U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 06 June 2007

CASE NO. 2006-CLA-17

In the Matter of:

U. S. DEPARTMENT OF LABOR,
WAGE and HOUR DIVISION,
Plaintiff

v.

J. RENTAL INC. d/b/a HANK PARKER'S RENTAL,
JACOB BERARDI Individually and as President,
Respondents

ORDER GRANTING SUMMARY DECISION AND CANCELLING HEARING

This proceeding arises under the Child Labor Provisions of the Fair Labor Standards Act ("Act"), 29 U.S.C. § 201 *et seq.* and the regulations promulgated thereunder at 20 C.F.R. §§ 570, 579, and 580. The Wage and Hour Division of the Department of Labor ("Wage and Hour"), after investigation, assessed a civil money penalty against the Respondent in the amount of $9,240.00 for violations of 29 C.F.R. §§ 570.52 and 570.58 by employing minors in hazardous occupations. The Respondent filed an exception to this determination. The case is currently scheduled for a hearing to commence on June 12, 2007 in Buffalo, New York. On May 30, 2007, the Complainant filed a Motion for Summary Decision, arguing that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law.[1]

Because there exists no genuine issue of material fact for the hearing, Complainant's Motion for Summary Decision is granted.

PROCEDURAL HISTORY

Beginning April 2005, Wage and Hour conducted an investigation of the Respondent's pay and work practices for the period of September 13, 2003-September 2, 2005. (Tischer Dec. ¶2). On November 22, 2005, Wage and Hour issued a letter of investigatory findings. (Fitzgerald Dec. Exh. 3). That letter advised the Respondent that Wage and Hour's investigation revealed seven child labor violations involving four minors, ages sixteen and seventeen, who had been engaged in hazardous occupations. On December 7, 2005, Wage and Hour issued a letter

[1] In support of its Motion, the Complainant also submitted a Memorandum of Law as well as Declarations by Joan Tischer, Michael Fitzgerald, and Jeffrey Rogoff. Each Declaration was accompanied by exhibits.

assessing a civil money penalty for these violations. On December 13, 2005, the Respondent filed an exception to Wage and Hour's determination.

On August 15, 2006, the matter was referred to the Office of Administrative Law Judges ("OALJ") for a final determination of the violations and penalties. On August 24, 2006, Associate Chief Judge Thomas Burke issued a Notice of Docketing, which required the parties to submit pre-hearing statements.[2] The Complainant submitted its pre-hearing statement on September 22, 2006. In lieu of submitting a pre-hearing statement containing the required elements, the Respondent filed a Petition to Dismiss, dated September 26, 2006. In its Petition, the Respondent contended that it is not covered by the Act, that the Department of Labor lacks authority to investigate this matter, and that this Court lacks jurisdiction to hear this case. The Complainant filed a Reply to the Respondent's Petition to Dismiss on October 17, 2006.

I was assigned the case on January 17, 2007. On January 20, 2007, I issued an Order Denying Respondent's Motion to Dismiss. Specifically, I found that the Respondent is a covered employer based on the theory of "enterprise coverage," that the Department of Labor has the regulatory authority to investigate the matter, and that this Court has the regulatory authority to hear this case. In that same Order, I set the hearing for June 12, 2007 in Buffalo, New York. I also ordered the Respondent to submit a pre-hearing statement that complies with Judge Burke's Notice of Docketing no later than February 12, 2007.

The Respondent never submitted such a pre-hearing statement. On March 29, 2007, the Complainant submitted a Motion for Default Judgment based on the Respondent's failure to submit its pre-hearing statement. On April 4, 2007, I denied the Complainant's Motion for a Default Judgment; however, I also ordered that if the Respondent did not submit its required pre-hearing statement by April 13, 2007, it would be precluded from presenting any evidence or witnesses other than its own testimony. The Respondent again failed to submit the required pre-hearing statement.

On May 17, 2007, the Complainant filed a Motion in which it advised this Court of its forthcoming Motion for Summary Decision and requested that the deadline for the Respondents to respond be shortened to June 6, 2007. By Order dated May 18, 2007, I granted that motion, required the Complainant to file its Motion for Summary Decision by May 31, 2007, and required the Respondent to file any response by June 6, 2007.

On May 30, 2007, the Complainant filed its Motion for Summary Decision. The Respondent did not file any response.

DISCOVERY MATTERS

In its Motion for Summary Decision and accompanying documents, the Complainant stated that it has made numerous discovery requests of the Respondent but received no response. Specifically, the Complainant stated that on April 26, 2007, it served on the Respondent a

[2] The pre-hearing statements were to include a witness list with a summary of the expected testimony of each witness, any other proceeding which is related to or may affect the progress of this case, a suitable location of the hearing, and the approximate number of days required for trial.

Request for Admissions, a Request for Production of Documents, and Interrogatories. (Rogoff Dec. ¶2). Each discovery item requested a response within thirty days. (Rogoff Dec. Exh. 2-4). As of May 29, 2007, the Respondent had not responded to any of the discovery requests.

Of particular note here is the Respondent's failure to respond to the Complainant's Request for Admissions. The Rules of Practice and Procedure before this Court, 29 C.F.R. Part 18, includes a provision governing Requests for Admissions. It states that "[a] party may serve upon any other party a written request for the admission…of the truth of any specified relevant matter of fact." 29 C.F.R. § 18.20(a). If the party to whom the request is directed does not deny, state why he or she cannot admit or deny, or object within thirty days, the matter is deemed admitted.[3]

In this case, as stated above, the Complainant served Requests for Admission of the Respondent on April 26, 2007. The Respondent has failed to respond in any way to these requests. Therefore, these matters are deemed admitted for the purpose of this proceeding.[4]

FACTUAL BACKGOUND[5]

Respondent, J. Rental, Inc. is a New York company that rents party equipment and tents as well as hardware, household supplies, and construction equipment to the public throughout the East Coast. (Tischer Dec. ¶¶10-16 & Exh. 1-5). It does business under several names and locations, including Hank Parker's Rental in Fairport, NY, All Season Rental in East Amherst, NY, and HP Event Rentals in Rockledge, FL and Orlando, FL. For 2003, J. Rental, Inc. had an annual gross volume of $1,998,067. (Tischer Dec. ¶37). For 2004, J. Rental, Inc. had an annual gross volume in excess of $1,300,000. (Tischer Dec. ¶38).

Respondent Jacob Berardi is the President and owner of J. Rental, Inc. (Tischer Dec. ¶11).[6] Berardi has the authority to hire and fire employees, determine company policy regarding employees, set pay rates, and set the conditions of employment for the employees of J. Rental, Inc. (Tischer Dec. ¶¶19-20).

The Respondent regularly receives goods, materials, merchandise, and equipment manufactured outside the state of New York in the course of its business. (Tischer Dec. ¶28). Examples of such items include Makita Sanding Paper from Georgia, Milwaukee Drills from Wisconsin, Stanley Tools from Connecticut, a Bostich Air Compressor from Virginia, and a Barreto Trencher from Oregon. (Tischer Dec. ¶28).

During the summer months, the Respondent employs over twenty-five employees in the course of its business, some of whom are minors. (Tischer Dec. ¶¶22-27). The Respondent

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[3] Any admission made by a party under § 18.20 is for the purpose of the pending action only and may not be used against that party in any other proceeding. 29 C.F.R. § 18.20(f).

[4] I note that upon serving the Request for Admission, the Complainant advised the Respondent of these consequences should it fail to respond. (*See* Rogoff Dec. Exh. 2).

[5] In addition to the Declarations and exhibits cited, this factual record is supported by the unanswered Requests for Admission, which are now deemed admitted.

[6] Hereinafter, unless otherwise distinguished, the two Respondents shall be referred to collectively as "the Respondent."

employed four such minors in 2004-05, who were the subject of Wage and Hour's investigation: William Kent, John Moss, Nicholas Cirelli, and Jeffrey Copp.

The Respondent employed William Kent as a laborer from June 20, 2004-August 31, 2004. (Tischer Dec. ¶44). Kent's date of birth is February 17, 1987. (Tischer Dec. ¶45 & Exh. 11). As part of his job duties, the Respondent required Kent to drive and operate a Bobcat loader, a forklift, a cargo van, and a truck. (Tischer Dec. ¶¶46-48; Exh. 12; & Exh. 10). Kent operated the cargo van and truck between ten and twenty times around the Rochester, NY area. (Tischer Dec. ¶49 & Exh. 12). He performed these duties while he was seventeen-years-old. (Tischer Dec. ¶¶46-48).

The Respondent employed John Moss as a laborer from July 6, 2004-August 31, 2004. (Tischer Dec. ¶46 & Exh. 10). Moss's date of birth is July 6, 1988. (Tischer Dec. ¶41 & Exh. 9). As part of his job duties, the Respondent directed Moss to drive and operate a forklift. (Tischer Dec. ¶42 & Exh. 10). He performed this task when he was sixteen-years-old. (Tischer Dec. ¶42 & Exh. 10).

The Respondent employed Nicholas Cirelli as a laborer from just after Memorial Day, 2005 through the end of July, 2005. (Tischer Dec. Exh. 14). Cirelli's date of birth is June 25, 1987. (Tischer Dec. Exh. 13). Therefore, he worked for the Respondent as a seventeen-year-old until June 25, 2005, his eighteenth birthday. As part of his job duties, Cirelli drove several trucks that exceeded 18,000 pounds in gross weight. (Tischer Dec. ¶55 & Exh. 14). He performed these tasks while still seventeen-years-old. (Tischer Dec. ¶55 & Exh. 14).

Finally, the Respondent employed Jeffrey Copp as a laborer during June and July 2004 and June and July 2005. (Tischer Dec. Exh. 16). Copp's date of birth is September 3, 1987; therefore, he was sixteen-years-old during his 2004 employment and seventeen-years-old during his 2005 employment. (Tischer Dec. Exh. 16). During his 2005 employment, the Respondent instructed Copp to operate a delivery van. (Tischer Dec. Exh. 16). At that time, Copp had a learner's permit but not a driver's license. (Tischer Dec. Exh. 16). Therefore, he was not to be driving unaccompanied; however, he operated the van alone. (Tischer Dec. at Exh. 16). Additionally, while Copp was seventeen, he once rode on the back of a pickup truck during the course of his duties. (Tischer Dec. Exh. 16).

Based on its investigation, Wage and Hour found that the Respondent had committed seven violations of the Act's child labor provisions. (Fitzgerald Dec. ¶7). In determining the resulting civil money penalties, Wage and Hour utilized the schedule of penalties set forth in the Child Labor Civil Money Penalty Report Form WH-266 ("WH-266"). (Fitzgerald Dec. ¶8 and Exh. 1). It assessed a base penalty of $1,320.00 for each of the seven hazardous order violations. (Fitzgerald Dec. ¶9 & Exh. 1).[7] Wage and Hour found that there was no basis to increase or decrease the base penalty for any of the factors set forth in 29 C.F.R. § 579.5. (Fitzgerald Dec. ¶¶12-15).

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[7] This base penalty is set forth in Section 54f02 of the Wage and Hour Filed Operations Handbook. (*see* Fitzgerald Dec. ¶9 & Exh. 2).

COMPLAINANT'S ARGUMENT

The Complainant argues that there exists no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. Specifically, the Complainant asks this Court to find that: (1) Respondent J. Rental, Inc. and Respondent Jacob Berardi are covered employers under the Act; (2) The Respondent violated the child labor provisions of the Act and the applicable Regulations, 29 C.F.R. §§ 570.52 and 570.58; and, (3) The proposed $9,240.00 civil money penalty is reasonable and appropriate. (Complainant's Memorandum of Law at 2).

With respect to coverage, the Complainant asserts that Respondent J. Rental, Inc. is covered by the Act under the theory of "enterprise coverage" because it has employees who have handled, sold, or otherwise worked on goods or materials that have been moved in or produced for commerce and it has a gross volume in excess of $500,000.00. The Complainant further asserts that the Respondent Jacob Berardi is an employer within the meaning of the Act such that he is jointly and severally liable with J. Rental, Inc. because he is a corporate officer with occupational control over the covered enterprise.

With respect to violations of the Act, the Complainant asserts that the Respondent violated 29 C.F.R. § 570.52 ("Hazardous Order Two") by requiring Cirelli, Kent, and Copp to drive trucks in the course of their employment and requiring Copp to work as an outside helper, all while under the age of eighteen. The Complainant further asserts that the Respondent violated 29 C.F.R. § 570.58 ("Hazardous Order Seven") by requiring Kent to operate a Bobcat loader and forklift and Moss to operate a forklift, each while under the age of eighteen.

With respect to the civil money penalty, the Complainant asserts that Wage and Hour's proposed $9,240.00 penalty is reasonable and appropriate because the violations were serious and repeated.

RESPONDENT'S ARGUMENT

The Respondent has submitted no reply to the Complainant's motion and thus no countervailing argument.

DISCUSSION

A. Summary Judgment Standard

Any party may, at least twenty days before the date fixed for the hearing, move with or without supporting affidavits for a summary decision on all or any part of the proceeding. 29 C.F.R. § 18.40(a).[8] When a motion for summary decision is made and supported, a party opposing the motion may not rest upon mere allegations or denials but instead must set forth specific facts showing that there is a genuine issue of fact for the hearing. 29 C.F.R. § 18.40(c); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The Administrative Law Judge may enter summary judgment for either party if the pleadings,

[8] By Order dated May 18, 2007, I allowed the Complainant to file its Motion for Summary Decision within the twenty day time period to account for the completion of discovery.

affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision. 29 C.F.R. § 18.40(d). When an Administrative Law Judge finds that no genuine issue of material fact exists, thus granting the motion for summary decision on all of the proceeding, he or she may issue a decision to become final as provided by the statute or regulations under which the matter is to be heard. 29 C.F.R. § 18.41(a).[9]

B. Coverage

The Complainant has moved for summary decision on the issue of coverage, arguing that Respondent J. Rental, Inc. is covered by the Act under a theory of "enterprise coverage" and that Respondent Jacob Berardi is a covered employer such that he is jointly and severally liable with J. Rental, Inc.

1. Coverage of Respondent J. Rental, Inc.

The Act provides that "[n]o employer shall employ any oppressive child labor in commerce or in the production of goods for commerce or in any enterprise engaged in commerce or in the production of goods for commerce." 29 U.S.C. § 212(c). Thus, coverage exists if either the employee is engaged in commerce (individual coverage) or the employer is an enterprise engaged in commerce (enterprise coverage).[10] *Chao v. A-One Medical Servs., Inc.*, 346 F.3d 908, 914 (9th Cir. 2003) (citing 29 U.S.C. § 203(b) & (s)). An "enterprise engaged in commerce" exists if the enterprise:

> (1)(a) has employees engaged in commerce; or
>
> (b) has employees engaged in the production of goods for commerce; or
>
> (c) has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person; and,
>
> (2) has an annual gross volume of $500,000 or more.[11]

29 U.S.C. § 203(s).

This standard has been interpreted broadly, such that coverage under the Act extends to companies that use products or materials that have been moved in interstate commerce. *See e.g. Radulescu v. Moldowan*, 845 F.Supp. 1260, 1264-65 (N.D. Ill. 1994); *Marshall v. Brunner*, 668 F.2d 748, 752 (3d Cir. 1982). Moreover, the Act does not require that all of a business's

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[9] Under the Act, the decision of the Administrative Law Judge shall be final unless appealed to the Administrative Review Board. 29 C.F.R § 580.12.

[10] The Act defines "commerce" as "trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof." 29 U.S.C. § 203(b).

[11] If an employer's business exceeds the dollar volume requirement in any calendar year, the business will be presumed to be covered in the next year, unless the employer establishes through the use of the rolling quarter method that its dollar volume for the previous twelve months has fallen below the $500,000 mark. 29 C.F.R. § 779.266(a).

employees be engaged in one of these activities for enterprise coverage to exist. *Radulescu*, 845 F.Supp at 1262. Nor does it require the specific employees at issue in a particular case to be so engaged. *See id*. Rather, so long as the gross volume requirement is met and the business in question has employees who meet the standard, enterprise coverage exists. *Id*.

