



In the Matter of:

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

PLAINTIFF,

v.

KEYSTONE FLOOR REFINISHING
COMPANY, INC. d/b/a KEYSTONE
FLOOR REFINISHING CO., and
DANIEL LIEZ,

RESPONDENTS.

ARB CASE NOS. 03-056
03-067

ALJ CASE NO. 02-CLA-017

DATE: September 23, 2004

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Plaintiff:

Roger W. Wilkinson, Esq., Paul L. Frieden, Esq., Steven J. Mandel, Esq.,
U. S. Department of Labor, Washington, D.C.

For the Respondents:

Mervin M. Wilf, Esq., *Philadelphia, Pennsylvania*

FINAL DECISION AND ORDER

The Wage and Hour Administrator has petitioned for review of an Administrative Law Judge's (ALJ) Decision and Order (D. & O.) finding that Keystone Floor Refinishing Company (Keystone) violated the child labor provisions of the Fair Labor Standards Act (FLSA), as amended, 29 U.S.C.A. §§ 212(c)-(d) and 216(e) (West 1998), and the implementing regulations at 29 C.F.R. Parts 570 and 516 (2003), but reducing the \$2,675.00 penalty imposed. Keystone appeals the ALJ's conclusion and imposition of any penalty. We affirm the ALJ's finding that Keystone violated the child labor provisions of the FLSA, and reinstate the full penalty.

BACKGROUND

The basic facts as stated by the ALJ are not in dispute. D. & O. at 4-9. The ALJ also accepted the parties' 16 stipulations. D. & O. at 2-3; ALJX 13.¹ We summarize briefly.

Keystone employed 17-year-old Robert Martin as a "go-fer" in its floor refinishing business from July 9 to November 17, 1999, but he actually worked only 32 days. His co-workers included Daniel James McDowell, John Miller, and Joseph Chmielowski, all of whom testified that they saw Martin operate power tools, including a miter saw and a nail gun,² which the FLSA prohibited him from using because of his age. Keystone presented four other co-workers, Tom Hazelwood, Neil McNicholl, Mike Solicki, and Daniel Kanagie, all of whom indicated that they had never seen Martin use either tool.

After Martin was fired on November 17, he filed a complaint, which the Department of Labor's Wage and Hour Division (WHD) investigated. The WHD found that Keystone violated section 212 by permitting a minor to operate a nail gun, prohibited under 29 C.F.R. § 570.55, and a miter saw, prohibited under 29 C.F.R. § 570.65. Using Form 266,³ WHD assessed a penalty of \$1,200.00 for each violation. WHD also found that Keystone violated two record-keeping provisions, 29 C.F.R. §§ 570.5(c) and 516.2(a)(3), and assessed a penalty of \$275.00, for a total of \$2,675.00. PX 5. Keystone timely excepted to the decision, and the ALJ held a formal hearing on August 28-29, 2002.

The ALJ found that Keystone violated two of the FLSA's hazardous occupation orders identified at 29 C.F.R. § 570.55 for power-driven, wood-working machines (Order 5) and at § 570.65 for saws and shears (Order 14). While finding that all the witnesses presented credible testimony, the ALJ concluded that the "balance" of the evidence

¹ The following abbreviations shall be used: Administrative Law Judge exhibit, ALJX; Plaintiff's exhibit, PX; Respondent's exhibit, RX; and hearing transcript, TR.

² The miter saw, also known as a chop box, is used to cut the corners of lengths of wood molding. The nail gun is used to hammer nails into the molding to secure it around a room. Keystone stipulated that it owned and used one Stanley pneumatic nail gun and one Delta compound miter saw (Model 36-040). D. & O. at 3; PX 1-2.

³ WHD investigators use Form WH-266, the Child Labor Civil Money Penalty Report, to determine civil money penalties. In *Administrator, Wage and Hour Div. v. Thirsty's Inc.*, No. 94-CLA-65, slip op. at 6 (ARB May 14, 1997), *aff'd sub nom. Thirsty's v. United States Dep't of Labor*, 57 F. Supp. 2d 431, 436 (S.D. Tex. 1999), the Board approved the WHD's use of the form, stating that the grid and matrix schedule in Form WH-266 is an appropriate tool for recommending penalties.

established that Martin used the miter saw and the nail gun. Accordingly, he ordered Keystone to pay the assessed penalty of \$2,400.00. D. & O. at 15.

