U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

JOHN R. FRASER,
DEPUTY ADMINISTRATOR
WAGE AND HOUR DIVISION
U.S. DEPARTMENT OF LABOR,

PLAINTIFF,

v.

AHN'S MARKET, INC. d/b/a VALLEY SUPREME SUPERMARKETS and STEVE AHN,

DEFENDANTS.

ARB CASE NO. 99-024

ALJ CASE NO. 97-CLA-33

DATE: July 28, 2000

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:
For the Plaintiff:
Leif G. Jorgenson, Esq., Steven J. Mandel Esq., Linda Jan S. Pack Esq., *Washington, DC*

For the Defendants:
Mark N. Reinharz, Esq., *Pine Bush, New York*

FINAL DECISION AND ORDER

This case arises under Section 12(c) of the Fair Labor Standards Act ("FLSA") of 1938, as amended, 29 U.S.C. §212(c) (1994), which prohibits the employment of "oppressive child labor" by any covered employer. At issue is whether Respondents Ahn's Market, Inc. and Steven Ahn (collectively "Ahn") employed minors in violation of 29 C.F.R. §570.63 (1998) (governing the employment of minors between 16 and 18 years of age in occupations involved in the operation of paper-products machines), and whether Respondents Ahn employed minors in violation of 29 C.F.R. §570.35 (governing periods and conditions of employment of minors 14 to 16 years of age). Also at issue, assuming a violation of either or both of the foregoing Department of Labor regulations (and thus violation of FLSA Section 12(c)), is whether and to what extent Respondents are subject to civil money penalties ("CMPs") under 29 U.S.C. §216(e).

This action arose as the result of an investigation of Respondents Ahn by the Wage and Hour Division of the Department of Labor in 1996. The investigation found Ahn committed violations of the Fair Labor Standards Act involving 10 minor employees: nine minors between the ages of 16 and 18 loaded and/or operated a scrap paper baler in violation of Hazardous Occupations Order No. 12 (29 U.S.C. §570.63), and one minor worked for two to three months immediately prior to his sixteenth birthday in violation of the hours-of-work restrictions of Child Labor Regulation No. 3 (29 C.F.R. §570.35). As a result, in September 1996, Wage and Hour issued a formal complaint assessing civil money penalties against Ahn totaling $11,250 for all violations.

Respondents took exception to Wage and Hour's determinations and requested a hearing before an Administrative Law Judge (ALJ). Following the hearing, the ALJ issued a Decision and Order (D. & O.) on November 6, 1998, in which the ALJ upheld six of the nine hazardous occupations violations and the hours-of-work violation. The ALJ also approved Wage and Hour's assessed penalties of $7,650 for the seven violations. Respondents appealed the ALJ's decision to the Administrative Review Board (ARB).[1/] We have jurisdiction of this case under 29 C.F.R. §580.13.[2/]

For the reasons discussed below, we affirm the ALJ's determination of six violations of Department of Labor Hazardous Occupations Order No. 12, and the violation of the hours-of-work restrictions imposed by Child Labor Regulation No. 3. The Board upholds the assessment of CMPs for violation of the hazardous occupations provisions set forth at 29 C.F.R. §570.63. However, we vacate the CMP assessed for violation of the hours-of-work proscriptions of 29 C.F.R. §570.35.

BACKGROUND

Respondents own the Valley Supreme Supermarket in Pine Bush, N.Y., which Ahn purchased in 1994. T. (transcript of hearing) 246-47. The supermarket is an independent market not affiliated with any chain of stores. T. 247. It has 20-25 full time employees, and 40-50 part time workers, many of whom are minors. T. 240-41; 221. Since purchasing the supermarket, Respondents have operated a scrap paper baler at the rear of the store for crushing scrap cardboard and paper, and for forming the crushed scrap into bales wrapped with wire for removal by a refuse company. T. 223-224, 248.

