U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 27 January 2003

CASE NO.: 2002-CLA-00017

In the Matter of :

UNITED STATES DEPARTMENT OF LABOR,

Plaintiff,

v.

KEYSTONE FLOOR REFINISHING COMPANY, INC., d/b/a KEYSTONE FLOOR REFINISHING COMPANY;
and
DANIEL LIEZ, Individually and as President of the aforementioned corporation,

Respondents.

Appearances: Andrea J. Appel, Esquire
United States Department of Labor
Office of the Solicitor
Philadelphia, Pennsylvania
For Plaintiff

Mervin M. Wilf, Esquire
Philadelphia, Pennsylvania
For Respondents

Before: RALPH A. ROMANO
Administrative Law Judge

DECISION AND ORDER

This matter arises under the child labor provisions of the Fair Labor Standards Act ("FLSA") as amended, 29 U.S.C. § 201 *et seq.*, and the applicable regulations issued at 29 C.F.R. Parts 579 & 580. Plaintiff alleges that Respondents violated the child labor provisions of the FLSA. Specifically, Plaintiff alleges that Respondents violated 29 U.S.C. §§ 212(c), 212(d), and 216(e) and corresponding regulations, 29 C.F.R. §§ 570.55, 570.65, 570.5, and 516.2, by allowing a minor to operate certain power tools and by failing to maintain certain records.

On or about 8 February 2001, following an investigation, the Administrator of the United States Department of Labor's Wage and Hour Division ("Administrator") notified Respondents of a civil money penalty in the amount of $2,675.00. Respondents filed a timely exception to the

civil money penalty on 16 February 2001 causing the matter to be referred on January 9, 2002 to the Office of Administrative Law Judges for a formal hearing.

A hearing was held before me on 28 and 29 August 2002 in Cherry Hill, New Jersey, at which time the parties were given the opportunity to present evidence and make oral argument.[1] The parties filed post-hearing briefs and reply briefs by 23 December 2002 and this matter is now ripe for disposition.

I. STIPULATIONS

The parties stipulate and I find as follows:

(1) Respondent Corporation was incorporated in Philadelphia, Pennsylvania in April, 1987.

(2) Respondent Corporation was engaged in the sanding and refinishing of hardwood floors in existing buildings in April of 1987, was engaged in such activities on 31 March 1990 and is currently engaged in such activities.

(3) Currently and between 9 July 1999 and 17 November 1999 Respondent Corporation employed employees, in and about its place of business in the activities of said enterprise, who are engaged in commerce or in the production of goods for commerce, or handled, sold, or otherwise worked on goods or materials that have been moved in or produced for commerce.

(4) Respondent Corporation sands or refinishes hardwood floors in existing buildings outside the state of Pennsylvania, sometimes, but rarely.

(5) Respondent Corporation employed Robert Martin in commerce or in the production of goods for commerce within the meaning of the FLSA in that Robert Martin on a weekly basis handled or worked with goods, materials, supplies or equipment moved in or produced in interstate commerce.

(6) Respondent Corporation employed Robert Martin from 9 July 1999 to 17 November 1999.

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[1]The transcript of the 28 and 29 August 2002 hearing will be cited as "Tr. –." Formal papers were admitted as Administrative Law Judge Exhibits, which will be cited as "ALJX–." Plaintiff submitted documentary evidence at the hearing, which will be cited as "PX–." Respondents's documentary evidence will be cited as "RX–." Respondents also submitted two depositions post-hearing which are hereby received and admitted into evidence; they will be cited as "RX14" and "RX15" respectively.

(7) Robert Martin was born on 27 January 1982.

(8) Robert Martin was seventeen (17) years old during his employment with Respondent Corporation.

(9) Respondent Corporation hired Robert Martin as a trainee.

(10) Robert Martin and Respondent Corporation did not have a formal written apprenticeship agreement and Respondent Corporation did not register Robert Martin as an apprentice with any state or federal agency.

(11) Respondent Corporation was in possession of Robert Martin's Social Security number at the time of his hire.

(12) Between July and November 1999, Respondent Corporation employed approximately 10 to 14 people, including both full-time and part-time employees.

(13) Between July and November 1999,[2] Respondent Corporation owned and utilized one Stanley N50FN/N60FN nail gun to be used by its employees to install moulding.

(14) Between July and November 1999, Respondent Corporation owned and utilized one Delta 8-1/4" Compound Miter Saw (Model 36-040) to be used by its employees to install moulding.

