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.	*	

BRIEF OF THE ADMINISTRATOR IN SUPPORT OF PETITION FOR REVIEW

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INTRODUCTION

In this Fair Labor Standards Act ("FLSA") child labor case, a 17-year-old minor was employed in violation of two Hazardous Occupation Orders ("HOs"). The Administrative Law Judge ("ALJ") found a recordkeeping violation by the employer for failing to keep a record of the employee's date of birth because that employee was under 19 years of age, see 29 C.F.R. 516.2(a)(3), but then inexplicably reversed and vacated the violation and related civil money penalty ("CMP") based on Wage-Hour's failure

to specify the precise regulation under which such violation was being charged.[1] As explained below, such a reversal of the section 516.2(a)(3) recordkeeping violation based on Wage-Hour's lack of specificity is unjustified because Wage-Hour's CMP Computation Worksheet (based on Wage-Hour Form 266), upon which the ALJ relied, clearly describes the very recordkeeping violation reversed by the ALJ -- "CL Recordkeeping - failure to have date of birth." Moreover, the decision is inconsistent with this Board's caselaw stating that the proper inquiry for the ALJ in his review of CMPs assessed by Wage-Hour does not end with Wage-Hour Form 266 (correctly utilized as an initial tool for assessing the penalties), but must instead entail an independent look at the appropriateness of such penalties in light of the relevant statutory and regulatory factors. The recordkeeping CMP is important because proper recordkeeping is vital to protect young workers who are placed in patently dangerous situations, as occurred here, as well as for effective enforcement through the imposition of CMPs.

[1] The other part of the recordkeeping violation found by Wage-Hour was based on Keystone's failure to have a certificate of the minor's age. That, however, was reversed by the ALJ because the language of the relevant regulation, 29 C.F.R. 570.5(c), was deemed not to be mandatory. The Administrator does not appeal the reversal of this portion of the recordkeeping violation.

71-73, 76, 78, 84, 220-23, 226), on February 8, 2001, Wage and Hour (the District Director having approved the investigator's recommendation) assessed a $2,675 CMP against Keystone and Liez for the employment of a 17-year-old minor in violation of the child labor HOs and the recordkeeping provisions of the implementing regulations. Specifically, a $1,200.00 penalty was issued for a violation of HO No. 5 (29 C.F.R. 570.55), which precludes a minor under 18 years of age from operating a power-driven wood-working machine. A second $1,200.00 penalty was issued for a violation of HO No. 14 (29 C.F.R. 570.65), which precludes a minor under 18 years of age from operating a circular saw. A $275.00 penalty was also issued for Keystone's failure to obtain a certificate of age and a record of date of birth for Robert, pursuant to 29 C.F.R. 570.5(c) and 516.2(a)(3), respectively (Dec. 1, 4; TR. 104).

Keystone filed a timely exception to the notice of penalty and the case was assigned to an administrative law judge for a hearing that took place on August 28 and 29, 2002 (Dec. 1, 2). The ALJ identified two issues: Whether Robert Martin used certain power tools in violation of the FLSA, and whether Keystone failed to maintain a certificate of age for Robert Martin in violation of the FLSA and the corresponding

regulations (Dec. 3, 4).[2] The Administrator called five witnesses at the hearing and Keystone called six (Dec. 4).[3]

Testifying for the Administrator, three former Keystone employees stated that they saw Robert use one or both of the prohibited power tools while working for the company, and that his age was common knowledge among co-workers there (TR. 23-26, 47-50, 70-75). One of the employees testified that, on various occasions, he assigned Robert to work with the nail gun and circular saw (TR. 26). The Wage and Hour investigator testified that Robert told him that he had operated a nail gun and

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[2] The ALJ's issue statement does not specifically mention the failure to keep a record of an employee's date of birth, see 29 C.F.R. 516.2(a)(3), but the decision does consider that particular violation, as well as the "failure to obtain a certificate" charge based on 29 C.F.R. 570.5(c). Furthermore, although the ALJ never directly addressed Liez's responsibility as an individual employer under section 3(d) of the FLSA, 29 U.S.C. 203(d), the ALJ accepted the parties' stipulations ("Respondent Daniel Liez manages the daily operations of Respondent Corporation, makes all employment and termination decisions, and determines corporate policy"), and refers to "Respondents" in his Order (Dec. 15).