[1/] The Deputy Administrator has not appealed the ALJ's dismissal of the three hazardous occupations violations, which were dismissed due to the failure of the Administrator to comply with the ALJ's pre-trial order. *See* Statement of the Deputy Administrator in Opposition to Petition for Review, at 3 nn. 1 & 2.

[2/] The Secretary of Labor has delegated her authority and responsibility for review of appeals of ALJ decisions under the Fair Labor Standards Act of 1938, as amended, to the ARB. Secretary's Order No. 2-96 (Apr. 17, 1996), 61 Fed. Reg. 19978 (May 3, 1996).

Respondents had a policy that any employee at Valley Supreme under the age of 18 could not operate the baler or remove baled scrap from it.[3/] T. 249-50. It communicated this policy to its employees in several ways. Two warning signs were prominently displayed on the baler, one near the operating button and one on the gate, which said, "WARNING Federal Regulation Prohibits Operation of this Equipment by Persons under 18 Years of Age." R (Respondent's exhibit) - B, pages 1-8; R- C. When a new employee was hired, the warning signs on the baler would be pointed out during the employee's initial tour of the store, and he/she would be informed of the store's policy against operation of the baler by anyone under 18 years of age. T. 222, 238. The store's evening manager, under whom most of the minor employees worked, held monthly meetings in which, among other things, the policy against operation of the baler by anyone under 18 was reviewed. T. 225. Moreover, the store's general manager testified that he told employees under 18 that it was against the law for them to operate the baler, including unloading it, T. 238-39, and that he would immediately reprimand any underage employee caught operating or unloading the baler. T. 240.

Respondents' policy against minors operating the baler did not, however, prohibit minors from loading or placing materials in the baler. Steven Ahn testified that it was his understanding that although minors under 18 were not allowed to operate the baler, they were allowed to load it. T. 248. Consistent with Steven Ahn's testimony, the evening store manager testified that while he told the minor employees they were not allowed to unload the baler or push the operation button, he also told them that "the only thing they could do on the baler is throw the cardboard in." T. 227.

The Wage and Hour investigator who conducted the investigation of Valley Supreme Supermarket summarized her findings for each minor employed by Respondents on a Wage and Hour Form 103. *See* P-5. The investigator found that during the period in question (the latter part of 1995 and first half of 1996) four employees under the age of 18 both loaded and operated the baler, with an additional five minors loading the baler only.[4/] *Id. See also* testimony of the investigator, T. at 85-97, 106-107, 123-124, 126. Corroborating the investigator's findings, several employees testified before the ALJ without refutation that the minor employees operated

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[3/] To operate the baler, an employee had to first insert a key to start the baler, and push a button to commence operation, after having ascertained that a gate covering the loading area was closed. T. 244. The baler could not operate when the gate was raised. T. 224.

[4/] As previously indicated, the determination of Wage and Hour with regard to the hazardous occupation violation was reduced by the ALJ to two minor employees who both loaded and operated the baler, and four who threw materials in the baler only. *See* footnote 1, *supra*.

the baler.[5/] T. 47-48, 137, 141. Indeed, one of the minor employees testified that he was actually instructed by a supervisor to throw material in the baler. T. 132.

The Wage and Hour investigator also found that one minor under the age of sixteen worked in violation of the hours-of-work restrictions in the regulations. *See* P-5. The employee in question had mistakenly listed his birthday on his employment application as December 28, 197**8**, while his working papers listed the correct date as December 28, 197**9**. T. 49. Based on the correct birth date, the employee was two to three months short of his sixteenth birthday when the hours-of-work violation took place.[6/]

DISCUSSION

The Fair Labor Standards Act prohibits the employment of "oppressive child labor" in commerce, in the production of goods for commerce, or in any operation which qualifies as an "enterprise" under the FLSA. 29 U.S.C. §212(c). The FLSA delegates to the Secretary of Labor the authority to find and declare by order those occupations which are particularly hazardous for the employment of children between the ages of 16 and 18 years, or detrimental to their health or well-being, and which by definition shall be considered "oppressive child labor." 29 U.S.C. §203(l). The Act also directs the Secretary to provide by regulation or order for the hours of work and conditions permitted in the employment of children between the ages of 14 and 16 years such that the employment will not be considered "oppressive child labor." *Id.*

