those previous applications particularly helpful, since the fundamental question here is a legal one. The legal conclusions reflected in those applications, even if inconsistent with Respondent's present position, would not be persuasive in my determination in any event.

<sup>54</sup> 29 C.F.R. § 500.20(s)(4).

The Solicitor also cites an Eleventh Circuit case holding year-round workers to be nonetheless seasonal.<sup>55</sup> In *Caro-Galvan*, during the prime harvest season of January through May, the workers were able to cut enough ferns to earn more than minimum wage. From June through December, the workers were unable to earn minimum wage cutting ferns. Instead, they were offered general field work at minimum wage and were also free to work elsewhere without risk of losing their jobs. The workers rarely did so, however, as little alternative work was available. The *Caro-Galvan* court cited the humanitarian purposes of the Act; reviewed the plight of agricultural workers; gave deference to the Agency's interpretation of the statute in promulgating its regulations; and, interpreting those regulations, concluded that the workers were indeed seasonal.

Respondent counters that the plain language of the statute requires that the work be seasonal. It also observes that the regulatory paragraph relating to fieldwork, when taken in context, does not lead to the conclusion that year-round fieldwork is, by counter-intuitive definition, seasonal. It further argues that fieldwork must take place on a ranch or farm and would therefore be inapplicable in this case. Finally, it notes that the *Caro-Galvan* workers were unable to cut fern year-round and had to do what was essentially other employment, where the workers in its case harvested pine straw year-round.

There is little doubt that an interpretation which expands the word seasonal to include year-round uninterrupted fieldwork reflects a marked departure from clear statutory language. A full reading of the opinion shows that departure was a function of the court's assessment of policy considerations, along with not only its deference to, but agreement with the Agency's position, notwithstanding its stark inconsistency with the legislative language. Moreover, notwithstanding Respondent's suggestion to the contrary, the *Caro-Galvan* opinion clearly implies that in the alternative, even if the "off-season" work was considered to be the same employment and therefore year-round, it would still be fieldwork and therefore seasonal. Finally, Respondent's argument that fieldwork must be on a farm or ranch is counter to the plain language of the regulation and inconsistent with case law.<sup>56</sup>

I am compelled to follow the ruling in *Caro-Galvan* and find that the work done in this case was "seasonal," at least so far as the Agency has defined the word under the Act and that definition was upheld by the controlling circuit.

#### *Joint Employment and Farm Labor Contractor Status*

The Solicitor's theory is that in an effort to avoid its obligations as an employer, Respondent relied on independent contractor crew chiefs to supply labor. "The undisputed material facts show that Respondent hired laborers through a third party, the

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<sup>55</sup> *Caro-Galvan v. Curtis Richardson, Inc.*, 993 F.2d 1500 (11th Cir. 1993).

<sup>56</sup> *Morante-Navarro, et al. v. T & Y Pine Straw, Inc.*, 350 F.3d 1163 (11th Cir. 2003).

two farm labor contractors, and that Respondent assigned functions of its responsibility as an employer to this third party. . . .”<sup>57</sup> However, it also maintains that the crew chiefs themselves were employees. “[A]ll the undisputed facts of record show as a matter of law that the two farm labor contractors were employees of Respondent. . . .”<sup>58</sup>

The Solicitor addresses that inconsistency, at least in part, by noting “the farm labor contractors’ status as independent contractors or employees is not relevant to the determination of whether Respondent is an agricultural employer. . . .”<sup>59</sup> While that may be true, the converse is not, since the statute excludes employees of an agricultural employer from the definition of a farm labor contractor. Moreover, there was no suggestion that the laborers obtained by the crew chiefs were independent contractors themselves.

Consequently, if the crew chiefs were not independent contractors, but employees, they could not be farm labor contractors. If that were the case, the laborers provided by the crew chiefs would clearly be Respondent’s employees. On the other hand, if the crew chiefs were independent contractors, Respondent might or might not be a joint employer of the laborers.

Respondent argues that the crew chiefs were independent contractors and it did not qualify as joint employers of the laborers.<sup>60</sup> The parties agreed that whether or not Respondent was a joint employer of the laborers would be determined by the application of a number of factors. Applying the same factors, they reached different conclusions. The Solicitor argues that the fundamental question relates to the economic dependence of the workers in a holistic approach to the various factors. Respondent looked at each factor from a more discreet viewpoint. In its most simplistic terms, the question is, “Whom did the laborers work for?” Arriving at the answer to that question requires an assessment of the various factors set forth in the case law and regulations.