The ALJ determined that Keystone did not violate 29 C.F.R. § 570.5, which provides that the prospective employer of a minor “should obtain” proof of age, because the language is “precatory,” not mandatory. Therefore, he reversed WHD’s decision. D. & O. at 14.

Noting that Keystone had stipulated that Martin was under 19 years old, the ALJ found that Keystone had failed to maintain a record of Martin’s date of birth, pursuant to 29 C.F.R. § 516.2(a)(3). D. & O. at 14. However, the ALJ vacated the \$275.00 fine because he determined that WHD’s penalty assessment document, Form 266, did not specify under which section the amount had been levied. Thus, he was “constrained” to find that WHD failed to provide the basis for the penalty. D. & O. at 14-15.

ISSUES PRESENTED

- I. Whether the WHD had jurisdiction under the FLSA to investigate Keystone’s alleged violations.
- II. Whether a preponderance of the evidence supports the ALJ’s conclusion that Keystone violated 212 of the FLSA.
- III. Whether the ALJ erred in reducing the civil monetary penalty.

JURISDICTION AND STANDARD OF REVIEW

The Secretary has delegated to the Administrative Review Board the authority and responsibility to act for her in civil money penalty cases arising under the child labor provisions of the FLSA. Secretary’s Order No. 1-2002, 67 Fed. Reg. 64272 (Oct. 17, 2002); see 29 U.S.C.A. § 216(e). The Board has jurisdiction, inter alia, to hear and decide appeals taken from the ALJs’ decisions and orders. 29 C.F.R. § 580.13.

Section 216(e) of the FLSA requires that administrative hearings in cases involving civil money penalties for violations of the child labor provisions be conducted in accordance with Section 554 of the Administrative Procedure Act (APA). 5 U.S.C.A. § 554 (West 1996). See 29 U.S.C.A. § 216(e). Section 557(b) of the APA states, in pertinent part, that “[o]n appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision” 5 U.S.C.A. § 557(b). Thus, the Board reviews the ALJ’s decision de novo. 5 U.S.C.A. §§ 554, 557. See *Administrator, Wage and Hour Div. v. Elderkin Farm*, ARB Nos. 99-033 and 99-048, ALJ No. 95-CLA-31, slip op. at 11 (ARB June 30, 2000) (The ARB conducts de novo review except that the ALJ’s credibility determinations of a witness are entitled to deference). However, the Board will adopt the ALJ’s findings of fact if supported by

substantial evidence. *Administrator, Wage and Hour Div. v. D. D. & D., Inc., d/b/a Sizzler Family Steakhouse*, 90-CLA-35, slip op. at 3 (Sec’y Apr. 3, 1995).

DISCUSSION

I. The ALJ properly found that Keystone was subject to coverage under the FLSA.

Initially, Keystone argues that it is not subject to the FLSA because its receipts are less than \$500,000.00 annually pursuant to the 1989 amendments to the FLSA, and the preservation of coverage clause does not cover employees hired after March 1990. Therefore, WHD had no jurisdiction over Keystone, and the case must be dismissed. Respondent’s Brief at 6-13.

WHD responds that there is both individual and enterprise coverage⁴ of Keystone in this case because Keystone has stipulated to both and the preservation of coverage clause included enterprises such as Keystone. Administrator’s Response Brief at 12-16. The ALJ termed Keystone’s argument “strained,” and found coverage under the FLSA, based on *Reich v. Troyer*, No. Civ.A 96-0471, 1996 WL 198111 (E.D. La. Apr. 23, 1996). D. & O. at 9-10.

Prior to the 1989 amendments, the FLSA covered an enterprise engaged in commerce “in the business of construction or reconstruction, or both,” 29 U.S.C.A. § 203(s)(4), without regard to the annual dollar amount of business.⁵ The amendments imposed a \$500,000 floor on covered enterprises, 29 U.S.C.A. § 203(s)(1)(A), but also contained a “grandfather clause” that extended coverage to enterprises that otherwise became exempt.