(15) Respondent Daniel Liez manages the daily operations of Respondent Corporation, makes all employment and termination decisions, and determines corporate policy.

(16) Respondent Corporation's gross receipts or sales exceeded $250,000 for each year from 1990 to 2000.

(ALJX13.)

II. ISSUES

The only issues I am to decide are (1) whether Robert Martin used certain power tools in violation of the FLSA and the regulations promulgated thereunder, and (2) whether Respondents

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[2]The stipulations read, "[b]etween November, 1999" in paragraphs 13 and 14 but fail to state a preceding or subsequent date. (ALJX13.) I understand those paragraphs to be a drafting error and read them to mean "between July and November, 1999" as stated in paragraph 12. (See Plaintiff's Proposed Findings of Fact and Conclusions of Law, p. 5.)

failed to maintain a certificate of age for Robert Martin in violation of the FLSA and the corresponding regulations.

Respondents have raised the issue of the fairness of the Administrator's investigation and the process afforded them. However, "[t]he decision of the Administrative Law Judge shall be limited to a determination of whether the respondent has committed a violation of section 12, or a repeated or willful violation of section 6 or section 7 of the Act, and the appropriateness of the penalty assessed by the Administrator." 29 C.F.R. § 580.12(b). Because the regulations limit the scope of my decision, I will not address Respondents's complaints regarding the fairness of the Administrator's investigation.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Factual Statement/Summary of the Evidence

At the August, 2002 hearing I heard testimony from several employees and former employees of Respondent Corporation, an investigator with the Department of Labor's Wage and Hour Division, and a junior high school carpentry instructor. Plaintiff presented testimony from Daniel James McDowell ("DJ"), John Miller ("Miller"), Joseph Chmielowski ("Joe"), William P. Nacios, and Robert Martin ("Robert"). (Tr. at 21-143.) Respondents presented testimony from Mr. Liez, Tom Hazelwood ("Tom"), Felicia Saunders ("Felicia"), Neil McNicholl, Mike Solicki ("Mike"), and Daniel Kanagie. (Tr. at 144-271.) Respondents also submitted the deposition testimony of Stewart Bostic and James Kolpack, two employees of the Department of Labor's Wage and Hour Division. (RX14 and RX15.)

1. Plaintiff's Case

DJ testified that he worked for Respondents from May, 1994 to September, 1999.[3] (Tr. at 23.) DJ said that he worked with Robert and saw him using a radiator machine, a miter saw, and a nail gun. (Tr. at 23-24.) When Plaintiff showed DJ a picture of the nail gun (PX1) and a picture of the miter saw (PX2),[4] he identified them as the tools he witnessed Robert using (Tr. at 24-25). He further stated that he saw Robert use both tools on 5 to 10 occasions to "install molding" and 5 to 10 occasions to "cut molding." (Tr. at 24-25.) He stated that on the occasions when he was in charge of work sites, he assigned Robert to work with the circular saw and the nail gun. (Tr. at 26.)

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[3]I note that Respondents's employee timesheets for July, 1999 to November, 1999, record DJ working 16 of the 32 days Robert worked. (RX1.)

[4]Plaintiff followed the same procedure with subsequent witnesses. Plaintiff showed exhibits PX1and PX2 to Miller, Joe, and Robert. All three were able to identify the tools. (Tr. at 50-51, 71-73.)

Miller, Plaintiff's next witness, testified that he worked for Respondents from January or July of 1999 to December of 1999.[5] (Tr. at 47.) While working for Respondents, he sanded floors. (Tr. at 47-48.) He testified that he knew that Robert was 17-years old. (Tr. 49.) He testified that he saw Robert use the miter saw once or twice but never saw him use the nail gun. (Tr. at 50.)

Joe, Plantiff's next witness, testified to having worked for Respondents from August, 1999 to December, 1999.[6] (Tr. at 70.) He testified that he worked with Robert every day during which time he witnessed Robert using a chop saw, a nail gun, a drum sander, and an edger sander. (Tr. at 71.) Joe stated that he witnessed Robert use the nail gun and the miter saw more than once and that he knew that Robert was 17-years old. (Tr. at 73-75.)