Hazardous Employment of Minors in the Operation of Paper-Products Machines

Concerning the issue of hazardous occupations violations, the facts of the instant case are virtually on all fours with *Acting Administrator v. Chism Trail, Inc.*, 92-CLA-45, Sec'y, June 30, 1993. As in the instant case, Chism Trail had an express policy against use of a scrap paper baler by minors, and the baler had a "boldly lettered sign" prohibiting minors from operating it. *Chism Trail,* slip op. at 2. Nevertheless, three minors who had been employed by Chism Trail testified that they placed material in the scrap paper baler at the direction of their supervisors, and that one minor operated the baler on one occasion. In addition, the Wage and Hour

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[5/] The ALJ found that the testimony presented by the Administrator regarding loading the baler was not rebutted, and that Respondents' efforts to challenge the credibility of the government's evidence did not affect the probity of the facts establishing the hazardous occupation violations. D. & O., at 5-6.

[6/] The Wage and Hour investigator recorded the "Period of Illegal Employment" on the WH-103 form, P-5, as "10/07/95 - 12/27/95," and testified that she transcribed the employee's dates and hours of work from the time cards beginning on October 7, 1995, through December 24, 1995. The employee testified that he worked at the supermarket from November 1995 until the summer of 1996. T. 43. We need not resolve this conflict in the testimony because we would reach the same result under either start date.

investigator testified that three other minors told him they placed material in the baler.[7/] *Id*. at 2. The Secretary affirmed the ALJ's finding that all six children operated the baler in violation of 29 C.F.R. §570.63. *Id.*

On the strength of the Secretary's determination in *Chism Trail*, we could in the instant case similarly conclude that Respondents violated Hazardous Occupations Order No. 12 (29 C.F.R. §570.63) by permitting minors to place materials in the scrap paper baler and, on at least one occasion, directing a minor to do so. The Secretary has determined that the operation of a scrap-paper baler is particularly hazardous for the employment of minors under the age of 18 years. 29 C.F.R. §570.63(a)(1)(i). "Operating" is defined by Department of Labor regulation to include, *inter alia*, "***placing*** or removing ***materials into*** or from ***the machine*** . . . ." 29 C.F.R. §570.63(b)(1) (emphasis added). However, before the Board can definitively conclude that permitting minors to place materials in the scrap paper baler in the instant case constitutes the employment of "oppressive child labor" in violation of 29 U.S.C. §212(c), we must address Respondents' argument that an amendment of the Fair Labor Standards Act (FLSA) subsequent to occurrence of the charged violations absolves Respondents from any liability under the Department of Labor's regulations.

In August, 1996, the FLSA was amended explicitly to allow 16 and 17 year old minors "to load materials into, but not operate or unload materials from, scrap paper balers and paper box compactors (i) that are safe for 16- and 17-year-old employees . . . and (ii) that cannot be operated while being loaded." 29 U.S.C. §213(c)(5)(A).[8/] Citing this amendment, Respondents argue that the Wage and Hour Division is, with regard to the issue of minors loading the scrap paper baler, seeking to assess fines against Respondents for actions no longer deemed unlawful.

The ALJ dismissed Respondents' argument on the grounds that Respondents sought to impermissibly apply the 1996 amendment retroactively. In so doing, the ALJ properly relied on *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S.Ct. 1483 (1994), wherein the Supreme Court refused to retroactively apply amendments to Title VII of the Civil Rights Act to a case arising out of events preceding congressional passage of the amendments. As the Court in *Landgraf* noted, retroactivity is not favored in the law: "Since the early days of this Court, we have declined to give retroactive effect to statutes burdening private rights unless Congress had made clear its intent." 511 U.S. at 270, 114 S.Ct. at 1499.