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<sup>57</sup> Solicitor’s opening brief, p. 22.

<sup>58</sup> Solicitor’s opening brief, p. 23.

<sup>59</sup> Solicitor’s opening brief, p. 23.

<sup>60</sup> For obvious reasons, Respondent declined to suggest that the crew chiefs were not farm labor contractors because of their status as employees. Instead, Respondent’s position was that although the crew chiefs were independent contractors, they were not farm labor contractors because the work was neither agricultural nor seasonal. I found against them on both of those issues. Consequently, if I nonetheless find the crew chiefs were employees, Respondent is liable as an employer. If I find the crew chiefs were independent contractors, but the laborers were not joint employees, Respondent is liable for using uncertified farm labor contractors. If I find the crew chiefs were independent contractors, but the laborers were joint employees, Respondent is liable for both using uncertified farm labor contractors and being the employer.

### Joint Employment

The specific questions that help determine who the laborers worked for include: 1) where did they work, 2) who provided them with tools and equipment, 3) who hired and fired them, 4) who supervised them, 5) who paid them, 6) who kept their pay accounts, and 7) whether or not the nature of the work performed by them was central and integral to the core of Respondent's business.

The starting point in determining who the laborers worked for is to ask where they worked. Although the parties argued about the technical legal status of the relationship between the Respondent and the various landowners, the practical nature of the relationship is clear. Respondent obtained the landowners' permission to enter, prepare, and harvest pine straw from their land. Whether that is correctly described as a lease, easement, or right of entry, it is to some degree a possessory interest in the land. Neither the crew chief nor the laborers had anything to do with obtaining the possessory interest and their ability to work was entirely dependent upon and derivative from Respondent's assignment or delegation of that possessory interest to them. The fact that the crew chiefs told the laborers which field to work on next might weigh toward finding that the laborers were working not for Respondents, but for the crew chiefs. However, even though there was evidence that the crew chiefs had some input on which field to work, that input was limited. The crew chiefs were not given a complete list of available fields and given the discretion to select which one to work next. Consequently, I find that Respondent chose the fields on which the laborers would work. Therefore, the nature of the relationship between the crew chiefs and the laborers to the location of their work makes it more likely that the laborers were working for Respondent.

The same is true when considering the second question: who provided the laborers with tools and equipment. Although the work done by the laborers was low-tech and required only very basic tools, those tools were provided by Respondent. Thus, this factor makes it more likely that the laborers were working for Respondent.

The third factor question is who hired and fired the laborers. Respondent appeared to have little interest in which laborers the crew chiefs chose to hire to rake and bale. Similarly, if there was a decrease in demand or problem with production, Respondent seemed to allow the crew chiefs to decide which laborers to keep on and which laborers to let go, which makes it more likely to say the laborers were working for the crew chiefs. On the other hand, while the laborers were free to pick where and when they would work, that freedom exists in many employment situations. These laborers did not exercise that freedom, though, and consistently accepted the crew chiefs' invitations to gather pine straw for Respondent. This makes it more likely that the laborers were working for Respondent. Thus, the factor relating to the laborers' hiring and firing is in equipoise and does not help dispose of the ultimate issue.

Another question is who supervised the laborers. Respondent was concerned almost exclusively with the end product and relied heavily on the crew chiefs to provide real-time oversight of the laborers work. The nature of the simple work allowed for very little discretion, needed little to no supervision, and was amenable to quality control by evaluating whether or not the bales complied with the Respondent's specifications. Supervision, in this case, primarily related to setting forth product specification, which was done by Respondent, and judging compliance, which was done first by the crew chiefs and then ultimately by Respondent. On the other hand, it does appear that Respondent was present with the laborers at least some of the time. The fact that Respondent became involved with and may have attempted to stop the investigator's questioning of the laborers is at least some indicia of authority beyond that of a general contractor. Thus, even though the job required very little supervision, to the extent that supervisory authority plays any role in determining who they were working for, this factor weighs in favor of finding Respondent as employer.

In terms of asking who pays the laborers, I note that the laborers were physically paid by the crew chiefs. Respondent insists that although it may have "suggested" pay rates that were followed by the crew chiefs, the pay was not merely passed from them through the crew chiefs to the laborers, and the crew chiefs were free to set any pay rate for the laborers. It appears that the pay rates for the laborers were more of a function of established local industry practices, rather than an independent choice by the crew chiefs. In other words, had the crew chiefs elected and been able to obtain laborers at a lower rate, Respondent might have had no objection, at least in the short term. Of course, in that instance, Respondent may have lowered the rate they paid the crew chiefs. In any event, the actual pay rate seems to have been set by the market and does not really say much about whom the laborers were working for. This factor, therefore, does not weigh in favor of either Respondent or the crew chiefs being the laborers' employer.