[3] After denying, in an Order dated September 25, 2002, Keystone's motion to resume the hearing to add testimony from two additional witnesses, the ALJ allowed Keystone to submit the transcripts from the depositions of these witnesses to be made part of the record. The ALJ, however, declined to summarize the depositions in his decision because they were relevant only to Keystone's claim that Wage-Hour's investigation was unfair. In support, the ALJ cited 29 C.F.R. 580.12(b), which limits the scope of administrative law judge CMP decisions to whether a violation has occurred, and the appropriateness of the assessed penalties. We will address any issue of unfairness as necessary in our response brief.

circular saw while working for Keystone. The investigator later confirmed this through other employee interviews (TR. 90-93, 98-99). He also described how he used the child labor assessment grid Form WH-266 to compute the CMPs (TR. 100-04).[4]

Robert Martin testified that he gave Keystone a copy of his birth certificate and social security card, and that he and Liez had several conversations regarding Robert's inability to buy cigarettes (TR. 225-26, 228). He also stated that he told his age to Keystone's office manager, Felicia Saunders, during the telephone call in which she hired him (TR. 231). On the stand, Robert was able to identify the miter saw and the nail gun, and explain how each tool functioned, from looking at exhibits (TR. 220-21).

Testifying for Keystone, three different employees stated that they had never seen Robert use the prohibited power tools on the job (TR. 160-61, 204-05, 265). Liez testified that he never told anyone to let Robert use the power tools, and added that Keystone did molding work requiring use of the tools on only five of the days when Robert worked for him (TR. 147-48). Felicia Saunders testified that when Robert called her to apply for work he told her that he was 18-years old (TR. 190).

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[4] Specifically, the investigator referred to "CMP Computation Worksheet (Replaces WH-266)," and explained what information he input to compute the CMPs (TR. 100-04).

B. Decision Of The ALJ

The ALJ upheld both HO violations and the related CMP assessments -- $1,200 for each violation (Dec. 12). The ALJ reversed that part of Wage-Hour's assessment of a recordkeeping CMP that was based on the employer's failure to obtain a certificate of age under 29 C.F.R. 570.5(c), because the language of the regulation (specifically, the use of the language "should") was deemed to be precatory rather than mandatory (Dec. 14). The violation for a failure to maintain and preserve a record of date of birth for those employees under 19 pursuant to 29 C.F.R. 516.2(a)(3) (which formed a part of Wage-Hour's $275 recordkeeping CMP) was upheld, but the ALJ then eliminated the related CMP because the "assessment document" the inspector used "fails entirely to specify either/both of the sections under which the assessment is made. The violation noted is simply 'CL Recordkeeping - failure to have date of birth.' I am thus constrained to find that Plaintiff has failed, in this respect, to advance the basis for this assessment, and accordingly cannot find Respondents responsible therefore" (Dec. 14, 15). The ALJ thus ordered that "[t]he record-keeping violations are REVERSED AND VACATED" (Dec. 15).

STANDARD OF REVIEW

It is clearly within the province of the Board to review the ALJ's decision de novo and to substitute its judgment for

that of the ALJ. See, e.g., Administrator v. Chrislin, Inc. d/b/a Big Wally's, ARB Case No. 00-22 (Nov. 27, 2002).

ARGUMENT

THE ALJ ERRED BY REVERSING AND VACATING A RECORDKEEPING VIOLATION AND CONSEQUENT CMP FOR THE EMPLOYER'S FAILURE TO KEEP A RECORD OF THE MINOR'S DATE OF BIRTH, BASED ON WAGE-HOUR'S FAILURE TO CITE THE APPLICABLE REGULATION, BECAUSE THE WAGE-HOUR ASSESSMENT DID IN FACT IDENTIFY THE REGULATION BY SPELLING OUT PRECISELY WHAT IT REQUIRED, AND BECAUSE, IN ANY EVENT, THE ALJ SHOULD INDEPENDENTLY REVIEW WAGE-HOUR'S CHILD LABOR CMP ASSESSMENTS

A. Statutory And Regulatory Background

The child labor provisions of the FLSA "seek to protect the safety, health, well-being, and opportunities for schooling of youthful workers." H.R. Rep. No. 1452, 75th Cong., 1st Sess., 6 (1937); S. Rep. No. 884, 75th Cong., 1st Sess., 2, 6 (1937). Indeed, the courts have held that there is a particularly compelling public interest in protecting the health and well-being of working children. See Lenroot v. Kemp, 153 F.2d 153, 156-57 (5th Cir. 1946); Lenroot v. Interstate Bakeries Corp., 146 F.2d 325, 327-28 (8th Cir. 1945); McLaughlin v. McGee Brothers, Inc., 681 F. Supp. 1117, 1137-38 (W.D.N.C.), aff'd sub nom. Brock v. Wendell's Woodwork, Inc., 867 F.2d 196 (4th Cir. 1989).

Section 12(c) of the FLSA, 29 U.S.C. 212(c), prohibits the employment of oppressive child labor in commerce, in the production of goods for commerce, or in any enterprise engaged

in commerce or the production of goods for commerce. The FLSA defines "oppressive child labor," in relevant part, as:

> a condition of employment under which . . . any employee under the age of sixteen years is employed by an employer . . . in any occupation, or [under which] any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Secretary of Labor shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well being; but oppressive child labor shall not be deemed to exist by virtue of the employment in any occupation of any person with respect to whom the employer shall have on file an unexpired certificate issued and held pursuant to regulations of the Secretary of Labor certifying that such person is above the oppressive child-labor age.

29 U.S.C. 203(l). Congress specified in 29 U.S.C. 212(d) that "[i]n order to carry out the objectives of this section ["Child labor provisions"], the Secretary may by regulation require employers to obtain from any employee proof of age." Thus, Congress made clear when enacting the child labor provisions of the FLSA that children under the age of 18 may not be employed in any occupation which the Secretary has declared hazardous, and further made clear the important part that recordkeeping plays in the enforcement scheme.

The Secretary's regulation at 29 C.F.R. 579.3(a)(5) specifically lists, under "violations for which [child labor civil money] penalty may be imposed," "[t]he failure by an employer employing any minor for whom records must be kept under any provision of part 516 or part 545 of this title to maintain

and preserve, as required by such provision, such records concerning the date of the minor's birth and concerning the proof of the minor's age as are specified therein." The regulation at 29 C.F.R. 516.2(a)(3) requires an employer to maintain and preserve a record of the date of birth for each employee under the age of 19 subject to the minimum wage and overtime provisions of the FLSA.

B. The ALJ Improperly Reversed And Vacated The Recordkeeping Violation, And Attendant CMP, Under 29 C.F.R. 516.2(a)(3).

1. The ALJ erred in ruling that Wage-Hour's "CMP Computation Worksheet" (based on Wage-Hour Form 266) was deficient because it didn't specify the regulation at 29 C.F.R. 516.2(a)(3), requiring an employer to maintain and preserve a record of date of birth for employees under the age of 19. The worksheet assessed a $275 CMP for "CL [child labor] Recordkeeping - failure to have date of birth." It is not clear why this is not sufficient to indicate a violation of 29 C.F.R. 516.2(a)(3), which prohibits the very thing described in the worksheet. Nowhere is there a requirement that the specific regulation in question be cited in the Wage-Hour assessment form. In addition, as the ALJ himself noted, the Wage-Hour investigator testified to a violation of 29 C.F.R. 516 (Tr. 102).

2. The ALJ also misunderstood that Wage-Hour's "CMP Computation Worksheet," based on Wage-Hour Form 266 (the grid), while a proper and valuable tool for the initial assessment of CMPs (subject to review by the Wage and Hour District Director), should not serve as a substitute for an administrative law judge's, and ultimately this Board's, independent review of the appropriate CMP based on the statute and relevant regulations.[5] This Board has repeatedly stated this principle.

Thus, in Administrator v. Thirsty's Inc., ARB No. 96-143 (May 14, 1997), aff'd sub nom. Thirsty's, Inc. v. U.S. Department of Labor, 57 F. Supp.2d 431 (S.D. Tex. 1999) (district court granted summary judgment to the Department on APA review), the Board, referring to 29 C.F.R. 580.12(c),[6] stated that "the regulations provide for a review of assessed CMPs by an ALJ, whose regulatory authority is broadly drawn consistent with the factors to be considered . . . ." The Board went on to state that "the review and modification of an assessed CMP is

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[5] The existence of the violation itself, of course, is also necessarily included within the scope of the ALJ's, and then the Board's, authority to review the appropriateness of the CMPs assessed by Wage-Hour.

[6] The regulation at 29 C.F.R. 580.12(c) states that "[t]he decision of the Administrative Law Judge shall include a statement of findings and conclusions, with reasons and basis therefor, upon each material issue presented on the record. The decision shall also include an appropriate order which may affirm, deny, reverse, or modify, in whole or in part, the determination of the Administrator."

not an arrogation of the Administrator's authority, but a proper adjudicatory process."[7] The Board reiterated this principle in Administrator v. Merle Elderkin, d/b/a Elderkin Farm, ARB Case Nos. 99-033, 99-048 (June 30, 2000), aff'd sub nom. Elderkin v. U.S. Department of Labor, No. 00-CV-776C (W.D.N.Y. Aug. 30, 2002), where it stated that "the proper inquiry for an ALJ when reviewing a child labor CMP is whether the penalty assessed by the Administrator is appropriate in light of the statutory and regulatory factors, and not whether the penalty comports with the Form WH-266 schedule."

Similarly, in Fraser v. Ahn's Market, Inc., ARB Case No. 99-024 (July 28, 2000), the Board stated as follows:

> 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 factual violations. However, . . . 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. 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.

(Internal quotation marks and citations omitted.) Finally, in a recent Board decision, Chrislin, supra, the Board stated that

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[7] The Board in Thirsty's, as it does in all the cases cited in this part of the discussion, recognizes that the Wage-Hour Form 266 grid is an appropriate initial tool for the investigator to utilize in recommending CMPs.

Wage-Hour Form 266 was to be used "to *recommend* penalties, subject to review. It did not absolve reviewing officials or the ALJ of the responsibility to ensure that the statutory and regulatory requirements are met." See also Administrator v. Lynnville Transport, Inc., ARB Case No. 01-011 (Nov. 27, 2002).

In this case, by vacating the recordkeeping CMP under 29 C.F.R. 516.2(a)(3) based on what he considered a deficient (because nonspecific) Wage-Hour "assessment document," the ALJ, who had found a violation of that very regulation, failed to follow Board precedent and independently determine the appropriate CMP attendant upon a violation in accordance with the statute and pertinent regulations. 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.

The recordkeeping penalty at issue in this case is particularly important because, in a case such as this, i.e., one with serious violations, the strict enforcement of the "record of date of birth" requirement plays an important role in preventing HO violations with their attendant, extreme risks to the safety of children.

CONCLUSION

For the foregoing reasons, that part of the ALJ's decision reversing the recordkeeping violation found, 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) should itself be reversed, and the full recordkeeping penalty restored.

Respectfully submitted,

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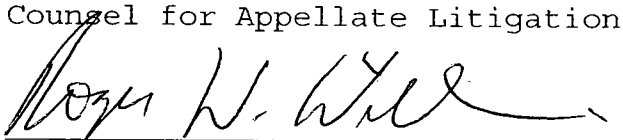

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CERTIFICATE OF SERVICE

I certify that on this 22 day of August, 2003, a copy of the forgoing Brief of the Administrator in Support of Petition for Review was sent by first class United States mail to:

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