

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 25 June 2009**

OALJ CASE NO.: 2005-MSP-00006

*In the Matter of:*

**EVERGREEN FORESTRY SERVICES, INC. a/k/a  
FOR-EVERGREEN FORESTRY SERVICES, INC. and  
PETER J. SMITH, III,**  
Respondents,

**DECISION AND ORDER**

This is an enforcement proceeding under the Migrant and Seasonal Agricultural Workers Protection Act (“MSPA”), 29 U.S.C. §§ 1801 et seq., and the implementing regulations at 29 C.F.R. Part 500.

*Procedural Background*

By notices dated April 13, 2004, and October 5, 2004, Respondents Evergreen Forestry Services, Inc., also known as For-Evergreen Forestry Services, Inc., (“Evergreen”) and Peter J. Smith, III (“Smith”)(collectively “Respondents”) were notified of the Secretary of Labor, Administrator Wage and Hour Division’s (“Secretary’s” or “Wage and Hour’s” or “Plaintiff’s”) determinations to refuse to issue a farm labor contractor certificate of registration to Evergreen and a farm labor contractor employee certificate of registration to Smith, respectively, based on Respondents’ failure to comply with the requirements of the MSPA. At some point, Respondents requested a hearing.

On January 13, 2005, Plaintiff issued an Order of Reference to the Office of Administrative Law Judges (this “Office” or “OALJ”) pursuant to 29 C.F.R. § 18.25. On February 16, 2005, this Office issued a Notice of Docketing and Pre-Hearing Order which required the parties to file additional documents.

On August 23, 2005, an Order Granting Stay of Proceedings was issued staying this proceeding until the Administrative Review Board’s (“ARB’s”) proceeding concluded in a related case that would have controlling influence on the present action. The parties were instructed to file status reports with this Office concerning the ARB case from time to time.

On February 9, 2007, Plaintiff informed this Office that the ARB entered its decision in the related matter on February 28, 2006, affirming the assessed civil penalty (\$17,000) and concluding that Respondents had violated the MSPA. In its February 9, 2007 response, Plaintiff filed a Motion for Summary Decision with supporting evidence (the “MSD”) arguing that since “there is no genuine issue of facts to be tried” summary decision against Respondents should be granted. The MSD contains evidence that in 2003 and 2004, the Department of Labor refused to issue Respondents a Farm Labor Contractor (“FLC”) certificate of registration and a Farm Labor

Contractor Employee (“FLCE”) certificate because of Respondents failure to comply with the requirements of the Migrant and Seasonal Agricultural Worker Protection Act (the “MSPA”) because Wage and Hour investigated Respondents in numerous locations and found numerous violations of the MSPA in 1993, 1997, 1998, and 2002, resulting in civil money penalties assessed and paid by Respondents. Ex “K” attached to the MSD.

On May 8, 2007, this Office issued an Order requiring Respondents to inform this Office within thirty (30) days from the issuance of the order:

- (1) Whether they wish to pursue this matter; or
- (2) File a response to Plaintiff’s MSD.

On June 7, 2007, Smith filed a letter response to the 5/8/07 Order stating that he wished to pursue the matter further though he did not see a reason to respond to the MSD. Smith further states that he would also like to pursue the matter involving the denial of his request for an FLCE certificate.

On April 23, 2009, this matter was assigned to me. The Secretary’s regulations governing these hearings adopt the Rules of Practice and Procedure for Administrative Hearings before the OALJ. 29 C.F.R. § 500.219. The matter may be handled under the summary decision provisions of 29 C.F.R. §§ 18.40 and 18.41.

On April 24, 2009, I issued an order scheduling service and filing date for Respondents’ response to Plaintiff’s 2/8/07 MSD ordering Respondents to serve and file a response to the MSD consisting of admissible affidavits and documentary evidence no later than May 27, 2009, and allowing Plaintiff to file a reply to the response no later than 14 days after receipt of the response.

On June 1, 2009 at 8:44 a.m., I received an *ex parte* communication letter from Smith in the form of a one-page letter responding to my 4/24/09 Order. The response states that Respondents have previously submitted all valid points as rejected by the ARB in the earlier action (*In the Matter of Evergreen Forestry Services, Inc. and Peter Smith, III*, ARB Case No. 05-029 Feb. 28, 2006), a related case the parties earlier accepted would have controlling influence on the present action. That case affirmed the imposition of the civil money penalties totaling \$17,000 against Respondents in connection with a tragic van accident and Respondents were ordered to remit that amount to the United States Department of Labor forthwith. *Id.* at 6.