A related question is who keeps the pay accounts. Since pay was based on bales, rather than hours worked, this question is slightly more tangential to the primary question of who the laborers were working for. Respondent paid the crew chiefs on a weekly basis, rather than waiting until a specific landowner's property was complete. Moreover, Respondent's books did not reflect simply a lump-sum per bale to be paid to the crew chief, but accounted for the individual laborers. Given the very simple nature of the pay process, it's difficult to say that it weighs heavily in favor of finding Respondent as a joint employer.

The final question is broader and considers whether or not the nature of the laborers' work is central and integral to the core of Respondent's business. The fundamental nature of Respondent's business was to gather pine straw from third-party landowners, bale it, and sell it to retailers and wholesalers. The laborers gathered the pine straw and baled it. The laborers were not providing a specialized ancillary service outside

of Respondent's core competency. Indeed, there are few things that could be more central to Respondent's business and this factor weighs in favor of finding that the laborers were working for Respondent.

Neither any one single factor nor a majority of the aforementioned factors is dispositive in the determination of whether or not the laborers were Respondent's employees. Equally as important is the legal principle of joint employment that provides that this is not an either or, or zero sum game determination. A finding that Respondent is an employer does not mean the crew chiefs were not.

I also note that the controlling case law construes the statutory definitions broadly to effectuate its humanitarian and remedial purposes and makes the primary inquiry whether the laborers were, in economic reality, dependent upon the Respondent.<sup>61</sup> There is little question that the laborers were, in economic reality, dependent upon the Respondent and, in that regard, they were working for the Respondent, who was, by definition, their employer.

#### *Farm Labor Contractor Status*

Although the record might suggest that the crew chiefs were also employees, Respondent consistently argued that they were independent contractors. On brief, the Solicitor inconsistently suggested that the record clearly established that the crew chiefs were both employees and independent contractors. I accept the Respondent's position. Given my finding as to the questions of the agricultural and seasonal nature of the work, I find that the crew chiefs were farm labor contractors. Thus, I find that Respondent was the joint laborers' employer and used the crew chiefs as farm labor contractors.

#### *Violations and Penalties*

The parties stipulated to the facts underlying the specific alleged violations as to uncertified farm labor contractors, nondisclosure of the terms and conditions of employment, and failure to provide wage statements, keep records, and display a poster in the fields.

The Agency assessed the maximum penalty of \$1000 each for the use of two uncertified farm labor contractors. It considered those violations aggravated because of allegations that the contractors provided the laborers' transportation. It also assessed a \$400 penalty for the failure to keep worker records. The Solicitor suggested that the aforementioned failures were further aggravated because the failures prevented the Agency from ensuring proper and timely payment to the laborers. The Agency

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<sup>61</sup> The case law is binding whether it is based on clear statutory interpretation or reflects public policy preferences. See text accompanying n. 56.

additionally assessed a \$50 penalty for the failure to disclose conditions and provide wage statements. Finally, the Agency assessed a \$25 penalty for the failure to display a poster.

Respondent objected to the characterization of the use of uncertified farm labor contractors as aggravated, arguing that there was no real evidence that either of the crew chiefs transported any of the laborers. Indeed, the record fails to establish that it is more likely than not that the contractors transported any laborers and I find it insufficient to support the use of that possibility or supposition as an aggravating factor. While the Solicitor rationally argues that the absence of accountability and recordkeeping makes it difficult to insure that the laborers were treated in accordance with the law, that justification is the fundamental reason the various failures are considered violations and do not necessarily qualify as an aggravating factor.

Accordingly, I reduce the penalties for use of uncertified farm labor contractors from \$1000 each to \$650 each and leave the remaining penalties unchanged, resulting in total civil money penalties of \$1,825.

**ORDERED** this day 25th day of April, 2017 at Covington, Louisiana.

**PATRICK M. ROSENOW**  
**Administrative Law Judge**

**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 02-2012, para. 5.c.(33), Delegation of Authority and Assignment of Responsibility to the Administrative Review Board, 77 Fed. Reg. 69377 (Nov. 16, 2012) (effective Oct. 19, 2012).

The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: [Boards-EFSR-Help@dol.gov](mailto:Boards-EFSR-Help@dol.gov)

If filing paper copies, you must file an original and four copies of the petition for review with the Board. If you e-File your petition, only one copy need be uploaded.

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).