Section 3(b), entitled “Preservation of Coverage,” provides:

(1) IN GENERAL. –Any enterprise that on March 31, 1990, was subject to section 6(a)(1) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(a)(1)) and because

⁴ Section 216(c) provides that no employer shall employ any oppressive child labor in commerce or any enterprise engaged in commerce or in the production of goods for commerce. 29 U.S.C.A. § 212(c). Section 203(d) defines an employer as any person acting directly in relation to an employee. 29 U.S.C.A. § 203(d)

⁵ It is undisputed, in fact, stipulated, that Keystone’s business activities prior to and after the 1989 amendments included the installation, sanding, and refinishing of hardwood floors in buildings. ALJX 13. These activities constitute “construction or reconstruction” whether performed during original construction or as part of remodeling or repair. *See Wage and Hour Field Operations Handbook*, Chapter 12, 12f07(a) “Floor covering firms,” page 581 (June 22, 1990).

of the amendment made by subsection (a) is not subject to such section shall—

(A) pay its employees not less than the minimum wage in effect under such section on March 31, 1990;

(B) pay its employees in accordance with section 7 of such Act; and

(C) remain subject to section 12 of such Act

(2) VIOLATIONS. – A violation of paragraph (1) shall be considered a violation of section 6, 7, or 12 of the Fair Labor Standards Act of 1938, as the case may be. Fair Labor Standards Amendments of 1989. Pub. L. No. 101-157, 103 Stat. 938 (codified in the notes to 29 U.S.C.A. § 203).

The court in *Troyer* quoted from the legislative history of the 1989 amendments to the FLSA, stating that Section 3(s) “prevents newly exempt employers from lowering their employees’ wages below the previous minimum wage under which they had been covered as well as continuing other protections. This hold harmless provision will [e]nsure that not [sic] employee will be adversely affected by the committee amendment.” *Troyer*, 1996 WL 198111 at 2 (quoting H.R. Rep. No. 260, 101st Cong., 1st Sess. (1989), *reprinted in* 1989 U.S.C.C.A.N 696, 706).

Under Keystone’s theory, the phrase “newly exempt” applies to “their employees” as well as to employers; thus, employers are required to continue wage and safety coverage only for those individuals who were employed prior to March 1990. Keystone argues that construing the language to maintain coverage for employees hired after March 31, 1990, would render meaningless the phrase, “newly exempt.” Respondent’s Brief at 8-9. Keystone also contends that the preservation of coverage clause was not meant to subject a small business to the pre-1989 amendments in perpetuity. Respondent’s Brief at 10-13.

We can find no statutory, regulatory, or legal support for Keystone’s division of coverage argument. Congress did not intend through the 1989 amendments to the FLSA to deny the protections of minimum wage, overtime pay, and child labor provisions to all employees hired after March 1990 by small businesses with less than \$500,000.00 annual receipts. The purpose of the 1989 amendments was to set an annual \$500,000.00 floor for covered businesses. 29 U.S.C.A. § 203(s)(1)(A). However, the preservation of coverage clause “grandfathered” in certain companies subject to section 6(a)(1) and required them, regardless of annual sales and receipts below \$500,000.00, to comply with sections 6, 7, and 12 of the FLSA.

Keystone's argument that *Troyer* did not decide FLSA coverage distorts legal analysis. In *Troyer*, the record failed to establish whether the company operated prior to the 1989 amendments to the FLSA, and the court could not therefore apply the preservation of coverage clause. The court stated unequivocally, however, that "previously covered enterprises remain accountable under FLSA through the grandfather clause" of section 203. 1996 WL 198111 at 2. Further, the court remanded the case to develop evidence on whether the company was formed before the 1989 amendments and thus subject to coverage.

In this case, there is no need to remand because Keystone stipulated to both individual and enterprise coverage under the FLSA. Stipulation (5) states that Keystone employed Martin in commerce or in the production of goods for commerce within the meaning of the FLSA, thus establishing enterprise coverage under section 212(c). 29 U.S.C.A. § 212(c). Stipulation 15 states that President Daniel Liez manages Keystone's daily operations, makes all employment decisions, and determines corporate policy, thus establishing individual coverage under section 203(d). 29 U.S.C.A. § 203(d).

