ARB No. 2023-0025

ADMINISTRATIVE REVIEW BOARD
UNITED STATES DEPARTMENT OF LABOR

ADMINISTRATOR, WAGE AND HOUR DIVISION,
U.S. DEPARTMENT OF LABOR,
Petitioner,

v.

A&M LABOR MANAGEMENT, INC.
Respondent.

On Appeal from the
Office of Administrative Law Judges
ALJ Nos. 2022-MSP-00002 & 2022-TAE-00004

ADMINISTRATOR'S OPENING BRIEF

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ADMINISTRATOR'S OPENING BRIEF

On March 23, 2023, the Chief Administrative Law Judge ("ALJ") issued a Decision and Order in this case arising under the Migrant and Seasonal Agricultural Worker Protection Act ("MSPA"), 29 U.S.C. § 1801 *et seq.*, 29 C.F.R. Part 500, and the H-2A program in the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(H)(ii)(a), 20 C.F.R. Part 655 & 29 C.F.R. Part 501. The ALJ found, among other things, that A&M Labor Management ("A&M") violated MSPA by failing to provide workers' compensation coverage for eight workers who were in a car crash while being transported in an A&M vehicle. But the ALJ significantly

reduced the civil money penalties ("CMPs") for A&M's MSPA violations from the amount assessed by the Wage and Hour Division ("WHD"). WHD had assessed a $2,505 CMP for each of the eight workers for whom A&M failed to provide insurance coverage, for a total of $20,040 in CMPs. The ALJ cut the CMP assessment to just $2,505, announcing that it was inappropriate to assess eight penalties (one per worker) because "a single mistake [was] sufficient to violate" MSPA's insurance requirements.

The Principal Deputy Administrator ("Administrator") of WHD requests that the Administrative Review Board ("Board") reverse the portion of the decision reducing the CMPs for A&M's undisputed MSPA violations.[1] It is long settled that separate violations of law warrant separate penalties, and equally well established that what constitutes a separate violation of law is a question of statutory and regulatory interpretation. This case therefore turns on how the MSPA statute and regulations at issue define a violation. The statutory and regulatory text, structure, and purpose all show that MSPA and its insurance regulations require a farm labor contractor, like A&M, to provide insurance coverage for each worker that the contractor transports in its vehicle. A contractor's failure to provide such insurance

[1] The Administrator also filed a separate timely petition for review of several H-2A issues raised in this case on April 24, 2023. The Administrator's H-2A petition remains pending before the Board.

is therefore a distinct violation—meriting a separate penalty—as to each worker deprived of the protection afforded by insurance coverage. Without analyzing the relevant statutory or regulatory text, the ALJ concluded that A&M's failure to provide insurance coverage for eight workers it transported in its vehicle warranted only a single CMP assessment because it arose from a "single mistake." There is no support for the ALJ's novel legal interpretation, which is entirely untethered from the statute and regulations. Because the ALJ's decision rests on a mistake of law, the Board should reverse the reduction of CMPs and reinstate the penalties assessed by the Administrator.

STATEMENT OF THE ISSUE

Whether the MSPA regulations at 29 C.F.R. §§ 500.120−.128 (requiring farm labor contractors to obtain insurance for "any migrant or seasonal agricultural worker" before transporting workers in a vehicle), permit the Administrator to find a violation and assess a CMP for each worker impacted by the contractor's failure to comply with MSPA.

STATEMENT OF THE CASE

A. The Statutory and Regulatory Framework

MSPA generally requires farm labor contractors, agricultural employers, and agricultural associations that hire, employ, transport, or house migrant and seasonal agricultural workers to meet baseline standards "to assure the health and safety of

those workers." *Zaharie*, ARB No. 12-070, 2013 WL 6979717 (ARB Dec. 12, 2013).[2] Further to that requirement, MSPA specifically requires a farm labor contractor that transports covered workers in a vehicle owned or operated by the contractor to obtain vehicle liability insurance covering damage to both persons and property arising from use of the vehicle. 29 U.S.C. § 1841(b)(1)(C).[3] Alternatively, the statute provides that a farm labor contractor may satisfy this insurance requirement by obtaining qualifying workers' compensation coverage that fully covers the contractor's transportation of covered workers. *Id.* at § 1841(c).

