



**In the Matter of:**

**EVERGREEN FORESTRY SERVICES,  
INC.,**

**and**

**PETER SMITH, III,**

**RESPONDENTS.**

**ARB CASE NO. 05-029**

**ALJ CASE NO. 2003-MSP-2**

**DATE: February 28, 2006**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For Deputy Administrator:*

**Paula Wright Coleman, Esq., Paul L. Frieden, Esq., Steven J. Mandel, Esq.,  
Howard M. Radzely, Esq., United States Department of Labor, Washington,  
D.C.**

*For Respondents:*

**S. Mason Pratt, Jr., Esq., Pierce Atwood, LLP, Portland, Maine**

**FINAL DECISION AND ORDER**

This matter arises under the Migrant and Seasonal Agricultural Workers Protection Act, 29 U.S.C.A. § 1801, *et seq.* (MSPA or Act) (West 1999), and the implementing regulations at 29 C.F.R. § 500 (2005). The Chief Administrative Law Judge (ALJ) for the United States Department of Labor (DOL) issued a Decision and Order (D. & O.) on November 19, 2004. The D. & O. held that Respondents Evergreen Forestry Services and Peter Smith (Evergreen) violated the transportation provisions of the MSPA when Evergreen's employee failed to operate a motor vehicle in accordance with the laws of the State of Maine, and the vehicle veered off a bridge and plunged into the Allagash River below, killing 14 migrant workers. On Evergreen's Petition for Review, we affirm the D. & O.

## BACKGROUND

Peter Smith, III, was president and owner of Evergreen, which was in the business of providing forestry services. Evergreen was under contract with Pine Belt to provide tree planting and pre-commercial thinning in Northwest Maine. At the time of the incident, Evergreen's crew was performing density control work on privately-owned land managed by the Seven Islands Land Company. Joint Exhibit (JX) EE. Evergreen's crew consisted of 14 Guatemalan and Honduran migrant workers and one migrant crew leader, who had entered the United States under a program for non-immigrant foreign workers. *See* 8 U.S.C.A. 1101(a)(15)(H)(ii)(b) (West 1999). As of September 2002, each day the 15 would make a 180-mile round trip in a rented van from their Caribou, Maine apartments over rough logging roads through the Allagash Wilderness Waterway to work sites near the Canadian border. JX A, C, F, Complainant's Responses to Interrogatories (Resp.) 2 (nn), (oo), (ss).

On the morning of September 12, 2002, the driver, Juan Tuncio-Matamoros, lost control of the van as it sped across St. John's Bridge, a narrow, one-lane bridge, with no guard rails. It plummeted into the Allagash River below. JX F, JX O, at 2, 3. The driver and thirteen of the crew died. JX S, at 8-9. One crew member, Edilberto Morales-Luis (Morales), survived. The Maine State Trooper who prepared the accident reconstruction report, Corey A. Hafford, concluded that the cause was imprudent speed and driver inattention. JX O at 6.

The DOL Wage and Hour Division (WHD) investigated Evergreen and assessed civil money penalties (CMPs) totaling \$17,000 for violations of the MSPA: (1) \$1,000 for each of the 15 MSPA violations for operating a vehicle to transport workers at a speed in excess of that permitted under applicable Maine law, *see* 29 U.S.C.A. § 1841(b)(2)(A) and 29 C.F.R. § 500.105(b)(2)(ii) and § 500.105(b)(2)(v); (2) \$1,000 for failing to register the driver of the van for driving and transporting workers, *see* 29 U.S.C.A. § 1811, and 29 C.F.R. § 500.40 and § 500.41; and (3) failing to list the rental van on Evergreen's farm labor certificate, *see* 29 C.F.R. § 500.45(b) and § 500.55. Evergreen does not contest the CMPs described in (2) and (3) on appeal. Nor does it address the amounts of the CMPs for (1), only the authority to impose them.

Evergreen appealed the WHD assessments to an ALJ. The Chief ALJ denied Motions for Summary Decision on February 24, 2004. Thereafter, in lieu of an evidentiary hearing, the parties agreed to submit the case on briefs and a joint stipulation of exhibits, consisting primarily of discovery responses, accident reports, witness statements, and a brochure regarding the ownership and use of the property at issue. The Chief ALJ issued his D. & O. on November 19, 2004. On December 6, 2004, Evergreen petitioned the ARB to modify the ALJ's decision and the ARB granted review on December 9, 2004.