Here, the evidence establishes that Respondent J. Rental, Inc. has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce and has an annual gross volume of over $500,000. Regarding, the first point, the Complainant has demonstrated that, although J. Rental, Inc. is a New York company, it regularly receives and uses goods and materials manufactured from states such as Georgia, Wisconsin, Connecticut, Virginia, and Oregon. (Tischer Dec. ¶28). Additionally, J. Rental, Inc. advertises that it provides rental equipment throughout the East Coast and maintains locations in both New York and Florida in furtherance of this objective. (Tischer Dec. ¶¶13-15 & Exh. 3-5). Regarding the gross volume requirement, the evidence establishes that Respondent J. Rental, Inc. exceeded the statutory minimum for the relevant time periods. (Tischer Dec. ¶¶35-38).

2. <u>Coverage of Respondent Jacob Berardi</u>

To be held liable under the Act, a person must be an "employer." *Herman v. RSR Security Servs. Ltd.*, 172 F.3d 132, 139 (2d Cir. 1999). The Act defines "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29. U.S.C. § 203(d). The Second Circuit has observed that the Act offers little guidance as to when an individual is or is not an "employer," but noted that that "the overarching concern is whether the alleged employer possessed the power to control the workers in question…with an eye to the 'economic reality' presented by the facts of each case." *Herman*, 172 F.3d at 139. To make this determination, the Second Circuit applied the "economic reality test," which considers whether the alleged employer:

(1) had the power to hire and fire employees;

(2) supervised and controlled employee work schedules or conditions of employment;

(3) determined the rate and method of payment; and

(4) maintained employment records. *Id*.

The Court further commented that no one factor standing alone is dispositive but rather the totality of the circumstances should be considered in a given case. *Id*.

In this case, the evidence establishes that Respondent Jacob Berardi is an "employer" under the Act. Specifically, he is the President and owner of J. Rental, Inc., has the authority to hire and fire employees, set pay rates, determines company policy, and sets the terms and conditions of employment. (Tischer Dec. ¶¶11, 19 & 20). Thus, under the "economic reality test," he possessed the power to control the minor workers in question. As a result, he may be held liable under the Act, jointly and severally with Respondent J. Rental, Inc.

Therefore, there is no genuine issue of material fact that both Respondent J. Rental, Inc. and Respondent Jacob Berardi are covered under the Act.

C. Finding of Violations

The Complainant has moved for summary decision on the issue of whether the Respondent committed seven violations of the Act by requiring minors to engage in hazardous occupations.

Section 12 of the Act provides that covered employers may not employ children under "oppressive child labor" conditions. 29 U.S.C. § 212(c). The Act defines "oppressive child labor" as a condition of employment under which:

> (1) any employee under the age of sixteen years is employed by an employer…in any occupation; or,
>
> (2) 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…to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being. 29 C.F.R. § 203(l).

Two categories of occupations found to be hazardous are described at 29 C.F.R. §§ 570.52 ("Hazardous Order Two") and 570.58 ("Hazardous Order Seven").

Hazardous Order Two prohibits minors between the ages of sixteen and eighteen from working as a motor vehicle driver and outside helper. 29 C.F.R. § 570.52.[12] The term "motor vehicle" is defined as "any truck, truck-tractor, trailer, semitrailer, motorcycle, or similar vehicle propelled or drawn by mechanical power and designed for use as a means of transportation…." 29 C.F.R. § 570.52(c)(1). The term "outside helper" is defined as "any individual, other than a driver, whose work includes riding on a motor vehicle outside the cab for the purpose of assisting in transporting or delivering goods." 29 C.F.R. § 570.52(c)(3).

[12] Hazardous Order Two puts forth an exception to this rule, which applies if all of the following criteria are met:
(1) The vehicle is under 6,000 pounds gross vehicle weight and is equipped with a seatbelt or similar restraining device;
(2) The driving is restricted to daylight hours;
(3) The minor holds a state license valid for the type of driving involved;
(4) The minor has completed a state-approved driver education course;
(5) The driving does not involve the towing of vehicles, route deliveries, route sales, the transportation for hire of property, goods, or passengers, time sensitive deliveries, or transporting at any one time of more than three passengers;
(6) The driving does not involve more than two trips away from the primary place of employment in any single day for the purpose of delivering goods to a customer;
(7) The driving does not involve more than two trips away from the primary place of employment in any single day for the purpose of transporting passengers;
(8) The driving takes place within a thirty mile radius of the minor's place of employment; and
(9) The driving is only occasional and incidental to the employee's employment.

Hazardous Order Seven prohibits minors between the ages of sixteen and eighteen from operating hoists and high-lift trucks. 29 C.F.R. § 570.58. The term "hoist" is defined as:

> a power-driven apparatus for raising or lowering a load by the application of a pulling force that does not include a car or platform running in guides. The term shall include all types of hoists such as a base mounted electric, clevis, suspension, hook suspension, monorail, overhead electric, simple drum, and trolley suspension hoists. 29 C.F.R. § 570.58(b)(4).

The term "high-lift truck" is defined as:

> a power-driven industrial type of truck used for lateral transportation that is equipped with a power-operated lifting device usually in the form of a fork or platform capable of tiering loaded pallets or skids one above the other. Instead of a fork or platform, the lifting device may consist of a ram, scoop, shovel, crane, revolving fork, or other attachments for handling specific loads. The term shall mean and include highlift trucks known under such names as fork lifts, fork trucks, fork-lift trucks, tiering trucks, or stacking trucks, but shall not mean low-lift trucks or low-lift platform trucks that are designed for the transportation of but not the tiering of material.

The evidence establishes that the Respondent committed four violations of Hazardous Order Two and three violations of Hazardous Order Seven. Specifically, the Respondent violated Hazardous Order Two by:

(1) requiring Cirelli to drive several trucks as part of his employment on numerous occasions whiles he was seventeen-years-old. (Tischer Dec. ¶¶55 & Exh. 14);

(2) requiring Kent to drive a cargo van and truck as part of his employment on numerous occasions while he was seventeen-years-old. (Tischer Dec. ¶48 & Exh. 12);

(3) requiring Copp to drive a delivery van as part of his employment while he was seventeen-years-old. (Tischer Dec. Exh. 16); and

(4) requiring Copp to work as an outside helper by directing him to ride in the back of a pickup truck as part of his employment while he was seventeen-years-old. (Tischer Dec. Exh. 16).

Moreover, the record contains no evidence that would give rise to the exception described in Hazardous Order Two.

The Respondent violated Hazardous Order Seven by:

(1) requiring Kent to drive and operate a Bobcat loader high-lift truck as part of his employment on numerous occasions while he was seventeen-years-old. (Tischer Dec. ¶46 & Exh. 12);

(2) requiring Kent to drive and operate a forklift high-lift truck as part of his employment on several occasions while he was seventeen-years-old. (Tischer Dec. ¶47 & Exh. 12); and

(3) requiring Moss to operate a forklift high-lift truck as part of his employment while he was sixteen-years-old. (Tischer Dec. ¶42 & Exh. 10).

Therefore, there exists no genuine issue of material fact that the Respondent committed a total of seven violations of the Child Labor Provisions of the Act.

D. Appropriateness and Reasonableness of the Penalty

Finally, the Complainant has moved for summary decision regarding the penalty Wage and Hour imposed, contending that the $9,240.00 is appropriate and reasonable.

Under Section 16(e) of the Act, an employer who violates the child labor provisions shall be subject to civil penalties for each minor employed in violation of the Act or Regulations. The maximum penalty for each employee is $10,000.000. In determining the amount of the penalty, the Court shall consider the size of the business and the gravity of the violation. 29 U.S.C. § 216(e).

The Regulations provide certain factors to consider in determining the size of the business, including the number of persons employed, the dollar volume of sales or business done, the amount of capital investment and financial resources, and such other information as may be available relative to the size of the business. 29 C.F.R. § 579.5(b). The Regulations also provide certain factors to be considered relating to the gravity of the violation, including any history of prior violations, evidence of willfulness or failure to take reasonable precautions to avoid violations, the number of minors illegally employed, the age of the minors so employed and records of 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 the hours of the day and whether such employment was during or outside school hours. 29 C.F.R. § 579.5(c).

By contrast, the Regulations also provide mitigating factors of a violation and the determination of whether a civil penalty would be necessary to achieve the purposes of the Act. To this end, the Regulations consider whether the violations were *de minimis*, or whether there is no previous history of child labor violations, the employer's assurance of future compliance is credible, and the exposure to obvious hazards was inadvertent rather than intentional. 29 C.F.R. § 579.5(d).

The Administrative Review Board ("Board") has found that the use of the WH-266 form to recommend civil money penalties comports with the Regulations. *Administrator, Wage &*

Hour Div. v. Keystone Floor Refinishing Co., ARB Nos. 03-056 & 03-067, ALJ No. 2002-CLA-17 (ARB Sept. 23, 2004) at 10(citing *Administrator, Wage & Hour Div. v. Thirsty's, Inc.*, ARB No. 96-143, ALJ No. 1994-CLA-65 (ARB May 14, 1997)), *aff'd sub nom. Thirsty's v. U.S. Dep't of Labor*, 57 F.Supp.2d 431, 436 (S.D. Tex. 1999). Nevertheless, the WH-266 is merely a starting point in assessing a penalty and may be modified by Wage and Hour, the Administrative Law Judge, or the Board. *Id.* Accordingly, it is not a substitute for an independent review of the appropriateness and reasonableness of the assessed penalty. *Id.*

The Administrative Law Judge may "affirm, reverse, or modify, in whole or in part" the penalty Wage and Hour set. 29 C.F.R. § 580.12(c). This review, however, is *de novo*, and is not an appeal from a fixed record before Wage and Hour. Rather, the Administrative Law Judge must re-weigh the statutory and regulatory factors that bear on a penalty. *Administrator, Wage & Hour Div. v. Chrislin, Inc.*, ARB No. 00-022, ALJ No. 1999-CLA-5 (ARB Nov. 27, 2002) at 9 n.3.

Here, I find that the evidence establishes that the $9,240.00 assessed by Wage and Hour is both appropriate and reasonable. To that end, the record contains no basis for increasing or decreasing the base penalty listed in WH-266. Regarding any potential decrease in penalty, based on the number of total violations and that the same children were involved in multiple violations, I do not find these violations to be *de minimis*. I also do not find that they meet the criteria for a reduction under § 579.5(d)(2) as there is no evidence in the record that the violations were unintentional or inadvertent, and no credible assurances of future compliance. To the contrary, the evidence shows that the Respondent repeatedly directed the minors to engage in the relevant conduct in the course of their employment. Therefore, I find that the base penalty without any decrease is both appropriate and reasonable.

Additionally, although not pursued, there is no evidence in the record that would give rise to an increase in the base penalty. Therefore, I also find that the base penalty without any increase is both appropriate and reasonable.

Thus, I find that there is no genuine issue of material fact that the $9,240.00 assessed by Wage and Hour is both appropriate and reasonable.

CONCLUSION

The Complainant has established that there is genuine issue of material fact that:

(1) Respondent J. Rental, Inc. and Respondent Jacob Berardi are covered employers under the Act;

(2) The Respondent committed seven violations of the Child Labor Provisions of the Act; and

(3) The $9,240.00 assessed by Wage and Hour is an appropriate and reasonable penalty.

Moreover, the Respondent has not set forth any facts showing that a genuine issue of fact for the hearing exists. Therefore, the Complainant's Motion for Summary Decision is granted.

ORDER

Therefore, it is hereby ORDERED that the Complainant's Motion for Summary Decision is GRANTED. As a result, it is ORDERED that:

(1) Respondent J. Rental, Inc. and Respondent Jacob Berardi are covered employers under the Act;

(2) The Respondent committed seven violations of the Child Labor Provisions of the Act as described above; and

(3) The $9,240.00 assessed by Wage and Hour is an appropriate and reasonable penalty.

It is further ORDERED that J. Rental, Inc. and Jacob Berardi are jointly and severally liable for the payment of a civil money penalty in the amount of $9,240.00. The hearing scheduled for June 12, 2007 in Buffalo, New York is CANCELLED.

A

RICHARD A. MORGAN
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Administrative Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days of the date of issuance of the administrative law judge's decision. *See* 29 C.F.R. § 580.13. The address for the Board is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210. *See* Secretary's Order 1-2002, 67 Fed. Reg. 64272 (2002). Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

At the time you file the appeal with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001. *See* 29 C.F.R. § 580.13.

If no appeal is timely filed, then the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 580.12(e).