Having stipulated to coverage under the FLSA, Keystone's argument that it is exempt from coverage because its annual receipts are less than the statutory amount flouts common sense. Further, its argument that the preservation clause applies only to the same employees who worked for Keystone on its 1990 effective date flies in the face of the statute, which states that enterprise coverage is determined by evaluating the activities and organization of a business rather than individual employees. 29 U.S.C.A. § 3(r)(1); 29 C.F.R. § 779.236. Accordingly, we affirm the ALJ's conclusion that Keystone is subject to the FLSA.

II. The ALJ properly found that Keystone violated section 12 of the FLSA by permitting a minor to operate prohibited tools.

Section 12 of the FLSA provides that covered employers may not employ children under "oppressive child labor" conditions. 29 U.S.C.A. § 212(c). The Act defines "oppressive child labor" as including, for minors under the age of 18, "any occupation which the Secretary of Labor shall find and by order declare to be particularly hazardous" to such children or "detrimental to their health or well-being."

The Secretary has promulgated hazardous occupation orders that prohibit or strictly regulate certain activities by employed minors between the ages of 16 and 18. See 29 C.F.R. Part 570, Subpart E. The applicable regulations in this case are Hazardous Occupation Order No. 5, 29 C.F.R. § 570.55, which prohibits the use of power-driven, wood-working machines, and Order No. 14, which covers saws and shears, 29 C.F.R. § 570.65.

The ALJ's discussion of Keystone's violations of the two hazardous occupation orders set forth at 29 C.F.R. §§ 570.55 and 570.65 is comprehensive and thus needs little further elucidation. D. & O. at 10-12. We have reviewed the record and conclude that

substantial evidence supports his conclusions. Therefore, we affirm his findings and address the arguments Keystone raises on appeal.

Keystone first argues that WHD failed to meet its burden of proof to establish any violations of the hazardous occupation orders because the ALJ erred in treating WHD witnesses as credible. Keystone describes testimonial flaws in each of the five witnesses called by WHD and contends that the ALJ failed to discuss their inconsistent statements. Keystone also contends that its witnesses produced credible testimony that the ALJ ignored. Respondent's Brief at 27-36.

For example, Keystone points out that McDowell testified that he saw Martin use both the miter saw and the nail gun five to ten times. TR at 24. McDowell added that he assigned Martin to use both and saw him carry out the assignments. TR at 26. However, in his interview with the WHD investigator, William P. Nacios, on April 28, 2000, McDowell said he did not observe Martin using the circular saw. Cite to PX. Asked about this inconsistency at the hearing, McDowell explained that he had mistakenly called the miter saw a circular saw,⁶ which was a "totally different" tool, and that he saw Martin using the miter saw. TR at 27-28.

Also, Keystone accuses employee John Miller of perjury because he told the investigator that Martin used the miter saw and nail gun "every other day," PX 3, but testified at the hearing that he saw Martin use a miter saw once or twice but never saw him use a nail gun. TR at 49-50. Asked about this discrepancy, Miller replied that he had "misled the thing by saying every day" because not every job had molding to be installed. TR at 53. On cross examination, he explained that he had sat down and thought about whether he had actually seen Martin use the nail gun and concluded that he had not. TR at 62-64.

Next, Keystone notes a "glaring inconsistency" in the testimony of the investigator, Nacios, who stated at the hearing that Martin was the first person he interviewed about possible child labor violations.⁷ TR at 134. In fact, he interviewed Miller on January 28, 2000, and Martin on February 8, 2000. RX 10-11 (unmarked).

Finally, Keystone contrasts Chmielkowski's testimony that he saw Martin use the miter saw and nail gun an average of two to three times a week with Martin's own statements that he used the tools maybe three or four times. Actually, Chmielkowski testified that the number of times varied, depending on whether the job required molding work. "It could be a couple of times a week. It could be two weeks without using [them], so it varies." TR at 73.

⁶ The miter saw has a circular blade. PX 2.

⁷ Other Keystone employees filed claims for overtime pay, which were settled. TR at 99-100.

None of these purported inconsistencies materially or negatively affects the weight of the evidence or the credibility of the witnesses. Nacios' inability to remember whom he interviewed when has little bearing on the content of the interviews. The inconsistencies of McDowell, Miller, and Chmielkowski in recalling the exact number of times they saw Martin use which tool over a five-month period are to be expected. The point is that these three witnesses corroborated Martin's statements that he used the prohibited power tools while working for Keystone. The fact that Keystone's witnesses consistently testified that they did not see Martin use the tools does not support a conclusion that he never used them. *See* RX 2; TR at 148, 155-56, 160-61, 265.

Keystone charges that the ALJ's description of Martin's testimony is "utterly remarkable" and "incomprehensible." Brief at 28-29. For example, Keystone notes that the ALJ was "impressed" with Martin's ability to explain how the miter saw and nail gun worked, but the ALJ did not consider that Martin had worked for two years since leaving Keystone, *see* TR at 219, and had obviously learned how to use these tools. *Id.* Keystone offered no evidence that this happened during Martin's subsequent employment. Therefore, the ALJ had nothing to consider.

Keystone challenges the ALJ's statement that Martin was hired as a "go-fer" but cut pre-marked molding and nailed it in for other workers. Keystone argues that a go-fer does only menial tasks, and therefore, Martin could not have used the miter saw and nail gun. Similarly, Keystone argues the ALJ erred in accepting Martin's testimony that he gave a copy of his birth certificate to the company after he was hired because Keystone had no such document. Keystone uses the same circular reasoning in asserting that because the installation of molding is highly skilled work, and Martin was not trained, he could not have used the miter saw or nail gun.

Our review of Martin's testimony confirms the ALJ's acceptance of his statements as credible. TR at 217-49; *see* PX 6. Martin described articulately and fully his work duties, his poor attendance and immature attitude, and his assault on Liez on the day he was fired. *See* RX 5-6.

Martin explained why he kept copies of his birth certificate and social security card, how he was hired over the telephone, why he lied about being in jail so he could not come to work, and what his relationship was with the three corroborating co-workers. He also distinguished the circular saw from the miter saw and explained the confusion of terms. TR at 242-46. On cross-examination Martin was completely candid about his altercation with Liez and his friendship with his three co-workers. TR at 228-36. Accordingly, we affirm the ALJ's credibility determinations. *See Administrator, Wage and Hour Div. v. Q. & D. d/b/a Lamplighter Tavern*, ARB No. 92-CLA-21, slip op. at 3-4 (Sec'y May 11, 1994) (great deference is due the fact-finder's credibility determinations, particularly where he or she observed "variations in demeanor and tone of voice").

Finally, Keystone makes two other arguments. First, Keystone objects to the ALJ's decision to take judicial notice of the fact that Keystone worked mainly on larger buildings and homes in which its workers were performing their duties in different

rooms. D. & O. at 12, Respondent's Brief at 32. As WHD points out, even if present, such error is harmless because various employees testified that they worked in separate rooms. TR at 50, 65, 68, 223, 226.

Second, Keystone argues that it was denied due process because the ALJ declined to address whether DOL conducted a full and fair investigation and therefore all penalties should be eliminated. Respondent's Brief at 14-16, 21-26. The ALJ admitted the depositions of two WHD employees, Stewart Bostic and James Kolpack, who disagreed over whether to interview witnesses offered by Keystone. RX 14-15. Regardless of the fairness of the WHD investigation, its decision is only a recommendation, to which Keystone excepted. Keystone had ample opportunity at the hearing to put on evidence supportive of its case and did so with the witnesses it had asked WHD to interview. Therefore, Keystone was not denied due process.

III. The ALJ erred in neglecting to review independently the \$2,675.00 civil money penalty assessed against Keystone and in reducing it by \$275.00.

In a timely filed petition for review, the WHD appealed the ALJ's elimination of the \$275.00 penalty assessed against Keystone for a record-keeping violation. Administrator's Brief at 8. Keystone argues that because the ALJ failed to consider the appropriateness of the \$2,400.00 penalty, the Board should eliminate all penalties. Respondent's Brief at 17-21.