## ISSUE

We granted review on the following issue: “Did the ALJ properly affirm the Department of Labor’s assessment of a \$17,000 civil money penalty against Evergreen on the grounds that Evergreen violated 29 C.F.R. §§ 500.105(b)(2)(ii) and 500.105(b)(2)(v) by operating a motor vehicle used to transport workers at speeds in excess of those permitted under the applicable Maine law, when a vehicle transporting fifteen migrant workers through the privately-owned North Maine Woods to a worksite plunged off a bridge into the Allagash River, drowning fourteen of the fifteen workers.”

## JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction over this appeal pursuant to the MSPA and its implementing regulations (see 29 C.F.R. § 500.264), as well as Secretary’s Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to ARB the Secretary’s authority to issue final orders under, inter alia, MSPA). Under the Administrative Procedure Act, we have plenary power to review an ALJ’s factual and legal conclusions de novo. *See* 5 U.S.C.A. § 557(b) (West 1996). *Zappala Farms*, ARB No. 01-054, ALJ No. 1997-MSP-9, slip op. at 6 (ARB Aug. 29, 2001).

## DISCUSSION

### I. The MSPA

The MSPA, 29 U.S.C.A. § 1801 *et seq.* protects migrant and seasonal farm workers “whose employment had been historically characterized by low wages, long hours and poor working conditions . . .” H.R. Rep. No. 97-885, at 3 (1982) *reprinted in* 1982 U.S.C.C.A.N. 4547. The MSPA requires farm labor contractors to be registered by the Secretary of Labor and regulates, among other activities, transportation of migrant and seasonal agricultural workers. Specifically, 29 U.S.C.A. § 1841(b)(2)(A) applies to farm labor contractors, and provides that the Secretary shall “prescribe such regulations as may be necessary to protect the health and safety” of farm workers. The implementing regulation at 29 C.F.R. § 500.105(b)(2)(ii) provides that “[e]very motor vehicle shall be driven in accordance with the laws, ordinances, and regulations of the jurisdiction in which it is being operated . . .” The regulation at 29 C.F.R. § 500.105(b)(2)(v) states that “[n]o person shall permit nor require the operation of any motor vehicle between points in such period of time as would necessitate the vehicle being operated at speeds greater than those prescribed by jurisdictions in or through which the vehicle is being operated.”

Section 2074 of the Maine Revised Statutes provides in relevant part:

An operator shall operate a vehicle at a careful and prudent speed not greater than is reasonable and proper having due

regard to the traffic, surface and width of the way and of other conditions then existing.

29-A M.R.S.A. 2074 (“Rates of Speed”) (West 2003).

Section 2074(4)(B), however, makes the statute inapplicable to the operation of a vehicle “on private land to which the public does not have access when used in or with the authorization of the landowner.” 29-A M.R.S.A. 2074(4)(B). It is undisputed that this was “private land” and that the use was “in or with the authorization of the landowner.” So the outcome of this case depends upon two inquiries: (1) whether the motor vehicle was operated on private land “to which the public [had] access;” and (2) whether its speed was greater than what was “reasonable and prudent” for the “conditions.” We discuss those issues in turn.

## **II. Public Access**

The Northern Maine Woods, Inc. (NMW) is a nonprofit corporation of private landowners and Maine governmental entities. Its mission is to coordinate public use of recreational areas within the North Maine Woods. JX D at 3; JX F; JX L. A critical piece of evidence is a 20-page brochure that NMW published to promote public recreational use of the land. JX F. It says, “The NMW area provides numerous outdoor recreational opportunities for thousands of visitors while at the same time providing renewable forest resources.” *Id.*, cover page. The Maine Department of Inland Fisheries and Wildlife notes that “Private landowners within the North Maine Woods honor and respect [the] traditional use” of the “privately owned land for recreational purposes.” *Id.* at (unnumbered) page 16. The brochure map shows over 80 state campsites and 100 NMW “authorized campsites,” *id.* at 9-11, and invites the public to hunt and fish. “The landowners have coordinated the management of recreational use within the NMW area with [Maine] State Agencies.” *Id.* at 6. NMW has a contract with the Maine Bureau of Parks and Recreation to collect user fees from visitors to the Allagash Wilderness Waterway as they pass through NMW checkpoints. *Id.* at 6.