Consistent with the statute, MSPA's implementing regulations prohibit farm labor contractors, like A&M, from transporting "any" MSPA-covered worker in a vehicle owned or operated by the contractor without first insuring against liability for injury to each of the workers being transported. 29 C.F.R. §§ 500.120−.128. To comply with this requirement, a farm labor contractor must obtain vehicle liability insurance of at least $100,000 for each seat in the vehicle and which covers personal injury to employees whose transportation is not covered by worker's

[2] Because A&M is a farm labor contractor, the rest of this brief references MSPA's requirements in terms of farm labor contractors only.

[3] MSPA directs the Secretary of Labor to determine the level of insurance required. 29 U.S.C. § 1841(b)(3).

compensation. *Id.* at § 500.121(b), (d). Alternatively, a farm labor contractor may obtain state worker's compensation insurance coverage for its workers and separately obtain property damage insurance. *Id.* at §§ 500.122−.123.

Any farm labor contractor that fails to comply with MSPA or its implementing regulations "may be assessed a civil money penalty of not more than $1,000 for each violation." 29 U.S.C. § 1853(a)(1)[4]; *see also* 29 C.F.R. § 500.140(d) (CMP may be assessed "for any violation" of MSPA or its regulations).

B. Statement of Facts and Course of Proceedings

The facts establishing A&M's MSPA violations are undisputed. A&M is a farm labor contractor which, during the period relevant to this appeal, employed migrant or seasonal agricultural workers and was subject to MSPA.

In 2016, A&M contracted with Impact Staff Leasing, LLC to process A&M's payroll and provide workers' compensation insurance for A&M's employees. *Administrator v. A&M Labor Mgmt., Inc.*, ALJ Nos. 2022-MSP-00002 & 2022-TAE-00004, slip op. at *4 (ALJ Mar. 23, 2023) ("D.O."). Under the terms

[4] Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Pub. L. No. 114-74, § 701, 129 Stat 584 (2015), this statutory maximum is regularly adjusted by regulation. The current, inflation-adjusted CMP maximum for a MSPA violation is $2,951. 29 C.F.R. § 500.1(e); *see also* Department of Labor Federal Civil Penalties Inflation Adjustment Act Annual Adjustments for 2023, 88 Fed. Reg. 2210, 2023 WL 171080 (Jan. 13, 2023).

of the contract, an A&M employee would receive workers' compensation coverage only if A&M first submitted the employee's application, I-9 form, and other documents to Impact Staff Leasing before the employee began work for A&M. *Id.* at 4 & n.10. But A&M failed to provide Impact Staff Leasing with the required documents for some of its migrant seasonal agricultural workers—leaving those employees without workers' compensation coverage. D.O. at 10−11.

A&M separately contracted with another insurer, Bruce Hendry Insurance, for a vehicle insurance policy and general liability insurance, but expressly rejected passenger liability insurance for workers transported in A&M vehicles. *Id.* at 4. A&M informed Bruce Hendry Insurance that it did not need vehicle insurance for its workers to satisfy MSPA's requirements because it had already obtained workers' compensation insurance for the employees that it transported. *Id.* Thus, any workers who were excluded from Impact Staff Leasing's coverage also lacked vehicle passenger insurance.

On November 23, 2018, a bus owned and operated by A&M was involved in an accident (for which A&M was not at fault). D.O. at 4. Of the 18 people onboard the bus, eight A&M workers were denied workers' compensation coverage because A&M had failed to provide each of those workers' applications, I-9 forms, and other documents to Impact Staff Leasing, leaving them without coverage. *Id.* at 4, 11.