The *ex parte* response further provides that Smith “would like to work as an employee of a FLC or a FLCE” and that other employers “would like me [Smith] to have a FLC or FLCE certificate.” Response at 1. He further argues that “[i]deally a FLC certificate with no employee’s [sic.] would be best to act as a [sic.] independent subcontractor to other FLC’s for training and inspection work.” He concludes by stating that he

“can only lean on W&H [Wage and Hour] for grace and an opportunity to work a few more years as I [Smith] have no argument to present against the [2/28/06 ARB] decision other than I [Smith] would be a great advocate for safety and compliance to law. I

[Smith] may have rights in the court of law but without funds to use this way I [Smith] am not able to supply 'evidentiary filings' 'supporting evidence' or 'admissible affidavits' really just a request for leniency and grace. I [Smith] believe I can bring benefits to this industry without any down side to speak of. So I [Smith] hope you can use some compassion in your decision, thank you."

*Id.*

On June 4, 2009, I issued a letter to Respondents admonishing them from sending me *ex parte* correspondence (the Response), and served them along with Plaintiff with a copy of the response.

No reply to the response has been timely filed by Plaintiff.

#### Findings of Fact

With no objections, I admit Plaintiff's MSD Exhibits ("EX's") "A" through "Q" into evidence at this time.

Respondents submitted an application for a FLC certificate of Registration on February 7, 2004, one of the two applications at issue in this action. (See Ex "A" attached to MSD).

The application was signed by Smith, as President of Evergreen. (See Ex. "A" attached to MSD).

Smith submitted an application for a FLCE certificate of registration for Progressive Environmental, LLC on July 5, 2004, which is also at issue in this action. (See Ex. "B" attached to MSD).

Department of Labor records establish that the Wage and Hour Division has investigated Respondents on a number of occasions in various locations throughout the U.S.; and that in those investigations, Respondents were found to have violated a number of the provisions of the MSPA, 29 U.S.C. 1801 *et seq.*, and its applicable regulations. at 29 C.F.R. Part 500. (See Ex. "C" attached to MSD).

As a result of each of those investigations, the Department assessed civil money penalties against, the Respondents for the violations, and Respondents paid civil money penalties for the violations in each of those investigations without contest. (See Exs. "D" & "E" attached to MSD).

On September 12, 2002, 14 migrant forestry workers employed by Respondents were killed in a vehicle crash in Northern Maine while being transported in a van leased by Respondents. An investigation of the accident by the Wage and Hour Division revealed that Respondents violated a number of MSPA provisions, and civil money penalties in the amount of \$17,000 were assessed for the alleged violations. (See Ex. "F" attached to MSD). Respondents objected to these findings and requested a hearing. (See Ex. "G" attached to MSD).

On November 19, 2004, an administrative law judge (“ALJ”) ordered that the determination of the \$17,000 civil money penalty assessed against Respondents as a result of the accident be affirmed. (See Ex. “H” attached to MSD).

Respondents sought review’ of this determination before the Administrative Review Board (“ARB” or “the Board”), wherein the Board, on February 28, 2006, affirmed the civil money penalty assessed by the ALJ, and concluded that Respondents had violated the transportation provisions of MSPA when their employee failed to drive a van in accordance with the speeding laws of the State of Maine, which resulted in the deaths of 14 migrant workers. (See Ex. “I” attached to MSD).

On April 13, 2004, and October 5, 2004, by certified mail, return receipt requested, the Secretary of Labor, through of officials in the Office of Enforcement Policy, Farm Labor Team, in response to Respondents’ certificate applications (see paragraphs 1-3), notified Respondents of the determinations to refuse to issue a FLC certificate of registration and a FLCE certificate of registration, based on Respondents’ failure to comply with MSPA and the applicable regulations thereunder. (See Exs. “3” and “K” attached to MSD).