William P. Nacios, a 36-year veteran investigator with the Department of Labor's Wage and Hour Division, also testified for Plaintiff. (Tr. at 86-87.) As part of his investigation of Respondents, Mr. Nacios spoke to Robert who told him that he had operated a nail gun and circular saw while in Respondents's employ. (Tr. at 90-93.) Mr. Nacios was able to ascertain his age. (Tr. at 98.) From subsequent phone and mail interviews, Mr. Nacios confirmed that Robert had operated a nail gun and circular saw. (Tr. at 98-99.) Mr. Nacios testified to having obtained Respondents's Corporate records (Tr. at 94) and having determined that Respondent was covered by the FLSA (Tr. at 94-96).

After explaining his investigative procedures, Mr. Nacios testified as to how he prepared his report. (Tr. at 100.) He explained how he used the "child labor assessment form, WH-266" to "compute the civil money penalty." (Id.; PX5.) He testified that to compute the penalty, he was required to input Respondents's number of employees, the age of any minors, the specific child labor

violation, the date of birth of any minors, and any prior violations that the company had been assessed. (Tr. at 100.) He then explained his understanding of how the regulations were violated in this case and how and why the monetary penalties were assessed in his report. (Tr. at 101-104.)

Mr. Nacios testified that once his report was complete, he forwarded it to the district director with his recommendation. (Tr. at 104.) Mr. Nacios recommended that the full $2,675.00 penalty be assessed, because he felt that Respondents were financially able to pay it, that the violation was very serious, and that the violation was not inadvertent. (Tr. at 105.) When asked

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[5]I note that Respondents employee timesheets for July, 1999 to November, 1999 record Miller working 28 of the 32 days that Robert worked. (RX1.)

[6]I note that Respondents employee timesheets for July, 1999 to November, 1999 record Joe working 16 of the 32 days that Robert worked. (RX1.)

why he did not interview additional employees at the Respondents's request, he stated that he had already obtained three statements corroborating Robert's statement, that his investigation was complete, and that the statements Respondents submitted were in agreement with the statements he had already taken. (Tr. at 107.)

Finally, Plaintiff offered Robert's testimony. (Tr. at 218.) Robert testified that his date of birth was 27 January 1982 and that he worked for Respondents during the summer of 1999.[7] (Tr. at 219.) Robert was able to identify the miter saw and the nail gun from looking at PX1 and PX2; he was also able to explain how each tool functioned. (Tr. at 220-221.) He testified that his duties consisted of being a "gopher," which meant cutting pre-marked moulding with the miter saw and nailing it in for other workers. (Tr. at 222-223.) He testified that Mr. Liez, Miller, and DJ asked him to use the miter saw and that DJ and Miller asked him to use the nail gun. (Tr. at 223.) He testified that when he started work with Respondent, he gave Mr. Liez a copy of his birth certificate and social security card. (Tr. at 225-226.) He indicated that when he was working for Respondents, workers would be in different rooms so that if he were cutting wood, which takes only five or 10 seconds, a person working in another room would not have observed it. (Tr. at 226.) According to Robert, Miller, Joe, DJ, and Mr. Liez all knew that he was 17-years old. (Id.)

2. Respondents's Case

Respondents's first witness was Mr. Liez, President of Respondent Corporation. (Tr. at 144-145.) Mr. Liez testified that his business caters to upscale customers (Tr. at 145), that his business installs moulding two to three times a month (Tr. at 146-147), and that Robert worked for him for a total of 31-days but that on only five of those days was Respondent Corporation doing moulding work (Tr. at 147). Mr. Liez testified that doing moulding work requires training. (Tr. at 147, 154-155.) He testified that Robert was hired as a trainee whom he never considered training for moulding work. (Tr. at 147-148.) Mr. Liez testified that he never told anyone to let Robert use the power tools. (Tr. at 148.)

Respondents next witness, Tom, worked for Respondent Corporation from May, 1999 to August, 1999.[8] (Tr. at 159.) He testified that while working for Respondent, Mr. Liez and DJ did the majority of the moulding work. (Tr. at 160.) He also testified that doing moulding work requires skill and that he never saw Robert do it. (Tr. at 160-161.) During Tom's testimony, Respondents showed him a letter, which he testified to having written after stopping work with

[7]I note that Respondent Corporation's employee timesheets for July, 1999 to November, 1999 record Robert working a total of 32 days, including the day of his termination. (RX1.)

[8]I note that Respondent Corporation's employee timesheets for July, 1999 to November, 1999 record Tom working 16 of the 32 days that Robert worked. (RX1.)

