



In the Matter of:

**SECRETARY OF LABOR, THE
UNITED STATES DEPARTMENT OF
LABOR,**

ARB CASE NO. 96-154

ALJ CASE NO. 95-CLA-0008

PLAINTIFF,

DATE: March 27, 1997

v.

**JERRAL D. PARRIS, INDIVIDUALLY,
D/B/A J. PARR CONSTRUCTION AND
DESIGN, INC. AND HARMONY WOOD
PRODUCTS**

and

**JERRAL D. PARRIS, PRESIDENT,
J. PARR CONSTRUCTION AND DESIGN,
INC., D/B/A HARMONY WOOD PRODUCTS,**

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD^{1/}

FINAL DECISION AND ORDER

Before us for review is the Summary Decision and Order (S. D. and O.) issued on May 24, 1996 by the Administrative Law Judge (ALJ) in this case arising under the child labor provisions of the Fair Labor Standards Act, as amended (FLSA), 29 U.S.C. § 201 *et seq.*, and

^{1/} On April 17, 1996, a Secretary's Order was signed delegating jurisdiction to issue final agency decisions under this statute and the implementing regulations to the newly created Administrative Review Board. Secretary's Order 2-96 (Apr. 17, 1996), 61 Fed. Reg. 19978 (May 3, 1996). Secretary's Order 2-96 contains a comprehensive list of the statutes, executive order, and regulations under which the Administrative Review Board now issues final agency decisions.

the regulations published at 29 C.F.R. Parts 579 and 580. The issues in this case are (1) whether Respondents Jerral D. Parris, Individually, d/b/a J. Parr Construction and Design, Inc., and Harmony Wood Products (Parris), and Jerral D. Parris, President, J. Parr Construction and Design, Inc., d/b/a Harmony Wood Products (Harmony), employed minors in occupations declared to be hazardous by regulations promulgated by the Secretary of Labor; and (2) whether the civil money penalties assessed by the Administrator, Wage and Hour Division, U.S. Department of Labor (Administrator), were appropriate and reasonable. For the foregoing reasons the decision of the ALJ is affirmed in part and reversed in part.

BACKGROUND

Harmony manufactures and produces materials used for the construction of Harmony Wood homes, and sells its wood by-products to other companies. S. D. and O. at 3, Transcript (T.) 83. The Wage and Hour Division of the Department of Labor (Wage and Hour) initiated an investigation of Harmony after receiving a complaint. Kenneth Stripling (Stripling), a Wage and Hour Investigator, conducted the investigation into Harmony's employment practices from September of 1991 to September of 1993. T. 272. Stripling and Parris met twice during Stripling's investigation, and during those meetings Parris acknowledged that he allowed minors to operate chain saws and nail guns. Parris also admitted that he did not keep records of the minors' birth dates. S. D. and O. at 7.

As a result of the observations made during Stripling's investigation, Wage and Hour alleged violations in the following areas:

Employment of minors between the ages of sixteen and eighteen in the occupation of operating or helping the operator on power-driven woodworking machines. 29 C.F.R. § 570.55 [Hazardous Order Number 5];

Employment of minors between the ages of sixteen and eighteen in the occupation of operating a high-lift truck, which includes forklifts. 29 C.F.R. § 570.58(a)(1) [Hazardous Order Number 7];

Employment of minors between the ages of sixteen and eighteen in the occupation of operating or helping on a power-driven circular saw or band saw. 29 C.F.R. § 570.65 [Hazardous Order Number 14];

Employment of minors between the ages of sixteen and eighteen in all occupations in roofing operations. 29 C.F.R. § 570.67 [Hazardous Order Number 16];

Employment of minors beyond eighteen hours in any one week, and more than three hours in any one day, when school is in session. 29 C.F.R. § 570.35(a)(3) and (a)(5); and

Failure to keep records concerning minors' dates of birth and proofs of age. 29 C.F.R. § 579.3(5).

S. D. and O. at 3-4. Stripling completed a Civil Money Penalty Report, Form WH-266, assessing Harmony \$12,750.00 in penalties. Government Exhibit 10. Stripling testified that this amount was calculated^{2/} based on violations involving the employment of four minors (Brad Barrett, Keith Barrett, Thomas Hobbs, and Jeremy Stone) who performed work for Harmony on March 28, 1994, and again on August 10, 1994.

Pursuant to 29 C.F.R. § 580.3, the Wage and Hour Division served a determination of child labor violations and an assessment of civil money penalties totaling \$12,750.00 on Parris and Harmony by certified mail March 28, 1994, and again on August 10, 1994. Parris timely excepted to the notice of alleged violations and on November 8, 1994, the matter was referred to the ALJ. On September 20, 1995, the Administrator filed a Motion for an Order of Default, seeking sanctions against Parris for failure to comply with an Order to Compel Discovery which was issued on August 10, 1995. On August 15, 1995, the ALJ issued a Notice of Hearing and Prehearing Order stating that a hearing in the matter would take place on October 23, 1995.

On September 29, 1995, the Administrator filed a Motion for Summary Decision, arguing that no genuine issue of material fact was present in this matter. On October 11, 1995, the ALJ issued an Order to Show Cause, ordering Harmony to demonstrate why the Administrator's motion should not be granted. The Order stated that Parris, who previously expressed his intention to appear *pro se*, would be given the opportunity to present oral argument in opposition to the motion at the hearing.

A hearing was held in Manchester, Tennessee on October 23 and 24, 1995. During his opening statement Brian Dougherty (Dougherty), counsel for the Administrator, stated that he would introduce evidence of further violations discovered since the initial investigation, and that the Administrator intended to increase the civil money penalties based on this information. T. 49, 70. Parris responded by stating: "Your Honor, does that sound like sort of making it up as you go? The \$12,750 was the number that I'm aware of." T. 50. The ALJ ignored Parris' concerns and informed him that he would have an opportunity to refute the new allegations during the hearing. T. 50.

^{2/} Form WH-266 is used to compute child labor violation monetary penalties. Part A determines what factors are involved in the violation. Part B determines the amount of the penalty by using a pre-established dollar amount for a violation multiplied by the number of violations. Parts C and D provide for additional penalties involving serious injury or death. Part E allows for reductions in the penalty when appropriate. Part F represents the grand total of the penalty.

On the morning of the second day of the hearing, Parris read a statement setting forth his objections to the hearing and, in protest, withdrew from the hearing before Stripling had the opportunity to testify. At that time the ALJ informed Parris that withdrawal from the hearing meant that summary decision would likely be entered on behalf of the Administrator. T. 270.

The ALJ allowed the hearing to continue in Parris' absence. Dougherty called Stripling to the witness stand, whereupon Stripling testified that after preparing and interviewing the witnesses for the hearing, he learned that Harmony committed additional violations that were not included on the original Form WH-266. T. 283. Stripling informed the ALJ of the additional violations and submitted a second Form WH-266, increasing the civil money penalties to \$44,650.00. T. 287; Government Exhibit 11.

In his S. D. and O., the ALJ held that Parris had violated the FLSA and did not demonstrate the elements necessary for a reduction in the penalty as recalculated by Stripling. S. D. and O. at 11.

DISCUSSION

The Administrator's findings and Parris' own admissions indicate that Harmony violated the FLSA by employing children under the age of eighteen in hazardous occupations. S. D. and O. at 8-10. Parris believes that he was justified in employing these minors because Harmony is a "school" designed to "help youth gain skills at an early age." Rebuttal Brief by Respondent, October 15, 1996, p. 4. The ALJ found that Parris acted in reckless disregard of the child labor provisions of the FLSA, and his findings are supported by substantial evidence on the record as a whole.

The ALJ properly applied the factors to be considered when determining the amount of the civil money penalty assessed pursuant to the original Form WH-266. The sole factor listed in the aforementioned regulations that might otherwise justify a reduction in the penalty is the financial status of Harmony. Although Parris was reluctant to comply with the ALJ's discovery orders that would have evidenced the size of his business, the record indicates that Harmony may have been small enough to qualify for a reduced penalty. Nevertheless, this fact is outweighed by the other factors cited in the aforementioned regulations. As stated by the ALJ:

Parris' lack of cooperation, both before and during the hearing, casts doubt on the sincerity of his assurance of future compliance. Given Parris' disdain for the regulations and this administrative hearing process, a civil penalty is necessary to achieve the objectives of the Act. Parris demonstrated no interest in the age of his employees, heedlessly exposing them to obvious hazards. Therefore, the violations cannot be found to be *de minimis*.

S. D. and O. at 11. Parris has a history of prior violations, having failed to pay back wages to employees in 1980, 1985, and 1987. S. D. and O. at 10. He has not evidenced a desire to comply with the FLSA in the future, and we see no reason why the penalty should be reduced on factual grounds.

However, it was inappropriate for the ALJ to allow the Administrator to more than triple the amount of civil money penalties sought by filing an additional Form WH-266 after the commencement of the hearing. Title 29 of the Code of Federal Regulations requires the Administrator to give written notice of civil money penalties.^{3/} The Administrator's determination of the amount of the penalty for a particular violation or violations of the child labor provisions becomes final 15 days after receipt of the notice of penalty by certified mail by the employer. 29 U.S.C. § 216(d)(3). The regulations require that the notice to the employer set forth, at a minimum, the amount of the penalty, the reasons for the penalty, and the employer's right to except to the penalties and request a hearing. 29 C.F.R. § 580.4.

Parris indicated at the beginning of the hearing that he had no knowledge of the additional allegations. Because Parris was appearing *pro se*, the ALJ should have recognized his statement regarding the new allegations ("Your Honor, does that sound like sort of making it up as you go? The \$12,750 was the number that I'm aware of." T. 50.) as an objection to their introduction. *See, e.g., Saporito v. Florida Power & Light Company, et al.*, Case No. 94-ERA-35, Final Dec. and Order, July 19, 1996 (complainant appearing *pro se* is entitled to a certain degree of adjudicative latitude); *Grizzard v. Tennessee Valley Authority*, Case No. 90-ERA-52, Final Dec. and Order, Sept. 8, 1992 (*pro se* Complainant cannot be held to the same standard of pleadings as if he were represented by legal counsel).

Parris never received a copy of the second Form WH-266 completed by Stripling and was not present to refute the claims contained in that document. The additional allegations that were not part of the Administrator's initial notice of violations were not properly before the ALJ because they had not been served in accordance with the regulations. Parris was not afforded proper notice of the additional allegations, and he had no opportunity to engage in discovery or prepare a defense to the new charges. It was improper for the ALJ to incorporate the additional allegations into what, in effect, became a default judgement against Parris after his departure from the hearing.

^{3/} 29 C.F.R. § 580.3 provides that:

Whenever the Administrator determines that there has been a violation by any person of section 12 of the Act relating to child labor or any regulation issued under that section, or determines that there has been a repeated or willful violation by any person of section 6 or section 7 of the Act, and determines that imposition of a civil money penalty for such violation is appropriate, the Administrator shall issue and serve a notice of such penalty on such person in person or by certified mail. Where service by certified mail is not accepted by the party, notice shall be deemed received on the date of attempted delivery. Where service is not accepted, the Administrator may exercise discretion to serve the notice by regular mail.

Therefore, it is hereby ordered that the determination of the ALJ regarding the Administrator's motion for summary judgment is AFFIRMED, in part, and Parris and Harmony are therefore ordered to pay the civil money penalties assessed by the Administrator in the amount of \$12,750.00. The portion of the S. D. and O. regarding the assessment of additional penalties is REVERSED and these claims are DISMISSED WITHOUT PREJUDICE.

SO ORDERED.

DAVID A. O'BRIEN

Chair

KARL J. SANDSTROM

Member

JOYCE D. MILLER

Alternate Member