Respondents’ timely requested hearings on the Secretary’s determinations (see Exs. “L” and “M” attached to MSD); the Wage and Hour Division granted the hearing requests on July 2, 2004 and November 2, 2004, respectively. (See Exs. “O” and “P” attached to MSD).<sup>1</sup>

#### Conclusions of Law

There are two applications for certificates of registration at issue in this case – the first application involves Respondent Evergreen’s request for an FLC certificate and the second application involves Respondent Smith’s request for an FLCE certificate. Both applications were denied for the same reason – that several investigations over a number of years had revealed that Respondents had on numerous occasions failed to comply with the requirements of the MSPA and its applicable regulations. See Exs “J” and “K” to the MSD.

The standard for granting summary decision is set forth at 20 C.F.R. 18.40(d), which is based on Federal Rule of Civil Procedure (FRCP) 56. Summary decision is appropriate “if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show there is no genuine issues as to any material fact and that a party is entitled to summary decision.” 20 C.F.R. 18.40(d). If the moving party meets the initial burden of showing no genuine issue of material fact, the burden shifts to the non-moving party to produce evidence showing the existence of a genuine issue for trial. *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 150 (2000); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

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<sup>1</sup> On June 27, 2005, the Department filed a Motion for Stay of Proceedings, pending ‘the resolution of the appeal before the ARB (see ¶8); the ALJ granted the Department’s motion on August 23, 2005. (See Ex. “Q” attached).

The moving party need not provide evidence negating elements on which it does not bear the burden at hearing. It only needs to identify those portions of the record which “demonstrate the absence of a genuine issue of material fact.” *Celotex Corp., v. Catrett*, 477 U.S. 317, 323 (1986). If the non-movant fails to establish the existence of an element that is essential to his case and on which they bear the burden of proof at hearing, there is no genuine issue of material fact and the movant is entitled to summary judgment. *Id.* Credibility, doubts, and reasonable inferences are resolved in favor of the non-moving party, but “[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party,” summary judgment is appropriate. *Matsushita*, 475 U.S. at 586.

Summary judgment is appropriate when there is “no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. p. 56(c). Under the Department of Labor rules of practice for administrative proceedings, the applicable provision pertaining to summary decision is found at 29 C.F.R. 18.41(a) (1). It states in part:

As stated above, where no genuine issue of a material fact is found to have been raised, the administrative law judge may issue a decision to become final as provided by the statute or regulations under which the matter is to be heard. In this case I adopt Plaintiff’s argument as there are no genuine issues of material fact which prevents the issuance of an order affirming Wage and Hour’s previous denial of the FLC and FLCE certificates of registration to Respondents given their prior MSPA violations referred to herein.

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, transporting, or housing farmworkers. 29 U.S.C. 1801. Before performing any of the previously-listed activities, farm labor contractors (FLCs), as well as their employees (FLCEs), must apply for and obtain certificates of registration from Wage-Hour, specifying the types of activities the FLCs/FLCEs are authorized to perform. See 29 U.S.C. 1811(a), (b); 29 C.F.R. 500.40.

The MSPA provides an enforcement mechanism for administrative “certificate action” to be taken against FLCs/FLCEs under certain prescribed circumstances. Section 103(a) (3) of the MSPA, 29 U.S.C. 1813(a) (3), provides in pertinent part:

Sec. 103. (a) In accordance with regulations, the Secretary may refuse to issue or renew, or may suspend or revoke, a certificate of registration . . . if the applicant or holder -

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(3) has failed to comply with this Act or any regulation under this Act....

The regulation at 29 C.F.R. 500.51(c) mirrors the statutory language.

The record presented in this case establishes that Respondents have a history of violating the MSPA since at least 1992. Not including the van accident, the record shows that there have been at least six other investigations of Respondents since 1992. Multiple violations have been found in each investigation, the Department has assessed CMPs, and Respondents have paid those CMPs without contesting the violations.

The requests for hearings and response to MSD in this case contain no defense or justification. In regard to Respondents' long and extensive history of failing to comply with the MSPA, Respondent claims in his hearing request dated October 22, 2004, that "[o]ther than the last violation [the van accident] none were as serious as they seem when one investigates more into the facts."<sup>2</sup> (Ex. "M" at 1). However, an investigation "into the facts" shows that other than the one covering the period from September, 1995-1997, each of the other investigations disclosed violations of the transportation and transportation-related provisions of the MSPA -- a harbinger of the tragic accident which ultimately occurred. Moreover, the statute contains no requirement that violations be "serious" before certificate action may be taken. It is enough that Respondents have "failed to comply" with the MSPA, as established by Respondents' lengthy history of MSPA violations.

Smith also argues in his hearing request (Ex. "M" at p.2) that Evergreen's/Smith's previous violations of MSPA as FLCs should not affect his ability to obtain a FLCE Certificate of Registration as an employee of an entirely different company "which has an excellent record with the department." (*Id.* at 2).<sup>3</sup> However, it is Respondents' record of extensive violations which is at issue here, and not the compliance history of another entity. The regulations state that "[a]ny person holding a valid [FLCE] Certificate of Registration ... is required to comply with the Act and these regulations to the same extent as if said person had been required to obtain a Certificate of Registration in such person's own name as a farm labor contractor." 29 C.F.R. 500.62. Further, Smith's assertion (*Id.* at 2; Response at 1) that he would be a person overzealous in the safety and obedience of any and all known regulations, if allowed to obtain a Certificate rings hollow, given the repeated, extensive, and egregious violations which characterize Respondents' compliance history with the MSPA.

In Sum, I find that Respondents were well aware of the applicability of MSPA to their operations. Moreover, Respondents do not deny — nor could they -- their long and extensive

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<sup>2</sup> In tacit recognition of the seriousness of the violations resulting in the van accident, Respondents consented to a stay sought by the Department of the instant proceedings until resolution of the van accident case while it was pending before the Board. I take administrative notice that the stay was granted based upon the Department's assertion that the decision of the Board would have a controlling influence in the present action. In fact, the ARB's 2/28/06 affirmance against Respondents is controlling authority in this case and evidence of Respondents' further violations of the MSPA.

<sup>3</sup> This claim is incorrect. Progressive Environmental, LLC has also been the subject of a number of investigations by the Department as far back as 1990, where violations have been found under the Fair Labor Standards Act, the Service Contract Act, as well as the MSPA. In the most recent investigation, Progressive entered into a Stipulation whereby it agreed to pay approximately \$10,700 in back wages to effected employees for violations of the Service Contract Act. I take administrative notice of the Stipulation filed with the MSD. A related debarment action was previously pending before another ALJ as per Plaintiff. See *Progressive Environmental LLC and Bruce Campbell and Randy Humbert*, ALJ Case No. 2006-SCA-00024.

history of non-compliance with MSPA and the applicable regulations. The MSPA and its regulations unequivocally permit the Secretary to refuse to issue a Certificate of Registration when non-compliance is established. These circumstances have been clearly established here, where it has been shown that Evergreen/Smith has failed on many occasions to comply with the MSPA. Given Respondents' failure to comply with the MSPA, there is more than sufficient basis for the Secretary's refusal to issue FLC/FLCE Certificates of Registration. No genuine issue of fact exists, and, thus, the Plaintiff is entitled to summary judgment as a matter of law.

### **ORDER**

The Respondents have been afforded all the due process required by the statutory and regulatory provisions of MSPA with respect to their dual applications for certificates of registration.

For the reasons stated above:

**IT IS ORDERED** that the MSD is **GRANTED** in its entirety and having found no genuine issue of material fact, Plaintiff is entitled to a decision as a matter of law.

**IT IS FURTHER ORDERED** that having considered the pleadings, the 2/28/06 controlling ARB decision affirming the imposition of civil money penalties against Respondents, other facts, and evidence in support of the MSD, particularly the evidence as to Respondents' repeated failures to comply with the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. 1801 *et. seq.*, and the applicable regulations at 29 C.F.R. Part 500, Plaintiff's determination to refuse to issue the FLC and FLCE certificates of registration to Respondents is **AFFIRMED**.

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GERALD M. ETCHINGHAM  
Administrative Law Judge

*San Francisco, California*

**NOTICE OF APPEAL:** Within twenty days after the date of issuance of this decision, any party desiring review of the decision may file a petition for issuance of a Notice of Intent as described under 29 C.F.R. §500.265. The filing shall include an original and two copies of the petition, and shall be filed with the Administrative Review Board, U.S. Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. The petition shall be in writing and shall contain a concise and plain statement specifying the grounds on which the review is sought. A copy of the Decision and Order of the Administrative Law Judge shall be attached to the petition. Copies of the petition shall be served upon all parties to the proceeding and on the Chief Administrative Law Judge. See, 29 C.F.R. § 500.264; Secretary's Order 2-96 (Authority and Responsibilities of the Administrative Review Board), 61 Fed. Reg. 19978 (1996).