Respondents.[9] (Tr. at 171.) Tom testified that he received no moulding installation training and that Robert was not a reliable employee. (Tr. at 171-172.) Tom indicated that moulding work was rare and that during his summer with Respondents, there were only three to five moulding jobs. (Tr. at 172-173.)

Felicia testified that she had been the office manager for Respondents for 11 years. (Tr. at 176-177.) She described her duties as office manager. (Tr. at 177-179.) She testified as to what procedure she follows when Respondents receive a phone call from an applicant. (Tr. at 189; RX4.) She testified, and a document reflects, that when Robert called to apply, he told Felicia he was 18-years old. (Tr. at 190; RX4.)

Felicia also described her involvement with incidents surrounding Robert's termination on 17 November 1999. (Tr. at 184.) On 17 November 1999 Mr. Liez called Felicia from a job site to inform her that Robert had struck him and that she should call the police.[10] (Tr. at 185-186.) A police report reflects that Felicia called the police at 2:45 p.m. on 17 November 1999. (RX5.) She testified that no charges were brought against Robert as a result of the assault. (Tr. at 187.)

Respondent's next witness was Neil McNicholl. (Tr. at 192.) Mr. McNicholl testified that he is an industrial arts teacher at William Penn Junior High School, that he has 26-years of carpentry experience, and that he is a journeyman. (Tr. at 193.) Mr. McNicholl said that he did hardwood floor installations for Respondent. (Tr. at 195.) He testified that moulding installation is high-end work, which requires expert skills. (Tr. at 197-198.) He testified that he teaches moulding installation to his junior high students and that a person with bad work habits is not someone you would want to train to do moulding installation. (Tr. at 199-200.)

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[9]The letter reads as follows:

> My name is Tom Hazelwood, and I worked for Keystone flooring around 4 months in the summer. I remember working with Rob Martin in the summer months and I was astonished when I found out he was not of a mature age. He told me that he was a little kid at home and went to a lot of sex and beer parties. In addition, he was big for not being of a mature age. He stood around 6'1 and he was probably 200lbs. While I was working at Keystone Flooring, I don't remember seeing Rob Martin doing repairs or using a power saw. I remember the repairs being done by DJ and Dan on the site.

(RX2.)

[10]Respondents submitted Felicia's scribbled notes written on the day Mr. Liez called from the job site. (RX6.)

Next, Respondent called Mike who testified he worked with Robert every-day while Robert was employed by Respondent.[11] (Tr. at 203.) Mike testified that he no longer works for Respondent and that he witnessed Robert's assault on Mr. Liez. (Tr. at 205.) Mike testified that while working for Respondent he installed moulding. (Tr. at 207.) He also testified that installing moulding requires skill. (Tr. at 208.) Like Tom, Mike testified to having written a letter concerning his observation of Robert.[12] (Tr. at 204-205.)

Respondents's final witness was Daniel Kanagie. (Tr. at 264.) Mr. Kanagie started working for Respondents in September of 1999.[13] (Tr. at 265.) He testified that he worked with Robert but that he never saw him use the miter saw or the nail gun. (Id.) He testified to writing a statement similar to those written by Tom and Mike.[14] (Tr. at 266.) He also testified to having witnessed the assault on Mr. Liez and Robert's subsequent termination. (Tr. at 267-269.)

3. The Testimony of Stewart Bostic and James Kolpack

On 20 September 2002 Respondents moved to resume the hearing in this matter so that I might hear testimony from Stewart Bostic (RX14) and James Kolpack (RX15). In an Order dated 25 September 2002 I denied that motion but allowed Respondents an opportunity to submit the transcripts from the two depositions to be made part of the record.

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[11]I note that Respondent Corporation's employee timesheets for July, 1999 to November, 1999 record Mike working 30 of the 32 days that Robert worked. (RX1.)

[12]The letter reads as follows:

> I MICHAEL SOLECKI STATE
> THAT AS LONG AS I WORKED
> AT KEYSTONE FLOOR WORKS I
> NEVER WITNESSED ROBERT MARTIN
> ENGAGED IN ANY WORK USING
> A MITER SAW OR A AIR GUN USED
> FOR NAILING

(RX2.)

[13]I note that Respondents's employee timesheets for July, 1999 to November, 1999 record Mr. Kanagie working 15 of the 32 days that Robert worked. (RX1.)