Keystone raised the issue of the civil money penalties in excepting to WHD's initial assessment and requested a hearing before the ALJ. ALJX 1; *see* Respondent's December 20, 2002 Brief at 9-22, Respondent's Reply Brief at 4-8; TR at 16. However, the ALJ's decision is devoid of any discussion whether the assessed penalties complied with the statute and the regulations. *See Elderkin*, slip op. at 9 (once a civil money penalty has been challenged before the ALJ, the issue is not whether the penalty comports with Form 266 but whether it complies with the statute and regulations). Accordingly, we will consider the pertinent factors to be weighed in determining the appropriateness of the entire, \$2,675.00 penalty assessed against Keystone. *See Administrator, Wage and Hour Div. v. Ahn's Mkt., Inc.*, ARB No. 99-024, ALJ No. 97-CLA-23, slip op. at 7 (ARB July 28, 2000) (the ARB has authority to conduct a de novo review of the penalty assessed to determine its appropriateness).

Under Section 16(e) of the FLSA, an employer who violates the child labor provisions shall be subject to civil penalties for each minor employed in violation of the statute or the regulations. The maximum penalty for each employee is \$10,000.00. In determining the amount of the penalty, "the appropriateness of [the] penalty to the size of the business of the person charged and the gravity of the violation shall be considered." 29 U.S.C.A. § 216(e).

The implementing regulation reiterates the statute. 29 C.F.R. § 579.5(a). Subsection (b) provides certain factors to consider in determining the size of the business,

including the number of persons employed, the dollar volume of sales or business done, the amount of capital investment and financial resources, and such other information as may be available relative to the size of the business. 29 C.F.R. § 579.5(b). Subsection (c) provides factors relating to the gravity of the violation, including any history of prior violations, evidence of willfulness or failure to take reasonable precautions to avoid violations, the number of minors illegally employed, the age of minors so employed and records of 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 the hours of the day and whether such employment was during or outside school hours. 29 C.F.R. § 579.5(c).

By contrast, subsection (d) deals with mitigating factors of a violation and the determination of whether a civil penalty would be necessary to achieve the purposes of the FLSA. These are whether the violations were de minimis, whether there is no previous history of child labor violations, whether the employer's assurance of future compliance is credible, and whether exposure to obvious hazards was inadvertent rather than intentional. 29 C.F.R. § 579.2(d). *See generally, Administrator, Wage and Hour Div. v. Navaho Mfg.*, 92-CLA-13 (Sec'y Feb. 21, 1996).

The WHD has provided guidelines to its investigators in assessing civil money penalties. *See Wage and Hour Field Operations Handbook*, Chapter 54, "Investigation and Related Forms," WH-266-1 (July 11, 1994). The handbook states that the purpose of the civil money penalty is to issue assessments that "will serve as an effective deterrent to violations" of the FLSA's child labor provisions. Part A of the WH-266 form, listing the factors for which a penalty shall be recommended, includes: "Any HO [hazardous occupation] violation or employment under legal age occurred." Part B lists standard penalties of \$275.00 for a record-keeping violation and \$1,200.00 for violation of a HO order for a 16 or 17-year-old. Part E, covering reductions, is applicable only in cases involving record-keeping or non-hazardous violations, which do not include any aggravating factors, such as injury, that would increase the penalty.

The Board has held that this standard schedule for the initial recommendation of civil money penalties comports with the pertinent regulations. *Administrator, Wage and Hour Div. v. Thirsty's, Inc.*, ARB No. 96-143, ALJ No. 94-CLA-65, slip op. at 5-6 (ARB May 14, 1997), *aff'd sub nom. Thirsty's v. United States Dep't of Labor*, 57 F. Supp. 2d 431, 436 (S.D. Tex.1999). However, Form 266 is not a substitute for the ALJ's independent review of the appropriateness of the assessed penalty; it is merely a starting point in assessing such a penalty and may be modified by WHD, the ALJ, and the ARB. *Id.*

