In the Matter of:

JAMES R. ZAPPALA, et al., d/b/a, ZAPPALA FARMS, and CLIFFORD J. DEMAY, d/b/a DEMAY LABOR,

and

NEMIAS PEREZ, a/k/a NEMIAS PEREZ-ROBLERO,

RESPONDENTS.

ARB CASE NO. 04-047

ALJ CASE NO. 97-MSPA-9-P

DATE: April 28, 2006

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Respondent DeMay:
Lucinda Odell Lapoff, Esq., Edmund C. Baird, Esq. ***Phillips Lytle LLP, Rochester, New York***

For the Administrator, Wage and Hour Division:
Barbara Eby Racine, Esq., Paul L. Frieden, Esq., Steven J. Mandel, Esq., Howard M. Radzely, Esq., ***United States Department of Labor, Washington, D.C.***

FINAL DECISION AND ORDER

Clifford DeMay d/b/a DeMay Labor (DeMay) prevailed in an action that the Administrator of the United States Department of Labor's Wage and Hour Division (Administrator) brought against him under the Migrant and Seasonal Agricultural Workers Protection Act (MSPA).[1] Because he had prevailed, DeMay applied for $71,374 in attorney's fees and expenses under the Equal Access to Justice Act (EAJA).[2]

[1] 29 U.S.C.A. § 1801, *et seq*. (West 1996).

[2] The Equal Access to Justice Act is codified at 5 U.S.C.A. § 504 (West 1996) (allowing award of attorney's fees and expenses against the federal government in administrative proceedings conducted prior to the filing of a civil action) and 28 U.S.C.A. § 2412 (West 1994)(permitting award of attorney's fees and expenses against the federal

A Department of Labor Administrative Law Judge (ALJ) denied the application on the ground that the Administrator was substantially justified in bringing the action and assessing civil money penalties (CMPs). On DeMay's Petition for Review, we affirm the ALJ's denial of DeMay's fee application.

BACKGROUND

The parties do not dispute the following background facts. Zappala Farms employs migrant workers to farm its onion fields in upstate New York. To obtain a migrant farm crew to work in its onion fields during the 1995 growing season, Zappala entered into an agreement with DeMay, a certified farm labor contractor in the business of providing migrant farm workers for agricultural employers, and Nemias Perez, also a certified farm labor contractor and crew leader who had worked for DeMay before becoming licensed as a farm labor contractor.[3] Pursuant to the agreement, DeMay would be responsible for providing farm workers for Zappala's onion fields, "licensing" Perez, and for completing all the necessary governmental paperwork. Perez would work for Zappala as a crew leader and furnish 20 workers. The agreement specified that Perez was responsible for making sure that the workers got to work, and that in the event that it became necessary for Perez to supply transportation, Perez agreed that he would become properly licensed and provide a properly licensed vehicle. In return for these services, Zappala agreed to pay Perez a wage equal to 13% of the workers' total wages and to pay DeMay 3% of the workers' total wages for his administrative work.

Because there was no public transportation on the roads between Zappala's onion fields, and because none of the workers that Perez recruited had transportation, Perez decided to provide transportation for the workers and asked for DeMay's help in completing the application for a Federal Farm Labor Contractor Automobile Liability Certificate. DeMay refused to help Perez when he saw the condition of the vehicle Perez intended to use and advised Perez not to transport the workers. Perez ignored his advice because the workers had no other way to get to the fields.

After attempting to transport the workers in several different vehicles, all of which broke down, Perez asked Zappala and DeMay for help. They suggested that Perez purchase a van at auction, but they did not involve themselves further in the workers' transportation problems. In June 1995, Perez bought a van to transport the workers. Because the van did not have any rear seats, the workers rode in the rear of the van on

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government in any civil action, including proceedings for judicial review of agency action). The two EAJA provisions largely mirror each other.

[3] A "farm labor contractor" is "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." 29 U.S.C.A. § 1802(7). "Farm labor contracting activity" is defined as "recruiting, soliciting, hiring, employing, furnishing, or transporting any migrant or seasonal agricultural worker." 29 U.S.C.A. § 1802(6).

overturned buckets and on the spare tire. On July 5, 1995, Perez's brother Amilcar Roblero, who had only a learner's driving permit, lost control of Perez's van while transporting 19 workers and crashed the van into a tree. Three of the farm workers traveling in the van were killed and several others suffered serious injuries.

After the accident, the Wage and Hour Division investigated whether Zappala, Perez, and DeMay had violated the MSPA. As a result of the investigation, the Wage and Hour Division assessed CMPs against all three parties.[4] All three objected to the assessments and requested a hearing before a Department of Labor ALJ.[5]

After a hearing the ALJ issued a Preliminary Decision and Order on Partial Findings – Modifying in Part and Reversing (P. D. & O.) in which he affirmed the CMP assessments against Perez, modified the assessments against Zappala, and reversed the assessments against DeMay. Zappala, Perez, DeMay, and the Administrator filed petitions asking the Administrative Review Board (ARB) to issue a notice of intent to modify or vacate the ALJ's P. D. & O.[6] Exercising its discretion under the MSPA regulations,[7] the ARB accepted only the three issues that the Administrator had raised: (1) whether the ALJ erred in concluding that DeMay did not "cause" migrant workers to be transported in unsafe vehicles in violation of 29 U.S.C.A. § 1841(b)(1)(A) and in dismissing the CMP the Administrator had assessed; (2) whether the ALJ erred in concluding that DeMay did not "utilize" an improperly registered farm labor contractor (Perez) in violation of 29 U.S.C.A. § 1842 and in dismissing the CMP assessed; and (3) whether the ALJ erred in concluding that Zappala did not "utilize" an improperly registered farm labor contractor (Perez) in violation of 29 U.S.C.A. § 1842 and in dismissing that CMP. The Administrator later advised the ARB that the Wage and Hour Division would not pursue the third issue. In a Final Decision and Order issued on August 29, 2001, the ARB affirmed the ALJ's determination that DeMay did not "cause" migrant workers to be transported in unsafe vehicles and did not "utilize" Perez in violation of the MSPA.[8]

DeMay, as the prevailing party, then filed a request under the EAJA for attorney's fees and expenses. The ALJ denied the request on the ground that the Administrator's decision to cite DeMay for the MSPA violations and assess the CMPs was substantially justified. DeMay filed a petition for review of the ALJ's decision with the ARB.[9]

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4 *See* 29 U.S.C.A. § 1853(a).

5 *See* 29 U.S.C.A. § 1853(b).

6 *See* 29 C.F.R. § 500.264.

7 *See* 29 C.F.R. § 500.265.

8 *Zappala Farms,* ARB No. 01-054, ALJ No. 1997-MSP-9 (ARB Aug. 29, 2001).

9 *See* 29 C.F.R. § 16.306.

JURISDICTION AND STANDARD OF REVIEW

The EAJA applies to proceedings involving CMP assessments under the MSPA.[10] We have jurisdiction over this appeal pursuant to 5 U.S.C.A. § 504(a)(1) and the Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating the Secretary's authority to issue final decisions under the EAJA to the ARB). Under the Administrative Procedure Act, we have plenary power to review an ALJ's factual and legal conclusions de novo.[11]

DISCUSSION

A. The Legal Standard

Attorney's fees and expenses are available under the EAJA when a party to an administrative adjudication prevails over a federal agency "unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust."[12] The Supreme Court has defined "substantially justified" to mean "justified in substance or the main – that is, justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). To meet this test, "the government must show that its position . . . had a reasonable basis in both law and fact." *Federal Election Comm'n v. Political Contributions Data, Inc.*, 995 F.2d 383, 386 (2d Cir.1993) (citing *Pierce v. Underwood*, 487 U.S. at 566). "Since fees are awarded only to a prevailing party, it follows that the fact that the government lost does not create a presumption that its position was not substantially justified." *United States v. Yoffe*, 775 F.2d 447, 449 (1st Cir. 1985).

The "position" of the agency includes both "the position taken by the agency in the adversary adjudication" itself and "the action . . . by the agency upon which the adversary adjudication is based."[13] Furthermore, the EAJA provides in relevant part: "Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought."[14]

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10 *See* 29 C.F.R. § 16.104 (vi).

11 *See* 5 U.S.C.A. § 557(b) (West 1996); *Zappala*, ARB No. 01-054, slip op. at 6.

12 5 U.S.C.A. § 504(a)(1). The Administrator does not contend nor do we find that "special circumstances" exist.

13 5 U.S.C.A. § 504(b)(1)(E).

14 5 U.S.C.A. § 504(a)(1).

Therefore, the adjudicator must examine both the agency's pre-litigation conduct, including the agency's action or failure to act, as well as the agency's litigation positions. *Commissioner, I.N.S. v. Jean*, 496 U.S. 154, 159 (1990). But in ruling on DeMay's EAJA application, neither the ALJ, nor the ARB, needs to perform separate evaluations of the Administrator's position at each stage of these proceedings. The "position of the agency" in the singular indicates that "only one threshold determination [of substantial justification] is to be made." *Id.* S*ee also United States v. $19,047 in United States Currency*, 95 F.3d 248, 251 (2d Cir.1996). Thus, in considering whether the Administrator's position as a whole was substantially justified in law and in fact, we have examined the Administrator's action in charging DeMay and assessing CMPs and the Administrator's position before the ALJ and ARB in justifying her action. The Administrator bears the burden of demonstrating that her position was substantially justified. *See Sotelo-Aquije v. Slattery*, 62 F.3d 54, 58 (2d Cir. 1995).

B. The Administrator was substantially justified in charging DeMay and assessing a CMP for "causing [an unsafe vehicle] to be used" to transport migrant workers.

The Administrator assessed a CMP of $17,000 against DeMay for violating the MSPA provision at 29 U.S.C.A. § 1841(b)(1), which states, in pertinent part, that "[w]hen using, or causing to be used, any vehicle for providing transportation . . . each agricultural employer, agricultural association, and farm labor contractor shall – (A) ensure that such vehicle conforms to the standards prescribed by the Secretary . . . and other applicable Federal and state safety standards." As already noted, the ALJ reversed the Administrator because he found that DeMay did not "cause" migrant workers to be transported in unsafe vehicles. The ARB affirmed the ALJ.[15]

The MSPA does not define "causing to be used." Several courts, however, have held that "[a]n employer is found to have caused the transportation of harvest workers by a farm labor contractor when this transportation is a 'necessary element in obtaining the workers' to harvest the grower's crop." *Saintida v. Tyre*, 783 F. Supp. 1368 (S.D. Fla.1992)*; Cardenas v. Benter Farms*, 2000 WL 1372848, 141 Lab. Cas. ¶ 34,148 (S.D. Ind. 2000); *Frenel v. The Freezeland Orchard Company*, 1987 WL 46894, 108 Lab. Cas. (CCH) ¶ 35,016, at 45,415, 28 WH Cases (BNA) ¶ 666,667 (E.D. Va.1987).[16] In

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[15] *Zappala Farms*, slip op. at 10.

[16] In a post-hearing brief before the ALJ on the merits, the Administrator relied on both *Saintida* and *Frenel* in support of her position. *See* Administrator's Memorandum of Law in Opposition to Respondent's Motion to Dismiss (August 11, 1999), at p. 19. In fact, the Administrator has consistently relied on *Saintida* and *Frenel* throughout these proceedings. *See* Acting Administrator's Brief to the ARB (June 4, 2001), responding to DeMay's petition for review of the ALJ's Partial Decision and Order on the merits, at p. 13, and Response Brief of the Acting Administrator to the ARB (August 2, 2004), responding to DeMay's

Saintida the court concluded that a farm labor contractor "caused" the transportation of farm workers in the vehicle of another farm labor contractor whom he had recruited because the "transportation of the harvest workers to the jobsite was a necessary element" in his furnishing the farm workers to the employers. *Saintida*, 783 F. Supp. at 1373. In opposing DeMay's EAJA application, the Administrator successfully argued to the ALJ that the "necessity of transportation" theory in *Saintida* was a reasonable legal basis upon which to cite DeMay under 29 U.S.C.A. § 1841(b)(1).

DeMay argues that the Administrator's position was not justified because there is no evidence that he had control of the workers. DeMay Brief at 9. The Administrator's theory of the case, however, was not based on DeMay's control, supervision, or direct responsibility; the Administrator relied on the *Saintida* "necessity of transportation" theory where the court found liability in the absence of direct control. Further, DeMay argues that since the Administrator did not pursue various other legal theories (agency, partnership, joint employers, alter ego) that might have indicated control, she therefore did not reasonably attempt to establish liability. DeMay Brief at 9. But again, we find that the Administrator reasonably relied on the "necessity of transportation" theory in *Saintida* and other district court cases rather than legal theories that DeMay suggests. The issue here is the reasonableness of the theory that the Administrator relied on, not the reasonableness of other potential theories.

Moreover, as the ALJ pointed out, the facts in *Saintida* and the instant case are similar. In both cases many miles separated the fields from the labor camps, and none of the migrant workers had their own vehicles. Thus, some other form of transportation became a necessity. Here, after the collapse of an attempted carpooling arrangement, transportation in the van that Perez provided became a necessity for the workers to get to Zappala's onion fields. Although Perez provided the vehicle itself, DeMay was under contract to Zappala to help Perez provide the work crew, and he benefited by his receipt of 3% of the workers' salaries for ensuring that the crew appeared for work. DeMay would not have been paid if the workers did not show up for work.

Therefore, the ALJ held that the Administrator reasonably relied on *Saintida* as a legal basis for charging DeMay. "Considering that contractual relationship, coupled with Mr. DeMay's suggestion that Mr. Perez obtain a vehicle from an auction to comply with his obligation to get workers in the field, the necessity of transportation theory was not an unreasonable legal basis for the Administrator's citation." S. D. & O. at 11. For the same reasons, we too find that the Administrator's reliance on the "necessity of transportation" theory was reasonable.

Turning to the factual basis for the Administrator's actions against DeMay for causing unsafe transportation of migrant workers, the ALJ cited three facts that support the Administrator's position. First, as an experienced farm labor contractor, DeMay

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petition for review of the ALJ's Supplemental Decision and Order denying EAJA fees, at pp. 23-24.

knew of the contractual and regulatory requirements applicable to Perez and knew that Perez did not have proper certification to transport workers. Moreover, DeMay had promised Zappala that he would be responsible for "licensing" Perez. Nevertheless, he suggested that Perez obtain a vehicle at auction and failed to remind Perez that he lacked the proper certification.

Second, DeMay was aware of the workers' transportation problem and "turned his back on it." The ALJ explained:

> Mr. DeMay did nothing other than continued to accept weekly remuneration for the workers being in the Zappala Farms fields until the work crew hit a tree. Granted, Mr. DeMay may not have had a contractual obligation to intervene. However, by profiting from the on-going unauthorized transportation of the workers to the fields by Mr. Perez, Mr. DeMay placed himself in a position not dissimilar to the farmer held liable in the *Saintida* case who benefited by having the workers transported to his farm by an unregistered farm labor contractor so his crop could be harvested.

S. D. & O. at 13.

Third, DeMay's agreement with Zappala required that DeMay ensure that a work crew was kept in the fields, and implicit in that requirement was DeMay's obligation to ensure that workers were transported in vehicles that met safety standards.

The ALJ concluded that although these three considerations did not provide adequate proof to support the Administrator's position on the merits of whether DeMay violated the MSPA, they "circumstantially combine to establish that the Administrator's position was substantially justified in fact." S. D. & O. at 13. In this regard, DeMay argues that it was "sheer speculation" for the ALJ to conclude that DeMay "knew or should have known" that Perez was transporting workers unsafely and unreasonable for the ALJ to conclude that DeMay was in a position to exercise some indirect control on the transportation situation. DeMay Brief at 12.

We disagree. The record clearly shows that Perez informed DeMay that the workers had no transportation and that Perez did not have a safe vehicle in which to transport them. Moreover, Perez asked for DeMay's help. Although DeMay refused to help Perez and advised Perez not to transport the workers in the van Perez had purchased, he nevertheless saw the condition of the vehicle Perez intended to use and took no further steps to ensure that Perez was not transporting the workers without proper registration.

In the earlier merits litigation, the Administrator argued that DeMay essentially controlled Perez because DeMay was responsible for helping Perez supply a work force and implicitly responsible for supplying transportation of that work force. But the ALJ

decided that to prove that DeMay violated section 1841(b)(1), the Administrator had to show that DeMay had direct control of Perez, particularly after the workers were recruited. P. D. & O. at 48. Here, however, in deciding the EAJA case, the ALJ found that the Administrator's indirect control theory was substantially justified. The ALJ reasoned that despite his knowledge, understanding, and prior experience, DeMay suggested that Perez, rather than the workers, obtain a vehicle at auction without reminding Perez that he was not authorized to transport the workers and that he had a contractual obligation to obtain such authorization. S. D. & O. at 12-13.

Like the ALJ, we find that the Administrator reasonably argued that DeMay, an experienced farm labor contractor, violated the statute by failing to intervene to ensure the safe transportation of the migrant workers whom he and Perez recruited. These facts substantially justified the Administrator's position.

C. The Administrator was substantially justified in charging DeMay and assessing a CMP for "utilizing" an uncertified FLC.

The Administrator assessed a second CMP of $1,000 against DeMay for violating the MSPA provision at 29 U.S.C.A. § 1842, which states, in pertinent part, that "[n]o person shall utilize the services of any farm labor contractor . . . unless the person first takes reasonable steps to determine that the farm labor contractor possesses a certificate of registration which is valid and which authorizes the activity for which the contractor is utilized." The Administrator charged that DeMay improperly "utilized" the services of Perez to transport migrant agricultural workers because DeMay relied on Perez to transport, house, and drive migrant farm workers without determining that he possessed a certificate of registration for these activities.

But the ALJ and the ARB found that DeMay did not violate section 1842. The statute does not define the term "utilized." The few courts that have addressed this issue have focused on the extent of control exercised over the farm labor contractor. *See, e.g.*, *Charles v. Burton*, 169 F.3d 1322 (11th Cir.1999). The ALJ and Board, which relied on *Burton,* concluded that DeMay did not violate section 1842 because he did not direct, control, or supervise the workers, or hire Perez directly. Specifically, the ALJ found it convincing that under DeMay's agreement with Zappala and Perez, "DeMay was not responsible for housing, transporting, or driving the workers."

In ruling on DeMay's EAJA application, however, the ALJ found that the Administrator was substantially justified in law and in fact for charging DeMay under section 1842 because, again, the Administrator relied on the "necessity of transportation" rationale. As discussed above, under the "necessity of transportation" rationale, a farm labor contractor who has no direct control over migrant workers may nevertheless be held liable for violations resulting from the unsafe transportation of those workers if transportation was a necessary element in furnishing the migrant workers to the employer. *Saintida,* 783 F. Supp. at 1373. Clearly, Perez's transportation of the migrant workers to Zappala's fields was a necessary element of DeMay's obligation to help Perez furnish workers to Zappala because public transportation to the fields was not available,

and none of the workers had their own transportation. Moreover, DeMay was well aware that Perez had serious difficulties in providing transportation. He also knew that Perez did not have a certificate of registration to transport agricultural workers because Perez had asked DeMay to help him apply for a certificate, and DeMay had refused to do so. Finally, under his agreement with Zappala, DeMay received payments equal to 3% of the workers' total wages for helping Perez recruit workers and performing administrative work. Although the ALJ and ARB did not find these facts sufficient to establish DeMay's liability on the merits, they do provide a reasonable basis in the EAJA context for the Administrator's "necessity of transportation" rationale. Therefore, the Administrator was substantially justified in charging DeMay with a violation of 29 U.S.C.A. § 1842.

CONCLUSION

In opposing DeMay's EAJA fee application, the Administrator reasonably relied on relevant case law and the undisputed facts of this case. Therefore, she demonstrated that she was substantially justified in charging DeMay with violating the MSPA and in assessing civil money penalties. We therefore **DENY** DeMay's petition for review and **AFFIRM** the March 24, 2003 Supplemental Decision and Order, denying DeMay's fee application.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge