ADMINISTRATIVE REVIEW BOARD

UNITED STATES DEPARTMENT OF LABOR

WASHINGTON, D.C.

In the Matter of:	
ADMINISTRATOR, WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,	
Petitioner,	
v.	ARB Case No. 03-056
KEYSTONE FLOOR REFINISHING COMPANY, INC., d/b/a KEYSTONE FLOOR REFINISHING COMPANY; and DANIEL LIEZ, Individually and as President of the aforementioned corporation,	
Respondents.	

ADMINISTRATOR'S REPLY BRIEF

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TABLE OF AUTHORITIES

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ADMINISTRATOR'S REPLY BRIEF

The Administrator submits this reply brief to rebut several points raised by Keystone in its response brief.

1. Keystone asserts that the Administrative Law Judge's ("ALJ") decision to reverse and vacate the recordkeeping violation and related civil money penalty ("CMP") was justified because the "assessment document" did not specify the recordkeeping requirement that was violated. (Resp. br. 5). As the Administrator argued in her opening brief, however, Wage-Hour's CMP Computation Worksheet (based on Wage-Hour Form 266)

clearly describes, on its face, the recordkeeping violation under 29 C.F.R. 516.2(a)(3) that was reversed by the ALJ. The worksheet specifically assessed a $275 CMP for "CL Recordkeeping - failure to have date of birth." That description tracks the regulatory language and sets forth the precise nature of the recordkeeping violation under 29 C.F.R. 516.2(a)(3).

2. The Administrator's decision not to appeal the ALJ's reversal of the recordkeeping violation based on 29 C.F.R. 570.5(c) (authorized certificate of the minor's age should be obtained by the prospective employer to protect himself from an unwitting violation) does not undermine the legitimacy of the separate basis for that recordkeeping violation under 29 C.F.R. 516.2(a)(3). At all times, both before the ALJ and this Board, the Administrator has asserted section 516.2(a)(3) as an independent ground for the single recordkeeping violation and the concomitant $275 penalty. The Administrator's decision not to appeal the ALJ's holding that the regulation at 29 C.F.R. 570.5(c) is not a mandatory requirement does not negate the applicability of the mandatory requirement to keep a record of the date of birth of employees under 19 years of age set out at 29 C.F.R. 516.2(a)(3). The two regulations are not mutually exclusive; in fact, they complement each other.

3. Keystone's argument that it was in "substantial compliance" with the regulation at 29 C.F.R. 516.2(a)(3) (Resp.

br. 3-4) is incorrect.[1] Specifically, Keystone points to a "statement in respondents' records" listing Robert Martin's age as 18 (Resp. br. 4). But this statement (RX4), based on Keystone's office manager's testimony that Martin told her upon applying for a job that he was 18, is not sufficient to comply with the explicit requirement of 29 C.F.R. 516.2(a)(3) to maintain and preserve a record of the date of birth of an employee under 19 years of age. Indeed, the office manager's testimony that Martin informed Keystone that he was an employee under 19 years of age should have put Keystone on notice that it was required to keep a record of his date of birth in accordance with that regulation. Moreover, the dispute between the parties concerning Martin's age (Martin testified that he told the office manager that he was 17-years-old) underlines the importance of the regulatory requirement that an employer maintain a record of the date of birth for an employee under 19 years of age.

4. Keystone blatantly misrepresents the Administrator's position by stating that "plaintiff's brief nowhere mentions the fact that the ALJ has the authority to eliminate any assessed

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[1] "Substantial compliance" is not a concept that is applicable in the child labor context. Cf. Martin v. Funtime, Inc., 963 F.2d 110, 115 (6th Cir. 1992) ("[A]n employer's responsibility for child labor violations approaches strict liability, and an employer cannot avoid liability by arguing that its supervisory personnel were not aware of the violation, or by simply adopting a policy against employing children in violation of the Act.").

penalty" (Resp. br. 4). Actually, the Administrator's opening brief states: "While we do not question an ALJ's authority, in appropriate cases, to reduce or eliminate the CMPs assessed by Wage-Hour by independently relying on relevant statutory and regulatory factors, in this case no such independent statutory or regulatory reasoning was provided" (Administrator's br. 13).

5. Finally, Keystone states that "[i]f the Board believes that the reason stated by the ALJ for eliminating the penalty is not sufficient, then we urge the Board to remand the matter to the ALJ for further hearing on this issue and further argument" (Resp. br. 6). There is, however, no need for a remand. The Board's review is de novo, and the record, as currently constituted, is sufficient for the Board to decide the recordkeeping issue.

CONCLUSION

For the reasons stated in her opening brief, and in this reply brief, the Administrator respectfully requests that that part of the ALJ's decision reversing the recordkeeping violation, and the attendant CMP, assessed by the Administrator for Keystone's failure to maintain and preserve a record of the date of birth of the minor employee pursuant to 29 C.F.R.

516.2(a)(3) be reversed, and the full recordkeeping penalty restored.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this _____ day of October, 2003, a copy of the forgoing Reply Brief of the Administrator was sent by first class United States mail to:

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