In this case, Keystone stipulated to annual gross receipts or sales of more than \$250,000.00 from 1990 to 2000, and to employment of 10 to 14 full and part-time workers. ALJX 13. The WHD investigator, William P. Nacios, explained how he calculated the three penalties, referring to the CMP Computation Worksheet, the computerized version of WH-266. TR at 100-04. He testified without contradiction that Keystone was not in financial difficulty and that "based on the sales of \$350,000.00 for

the last three years, plus their payment of back wages in the amount of \$5,100.00 a few months prior . . . the company could afford to pay the civil money penalty.” TR at 119. Asked why he had not reduced the penalty, Nacios reiterated that he felt the company was financially able to pay because their average gross sales for the past three years were about \$350,000.00 and he had received no documentation to show that Keystone was in financial straits. *Id.*

Additionally, Keystone’s president, Daniel Liez, was asked whether he was claiming inability to pay the assessed penalty. He replied: “It’s certainly a hardship. I mean, that’s a lot of money. Is there an inability, no. If I have to, I can borrow the money, but it is certainly a hardship. Is there an inability, no, but that is a lot of money.” TR at 261-62. Liez added that he did not have to borrow the \$5,175.54 he paid in back wages, which came from the company’s resources. *Id.* Based on Keystone’s stipulations and the testimony of Nacios and Liez, we conclude that Keystone was a well-established, financially solid small business.

The fact that Keystone is a small business, however, does not mandate a lesser penalty because the gravity of the violations must also be considered. We believe that the two infractions found in this case were neither de minimus nor inadvertent. *Cf. Administrator, Wage and Hour Div. v. Horizon Publishers and Distributors*, No. 90-CLA-29, slip op. at 7 (Sec’y May 11, 1994) (Board finds that children stuffing envelopes at home while watching television was a de minimus violation).

While only one minor was involved and no injury resulted, Martin, admittedly immature, engaged in multiple uses of the prohibited tools over five months of sporadic employment. TR at 220, 2223, 227; PX 6. He testified that he was handed pre-marked molding and told to cut it, using the miter saw. TR at 222. He also testified that he “went behind” other workers and used the nail gun to secure molding around the perimeters of rooms. TR at 223. Two other co-workers, Miller and Chmielkowski, corroborated Martin’s use of the miter saw and nail gun. TR at 53, 71-73, 82.

Nor were the infractions inadvertent. Martin’s co-worker, McDowell, who was also the foreman, testified credibly that he assigned Martin to use both tools and saw him carry out the tasks. TR at 26, 78. McDowell added that installing molding was a simple job,⁸ TR at 38, and just about all the employees did it, TR at 39. Martin testified that it was “normal” for co-workers to ask him to use the miter saw or the nail gun. In fact, Liez himself asked Martin to use the miter saw once. TR at 222-3. Also, Nacios testified that Martin used the two pieces of equipment “as a regular part of his job.” TR at 105.

Further, these power tools are indisputably dangerous. Keystone’s own expert witness, Neil McNicholl, testified that only “a foolish person” would use the miter saw and nail gun without specific training because even qualified workers have been badly

⁸ Miller agreed that molding installation was an easy job. “I mean, you have to have a little skill but, you know, you don’t have to be a rocket scientist to cut an angle.” TR at 61.

hurt. TR at 195-201. Liez himself testified about an employee who was hurt using a saw. TR at 260. And Nacios stated that he considered the tools “extremely dangerous.” TR at 105. Indeed, a review of the manuals for both tools reveals multiple warnings and safety rules of operation. PX 1-2.

Based on these factors, we find that the \$1,200.00 fine for each violation of the hazardous occupation orders is appropriate, and that there are no mitigating factors that would support any reduction. *Compare Administrator, Wage and Hour Div. v. Chrislin, Inc. d/b/a Big Wally’s*, ARB No. 00-022, ALJ No. 99-CLA-5, slip op. at 11 (ARB Nov. 27, 2000)(Board reduces penalty of \$56,762.50 to \$16,143.75 based on the small size of the business and the gravity of the violations) *with Elderkin*, slip op. at 14 (Board reinstates \$71,000.00 penalty against small business based on the gravity of the violations).

We next consider the ALJ’s elimination of the \$275.00 penalty, a decision he seems to have based on the fact that WHD found two record-keeping violations but assessed only one penalty. We find that the record evidence does not support the ALJ’s conclusion that the WHD failed to advance the basis for its assessment of the penalty. D. & O. at 15.

