



MLB TRANSPORTATION, INC.
AND OWL, INC.,

PETITIONERS,

ARB CASE NO. 2016-0078

DATE: February 13, 2020

v.

ADMINISTRATOR, WAGE AND
HOUR DIVISION,

RESPONDENT.

Appearances:

For the Petitioners:

Les A. Schneider, Esq.; J. Larry Stine, Esq.; and Jonathan D. Gaul,
Esq.; *Wimberly, Lawson, Steckel, Schneider & Stine, P.C.*; Atlanta
Georgia

For the Administrator, Wage and Hour Division:

Kate S. O'Scannlain, Esq.; Jennifer S. Brand, Esq.; Sarah Kay Marcus,
Esq.; Jonathan T. Rees, Esq.; and Quinn Philbin, Esq.; *U.S.*
Department of Labor, Office of the Solicitor; Washington, District of
Columbia

Before: Thomas H. Burrell, *Acting Chief Administrative Appeals Judge* and
James A. Haynes and Heather C. Leslie, *Administrative Appeals Judges*

**FINAL DECISION AND ORDER DENYING RECONSIDERATION IN PART,
GRANTING RECONSIDERATION IN PART, AND AFFIRMING THE
ADMINISTRATOR'S DENIAL OF RECLASSIFICATION**

PER CURIAM. This case arises under the McNamara-O’Hara Service Contract Act of 1965, as amended (SCA). 41 U.S.C. § 6701 *et seq.* (2011) and implementing regulations at 29 C.F.R. Parts 4, 6, 8, and 18 (2016). MLB Transportation, Inc., and OWL, Inc., appeal the Administrator’s final ruling denying conformance procedures and denying revision of applicable wage rates for drivers employed in furtherance of MLB’s SCA contract. The Administrative Review Board (ARB or Board) denied the petition for review on July 23, 2019. The parties asked for reconsideration. For the following reasons, the ARB denies reconsideration in part, grants reconsideration in part, and affirms the Administrator.

BACKGROUND

MLB Transportation, Inc., and OWL, Inc. (collectively MLB or Petitioners) entered into an SCA-covered contract to provide wheelchair transportation services for patients traveling to the Atlanta Veterans Administration Medical Center in Decatur, Georgia. Contract number VA247-P-0957 between the Department of Veterans Affairs (VA) and MLB began on October 1, 2009, and option-year four became effective beginning October 1, 2013. MLB and the VA subsequently signed a six-month extension of the contract from October 1, 2014, to March 30, 2015. MLB and the VA entered into a new contract, VA247-15-D-0272, beginning on April 1, 2015. June 17, 2016 Admin. Determ. at 7.

The Wage and Hour Division, U.S. Department of Labor (WHD) conducted an investigation and determined that MLB was not in compliance with the SCA because non-emergency medical transportation (NEMT) drivers were improperly classified as taxi-drivers rather than shuttle drivers. June 17, 2016 Admin. Determ. at 1.

On March 6, 2014, MLB challenged WHD’s determination by asserting first that NEMT drivers should not be classified as shuttle bus drivers but rather should be classified at the lower rate for taxi drivers. MLB asserted that NEMT drivers are much more like taxi drivers than shuttle drivers because the vans that they drive do not require special commercial driving licenses. *Id.* at 2. MLB also asserted that the wage rate for shuttle drivers on WD05-2133 did not represent the prevailing wage and should be revised. June 17, 2016 Admin. Determ. at 1.

The Branch of Service Contract Wage Determinations, WHD (Branch) declined to create a new classification, to reclassify workers as taxi drivers, or to revise the wage rate for WD05-2133 for shuttle drivers. MLB’s request for reclassification is similar to a conformance request.¹ Conformance requests are not

¹ SCA’s conformance regulations provide both procedural and substantive guidelines for adding a job classification to the wage determination that applies to a particular SCA-

available if the employees in question perform duties that are covered by an existing classification within the wage determination. *Id.* at 1–2, 4–5. The Branch also denied MLB’s request to revise the wage rate for Shuttle Drivers. *Id.* at 2.

On December 9, 2014, MLB requested a review of the Branch’s decision by the Administrator, WHD. The Administrator issued its final determination denying MLB’s request on June 17, 2016. The Administrator determined that the NEMT drivers were properly classified as shuttle drivers. *Id.* at 5. The Administrator also determined that MLB’s March 6, 2014 challenge to the wage determination for Contract number VA247-P-0957 was untimely under 29 C.F.R. § 4.56(a). However, MLB’s challenge was timely with respect to the six-month extension of that contract, and the Administrator proceeded to address MLB’s challenge to the wage rate for Shuttle Drivers. *Id.* at 7.

On July 7, 2016, the Petitioners filed a Petition for Review of the Administrator’s June 17, 2016 final determination. The ARB docketed the appeal for review and set a briefing schedule. Notice of Appeal and Order Establishing Briefing Schedule (July 14, 2016). On July 23, 2019, the ARB set aside the Order Establishing Briefing and denied the petition for review. MLB moved the ARB to reconsider the order denying the petition. The Administrator filed a response brief supporting MLB’s motion in part.

JURISDICTION AND STANDARD OF REVIEW

The ARB has jurisdiction to hear and decide questions of law and fact arising from the Administrator’s final determinations under the SCA. 29 C.F.R. §§ 8.1(b)(1), (6). The Secretary of Labor has delegated to the Board authority to issue final agency decisions under the SCA. Secretary’s Order 01-2019 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 84 Fed. Reg. 13,072 (Apr. 3, 2019).

covered contract. *See* 29 C.F.R. § 4.6(b)(2)(i)–(vi). The regulations governing the SCA authorize the Administrator to add an additional job classification and wage rate only if the proposed classification meets the following test: 1) The work to be performed by the classification is not within the scope of any classification listed on the wage determination; and 2) the conformance does not combine two or more classes listed in the wage determination into a new classification to be conformed or propose a new classification that performs only part of the duties of an existing classification; and 3) the conformed rate must bear a reasonable relationship to those classifications listed in the applicable wage determination with comparable skills and duties. 29 C.F.R. §§ 4.6(b)(2)(i), 4.152(c)(1); *Andrew Aiken*, ARB No. 08-009, slip op. at 7 (ARB Apr. 30, 2009).

The ARB's review is in the nature of an appellate proceeding. 29 C.F.R. § 8.1(d). The Board reviews questions of law de novo. *United Gov't Sec. Officers of America, Loc. 114*, ARB Nos. 02-012, -020, slip op. at 4–5 (ARB Sept. 29, 2003); *United Kleenist Org. Corp. & Young Park*, ARB No. 00-042, ALJ No. 1999-SCA-018, slip op. at 5 (ARB Jan. 25, 2002). We nonetheless defer to the Administrator's interpretation of the SCA when it is reasonable and consistent with law. See *Department of the Army*, ARB Nos. 98-120, -122, slip op. at 15-16 (ARB Dec. 22, 1999).

When reviewing the Administrator rulings on wage determinations, the Board “will act expeditiously, taking into consideration procurement deadlines. The Board shall decide the case upon the basis of all relevant matters contained in the entire record before it and shall not consider any data not submitted to the Wage–Hour Administrator with the request for reconsideration. The Board in its decision affirming, modifying, or setting aside the wage determination, shall include a statement of reasons or bases for the actions taken.” 29 C.F.R. § 8.6(e). In review of final determinations other than wage determinations, the Board is authorized to modify or set aside the Administrator's findings of fact only where they are not supported by a preponderance of the evidence. 29 C.F.R. § 8.9(b).

DISCUSSION

A. Statutory and Regulatory Framework

The SCA requires that whenever the United States enters into a contract in excess of \$2,500, the principal purpose of which is to provide services through the use of employees in the United States, the contract must contain a provision that specifies the minimum hourly wage rates that are payable to the various classifications of service employees working under the contract. 41 U.S.C. §§ 6702, 6703; 29 C.F.R. § 4.6.

The SCA requires the Secretary of Labor to determine minimum wage and fringe benefit rates for service employees employed on Federal service contracts. These wage and fringe benefit rates are predetermined by the Wage and Hour Division acting under the authority of the Administrator, who has been designated by the Secretary of Labor to administer the Act. The Administrator specifies the minimum monetary wages and fringe benefits to be paid under the Act in two types of determinations. The first type is set by the minimum monetary and fringe benefits determined to be prevailing in the locality. 29 C.F.R. § 4.3, subpart B. The Administrator bases these wage determinations on wage data, including area surveys compiled by the Department's Bureau of Labor Statistics (BLS). 29 C.F.R. § 4.51. A second type of wage determination is issued at locations when there is a Collective Bargaining Unit (CBA) between the service employees and an employer

working on a federal service contract.

B. We Deny MLB's Motion for Reconsideration Concerning the Wage Determination of Shuttle Bus Drivers

Interested parties affected by wage determinations may request review and reconsideration by the Administrator. 29 C.F.R. §§ 4.56(a)(1), (2). The Administrator's final determination is subject to review by this Board. 29 C.F.R. § 4.56(b); 29 C.F.R. Part 8. With some exceptions, the Board will not review a petition that is filed after a contract award or option year start date.² If a party files a petition with the ARB for review of a wage determination prior to contract award, exercise of option or extension, the Board may review the wage determination after the award, exercise of option or extension "if the issue is a significant issue of general applicability." 29 C.F.R. § 8.6(d). However, retroactive modification affecting wage determination rates for contemporaneous contract periods is not available. 29 C.F.R. § 8.6(d) ("The Board's decision shall not affect the contract after such award, exercise of option, or extension."); *D.B. Clark III*, ARB No. 98-106, slip op. at 9-10 (ARB Sept. 8, 1998).

The record shows that MLB filed the Petition for Review with the Board on July 7, 2016. The contracts at issue began in 2009 with option years and extensions extending into 2015.³ MLB did not file its Petition for Review prior to any "award, exercise of option, or extension of a contract" on any of these service contracts. The ARB's July 23, 2019 Order correctly determined that under 29 C.F.R. §§ 8.6(b), (d), MLB's petition is untimely. Accordingly MLB's motion for reconsideration pertaining to the ARB's review of the wage for shuttle bus drivers in WD05-2133 is **DENIED**.

² Regulations 29 C.F.R. §§ 8.6(b),(d) provide the following:

(b) Except as provided in paragraphs (c) and (d) of this section, the Board will not review a wage determination after award, exercise of option, or extension of a contract, unless such procurement action was taken without the wage determination required pursuant to §§ 4.4 and 4.5 of part 4 of this title. . .

(d) Where a petition for review of a wage determination is filed prior to award, exercise of option, or extension of a contract, the Board may review the wage determination after such award, exercise of option, or extension of a contract if the issue is a significant issue of general applicability. The Board's decision shall not affect the contract after such award, exercise of option, or extension.

³ June 17, 2016 Admin. Determin. at 7. The Administrator notes that there is a gap in data for some of the contracts in question. *Id.* at 3 n.1; *see also* Statement of the Administrator in Response to the Petition for Review at 11 n.5.

C. We Grant MLB's Motion for Reconsideration Concerning the Classification of NEMT Drivers

The MLB also petitioned the ARB to review the Administrator's final determination of the reclassification matter. MLB's petition of this matter arises under a different subsection of 29 C.F.R. Part 8. Regulation 29 C.F.R. § 8.7 provides that an aggrieved party may petition the ARB to review final determinations of the Administrator on rulings other than wage determinations within 60 days of the Administrator's rulings. § 8.7(b). The Administrator issued its final determination denying MLB's motion for reclassification and conformance on June 17, 2016. MLB's July 7, 2016 Petition for Review is timely. Accordingly, the ARB **GRANTS** MLB's Motion to Reconsider its denial of MLB's Petition for Review on this matter.

D. We Affirm the Administrator's Decision Denying Reclassification

Answering MLB's challenge, the Branch declined to reclassify drivers or add a new classification for WD05-2133 on the grounds that reclassifications and conformances are appropriate where the work the employee performs does not fall within the scope of any existing classification listed in the WD. June 17, 2016 Admin. Determ. at 2. The Branch found that the duties of NEMT drivers fit within several existing classifications. The Branch noted that the NEMT drivers need not perform all of the duties described in an occupational classification in order for the existing classification to apply to them. *Id.*