Thus, the tribunal's first task when presented with a statute enacted after the events giving rise to the action before it is to determine whether Congress has expressly prescribed the statute's proper reach.

[7/] One supervisor testified that he "might have told [the minors] . . . [to] [j]ust lay [the boxes] in [the baler] but don't touch it." *Chism Trail, Inc.*, ALJ Decision, Oct. 27, 1992, slip op. at 5.

[8/] The Compactors and Balers Safety Standards Modernization Act ("Baler Act"), P.L. 104-174, 110 Stat. 1553, Aug. 6, 1996.

> If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

511 U.S. 280, 114 S.Ct. 1505. *Accord Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 208, 109 S.Ct. 468, 471 (1988).

In support of their argument that the 1996 amendments to the FLSA should be construed to operate retroactively, Respondents cite congressional history evidencing considerable displeasure by Members of Congress with the Department of Labor's interpretation of the pre-1996 provisions of the FLSA herein at issue. However, no where within that extensive legislative history or within the language of the Baler Act itself do we find any indication that Congress *intended* that the 1996 amendment be given retroactive effect. *See* 142 Cong. Rec. H8518, July 25, 1996; 141 Cong. Rec. H10663 - H10667, Oct. 24, 1995; 141 Cong. Rec. S6006 et al. Thus, the ALJ was correct in refusing to apply the 1996 FLSA amendments upon which Respondents rely.

Based upon the foregoing, we conclude that Respondents violated the Hazardous Occupations Order No. 12 (29 C.F.R. §570.63) by permitting minors to place materials in the scrap paper baler, to operate it, and on at least one occasion directing a minor to place materials in it. 29 C.F.R. §570.63(b)(1).

Assessment of Civil Money Penalties for the Hazardous Order Violations

The FLSA provides that "[a]ny person who violates the provisions of section 212 . . . relating to child labor, or any regulation issued under section 212 . . . shall be subject to a civil penalty of not to exceed $10,000 for each employee who was the subject of such violation." 29 U.S.C. §216(e). In determining the amount of any such civil money penalty "the appropriateness of such penalty to the size of the business of the person charged and the gravity of the violation shall be considered." *Id.*

The Secretary has promulgated regulations, at 29 C.F.R. §579.5, establishing guidelines for the assessment of CMPs under 29 U.S.C. §216(e). Factors to be taken into account in considering the appropriateness of the CMP to the size of the business of the person charged with the violation are

> the number of employees employed by that person . . . , 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.

29 C.F.R. §579.5(b). Factors to consider in assessing the appropriateness of the CMP to the gravity of the violation include

> 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 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.

29 C.F.R. §579.5(c). The regulations further direct that the following additional factors also be taken into consideration 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.

29 C.F.R. §579.5(d).

The Wage and Hour Division has developed a schedule, set out in the Child Labor Civil Money Penalty Report–Form WH-266, to standardize the application of the foregoing factors by Wage and Hour Division officials to child labor CMP assessments. Utilizing that schedule, the Wage and Hour investigator calculated a penalty of $1,200 for each of the six Hazardous Order No. 12 violations.

The Form WH-266 schedule, the ARB has held, "is an appropriate tool to be used by a field Compliance Officer to recommend penalties through the enumeration and determination

of the gravity of actual violations. . . ." *Administrator v. Thirsty's, Inc.*, ARB No. 96-143, ALJ No. 94-CLA-65, Final Decision and Order, May 14, 1997, slip op. at 5-6, *aff'd sub nom Thirsty's v. U. S. Dept. of Labor*, 57 F. Supp. 2d 431 (S.D. Tex. 1999). However, as we further held in *Thirsty's*, slip op. at 6, WH-266 is merely the starting point. The ALJ does not determine whether the CMP assessed by the Administrator comports with the Form WH-266 schedule, but instead whether the penalty to be assessed is appropriate in light of the foregoing statutory and regulatory factors. *See Administrator v. Elderkin Farm*, ARB No. 99-033, ALJ No. 95-CLA-31, Final Decision and Order, June 30, 2000, slip op. at 13. Similarly, upon appeal from the decision of an ALJ, the ARB is free to substitute its judgment for that of the ALJ in determining *de novo* the appropriateness of the CMPs assessed. *Administrator v. Elderkin Farm*, *supra*. *Accord Thirsty's v. U. S. Dept. of Labor*, 57 F. Supp. 2d at 436.