After an investigation, WHD determined that A&M violated MSPA by failing to obtain required workers' compensation insurance coverage for the eight MSPA-covered workers who were in the 2018 bus accident. *Id.* at 2, 5. WHD assessed the maximum CMP of $2,505 for each of the eight workers whom A&M transported in the bus without first obtaining workers' compensation coverage. *Id.* at 5.[5] The total assessed was thus $20,040: $2,505 for each of the eight agricultural workers deprived of legally-mandated insurance coverage. *Id.*

C. The Administrative Law Judge's Decision

After a hearing, the ALJ found that A&M violated MSPA's regulations by failing to obtain either workers' compensation insurance or vehicle liability insurance covering the eight workers transported in the bus that A&M owned and operated. D.O. at 10−11.

But the ALJ reduced the CMPs from $20,040 to just $2,505, announcing that it was impermissible to assess "a separate penalty for each individual denied workers compensation coverage." *Id.* at 17−18 (citing *Bittner v. United States*, 143 S. Ct. 713 (2023)). The ALJ opined that a CMP "cannot be multiplied by the number of mistakes made where a single mistake is sufficient to violate the relevant statute or regulation." *Id.* at 17.

[5] The maximum CMP applicable at the time that WHD assessed CMPs was $2,505. D.O. at 17 n.30.

JURISDICTION AND STANDARD OF REVIEW

The Board has jurisdiction over this appeal pursuant to MSPA and its implementing regulations, 29 C.F.R. § 500.263, and Secretary's Order No. 1-2020, Delegation of Authority and Assignment of Responsibility to the Administrative Review Board, 85 Fed. Reg. 13186 (Mar. 6, 2020). The Administrator timely filed a petition for review on April 12, 2023, which the Board accepted on April 17, 2023.

This Boards review an ALJ's legal conclusions *de novo*. *Zaharie*, ARB No. 12-070, 2013 WL 6979717 (ARB Dec. 12, 2023).

SUMMARY OF THE ARGUMENT

MSPA grants the Secretary the authority to assess a CMP for *each* violation of MSPA. MSPA's insurance provision, and its implementing regulations, define violations at the per-worker level. The statute requires farm labor contractors like A&M to secure insurance coverage for *each* of its individual migrant and seasonal agricultural workers before transporting that worker in a vehicle owned, operated, or controlled by the contractor. A&M's legal duty was thus not merely to obtain some form of insurance that may cover some employees. Rather, the plain text of the statute and regulations, as well as the broader statutory context, demonstrate that a farm labor contractor like A&M has a legal duty to obtain that insurance coverage for each and every covered worker it transports. Thus, when A&M failed

to obtain insurance for eight of the 18 workers whom A&M transported in its bus, it committed eight separate violations: one for each worker it transported without legally-mandated insurance. Therefore, MSPA authorizes eight corresponding penalties.

The ALJ erred in concluding otherwise. Specifically, the ALJ erred in concluding that A&M was subject to only a single CMP assessment because its failure to secure workers' compensation coverage for eight employees resulted from a "single mistake." The ALJ's reasoning cannot be squared with this Board's precedent or federal cases applying MSPA, which make clear that an employer may commit separate, per-worker violations of applicable law, whether or not those violations all stem from a single unlawful act or omission, and regardless of whether a violation against one worker would alone be sufficient to show that the act or omission was a violation. The Supreme Court's recent decision in *Bittner v. United States*, 143 S. Ct. 713 (2023), the only legal authority referenced by the ALJ, is inapposite because it involved an entirely different statutory scheme that had nothing to do with an employer's legal duties to its individual workers. Therefore, *Bittner* does not preclude per-worker penalties for the violations of MSPA or its insurance regulation.

Finally, the plain meaning of the statutory and regulatory text is confirmed by the purpose of CMPs and leads to sensible practical results, as this case

illustrates. If left in place, the ALJ's erroneous conclusion would thwart the deterrent purpose of civil monetary penalties by making the likely cost of a violation—one $2,505 CMP—cheaper than the cost of compliance of insuring each worker it transports. The ALJ's error thus risks turning MSPA's civil monetary penalties into merely the cost of doing business, depriving migrant and seasonal agricultural workers of the critical insurance protections to which they are entitled under the law.

ARGUMENT

The undisputed facts show that A&M committed eight violations of MSPA when it failed to secure legally-mandated insurance coverage for eight of its workers. A&M contracted with a third party, Impact Staff Leasing, to provide worker's compensation coverage for its workers—but A&M failed to send Impact Staff Leasing eight workers' hiring documents needed to enroll those workers in A&M's workers' compensation coverage. When an A&M van crashed in 2018, eight of the eighteen workers in the van were uninsured due to A&M's multiple MSPA violations. By committing eight separate violations of MSPA's insurance requirements, A&M exposed itself to eight separate civil monetary penalties.

A. MSPA's Statutory and Regulatory Text Show that a Farm Labor Contractor Commits a Separate Violation—Meriting a Separate Penalty—for Each Worker whom the Contractor Transports Without Providing Insurance Coverage.

1. Congress authorized the Secretary to impose "a civil money penalty" for "each violation" of MSPA or any of its implementing regulations. 29 U.S.C. § 1853(a)(1); *see also* 29 C.F.R. § 500.143(a) ("A civil money penalty may be assessed for each violation of [MSPA] or these regulations."). The plain meaning of this text is that A&M may face separate penalties for "each" separate violation of MSPA's insurance requirements. *See Kaspar Wire Works, Inc. v. Sec'y of Labor*, 268 F.3d 1123, 1130 (D.C. Cir. 2001) (concluding that the Occupational Safety and Health Act's language that a CMP may be assessed "for each violation" of statute's regulations "could hardly be clearer" and therefore a CMP "per-instance" of a violation was permissible); *Washington Farm Labor Ass'n*, ARB Case No. 2021-0069, 2023 WL 3042232, at *19 (Mar. 31, 2023) (holding that per-worker penalties are appropriate when regulatory text grants the Administrator "discretion to assess CMPs 'for each violation' of the H-2A program requirements"). MSPA's text is consistent with the well-established "general principle that each violation of a statutory duty exposes the violator to a separate statutory penalty." *Kaspar Wire Works*, 268 F.3d at 1130; *see also FAA v. Landy*, 705 F.2d 624, 636 (2d Cir. 1983) (explaining that, in the absence of a statutory

limitation, "a determination that separate violations are involved makes it possible to fine cumulatively").

2. The ALJ erred in holding that A&M committed only one violation of the statute by failing to procure required insurance coverage, rather than a separate violation for each worker for whom A&M failed to obtain insurance coverage. An employer commits a separate violation of law when it breaches the relevant legal duty imposed by a statute or a regulation. *See, e.g.*, *Kaspar Wire Works*, 268 F.3d at 1130 (citing *Mo., Kan., & Tex. Ry. Co. v. United States*, 231 U.S. 112, 119 (1913)). Here, MSPA's statutory and regulatory text provide that a farm labor contractor commits a separate violation for each worker whom the contractor transports without first obtaining insurance covering that worker.

Under MSPA, a farm labor contractor has a legal duty to provide safe motor vehicle transportation, including by securing insurance coverage for passengers, to each individual worker whom the contractor transports in any vehicle owned, operated, or controlled by that contractor. Both the statutory and regulatory text speak in terms of legal obligations owed by contractors to each of their workers. MSPA's motor vehicle safety provision applies "to the transportation of *any* migrant or seasonal agricultural worker." 29 U.S.C. § 1841(a)(1) (emphasis added). That provision also specifies that a farm labor contractor that owns or operates a vehicle used to transport MSPA-covered workers must have insurance

against liability for injury to "persons" (in addition to property). *Id.* at § 1841(b)(1)(C); *see also* 29 C.F.R. § 500.120 (providing that a farm labor contractor shall not transport "any migrant or seasonal agricultural worker" in a vehicle owned, operated, or controlled by the contractor, unless the contractor first obtains an insurance policy covering injury to "persons" (and property)); 29 C.F.R. § 500.121(d) (vehicle insurance must cover liability for personal injury to "employees" whose transportation is not covered by workers' compensation insurance).