On December 9, 2014, MLB requested that the Administrator review and reconsider the Branch's decision. Citing relevant case law and 29 C.F.R. § 4.6(b)(2)(i), the Administrator determined that NEMT drivers were properly classified as shuttle bus drivers based on the SCA Directory of Occupations. *Id.* at 5. NEMT drivers' duties include providing wheelchair van and sedan services for VA beneficiaries to the Atlanta Veterans Administration Medical Center in Decatur, Georgia, as well as transportation to other treatment clinics. The contract required that vehicles have several specific safety features including tie-down straps and shoulder harnesses. The Administrator compared the description in the contract with the descriptions for shuttle drivers and taxi drivers from the SCA Directory and concluded that the "shuttle bus driver classification is most appropriate for the duties performed under this contract." *Id.* at 6. The Administrator continued "[a]lthough several of the drivers' duties may be viewed as encompassed in both of the relevant classifications, the contract also identifies multiple driver duties that are *not* encompassed within the taxi driver classification, some of which *are* referenced in the shuttle bus driver classification. These include securing wheelchairs in the vehicle, assisting disabled passengers,

informing the VA travel clerk when a beneficiary is delivered to the medical center, and assisting a disabled passenger into the airport.” *Id.* The Administrator distinguished the duties of the taxi driver classification in some respects. Because “an existing classification merely needs to be a reasonable fit based on the actual job duties performed,” the Administrator declined MLB’s request for reconsideration to reclassify or conform the drivers as taxi drivers. *Id.*, citing 4.152(b); *Andrew Aiken*, ARB No. 08-009.

On appeal, MLB reiterates the arguments that it made to the Administrator. MLB claims that the vans are not like shuttle buses because they do not require commercial licenses. MLB distinguishes the duties of shuttle drivers because the NEMT drivers do not drive a large number of individuals from a staging area to the hospital but rather, like taxis, transport individuals from personal residences to the facility.

Having reviewed MLB’s filings and the Administrator’s decision, we summarily affirm the Administrator’s final determination denying MLB’s reclassification request. The Administrator’s determination that NEMT drivers’ duties overlaps with that of Shuttle Bus Driver is reasonable.⁴ The Administrator’s wage rate decisions will be reversed “only if inconsistent with the regulations, or if they are ‘unreasonable in some sense, or . . . exhibit[] an unexplained departure

⁴ The SCA’s Directory of Occupations provides the following description for Shuttle Bus Driver and Taxi Driver:

31290 SHUTTLE BUS DRIVER (Van Driver)

The Shuttle Bus Driver (Van Driver) drives minibus or van to transport clients, trainees, or company personnel; drives vehicle from individual or central loading area to social services or rehabilitation center, training location, job site, or other destination according to assigned schedule. This driver may assist disabled passengers into and out of vehicle, secure passengers’ wheelchairs to restraining devices to stabilize wheelchairs during trip; may operate radio or similar device to communicate with base station or other vehicles to report disruption of service, clean and/or service vehicle with fuel, lubricants, and accessories, keep records of trips and/or behavior of passengers, and perform other duties when not driving such as, custodial and building maintenance tasks.

31310 TAXI DRIVER

The Taxi Driver drives motor vehicle, with or without a taximeter, to transport passengers for a fee, picks up passengers while cruising streets or in response to radio or telephone relayed request for service, collects fee recorded on taximeter or based on mileage or time factor, records transaction on log, and reports by radio or telephone to central location on completion of trip.

June 17, 2016 Admin. Determ. at 5.

from past determinations” *Environmental Chem. Corp.*, ARB No. 96-113, slip op. at 3 (ARB Feb. 6, 1998) (quoting *Titan IV Mobile Serv. Tower*, WAB No. 98-14 (May 10, 1991); *see also see also In re COBRO Corp.*, ARB No. 97-104, slip op. at 10 (ARB July 30, 1999). When reviewing the Administrator’s determination in a reclassification or conformance action, we must focus on the *Administrator’s* choice and the rationale advanced to support it. Comparing the duties listed with those in shuttle driver, we cannot conclude that the Administrator erred in refusing to reclassify NEMT drivers as taxi drivers. *Cf. Andrew Aiken*, ARB No. 08-009, slip op. at 8 (“the conformance process does not require the exactitude that might be achieved in a de novo determination of prevailing wage rates.”).

CONCLUSION

Accordingly, we **DENY** MLB’s Motion for Reconsideration in part, **GRANT** the Motion in part and **AFFIRM** the Administrator’s denial of MLB’s request to reclassify NEMT drivers as taxi drivers.

SO ORDERED.