



Issue Date: 06 October 2004

CASE NO.: **2003-CLA-00002**

In the Matter of

U. S. DEPARTMENT OF LABOR,
Plaintiff,

v.

DAVID K. SERVICE COMPANY,
a Corporation,
and

DAVID KIM HARDING,
Individually,

Respondents.

DECISION AND ORDER¹

This case arises under the Child Labor Provisions of the Fair Labor Standards Act, as amended, 29 U.S. Code, Section 261(e) and the applicable regulations issued at 29 CFR Parts 579 and 580.

A formal hearing was held in Price, Utah on June 30, 2004 at which time all parties were afforded full opportunity to present evidence and argument as provided in the Act and the applicable regulations. Mr. Harding was pro se and stated "I have decided to do this myself."

The findings and conclusions which follow are based upon a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations and pertinent precedent.

At the hearing, counsel for the Plaintiff stated

The Wage and Hour Division is charged with the enforcement of child labor laws as set forth in the Fair Labor Standards Act and the implementing regulations.

¹ The following abbreviations will be used as citations to the record:

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|----|---|----------------------------|
| JS | - | Joint Stipulations; |
| TR | - | Transcript of the Hearing; |
| GX | - | Plaintiff's Exhibits; |
| RX | - | Respondent's Exhibits. |

Section 203 of the Act prohibits oppressive child labor, which includes hazardous occupations for minors between the ages of sixteen and eighteen, in order to insure that their employment of these minors will not harm them.

When violations of the child labor provisions occur, the Secretary is charged in Section 216(e) of the Act to assess a civil money penalty for each employee subject to a violation.

On March 3rd, 2001 while Cody Rasmussen, who was sixteen at the time, was employed by the Respondent, he was seriously injured when a piece of wood he was feeding into a wood chipper flew out and hit him on the head, fractured his skull and caused a whiplash injury.

After the Wage and Hour investigation, civil money penalties in the total amount of \$8,775.00 were assessed.

\$275.00 was assessed for the failure to have the date of birth of Mr. Rasmussen on record.

And \$8,500.00 was assessed for the serious injury that Cody suffered while working in violation of the Hazardous Order 5.

In assessing these civil money penalties, the Wage and Hour Division considered the gravity of the violation and the size of Respondent's business, as required by the statute. (TR 5 & 6).

The \$275.00 penalty for the record keeping violation was withdrawn. (TR 7).

Harding testified that he had a tree trimming operation. At the time of the accident, he had two part-time employees and the three of them were trimming for a public utility. The respondent acknowledged that there was an accident and that the law was broken. (TR 8).

Plaintiff's counsel stated that the case focuses on 29 C.F.R. § 570.55, Hazardous Order 5. (TR 31).

Subpart E of Part 570 deals with

Occupations Particularly Hazardous for the Employment of Minors Between 16 and 18 Years of Age or Detrimental to Their Health or Well Being

§ 570.55 - Occupations involved in the operation of power-driven woodworking machines (Order 5).

(a) Finding and declaration of fact. The following occupations involved in the operation of power-driven wood-working machines are particularly hazardous for minors between 16 and 18 years of age:

(1) The occupation of operating power-driven woodworking machines, including supervising or controlling the operation of such machines, feeding material into such machines, and helping the operator to feed material into such machines but not including the placing of material on a moving chain or in a hopper or slide for automatic feeding.

(2) The occupations of setting up, adjusting, repairing, oiling, or cleaning power-driven woodworking machines.

(3) The occupations of off-bearing from circular saws and from guillotine-action veneer clippers.

(b) Definitions. As used in this section:

(1) The term power-driven wood-working machines shall mean all fixed or portable machines or tools driven by power and used or designed for cutting, shaping, forming, surfacing, nailing, stapling, wire stitching, fastening, or otherwise assembling, pressing, or printing wood or veneer.

Part 579 pertains to child labor violations-civil money penalties.

§ 579.5. How is the amount of the penalty determined?

(a) The administrative determination of the amount of the civil penalty, of not to exceed \$10,000 for each employee who was the subject of a violation of section 12 or section 13(c)(5) of the Act relating to child labor or of any regulation issued under that section, will be based on the available evidence of the violation or violations and will take into consideration the size of the business of the person charged and the gravity of the violation as provided in paragraphs (b) through (d) of this section; Provided, however, that for any violation occurring on or after January 7, 2002 the civil money penalty amount will increase to not to exceed \$11,000.00 for each employee who was the subject of a violation.

(b) In determining the amount of such penalty there shall be considered the appropriateness of such penalty to the size of the business of the person charged with the violation or violations, taking into account the number of employees employed by that person (and if the employment is in agriculture, the man-days of hired farm labor used in pertinent calendar quarters), dollar volume of sales or business done, amount of capital investment and financial resources, and such other information as may be available relative to the size of the business of such person.