The accident occurred in the NMW. Evergreen argues that the roads at issue are not open to the public because the public must pass through gates, pay user fees, and agree to the conditions of use, including yielding the right of way to logging trucks. Respondents’ Brief in Response to Notice of Intent to Modify or Vacate Decision and Order at 19-22. But the fact that there are restrictions on use does not mean that the public is excluded. On the contrary, it suggests that the public is permitted to use the land and roads, subject to those restrictions. We therefore agree with the Chief ALJ’s conclusion that the public had access and that 29-A M.R.S.A. 2074 therefore applies. D. & O. at 9.

## **III. Imprudent speed**

If, as we have concluded, the public had access to the land, Evergreen is bound by 29-A M.R.S.A. 2074, which requires that a vehicle be operated “at a careful and prudent

speed no greater than is reasonable and proper *having due regard to the traffic, surface and width of the way and of other conditions then existing.*” (Emphasis added). In this case, those conditions included a fully loaded van, crossing a narrow, single-lane, planked bridge with no guard rails, in 15-mile per hour winds.

Over Evergreen’s objection, the Chief ALJ considered the Maine State Police Accident Reconstruction Report that concluded that the “primary cause of this crash was imprudent speed and [the] driver’s inattention to the roadway, specifically the bridge.” JX O at 6. Expert opinion is admissible if it will “assist the judge as the trier of fact,” 29 C.F.R. § 18.702 (2005), *cf.* Federal Rule of Evidence 702, and his/her methods are sufficiently reliable. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999); *Daubert v. Merrill Dow Pharms., Inc.*, 509 U.S. 579 (1993).

Trooper Hafford, whose report was admitted, was qualified to express expert opinions. He underwent extensive training in accident reconstruction at the Maine State Police Academy and had performed more than 50 accident reconstructions at the time of this accident. JX BB.

The trooper’s report assisted the trier of fact in two important ways: First, based on the physical evidence, he determined that the tires did not blow out and cause the accident, but rather were damaged as the van tires scraped against wood and metal as the van rolled across and then off the bridge. *Id.* at 6. Second, the trooper performed a calculation based upon the height of the bridge above water (17 feet 6 inches) and the distance between where the van left the bridge and where it landed in the water (43 feet) and concluded that it was going 28 miles per hour when it left the bridge. *Id.* Therefore, it must have been traveling at a rate of speed substantially more than that before its motion was slowed by the tires scraping against the edge of the wood planks and the metal on the bridge. *Id.*

Evergreen does not attack the reconstructionist’s methodology, but rather his conclusions, in particular that he did not consider the survivor, Morales’, statement suggesting that a blowout caused the accident. Respondents’ Brief at 24-25. But the Forensic Vehicle Inspection Report, considered by the accident reconstruction expert, showed a cut in the sidewall of the right front tire and a large tear in the sidewall of the right rear tire, which were the result not the cause of the tires contacting wood and metal. JX T at 10.

Evergreen’s remaining argument is that DOL did not prove a violation of 29-A M.R.S.A. 2074(1)(D), which imposes a maximum speed limit of 45 miles per hour on “public ways unless otherwise posted.” Respondents’ Brief at 12-15. Yet the violation of § 2074 does not depend on proof that the vehicle was being driven in excess of 45 miles per hour; only that it was going too fast for the “conditions then existing.” We agree with the ALJ that the DOL met that burden. D. & O. at 11.

## **CONCLUSION**

We affirm the imposition of the civil money penalties totaling \$17,000 against Respondents Evergreen and Smith and Respondents are **ORDERED** to remit that amount to the United States. Department of Labor forthwith.

**SO ORDERED.**

**WAYNE C. BEYER**  
**Administrative Appeals Judge**

**M. CYNTHIA DOUGLASS**  
**Chief Administrative Appeals Judge**