As previously mentioned, the Administrator assessed a $1,200 CMP for each of the six minors found to have been employed in violation of Hazardous Occupations Order No. 12, for a total assessment against Respondents of $7,200. Considering, first, the appropriateness of this CMP to the gravity of the violation, the Board notes that those factors identified at 29 C.F.R. §579.5(c) weigh in support of the CMPs assessed. While there was no history of prior child labor law violations by Respondents, and while Respondents had a policy in place prohibiting the **operation** and **unloading** of the paper baler by employees under the age of 18 which was reasonably communicated by Ahn to its employees, nevertheless Ahn's policy was not effective in preventing minor employees from engaging in the loading, and on occasion even the operation, of the paper baler – work prohibited to children because the Secretary had determined it posed a hazard to minors. As previously noted, not only did Steven Ahn think that it was permissible for underage children to load the baler, on at least one occasion a supervisor directed a minor to place material in the baler–in direct contravention of Hazardous Occupations Order No. 12. The other factors to be considered under 29 C.F.R. §579.5(c) relative to the gravity of the violation–the number and age of the minor employees involved, duration of illegal employment, and when the violations occurred–do not, in our estimation, warrant a CMP any lower than $1,200 per violation.

Nor do we do not find any valid reason for altering the amount of the CMP assessment based on the size of Respondents' business. Valley Supreme's gross annual dollar volume of sales was $1.7 million. P-3. As we recently noted in *Administrator v. Elderkin Farm*, *supra*, slip op. at 15, Congress's tenfold increase in the maximum penalty in 1990 for child labor violations, from $1,000 to $10,000, was an effort to increase the deterrent effect of civil money penalties for child labor violations. In the instant case the CMPs are only 12% of the maximum penalty that could be assessed. Thus, we fail to see how anything less than $1,200 per violation would serve any credible deterrent effect in light of the size and resources of Respondents' business.

Finally, upon review of the facts of this case in light of the additional factors under 29 C.F.R. §579.5(d), we do not find that either of these alternative considerations warrant alteration of the penalties for the violations of Hazardous Occupations Order No. 12. To begin with, we agree with the ALJ's assessment that the violations were not "de minimis" within the meaning

of Section 579.5(d). D.& O. at 7. The evidence of record indicates that the violations involved the heedless exposure of minors to an obvious hazard. Two of the violations involved operation–not simply loading–of the baler. Moreover, in light of the fact that a supervisor directed at least one minor to load the baler, the violations cannot be considered "inadvertent."

Finally, as we have noted, the Baler Act amendment expressly exempts employees 16 and 17 years of age from the proscription against loading scrap paper balers and paper box compactors *provided* they "are safe for 16- and 17-year-old employees" to load, *and provided* the balers/compactors "cannot be operated while being loaded." 29 U.S.C. §213(c)(5)(A). Because Congress has now declared that in certain limited circumstances it is permissible for an underage employee to engage in loading, it might be argued that CMPs for violations of Hazardous Occupations Order No. 12 involving the loading of the baler are not necessary in order to achieve the objectives of the Child Labor provisions of the FLSA. However, we need not resolve that issue here, because Ahn did not establish that its baler fell within the loading exemption contained in the Baler Act. Under Section 213(c)(5), a paper baler or compactor is considered safe for 16- and 17-year-olds to load *only if*: (1) the baler or compactor meets currently applicable standards established by the American National Standards Institute or subsequently adopted ANSI standards certified by the Secretary of Labor, and (2) the baler or compactor has "an on-off switch incorporating a key-lock or other system" controlled by an employee 18 years of age or older, and the baler or compactor is "maintained in an off position" when the baler or compactor is not in operation. 29 U.S.C. §213(c)(5)(B). Respondents, having argued that the paper baler in operation at Valley Supreme Supermarket was exempt pursuant to Section 213(c)(5) from the prohibitions of the child labor laws, nevertheless have failed to establish that its paper baler did in fact constitute a "safe" baler within the coverage of the 1996 amendment.[9/]

Thus, under the facts of this case, taking into consideration both the gravity of the violations and the size of Respondents' business, we find the imposition of a $1,200 CMP for each of the six violations of Hazardous Occupations Order No. 12 both reasonable and appropriate. Accordingly, the Board assesses a total CMP against Respondents of $7,200 for the Hazardous Occupations violations.

Periods and Conditions of Employment for Minors Ages 14 to 16

[9/] Respondent has argued that it is Wage and Hour that has the burden of proving that the paper baler did not meet the requirements of Section 213(c)(5). However, it is Respondents that seek the protection from liability that the Baler Act exemption offers. As the Court of Appeals for the District of Columbia Circuit noted in *Hazardous Waste Treatment Council v. E.P.A.*, 886 F.2d 355, *cert. denied*, 498 U.S. 849 (1989), under the A.P.A. "the proponent of a rule or order has the burden of proof." 886 F.2d at 366. *See* 5 U.S.C. §556(d) (1982). *See also* Department of Labor *Proposed Rules*, 64 Fed. Reg. 67130, 67138 (Nov. 30, 1999) ("the employer bears the burden of proving compliance with the conditions established by the . . . Baler Act which allow 16- and 17-year-olds to load certain scrap paper balers and paper box compactors").

The ALJ upheld Wage and Hour's finding that Respondents had, with regard to employee Aaron Chiesa, violated 29 C.F.R. §570.35, which governs the maximum number of hours, and the hours within which work must be confined, for employees between 14 and 16 years of age. Chiesa started work at Valley Supreme in October or November 1995. T. 43. Although Respondents were under the impression that Chiesa was 16 at the time he began work, in fact he was two to three months shy of his sixteenth birthday. P-1.[10/] The ALJ held that the fact Chiesa had mistakenly listed an incorrect birth date on his employment application did not absolve Respondents of the underage hours violation given that Chiesa's working papers, which were also in Respondents' possession, listed his correct age. D. & O. at 6. The ALJ imposed a CMP of $450 for the violation of Child Labor Regulation No. 3.

Although the ALJ was correct that a violation occurred, we do not agree that a CMP should be assessed for the employment of Chiesa. At most, the violation of the hours-of-work regulation, involving but one employee, lasted two to three months. This we weigh against the fact that the violation resulted from the simple error of not checking Chiesa's working papers against his application form, and there is no evidence that Chiesa was exposed to any obvious hazard or threat to his health.[11/] Finally, Respondents have given satisfactory assurances of future compliance with the hours-of-work restrictions of Child Labor Regulation No. 3 (29 C.F.R. §570.35). T. 251-52. Consistent with the Secretary's decision in *Echaveste, Administrator, Wage and Hour Division v. City of Wheat Ridge, Colo.*, 91-CLA-22, Sec'y Final Decision, April 18, 1995,[12/] we assess no CMP against Respondents for their employment of Chiesa.

The Admission of the Investigator's Testimony

Finally, Respondents argue that they were denied a fair hearing due to the ALJ's admission, over Respondents' objection, of the Investigator's testimony regarding what several minors had told her during the course of her investigation, evidencing the violations herein at

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[10/] Chiesa's employment application gave his birthday as December 28, 1978, whereas his working papers stated his birth date was December 28, 1979. Chiesa testified that his correct date of birth was December of 197**9**, and that the incorrect date he had put on his employment application had been a mistake. T. 49.

[11/] The Administrator alleged no violation by Respondents involving Chiesa's use of the paper baler.

[12/] In *Echaveste, Administrator, Wage and Hour Division v. City of Wheat Ridge, Colo.*, the City of Wheat Ridge hired 12 minors under the age of 14 as swimming pool aides but let them all go three weeks later when the City was informed by Wage and Hour that their employment was illegal. *City of Wheat Ridge*, slip op. at 3. On review of civil money penalties of $6,000 assessed by Wage and Hour, the Secretary upheld the ALJ's order vacating the penalties. The Secretary held that there was no previous history of child labor violations, the minors were not exposed to any hazards, none were injured, and the City gave credible assurances of future compliance. In addition, the duration of the violation was very short, only two or three weeks. *Id.* at 6-7.

issue. Respondents argue that because the ALJ excluded certain documentary evidence due to the Administrator's failure to comply with the ALJ's pretrial discovery order,[13/] the ALJ therefore should have excluded the Investigator's testimony about what she was told over the phone by several of the minors. Respondents assert that the admission of the Investigator's testimony regarding these conversations constituted the impermissible admission of hearsay testimony in violation of 29 C.F.R. §580.7(b),[14/] and deprived Respondents of their due process rights.

We find Respondents' argument unpersuasive. As explained by the ALJ, two types of documents were excluded from evidence: written questionnaires that had been answered and signed by various minors, and the investigator's written memorializations of what she was told on the telephone by particular minors. *See* D.& O. at 2, n.1. The exclusion of the written questionnaires does not give rise to any issue on appeal.[15/] Rather, it is the ALJ's admission of testimony regarding what the investigator was told, notwithstanding the ALJ's exclusion of the investigator's memos about those conversations, that is challenged.

Exclusion of the investigator's telephone memos did not, as the ALJ noted (D.& O. at 3, n.4), result in a total lack of record evidence establishing that these alleged violations occurred. Although the investigator would not have been free to testify as to the contents of the excluded memos, she nevertheless was entitled, as the ALJ correctly held, to testify as to her independent recollection of what the minors told her over the telephone. The investigator's testimony was itself evidence of the violations independent of the memos, admissible pursuant to 29 C.F.R. §580.7(b) even if it was hearsay.[16/]

[13/] The Administrator has not challenged this ruling on appeal.

[14/] Section 580.7(b) states, in relevant part:

> Notwithstanding the provisions of subpart B, including the hearsay rule (§18.802), testimony of current or former Department of Labor employees concerning information obtained in the course of investigations and conclusions thereon, as well as any documents contained in Department of Labor files (other than the investigation file concerning the violation(s) as to which the penalty in litigation has been assessed), shall be admissible in proceedings under this subpart. . . .

[15/] Because the answers to the questionnaires were not allowed into evidence, the investigator was barred from testifying regarding the contents of these documents. As the ALJ properly noted, the exclusion of the answered questionnaires eliminated all record evidence of some of the alleged violations which, in turn, necessarily required dismissal of the charges and penalty assessments that were based exclusively on the answered questionnaires. *See* D.& O. at 4, and n.6.

[16/] Assuming the investigator's testimony constituted hearsay, 29 C.F.R. §580.7(b) expressly (continued...)

CONCLUSION

For the reasons discussed, a CMP of $7,200 is assessed against Respondents for six violations of the hazardous occupations regulations. The penalty assessed for the hours-of-work violation is vacated.

SO ORDERED.

PAUL GREENBERG
Chair

E. COOPER BROWN
Member

CYNTHIA L. ATTWOOD
Member

[16/](...continued)
excepts from the hearsay rule "testimony of current or former Department of Labor employees concerning information obtained in the course of investigations and conclusions thereon" in proceedings under 29 C.F.R. Part 580. Respondents' reliance upon the qualifying language within Section 580.7(b) which limits the scope of the regulation's hearsay exception, by excluding from admissibility documents contained in DOL investigation files "concerning the violation(s) as to which the penalty in litigation has been assessed," is misplaced. As the ALJ properly noted, D.& O. at 3, n.4, this limitation does not extend to the testimony of the investigator, but only to documentary evidence.