(c) In determining the amount of such penalty there shall be considered the appropriateness of such penalty to the gravity of the violation or violations, taking into account, among other things, any history of prior violations; any

evidence of willfulness or failure to take reasonable precautions to avoid violations; the number of minors illegally employed; the age of the minors so employed and records of the required proof of age; the occupations in which the minors were so employed; exposure of such minors to hazards and any resultant injury to such minors; the duration of such illegal employment; and, as appropriate, the hours of the day in which it occurred and whether such employment was during or outside school hours.

(d) Based on all the evidence available, including the investigation history of the person so charged and the degree of willfulness involved in the violation, it shall further be determined, where appropriate,

(1) Whether the evidence shows that the violation is “de minimis” and that the person so charged has given credible assurance of future compliance, and whether a civil penalty in the circumstances is necessary to achieve the objectives of the Act; or

(2) Whether the evidence shows that the person so charged had no previous history of child labor violations, that the violations themselves involved no intentional or heedless exposure of any minor to any obvious hazard or detriment to health or well-being and were inadvertent, and that the person so charged has given credible assurance of future compliance, and whether a civil -penalty in the circumstances is necessary to achieve the objectives of the Act.

Dean Campbell, the District Director with the Wage and Hour Division, testified that in assessing a penalty

We do weigh the size of the business.

However, when you have a serious injury where it exposes the minor intentionally to, to me an obvious hazard, that far outweighs the size of the business criteria. That’s the Department of Labor’s position. (TR 16).

Campbell indicated that the maximum penalty could be \$10,000.00. As there was a serious injury and a hazardous order violation, the penalty would be the same regardless of the size of the business.

Cody Rasmussen testified that he never operated the wood chipper but merely fed branches into the machine. Cody spent three and a half days in a hospital and then three weeks at home before returning to school. The skull fracture required surgery with insertion of a titanium plate.

Plaintiff’s counsel stated that 29 C.F.R. § 570.55, Hazardous Order 5 prohibits the operation of a fixed or portable machine driven by power and used or designed for cutting or shaping.

The machine in question was a power driven, very large wood chipper, and it was designed to cut wood pieces into wood chips from larger limbs.

The Department is very adamant that the work was covered by this Hazardous Order regulation. (TR 31).

Harding stated that "I'm offended and I'm frustrated because I do not know what I owe." (TR 9). He indicated that the original penalty was \$8,500.00. However, when he indicated that he might appeal, he received an offer reducing the penalty to \$7,000.00.

A subsequent reduction to \$5,700.00 was offered in an attempt to settle the case. (TR. 36). Harding did not feel that he should have to barter. The respondent felt that the wage and hour division did not investigate his company enough to know the size of his business. Harding drew a salary of \$1,000.00 per month. He acknowledged that his assets were worth at least \$150,000.00 and that the business gross income was about \$120,000.00 per year.

Plaintiff's counsel stated that

The Department's position is clear that that criteria follows meeting the first criteria, which is either that it's de minimis, or that there was no heedless exposure to a hazard, to an obvious hazard to the detriment of the health.

And since those were not present, that criteria does not need to be considered. (TR 67 & 68).

Discussion

The undersigned is aware that Mr. Rasmussen was 16 years of age when he sustained a serious head injury from a wood chip thrown by a machine. (See GX 1 and GX 2). The government's argument is plain and based on exposure to a danger precluded by hazardous order number five.

Ignorance of the law is not an excuse and Harding does not contend otherwise. However, there are mitigating factors in this case. Harding did not intentionally violate the rule as he was unaware of its content. Rasmussen was the only minor employed by the firm. Moreover, there is no record of a previous violation of the child labor laws. Harding indicated that he would not hire minors for such work in the future. There was testimony that Rasmussen had worked on Saturdays for about two months. This firm can be considered to be a small business.

Harding has submitted incomplete corporate tax returns for the years 2000 and 2001. These reflect "ordinary income" as \$27,012.00 and as \$18,785.00 for these years, respectively.

In view of the facts and the arguments in this case, the undersigned concludes that a deduction from the last offer is merited and that a civil money penalty assessment of \$4,000.00 is appropriate in this case.

ORDER

David K. Service Company, a corporation, and David Kim Harding, individually, are ordered to pay the **U. S. DEPARTMENT OF LABOR** civil money penalty in the total amount of **\$4,000.00**.

A

RICHARD K. MALAMPHY
Administrative Law Judge

RKM/ccb
Newport News, Virginia

NOTICE OF APPEAL RIGHTS: Pursuant to 29 C.F.R. § 580.13, any party dissatisfied with this Decision and Order may appeal it to the Administrative Review Board within 30 days of the date of this decision, by filing a notice of appeal with the Administrative Review Board, U.S. Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, D.C. 20210. The Administrative Review Board has been delegated authority and assigned responsibility by the Secretary to issue final decisions in Fair Labor Standards Act cases. Secretary's Order 1-2002, 67 Fed. Reg. 64272 (2002). A copy of the notice of appeal must be served on all parties to this Decision and Order and on the Chief Administrative Law Judge, U.S. Department of Labor, 800 K Street, N.W., Suite 400, Washington, D.C. 20001-8002. If no timely appeal is filed, this Decision and Order shall be deemed the final agency action.