As explained above, contractors may satisfy MSPA by obtaining vehicle liability insurance that covers injury to passengers or, alternatively, workers' compensation insurance. Reading these options together demonstrates that a contractor's legal duty under MSPA is to provide insurance for the benefit of "any" individual worker being transported in that contractor's vehicle. 29 C.F.R. § 500.120. When contractors opt to satisfy MSPA's requirements by obtaining passenger insurance through vehicle liability coverage, the regulation requires that coverage be no less than "$100,000 for *each seat* in the vehicle." 29 C.F.R. § 500.121(b) (emphasis added). And farm labor contractors must have a certificate evidencing that the liability insurance they purchase "covers *the workers* while being transported." 29 C.F.R. § 500.121(e) (emphasis added). Alternatively, MSPA provides that a farm labor contractor that employs "any" MSPA-covered

worker may satisfy MSPA's insurance requirements if it "provides workers' compensation coverage for *such* worker." 29 U.S.C. § 1841(c) (emphasis added); *see also* 29 C.F.R. § 500.122(a) (farm labor contractor that employs "a" MSPA-covered worker may satisfy the MSPA's insurance requirement by obtaining workers' compensation coverage for "*such* worker") (emphasis added).

Under either option, a contractor cannot satisfy MSPA's requirements simply by obtaining an insurance policy. Rather, a farm labor contractor must ensure that insurance protects each individual MSPA-covered worker, whether by obtaining passenger insurance on a per-seat basis, 29 C.F.R. § 500.121(b), (e), or by obtaining workers' compensation on a per-worker basis, 29 C.F.R. § 500.122(a). Because a farm labor contractor owes a legal duty to each of its individual migrant or seasonal agricultural workers, a contractor commits a separate violation of the regulations every time it fails to insure any such worker. *Cf. Washington Farm Labor Ass'n*, 2023 WL 3042232, at *19 ("[E]ach instance in which a domestic worker was denied the same benefits and working conditions as the H-2A workers constitutes a separate violation."). The ALJ's decision did not engage with this statutory and regulatory language. D.O. at 17.

3. Other sections of MSPA and its regulations also consistently speak in terms of legal duties owed to each individual worker. For example, 29 U.S.C. § 1823(b)(1) forbids housing "any migrant agricultural worker" in a facility before

it passes a state or local health inspection. Similarly, 29 U.S.C. § 1832(b) bars farm labor contractors from requiring "any seasonal agricultural worker" to purchase goods and services solely from that contractor and 29 U.S.C. § 1843 requires farm labor contractors to make certain disclosures "to every worker" they employ. *See also* 29 U.S.C. § 1854(a) (authorizing "any person aggrieved by a violation" of MSPA or its regulations to sue and seek separate penalties). The statutory scheme, when read as a whole, thus provides further evidence that MSPA and its insurance regulation creates duties owed to individual workers. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) ("In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.")

Because these provisions of the statute—like the insurance requirement at issue in this case—speak in terms of individual workers harmed, courts have consistently recognized that employers commit a separate violation for each individual worker whose rights they violate. *See, e.g.*, *Fanette v. Steven Davis Farms, LLC*, 28 F. Supp. 3d 1243, 1262−63, 1266 (N.D. Fla. 2014) (assessing separate statutory penalties for each plaintiff housed in violation of MSPA's housing requirement); *Avila v. A. Sam & Sons*, 856 F. Supp. 763, 774 (W.D.N.Y. 1994) (assessing separate statutory penalties "for each of the ten plaintiffs" who were housed unlawfully); *Garcia Gutierrez v. Puentes*, 437 F. Supp. 3d 1035, 1040

(D.N.M. 2020) (awarding per-plaintiff statutory sanctions to each worker impacted by the employer's failure to make legally-mandated disclosures, satisfy certain posting requirements, preserve payroll records, and comply with other MSPA requirements).[6]

4. Because MSPA's holistic statutory scheme protects individual workers from harm, even MSPA provisions that do not specifically refer to a legal duty to "any" individual MSPA-covered worker have been the basis for per-worker violations and CMPs. For example, apart from the insurance requirements, MSPA requires that each driver of a vehicle owned or operated by a farm labor contractor have a valid driving license. 29 U.S.C. § 1841(b)(1)(b). The statute also directs the Secretary of Labor to prescribe regulations "to protect the health and safety of migrant and seasonal agricultural workers" who are transported in a vehicle owned or operated by a farm labor contractor. 29 U.S.C. § 1841(b)(2)(A); *see also* 29 C.F.R. § 500.105(b)(2) (establishing driving standards which incorporate state and local traffic safety laws of the jurisdiction in which the vehicle is driven). MSPA's driving standards requirements do not expressly apply to "any" worker. Still, when read in context, the driving standards seek to protect each individual worker from being transported by an unlicensed or reckless driver, so a failure to comply is a

[6] MSPA includes a private right of action, which permits plaintiffs to recover statutory damages. 29 U.S.C. § 1854(c).

separate violation for each individual worker that merits a separate penalty. *Avila*, 856 F. Supp. at 774 (assessing separate statutory penalties "for each of the ten plaintiffs" who were transported in a vehicle driven by unlicensed driver); *Evergreen Forestry Servs., Inc.*, 2006 WL 535428, at *1−2, *4−5 (ARB Feb. 28, 2006) (affirming that MSPA requires vehicles to be driven at a safe driving speed even while on private land, that CMPs were warranted after an employer's speeding vehicle crashed while 15 workers were inside, and affirming WHD's assessment of 15 separate CMPs on behalf of each worker).

B. An Employer May Commit Separate Violations of Law, Meriting Separate Penalties, Even When Those Violations Stem from a Single Unlawful Act or Omission.

1. The ALJ here appeared to have recognized the principle that separate violations may lead to separate penalties, but erred in reasoning that the penalty for violating MSPA's insurance regulations "cannot be multiplied by the number of mistakes made where a single mistake is sufficient to violate the relevant statute or regulation." D.O. at 17. The ALJ's reasoning is out-of-step with precedent confirming that a farm labor contractor may commit separate, per-worker violations of worker protection laws for which separate penalties are warranted—whether or not those violations stem from a single unlawful act or omission, and regardless of whether a single or several workers were harmed by an employer's unlawful act or omission.

2. This Board's precedent explains that a farm labor contractor commits separate violations—for which the Administrator may assess per-worker, rather than per-regulation penalties—even when a single mistake, act, or omission would be sufficient to violate the relevant statute or regulation. For example, in *Sun Valley Orchards, LLC*, ARB No. 2020-0018, 2021 WL 2407468, at *7−*8 (May 27, 2021), this Board concluded that an employer committed a separate violation of the H-2A regulations for each of the 147 workers whose pay was unlawfully reduced because the employer failed to disclose meal deductions in a job order, rejecting the employer's argument that it only committed one violation of the regulations by issuing one inaccurate job order. Although Sun Valley Orchards only committed a single mistake in the form of one inaccurate job order, this Board affirmed 147 separate CMPs for each of the 147 workers. *See also Evergreen Forestry Servs.*, 2006 WL 535428, at *4−*5 (affirming the Administrator's assessment that an employer committed 15 separate violations of MSPA when the employer transported 15 workers in a van which crashed after a single speeding incident, meriting 15 separate penalties).

Like the workers in *Sun Valley* and *Evergreen*, all eight A&M workers who were denied workers' compensation coverage suffered a discrete harm. *See Landy*, 705 F.2d at 636 (permitting separate violations and penalties stemming from one act, such as failing to prepare an airplane inspection manual, because the

regulatory scheme at issue contemplated "discrete harms" that flow from the one act). Moreover, as discussed above, MSPA and its regulations create a legal duty for farm labor contractors to provide insurance coverage for each of its individual workers, and a farm labor contractor commits a separate violation each time it breaches that duty. Thus, even if the "gravamen of this offense is the failure to provide workers' compensation coverage," as the ALJ reasoned, D.O. at 17, it does not follow that A&M committed only one violation of law. Rather, A&M committed a separate violation, resulting in separate harms, for every worker left without legally-mandated coverage because of A&M's failure to submit required hiring documents to Impact Staff Leasing.

Moreover, as this case illustrates, the ALJ's novel "single mistake" standard is unworkable because it is subject to arbitrary determinations about how to identify the "mistake" giving rise to the violations. Here, the record does not show that A&M's failure to obtain workers' compensation insurance for all eight workers resulted from a single mistake, act, or omission. A&M's obligation was to provide insurance coverage for each of the 18 workers on the bus in question. To do so, A&M had to perform certain actions with respect to *each* of those 18 workers—namely, submitting the required documents to Impact Staff Leasing. A&M could not have met this obligation by submitting a general form covering every worker, but rather had to submit worker-specific documentation such as

individual I-9 forms. And the record shows that while A&M submitted the required documents for 10 of the workers, it failed to do so for eight—and thus committed eight separate violations. That the ALJ could nonetheless characterize all of this as a single mistake—in the ALJ's words, a "fail[ure] to provide the required information to [Impact Staff Leasing] before the workers boarded the bus" or a "failure to provide worker's compensation insurance," D.O. at 17—underscores that the "single mistake" standard is so vague that it can readily result in improperly grouping together a discrete set of acts or omissions as a single violation.

3. Per-worker penalties are also appropriate when an employer would "violate the relevant statute" regardless of whether the violations affect one worker or many. D.O. at 17. An employer commits multiple violations, for which per-worker penalties are permissible, when multiple workers are harmed by an employer's conduct or policy—including when the employer would still be liable even if only one worker were impacted. In *Washington Farm Labor Association*, this Board upheld separate penalties for each of 207 domestic workers who were affected by a farm contractor's policy of charging housing deposits to domestic workers, but not to H-2A workers. *Washington Farm Labor Ass'n*, 2023 WL 3042232, at *19 (concluding that the employer committed many separate violations of 20 C.F.R. § 655.121(a)'s ban on preferential treatment for H-2A

workers by charging housing deposits to domestic workers). In both *Washington Farm Labor* and *Sun Valley*, the employer would have violated the applicable regulations if it had only subjected one worker to disfavored treatment. Nonetheless, the Board recognized in each case that it was permissible to assess CMPs on a per-worker basis, rather than a per-regulation basis, because the employer committed a separate violation of law every time it breached its legal duty to each separate worker. *Washington Farm Labor Ass'n*, 2023 WL 3042232, at *19; *Sun Valley*, 2021 WL 2407468, at *7−*8. Here, because MSPA creates legal duties that a farm labor contractor owes to each and every one of its individual employees, the fact that A&M would have violated its MSPA requirements if it had failed to obtain insurance coverage for one worker does not negate the fact that it committed a separate violation for each of the eight workers for whom it failed to obtain insurance coverage.

4. The ALJ's reliance on *Bittner v. United States*, 143 S. Ct. 713 (2023)—a case that did not involve a statute imposing obligations on an employer with respect to each of its covered workers—is misplaced. In *Bittner*, the statute at issue, the Bank Secrecy Act, permitted a penalty for "any violation." *Id.* at 720. The relevant question in *Bittner*, as here, was how the statutory scheme defined a "violation" for which it was permissible to assess a separate penalty. *Id.* at 719−20. The *Bittner* Court answered that question by applying standard tools of statutory

construction and concluding that the "relevant legal duty" created by the statute was to file timely and accurate reports of foreign banking transactions. *Id.* An individual committed a single violation of the Bank Secrecy Act when he failed to file a timely or accurate report, rather than committing many violations for each account that was or should have been included in a single report. *Id.* Thus, even though each report an individual was required needed to include certain minimum information about their foreign banking accounts, the Court concluded that the statute permitted only one penalty corresponding to one per-report violation. *Id.* In other words, *Bittner* was an ordinary statutory interpretation case that applied traditional tools of textual construction to identify the legal duty at issue—there, filing reports of foreign banking transactions, rather than reporting each individual foreign account—and concluding that one violation of that duty could result in one penalty.

The ALJ characterized *Bittner* as establishing that "when the legal duty imposed by a statute is violated regardless of the number of errors made, it is not appropriate to multiply the resulting penalty by the number of errors that were actually made." D.O. at 18 n.31. The ALJ relied on this premise to conclude that per-worker CMPs are impermissible when an employer's "single mistake is sufficient to violate the relevant statute or regulation," and therefore that MSPA's insurance requirement did not authorize WHD to assess a separate penalty for each

individual denied workers' compensation coverage. D.O. at 17−18. But nothing in *Bittner* says that a single act can never constitute multiple violations. Rather, *Bittner* is a routine application of the well-settled principle that a single violation of a statute permits a single penalty and multiple separate violations permit multiple penalties, "so that the real question is simply what the statute means." *Mo., Kan.. & Tex. Ry. Co.*, 231 U.S. at 118−19.

Thus, the ALJ's reliance on *Bittner* was misplaced. Because *Bittner*'s conclusion is specific to the banking statute at issue in that case, *Bittner* says little about whether MSPA, an unrelated statutory scheme, permits per-worker penalties. Rather, the question here is how MSPA and its insurance regulations define a violation.

As explained above, the MSPA statute and regulations create a legal duty owed by A&M to each of its workers to obtain insurance coverage for each worker prior to transporting them in a vehicle that A&M owned or operated. The ALJ therefore erred in holding that A&M only violated the regulations one time by failing to secure workers' compensation coverage. Rather, the text and structure of the regulations show that A&M owes a legal duty not to transport "any" of its workers without first obtaining insurance coverage for each of them. Thus, A&M committed eight separate violations of MSPA's insurance regulations by failing to insure eight individual workers who were in an accident in an A&M vehicle.

C. The ALJ's Novel Interpretation Would Thwart the Purpose of CMPs for MSPA Violations.

MSPA aims "not only to punish, but also to prevent" unlawful treatment of vulnerable migrant and seasonal workers. *Castillo v. Case Farms of Ohio, Inc.*, 96 F. Supp. 2d 578, 632 (W.D. Tex. 1999). Thus, in addition to actual damages and back wages, MSPA provides for CMPs in enforcement actions brought by the Administrator and statutory damages in private actions brought by workers to deter violations of agricultural workers' rights. And, as a general matter, the purpose of civil money penalties is "deterrence" of unlawful and dangerous conduct. *See, e.g.*, *Nat'l Indep. Coal Operators' Ass'n v. Kleppe*, 423 U.S. 488, 401 (1976). If left in place, the ALJ's narrow rule would undermine the deterrent purpose of MSPA's civil money penalties.

Under the ALJ's theory, a farm labor contractor that fails to secure insurance (either vehicle liability insurance or workers' compensation insurance) for its workers would face a maximum total CMP of just $2,505—even if the contractor failed to insure dozens of workers. The cost of obtaining required insurance for a large number of migrant and seasonal workers will, in many cases, dwarf $2,505. Rather than spurring compliance, a single, low CMP would incentivize contractors to ignore MSPA's requirements, knowing that they would face only a financial slap on the wrist for violating safety and health protections for agricultural

workers. As the district court in *Castillo* observed, "it ought not to be cheaper to violate [MSPA] and be sued than to comply." 96 F. Supp. 2d at 631 (internal quotation marks omitted). Here, both purpose and practical consequences confirm the plain meaning of the statutory and regulatory text. *See Gundy v. United States*, 139 S. Ct. 2116, 2126 (2019) (plurality opinion) (explaining that purpose helps shed light on the meaning of statutory text). It is implausible that either Congress, in writing MSPA, or the Department, in writing the regulations, meant to require insurance coverage for "any migrant or seasonal agricultural worker"—but to impose a singular, low penalty for violating that rule, no matter how many workers' rights were violated. Any other outcome would turn the statute's deterrent penalties into merely the cost of doing business for scofflaw contractors.

CONCLUSION

For the foregoing reasons, the Administrator respectfully requests that the Board reverse the ALJ's Decision and Order regarding Respondents' civil money penalties assessment and reinstate the Administrator's assessment.

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CERTIFICATE OF SERVICE

I certify that this Brief was filed using the Administrative Review Board's eFile/eServe system and that a copy was sent by email to the following individual on May 8, 2023. Counsel has consented to service by email.

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