[14]Mr. Kanagie's letter, similar to that of Tom and Mike's, reads in pertinent part that Robert "never used the nail gun or circular saw." (RX2.)

I have thoroughly reviewed, in its entirety, both Mr. Bostic and Mr. Kolpack's deposition testimony. Respondents rely on this testimony and Mr. Nacio's testimony to advance their argument that they were denied due process and a fair investigation. Because exhibits RX14 and RX15 are relevant only to the due process question and 29 C.F.R. § 580.12(b) limits the scope of my review, I will not summarize this testimony relevant to a question I cannot consider.

B. Discussion

1. Respondents Are Subject to the FLSA

Respondents argue that they are not subject to the FLSA, because Respondent Corporation's annual dollar volume is less than $500,000.[15] Plaintiff counters that the Respondents are covered because of the FLSA's preservation of coverage clause. Both parties direct me to *Reich v. Troyer*, No. CIV.A. 96-0471, 1996 WL 198111 (E.D. La. Apr. 23, 1996).

In *Troyer*, the court considered "the narrow question of whether . . . [the Respondent] is subject to the FLSA by virtue of the 'Preservation of Coverage' provision."[16] *Troyer*, 1996 WL

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[15]The definitions to the FLSA, as amended, provide,

> **(s)(1)** "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise that –
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> **(A) (i)** has employees engaged in commerce or in the production of goods for commerce, or that has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person; and
>
> **(ii)** is an enterprise whose annual gross volume of sales made or business done is not less than $500,000 (. . .);

29 U.S.C. § 203(s)(1).

[16]The "Preservation of Coverage" provision provides as follows:

> (b) PRESERVATION OF COVERAGE. --
> (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 that because 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 (29 U.S.C. 207); and
> (C) remain subject to section 12 of such Act (29 U.S.C. 212).
>
> . . .

198111, at *2. Relying on that provision, which the court said continues "coverage to enterprises that otherwise became exempt due to the 1989 Amendments," the court held that it was unable to make a determination "whether the defendant was subject to the Act prior to the 1989 Amendments such that the grandfather clause would apply. " *Id.* In order to make this determination, the court said, it required "sufficient evidence of defendant's 'enterprise' status on March 31, 1990."[17] *Id.*

In this case, Respondents ask me to reject *Troyer* by engaging in a strained reading of the legislative history to the 1989 Amendments. I decline this invitation, finding *Troyer* to be well-reasoned and consistent with the purposes of the FLSA. As Plaintiff points out, it is undisputed in this case that since 1987 and up to the present, Respondents's business activities have included the repair, maintenance, improvement, or replacement of hardwood flooring in existing buildings. (ALJX13.) Because Respondents were engaged in these activities on 31 March 1990 and because the FLSA, pre-1989 amendments, defined an enterprise as "the related activities performed (. . .) by any person or persons for a common business purpose," 29 U.S.C. 203(r)(1), I find that under *Troyer* Respondents were an enterprise on 31 March 1990 and thus continue to be subject to the FLSA.

2. Respondents Violated 29 C.F.R. §§570.55 and 570.65

The FLSA provides as follows:

> [a]ny person who violates the provisions of section 212 or section 213(c)(5) of this title, relating to child labor, or any regulation issued under section 212 or section 213(c)(5) of this title, shall be subject to a civil penalty of not to exceed $10,000 for each employee who was the subject of such a violation.

Fair Labor Standards Amendments of 1989, Pub. L. No. 101-157, 103 Stat. 939 (codified in the notes to 29 U.S.C. § 203).

[17]The *Troyer* court noted,

> [t]he legislative history of the 1989 Amendments indicates that along with the change in the 'enterprise test,' "Section 3(s) of the Act . . . 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 insure 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) (emphasis added).

29 U.S.C. § 216(e). Section 212(c) of the FLSA prohibits "oppressive child labor." 29 U.S.C. § 212(c). The FLSA defines "oppressive child labor" as,

> a condition of employment under which . . . (2) any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Secretary of Labor ["the Secretary"] 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;
> . . .

29 U.S.C. § 203(*l*).

In 29 C.F.R. part 570, subpart E, the Secretary has identified 17 occupations as particularly hazardous for the employment of minors between 16 and 18 years of age or detrimental to their health or well-being. 29 C.F.R. § 570.50 *et seq.*. At issue in this case are the occupations identified at sections 570.55 and 570.65. Section 570.55 identifies occupations involved in the operation of power-driven wood-working machines (Order 5) and section 570.65 identifies occupations involved in the operation of circular saws, band saws, and guillotine shears (Order 14).

In order to sustain its burden, the Plaintiff needs to establish, by a preponderance of the evidence, that the alleged violations occurred. *See Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 281 (1997).

Respondents argue that the credible evidence in this case establishes that there was no violation of the child-labor provisions of the FLSA. Respondents direct me to the testimony of the following five individuals: Mr. McNicholl, Mike, Mr. Liez, Mr. Kanagie, and Tom. Respondents rely on much of the aforementioned testimony to advance their argument that only experienced craftsman should do moulding work and *ipso facto* Respondents would never have assigned moulding work to Robert. Plaintiff, in turn, directs my attention to the testimony of Robert, Miller, Joe, and DJ.

Respondents characterize the testimony of Plaintiff's witnesses as inconsistent and tainted by their mutual animosity towards Respondent Mr. Liez. Because of these inconsistencies, the animosity, and the testimony of Respondents's witnesses, Respondents would have me conclude that Robert never used the power tools in question. Respondents, however, fail to explain how the skill required to install moulding, leads to the ultimate conclusion that Robert never used power tools.

I find that the balance of the credible evidence establishes that Robert used the miter saw and nail gun. Respondents stipulated that they owned the miter saw and nail gun (ALJX13), several witnesses testified to seeing Robert use the tools (Tr. at 24-25, 50, 71), and Robert himself testified to the specifics of how the tools are used (Tr. at 223, 221). I am particularly

persuaded by the fact that Robert testified to having used the miter saw to cut pre-marked pieces of moulding. (Tr. at 222-223.) The fact that there was testimony that the moulding was handed to Robert pre-marked and that the nail gun was used to secure moulding already in place, weighs heavily against Respondents argument that only a skilled craftsman could install moulding. While Respondents evidence persuades me that moulding installation rises to the level of art, I fail to see how this equates with Robert never having used the tools in question.

Furthermore, Plaintiff convincingly established that it was possible for Respondents's employees to be at work with Robert and not witness him use the subject tools. (Tr. at 50, 65, 68, 226.) While I find that all of the witnesses presented credible testimony, the cutting and nailing of moulding with the miter saw and nail gun could have taken place quickly, out of eyeshot of any of Respondents's employees, even when they were working at the same job-site. In fact, in as much as Respondents profess to taking pride in their craftsmanship and working on only high-end homes and buildings, I take notice of the fact that such homes and buildings tend to be larger and more likely to allow for employees to be working in different rooms at the same time. This would explain how an employee using the nail gun or miter saw in one room would not be seen by an employee working in another room, and may well explain why Mr. Liez, Tom, Mike, and Mr. Kanagie testified that they never witnessed Robert using the tools.

Respondents's own timesheets reflect that its employees were working at several different time intervals during the course of Robert's scattered employment. (RX1.) I find it to be highly probable that Respondents's witnesses, who testified to having never seen Robert use the subject tools, were either not employed or not working during the time of Robert's use or were present but were out of eyeshot and not able to witness the use take place.

In light of the foregoing, I find, by a preponderance of the evidence, that Robert did use both the miter saw and nail gun while in Respondents employ in violation of 29 C.F.R. §§ 570.55 and 570.65.

3. Respondents Did Not Violate 29 C.F.R. § 570.5 But Did Violate § 516.2(a)(3)

Section 212 of the FLSA provides, "[i]n order 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. § 212(d). At issue in this case are the regulations found at 29 C.F.R. §§ 570.5 and 516.2(a)(3).

Section 570.5(c) provides as follows:

> [t]he prospective employer of a minor, in order to protect himself from unwitting violation of the Act, should obtain a certificate (as specified in paragraphs (b) (1) and (2) of this section) for the minor if there is any reason to believe that the minor's age may be bellow the applicable minimum for the occupation in which he is to be

> employed. Such certificate should always be obtained where the minor claims to be only 1 or 2 years above the applicable minimum age for the occupation in which he is to be employed. It should also be obtained for every minor claiming to be older than 2 years above the applicable minimum age if his physical appearance indicates that this may not be true.

29 C.F.R. § 570.5(c). Paragraphs (b)(1) and (2) of section 570.5 provide as follows:

> [t]he employment of any minor shall not be deemed to constitute oppressive shild [sic] labor under the Act if his employer shall have on file an unexpired certificate, issued and held in accordance with this subpart, which shall be either:
>
> (1) A Federal certificate of age, issued by a person authorized by the Administrator of the Wage and Hour Division, showing that such minor is above the oppressive child-labor age applicable to the occupation in which he is employed, or
>
> (2) A State certificate, which may be in the form of and known as an age, employment, or working certificate or permit, issued by or under the supervision of a State agency in a State which has been designated for this purpose by the Administrator showing that such minor is above the oppressive child-labor age applicable to the occupation in which the minor is employed. States so designated are listed in § 570.9(a). Any such certificate shall have the force and effect specified in § 570.9.

29 C.F.R. §§ 570.5(b)(1) - (2).

Section 516.2(a)(3) provides as follows:

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

29 C.F.R. § 516.2(a)(3).

In this case, Respondents argue that section 570.5(c) does not apply to them, because Robert was hired as a "gopher." Because he was hired to do "gopher" duties, which were duties that did not require him to be 18-years old, Respondents argue "the occupation in which he is to be employed" was not one that required Respondents to obtain a certificate of age. Respondents

also argue that because Robert appeared older than 18-years, his physical appearance made it unnecessary for them to obtain a certificate.

Plaintiffs argue that Robert's intended work duties and his appearance are not relevant factors in this controversy, because even if Robert was not hired to use the miter saw or nail gun, section 570.5(c) still requires Robert to be at least 16-years of age to work for Respondents. Thus, under Plaintiffs interpretation, even if Robert claimed to be 18-years of age, Respondents still would have been required to obtain a certificate of age, because "[s]uch certificate should always be obtained where the minor claims to be only 1 or 2 years above the applicable minimum age for the occupation in which he is to be employed." 29 C.F.R. § 570.5(c). According to Plaintiff, Robert would have had to have claimed to be 19-years of age (more than two years above the 16-year old minimum age required to work for Respondents) for the portion of the regulation which discusses the appearance of a minor to have been applicable. In support of their position that Respondents knew that Robert was 17-years old, Plaintiff directs me to Robert's testimony that it was common knowledge among his co-workers that he was 17 (Tr. at 226) and the testimony of Robert's co-workers themselves (Tr. at 49, 73-75).

While I am in substantial agreement with Plaintiff's interpretation and application of section 570.5(c), I cannot agree with Plaintiff's position that section 570.5(c) is a mandatory requirement. Section 570.5(c) speaks of what an employer "should" do. Because this regulation uses precatory language, I cannot find that Respondents were in violation of that section.

Section 516.2(a)(3) is another matter. Respondents argue, based upon the office form filled out by Felicia (RX4), that they were in substantial compliance with this section. However, as Plaintiff points out, Respondents have stipulated that Robert was under 19-years of age for the entirety of his employment with Respondents. (ALJX13.) Moreover, Robert credibly testified that Respondent Liez had knowledge that Robert was 17-years old. (Tr. at 226.) While Felicia wrote down Robert's age as being 18-years at the time of Robert's application, Robert testified that he told Felicia he was 17-years old. (Tr. at 231.) Robert testified that when he started work with Respondents he gave them a copy of his birth certificate and social security card. (Tr. at 225, 228.) He also testified that he and Respondent Liez had several conversations regarding Robert's inability to buy cigarettes. (Tr. at 226.)

Mr. Nacios testified that during his investigation of Respondents he entered a violation for section 516, because Respondents failed to have a record of Robert's age. (Tr. at 101-104.)

Based upon Robert and Mr. Nacios testimony, I find, by a preponderance of the evidence, that Respondents violated section 516 by failing to maintain and preserve a record containing the information required by section 516.2(a).

Plaintiff's assessment document (PX5), however, 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." (PX5.) 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 therefor.[18]

ORDER

In light of the foregoing, the decision of the Administrator is AFFIRMED in-part and DENIED in-part. The Respondents are found to have violated section 12 of the FLSA and they are ORDERED to pay the Secretary the sum of $2,400.00 as a civil money penalty for the violations of 29 C.F.R. §§ 570.55 and 570.65. The record-keeping violations are REVERSED AND VACATED.

A

RALPH A. ROMANO
Administrative Law Judge

[18]Mr. Nacios's testimony on this score (Tr. at 102) is unhelpful as he too, without specificity, refers to "… Regulation 516, and … Regulation 570.5."