Section 212 of the FLSA provides that “to carry out the objectives of this section, the Secretary may by regulation require employers to obtain from any employee proof of age.” 29 U.S.C.A. § 212(d). At issue in this case is the implementing regulation found at 29 C.F.R. § 516.2(a)(3),⁹ which provides :

(a) Items required. Every employer shall maintain and preserve payroll or other records containing the following information and data with respect to each employee to whom section 6 or both sections 6 and 7(a) of the Act apply:

...

(3) Date of birth, if under 19, . . .

29 C.F.R. § 516.2(a)(3).

First, Keystone stipulated to the fact that Martin was under 19. ALJX 13. Therefore, Keystone was required to have in its possession proof of Martin’s age. 29 U.S.C.A. § 212(d); 29 C.F.R. § 516.2(a)(3); *Lamplighter Tavern*, slip op. at 5. While office manager Felicia Saunders testified that Martin had told her he was 18, Keystone’s

⁹ The WHD did not appeal the ALJ’s finding that Keystone had not violated section 570.5(c), which warns the prospective employer of a minor to obtain a certificate of proof of age. Administrator’s Brief at 2 n.1. Thus, we need not address this issue.

accountant had no record proof of his age. TR at 189-90, RX 4. Martin testified that he gave a copy of his birth certificate to Keystone the first day of work. TR at 225, 231. Further, Martin stated that his co-workers and Liez knew he was 17 because they all joked about the facts that he could not go into a bar and had to have one of them buy cigarettes for him. TR at 226-27.

Second, the penalty assessment worksheet states: “CL [child labor] Record-keeping – failure to have date of birth.” PX 5. This language mirrors that found at 29 C.F.R. § 516.2(a)(3), “Date of birth, if under 19.” While the worksheet does not specify section 516.2(a)(3), it states directly across from the record-keeping entry, “failure to have date of birth,” the amount “computed” and “recommended” as a penalty, \$275.00. Further, the record-keeping violation “where records were not kept” states “No CMP” or zero penalty. Nowhere on the worksheet is there any requirement that the specific regulation be cited. Nor does the form have a space for such citation. Based on the above evidence, we find that the worksheet itself clearly indicates that the \$275.00 penalty is for a violation of section 516.2(a)(3).

Additionally, Nacios testified that when he interviewed Keystone’s accountant, he asked for the dates of birth of any minors employed in the past two years and was “not given any.” TR at 94, 96-97. When he determined that Martin was 17 at the time of his employment, Nacios entered a record-keeping violation “for failure to have dates of birth of minors under 19 years of age.” TR at 101. Nacios acknowledged that section 516 requires the employer to have the date of birth on file for every person under the age of 19, and added that even if Martin had not used the nail gun or miter saw, Keystone was still required to have his date of birth on file because the regulation does “not stipulate any condition.” TR at 102.

Based on Nacios’ testimony and the worksheet, we reverse the ALJ’s finding and reinstate the \$275.00 penalty. *See Administrator, Wage and Hour Div. v. Western Steer Steakhouse, Inc.*, Nos. 93-CLA-18, 93-CLA-22, 93-CLA-23, slip op. at 7 (Sec’y Sept. 27, 1996) (Board reinstates the full penalty for violations spanning the 1989 FLSA amendments); *see also Administrator, Wage and Hour Div. v. Fisherman’s Fleet, Inc., d/b/a Maplewood Fish Mkt.*, ARB No. 03-025, ALJ No. 01-CLA-034, slip op. at 9 (Board reverses the ALJ’s 25 percent reduction of the \$132,575.00 penalty assessed for violations involving the death of a minor).

We note that the total penalty is only 27 percent of the maximum that could be assessed and we find that anything less would have failed to serve any credible deterrent effect. *See Ahn’s Mkt.*, slip op. at 7 (noting that Congress’ tenfold increase in the maximum penalty in 1990 was intended to increase the deterrent effect of civil fines for child labor violations).

CONCLUSION

For the foregoing reasons, we **REVERSE** the ALJ's elimination of the \$275.00 civil money penalty and **AFFIRM** his findings that Keystone violated two hazardous occupation orders and a record-keeping regulation. Keystone Floor Refinishing Company, Inc. is **ORDERED** to pay a civil money penalty of \$2,675.00.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge