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 Nos. 03-056, 03-067
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 BRIEF IN RESPONSE TO RESPONDENTS' OPENING BRIEF

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INTRODUCTION

The Administrator submits this brief in response to Respondents' opening brief. The Administrator asserts that both the controlling law and the evidence of record support the conclusion that Keystone Floor Refinishing Company, Inc. ("Keystone")[1] is covered by the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. 201 et seq. ("FLSA" or "Act"); that

[1] Respondents will be referred to as Keystone in this brief unless otherwise indicated.

Keystone violated two child labor Hazardous Occupation Orders ("HOs"), at 29 C.F.R. 570.55 and 570.65; and that the assessed civil money penalties ("CMPs") for the HO violations were appropriate. The issue of the recordkeeping violation and related penalty was treated in the Administrator's opening brief.

ISSUES PRESENTED

1. Whether there is both individual and enterprise coverage in the instant case.

2. Whether the Administrative Law Judge ("ALJ") correctly concluded that the evidence showed that a 17-year-old employee repeatedly used a circular saw and a nail gun on the job in violation of HO Nos. 14 and 5, at 29 C.F.R. 570.65 and 570.55, respectively.

3. Whether the ALJ correctly concluded that the $2,4000 CMP assessed by Wage-Hour was appropriate for the hazardous, illegal work performed by the 17-year-old.

4. Whether Keystone was denied a full and fair opportunity to present its case.

STATEMENT OF THE CASE

A. Statement Of Facts[2]

The facts that follow were stipulated to by the parties. Between July 9 and November 17, 1999, Keystone employed employees, in and about its place of business, who were 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 (Dec. 2). Keystone was specifically engaged in installing, sanding, and refinishing hardwood floors in buildings from April 1987 through the time period relevant to this proceeding, July 9 to November 17, 1999 (Dec. 2). Between July and November 1999, Keystone owned and utilized one Stanley N50FN/N60FN nail gun used by its employees to install moulding, and one Delta 8-1/4" Compound Miter Saw (Model 36-040), also used by its employees to install moulding (Dec. 3).

Keystone's annual gross receipts or sales for the years 1990 through 2000 exceeded $250,000 (Dec. 3). Between July and November 1999, Keystone employed approximately 10 to 14 people, including both full-time and part-time employees, during which time Respondent Daniel Liez, owner and president of Keystone,

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[2] The procedural history of this case and the facts relevant to the recordkeeping issue are set forth in the Administrator's opening brief.

managed Keystone's daily operations, made all employment and termination decisions, and determined corporate policy (Dec. 3).

Keystone employed Robert Martin from July 9, 1999 to November 17, 1999 in commerce or in the production of goods for commerce within the meaning of the FLSA. On a weekly basis, Martin handled or worked with goods, materials, supplies, or equipment moved in or produced in interstate commerce (Dec. 2). Born on January 17, 1982, Martin was 17-years-old during his employment with Keystone (Dec. 3). Keystone was in possession of Martin's Social Security number at the time of his hire (Dec. 3). Furthermore, as the credited testimony set forth below reveals, Martin used a circular saw and nail gun while employed by Keystone.[3]

B. Proceedings Below And Decision Of The ALJ

1. At the August 2002 hearing, covering two days, the ALJ heard testimony from several current and former Keystone employees, and from an investigator of the Wage and Hour Division. The Administrator presented testimony from Daniel James McDowell, John Miller, Joseph Chmielowski, and Robert

[3] The Administrator lays out the conflicting testimony regarding Martin's use of the circular saw and nail gun in the following section of this brief. While the ALJ found that all the testimony was credible, he found Martin's testimony particularly persuasive, and thus, even taking into account the testimony of those employees who stated that they did not see Martin using the power tools, he concluded that Martin indeed used both the circular saw and the nail gun.

Martin himself (tr. 21-143), all of whom testified that Martin had used one or both of the prohibited power tools on the job while assisting other, more experienced workers. The Administrator also called the investigator, William P. Nacios, to testify. Keystone presented testimony from Daniel Liez, Tom Hazelwood, Felicia Saunders, Neil McNicholl, Mike Solicki, and Daniel Kanagie (tr. 144-271), who testified that they had never seen Martin use the prohibited power tools on the job and/or that they doubted he would be allowed to use them because he lacked sufficient skill and experience. Keystone also submitted the deposition testimony of Stewart Bostic and James Kolpack, two employees of the Wage and Hour Division who commented on investigative procedures. (RX14 and RX15.)

2. The minor, Robert Martin, testified that he used the circular saw and the nail gun on a regular basis during his employment at Keystone (tr. 220-23, 226). Specifically, he stated that he would operate the circular saw after a person responsible for measuring and fitting the moulding marked on a piece of moulding the angle and direction in which the cut was to be made, and handed the marked piece to him (tr. 222). He then used the circular saw to make the pre-marked cut, which often took only five to ten seconds, and returned the moulding to the person who had handed it to him (id.). Martin also testified that the circular saw was sometimes located outside

the building in which the employees were working, and that a piece of moulding would be given to him to cut so that the person measuring and installing the moulding would not have to leave the room or building (tr. 223). He repeatedly used the nail gun, as asked, to add additional nails to moulding already fixed into place (tr. 222-23), and he also took over nailing at the request of more experienced employees who had to temporarily leave the building (tr. at 223). Martin testified in detail how the circular saw was stored, how the grip of the saw was held, where the wood was cut, and how the safety latch was turned off to begin cutting (tr. at 221). He also explained in detail how the nail gun was held, turned on, and used (tr. at 220). Martin further testified that he and Daniel Liez had several conversations regarding Martin's inability to buy cigarettes because he was only 17-years-old, (tr. 226), and that Liez personally directed him to use the circular saw to cut moulding (tr. at 223).

People who worked at Keystone with Martin testified that they personally observed him using the circular saw and/or the nail gun. Daniel McDowell, who was often left in charge of the worksite in Daniel Liez's absence (tr. at 25, 31, 53, 65, 73, 78, 82), stated that he assigned Martin the duties of cutting moulding with the circular saw while he was in charge of the worksite, and saw Martin use the saw to cut the pre-marked

moulding multiple times (tr. at 24-26, 28). McDowell also testified that he instructed Martin to use the nail gun to nail moulding while he was in charge of the worksite, and that he observed Martin using the nail gun to nail moulding on various occasions (tr. at 24-26). Furthermore, McDowell testified that most Keystone employees used these tools to assist in the installation of moulding when the job required it, including employees who had only worked at Keystone for a single week (tr. at 37, 39).

Joseph Chmielowski testified that he repeatedly observed Martin use the circular saw to cut moulding, and the nail gun to nail moulding (tr. 71-73, 76, 78, 84). In addition, Chmielowski described that a more experienced Keystone employee, including Liez, would mark the piece of moulding and give it to Martin, who would make the cut and return the moulding (tr. at 82). Chmielowski stated that, although he had never been trained in the operation of Keystone's circular saw or nail gun, he had used each of them to help install moulding (tr. at 72-73, 77-78, 82-83). John Miller also testified that he observed Martin using the circular saw to cut moulding; in fact, Martin cut pre-marked moulding for him several times while Miller took a smoking break (tr. 53, 65). Like Chmielowski, Miller testified that, although he used both the circular saw and nail gun in his work to help install moulding, he never was trained to do so

(tr. at 51-52, 65).

The Wage and Hour investigator, William Nacios, testified that in the initial penalty assessment process he entered appropriate information into the electronic version of the approved Wage-Hour Form WH-266 (tr. 100-04, 122, 142). The investigator entered into the electronic form information to the effect that Keystone had six current employees, and had violated three child labor provisions of the Act with regard to one 17-year-old minor (tr. 100-01). Specifically, he input information that Keystone violated HO Nos. 5 (power-driven wood-working machines) and 14 (circular saws), and that Keystone committed one violation of the child labor recordkeeping requirements of the FLSA (tr. 101). With regard to the gravity of the violations, the investigator stated that the violations were "extremely dangerous" because "[t]here were two pieces of equipment that were extremely dangerous that the minor operated as a regular part of his job" but, because Keystone had no history of prior violations, he did not enter a multiplier into the electronic form (tr. 105, 122). Investigator Nacios also said that no reduction in the penalty was justified in light of Keystone's annual average gross sales for the past three years, and because it was not in any financial difficulty which would, for instance, make it difficult for it to pay the assessed CMPs (tr. 105, 119-120, 122).

Following the investigator's inputting of the information, an initial CMP was computer-generated in the amount of $2,675.00 (tr. at 104; GX 5). Specifically, a $1,200 penalty was issued for Keystone's employment of Martin in violation of HO No. 5, 29 C.F.R. 570.55, which prohibits a minor's operation of a power-driven nail gun; a $1,200 penalty was issued for Keystone's employment of Martin in violation of HO No. 14, 29 C.F.R. 570.65, which prohibits a minor's operation of a circular saw; and a $275 penalty was issued for Keystone's recordkeeping failure as required (id.). All of the investigator's recommended CMPs were reviewed by the Wage-Hour District Director (tr. 104).

3. Keystone's first witness was Daniel Liez, owner and president of Keystone (tr. 144-45). He testified that his business caters to upscale customers (tr. at 145), can install moulding two to three times a month (tr. at 146-47), and that Martin worked for him for 31 days, but that on only five of those days was Keystone doing moulding work (tr. 147). Liez added that moulding work requires training (tr. 147, 154-55) and, although Martin was hired as a trainee, Liez never considered training Martin to perform moulding work (tr. 147-48). He also testified that he never told anyone to let Martin use the power tools (tr. 148). Liez stated that an employee,

William Kravinskus, sliced his hand using the circular saw to cut moulding and required hospital attention (tr. 260).

Tom Hazelwood testified for Keystone that, while working for the company, Liez and McDowell did the majority of the moulding work, which requires a certain level of skill, and that he never saw Martin perform such work (tr. at 160-61). Hazelwood admitted that he installed moulding for Keystone but had never been trained to perform such work (tr. 160, 171).

In her testimony for Keystone, Felicia Saunders described her duties as office manager (tr. at 177-179), and what procedures she follows when Keystone receive a phone call from a job applicant (tr. at 189). She testified that when Martin called to apply, he told her that he was 18-years-old (tr. at 190; RX4).

Neil McNicholl testified for Keystone that he had 26 years of carpentry experience, taught industrial arts at junior high school (tr. at 193), and did hardwood floor installations for Keystone (tr. at 195). He stated that moulding installation is high-end work, which requires expert skills (tr. at 197-198). Mike Solicki testified that he worked with Martin every day while Martin was employed by Keystone (tr. at 203), and that while working for Keystone he installed moulding (tr. at 207). He also testified that installing moulding requires skill (tr. at 208). Keystone's final witness was Daniel Kanagie, who

testified that he worked with Martin but never saw him use the circular saw or the nail gun (tr. at 264-65).[4]

4. The ALJ, by Decision and Order dated January 27, 2003, concluded that Keystone was a covered enterprise under the FLSA under the "Preservation of Coverage" clause at section 3(b) of Pub. L. 101-157, 103 Stat. 938 (1989) (Dec. 10). He also made a credibility determination that the HO violations alleged occurred on more than one occasion (Dec. 12). In this regard, the ALJ relied on the testimony of witnesses stating that they saw Martin use the tools, and on Martin's own testimony concerning his knowledge of how the tools were used. The ALJ found particularly persuasive the minor's testimony regarding his use of the circular saw to cut pre-marked pieces of moulding (the nail gun was used to secure moulding already in place),

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[4] On September 20, 2002, Keystone moved to resume the hearing in this matter so that the ALJ might hear testimony from Stewart Bostic (RX14) and James Kolpack (RX15). In an Order dated September 25, 2002, the ALJ denied the motion but allowed Keystone an opportunity to submit the transcripts from the depositions of the two to be made part of the record. The ALJ reviewed both Mr. Bostic's and Mr. Kolpack's deposition testimony, noting that Keystone relied on this testimony in support of its argument that the investigation was unfair. Because exhibits RX14 and RX15 were relevant only to the fairness question, and because 29 C.F.R. 580.12(b) limits the scope of an administrative law judge's review in a CMP assessment case to whether a violation has been committed and the appropriateness of such penalty, the ALJ here did not summarize that testimony (Dec. 8, 9). For the same reason, the ALJ did not address the fairness question in his decision (Dec. 4).

thereby refuting Keystone's argument that experience was needed for this kind of work (Dec. 12). Taking notice of the fact that the homes and buildings that Keystone worked on were often large ones, the ALJ concluded that "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" (Dec. 12).

STANDARD OF REVIEW

The Board reviews the ALJ's decision de novo. See Administrator v. Chrislin, Inc. d/b/a Big Wally's, ARB Case No. 00-22 (Nov. 27, 2002); Administrator v. Merle Elderkin, d/b/a Elderkin Farm, ARB Case Nos. 99-033 and 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. 20, 2002).

ARGUMENT

I. THERE IS BOTH INDIVIDUAL AND ENTERPRISE COVERAGE UNDER THE FLSA IN THIS CASE

Keystone asserts that it is not subject to the FLSA because Keystone's annual dollar volume for 1999 was less than $500,000. This argument must fail.

1. First, although not directly addressed by the ALJ, the stipulations themselves establish individual coverage in this

case. Section 12(c) of the FLSA states 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). The relevant stipulation, as laid out by the ALJ, states that "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" (Dec. 2, stip. 5). Thus, by the very terms of the statute and the stipulation, individual coverage is clearly established here.

2. Second, Keystone misapprehends the Preservation of Coverage clause of the 1989 Amendments to the FLSA that the ALJ applied in this case. That provision provides enterprise coverage regardless of a company's annual dollar volume under certain conditions. Although the 1989 Amendments provide that the FLSA would cover only enterprises engaged in commerce or in the production of goods for commerce with an annual dollar volume of not less than $500,000, 29 U.S.C. 203(s)(1)(A), the Preservation of Coverage clause "grandfathered" in certain companies that otherwise would not have been covered under the 1989 Amendments. It states as follows:

> (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 . . . 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 . . . .; and
>
> (C) remain subject to section 12 of such Act . . . .

Section 3(b) of Pub L. No. 101-157, 103 Stat. 938 (codified in the notes to 29 U.S.C. 203).

Prior to the 1989 Amendments, enterprise coverage extended to a company engaged in commerce that "is engaged in the business of construction or reconstruction, or both," 29 U.S.C. 203(s)(4), without regard to the annual dollar volume of business. See generally Reich v. Troyer, No. CIV.A 96-0471, 1996 WL 198111 (E.D. La. Apr. 23, 1996) (denying a motion to dismiss for lack of jurisdiction because the Preservation of Coverage clause would grandfather FLSA enterprise coverage of a business that was enterprise-covered before the 1989 Amendments, if it had been engaged in construction or reconstruction, irrespective of the annual dollar volume of the business).

It is undisputed that Keystone's business activities have, starting prior to the 1989 Amendments, continuously included the installation, sanding, and refinishing of hardwood floors in

buildings (Dec. 3, Stip. 2, 3, 4).[5] In fact, Keystone does not contest that its business activities constitute construction or reconstruction for purposes of the Act, nor that it has been engaged in these activities continuously from 1987 through the time it employed Robert Martin (Dec. 3, Stip. 2). Therefore, Keystone is a covered business under the Preservation of Coverage clause.[6]

Keystone's argument, that the Preservation of Coverage clause applies to only those employees who were employed continuously since before March 31, 1990, lacks any statutory, regulatory, or other legal support. In fact, the FLSA, in defining an "enterprise," and the applicable regulations, clearly state that enterprise coverage is determined by

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[5] Section 12fo7(a) of the Wage and Hour Field Operations Handbook specifically addresses how floor covering firms should be classified for the purposes of determining enterprise coverage under the then existing section 3(s)(4) of the FLSA. It provides that "[t]he installation of hardwood floors, wall tile, and floor tile is 'construction or reconstruction' for the purposes of Sec 3(s)(4) [of the Act] whether performed in conjunction with original construction or as part of a remodeling or repair operation." Thus, Keystone would have qualified as an enterprise engaged in construction or reconstruction under the pre-1989 FLSA.

[6] Respondent Daniel Liez is covered individually as an employer within the meaning of section 3(d) of the Act, 29 U.S.C. 203(d), based on undisputed facts and his own testimony that, as president of Keystone, he acts directly or indirectly in the interest of the employees. As the ALJ stated, "Respondent Daniel Liez manages the daily operations of Respondent Corporation, makes all employment and termination decisions, and determines corporate policy (Dec. 3, stip. 15).

evaluating the activities and organization of corporate or other business units rather than individual employees. See 29 U.S.C. 203(r)(1); 29 C.F.R. 779.236. See generally Maryland v. Wirtz, 392 U.S. 183 (1968), overruled on other grounds by National League of Cities v. Usery, 426 U.S. 833 (1976), overruled by Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985).

Keystone's assertion that the decision in Troyer does not support the application of the Preservation of Coverage clause to construction or reconstruction enterprises like Keystone is incorrect. In Troyer, the court specifically decided, with regard to the construction/reconstruction firm of Troyer Enterprises, that "it is clear that previously covered enterprises remain accountable under certain provisions of the FLSA by virtue of the grandfather clause." 1996 WL 198111, at *2. The court, however, did not have sufficient factual evidence to decide whether that particular firm had been continuously engaged in construction or reconstruction since March 31, 1990. In this case, there is ample evidence, including stipulations by the parties, to decide this question in favor of the Administrator.

II. AMPLE EVIDENCE SUPPORTS THE ALJ'S CONCLUSION THAT KEYSTONE EMPLOYED A 17-YEAR-OLD WHO REPEATEDLY OPERATED A CIRCULAR SAW AND A NAIL GUN IN VIOLATION OF HAZARDOUS ORDER NUMBERS 5 AND 14

The ALJ reasonably determined that a "balance of the credible evidence" demonstrated that Martin repeatedly operated dangerous power equipment in violation of section 12(c) of the Act, 29 U.S.C. 212(c), and HO Nos. 5 and 14.

1. The FLSA prohibits "oppressive child labor," 29 U.S.C. 212(c), as a means of protecting 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); 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); Marshall v. Jerrico, Inc., 446 U.S. 238, 244 (1980); 29 C.F.R. 570.101(a). 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, 867 F.2d 196 (4th Cir. 1989).

The FLSA defines "oppressive child labor" as hiring an employee under the age of sixteen in any occupation,[7] or hiring an employee between the ages of sixteen and eighteen in "any occupation which the Secretary of Labor shall find and by order declare to be particularly hazardous."[8] 29 U.S.C. 203(l)(1), (2). Thus, children under the age of 18 may not be employed in any occupation which the Secretary has declared to be hazardous.

2. The Secretary of Labor has identified 17 occupations as particularly hazardous and, therefore, unsuitable for any minor below the age of 18. See 29 C.F.R. 570.50-68. As relevant to this case, HO No. 5 states that occupations involving the operation of power-driven wood-working machines are particularly hazardous. See 29 C.F.R. 570.55. The term "power-driven wood-working machines" is defined as "all fixed or portable machines or tools driven by power and used or designed for cutting, shaping, forming, surfacing, nailing, stapling, wire stitching,

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[7] The statute goes on to state, however, that "[t]he Secretary of Labor shall provide by regulation or by order that the employment of employees between the ages of fourteen and sixteen years in occupations other than manufacturing and mining shall not be deemed to constitute oppressive child labor if and to the extent that the Secretary of Labor determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being." 29 U.S.C. 203(l)(2). See also 29 C.F.R. Part 570, Subpart C (employment of minors between 14 and 16 years of age).

[8] The Hazardous Orders are, in turn, specifically made applicable to minors under the age of 16 by 29 C.F.R. 570.33(e).

fastening, or otherwise assembling, pressing, or printing wood or veneer." 29 C.F.R. 570.55(b)(1) (emphasis added). HO No. 14 states that occupations involving the operation of circular saws, band saws, and guillotine shears are particularly hazardous. See 29 C.F.R. 570.65. The regulation defines the term "circular saw" as "a machine equipped with a thin steel disc having a continuous series of notches or teeth on the periphery, mounted on shafting, and used for sawing materials." 29 C.F.R. 570.65(b)(4).

3. It is undisputed that Robert Martin was 17-years-old during his employment at Keystone and that the floor refinishing jobs performed by Keystone during his employment sometimes involved the installation of new moulding around the bottom of the wall (Dec. 3, Stip. 7, 8, tr. 147). Also undisputed is that Keystone owned and its employees utilized both a compound miter saw (a circular saw) and a nail gun to install such moulding (Dec. 3, Stip. 13, 14). The miter saw clearly qualifies as a circular saw under HO No. 14, and the nail gun clearly is a wood-working tool as defined in HO No. 5. At issue is whether or not the youngster operated these hazardous pieces of machinery while working for Keystone.

Martin credibly testified that he would use the circular saw to make a five to ten second cut that had been pre-marked, and then return the piece of moulding to the person who had

handed it to him (tr. at 222, 226). He further testified that he used the nail gun to add additional nails to moulding already fixed into place, or to continue the nailing that a more experienced employee had started (tr. at 222-23). Martin also demonstrated in detail for the ALJ how each of the power tools function (tr. at 221). McDowell and Chmielowsky, who worked at Keystone with Martin, testified that they observed him using the circular saw and/or the nail gun (tr. 24-26, 50, 73-75). Chmielowski's testimony corroborated Martin's, stating that a more experienced employee would mark a piece of moulding, pass it to Martin to make the cut, and then take back the piece (tr. 82).

Although Keystones' witnesses testified that they never saw Martin use the dangerous power tools, the testimony provides plausible reasons why the minor could have used these tools without their knowledge. For example, Tom Hazelwood explained that he stopped working for Keystone in the middle of August 1999, and therefore had no knowledge of what Martin may or may not have done for Keystone for the next four months (tr. at 175). Several employees testified that the work team often worked in more than one room at a time, with employees in one room unable to observe what the employees in another room were

doing (tr. 50, 65, 68, 226).[9] This fact, combined with the corroborating testimony of Robert Kanagie, that once moulding is marked it only takes five or six seconds to cut with a circular saw (tr. 274), provides a logical explanation for why Keystone's witnesses may not have observed Martin's use of the tools.

Keystone's assertion that Martin could not have used the circular saw or the nail gun because he was not an experienced carpenter is unconvincing. Miller, Chmielowski, and Hazelwood testified that, although they were never trained in the operation of Keystone's circular saw or nail gun, they all have used both of these power tools in their work for Keystone to help install moulding (tr. at 51-52, 65, 72-73, 77-78, 82-83, 160, 171).

In sum, there was abundant credible evidence establishing Martin's use of the circular saw and nail gun in violation of HO Nos. 14 and 5, respectively.

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[9] Keystone argues that the ALJ erred by taking notice of the fact (see 29 C.F.R. 18.201) that, because Keystone generally works for an upscale clientele, its projects would involve larger spaces and, as a result, would likely require employees to work in different rooms. However, even if this taking notice constituted error, it was harmless, because the testimony of various employees, as noted above, indicates that Keystone's employees did in fact work in separate rooms.

III. THE CMP OF $2,400 IS APPROPRIATE FOR THE TWO HO VIOLATIONS UNDER RELEVANT STATUTORY AND REGULATORY AUTHORITY

Keystone argues that the ALJ failed to consider the appropriateness of the assessed CMP in light of the applicable statutory and regulatory authority. The record, however, shows that the ALJ evaluated the requisite child labor CMP factors. Additionally, this Board, reviewing the case de novo, should uphold the CMPs in light of all the relevant factors, including the gravity of the violations and the size of the business.

1. Section 16(e) of the FLSA requires the consideration of the "size of the business" and the "gravity of the violation" in assessing CMPs. 29 U.S.C. 216(e). "Size of the business" is reflected by the number of employees, sales volume, capital investment, financial resources, and other relevant information. See 29 C.F.R. 579.5(b). "Gravity of the violation" is reflected by a history of prior violations, evidence of willfulness or a failure to take reasonable precautions to avoid violations; the number of illegally employed minors and their records of proof of age; the length of time the minors were illegally employed and the hours of the day they were employed; the occupations in which the minors were employed; whether they were exposed to injury; and whether any injury occurred. See 29 C.F.R. 579.5(c). There exists some flexibility regarding the evaluation of these factors because "[t]here is no guidance as

to the weight or import of any particular factor, nor do the regulations prescribe any numerical or percentage factor to guide an increase in the assessment for an aggravated violation or a mitigation of the assessment where appropriate." Thirsty's, supra.

2. The use of Form WH-266, which takes into account the size of the business and the gravity of the violations, has been endorsed by the Board as a viable tool to initially determine penalties, subject to independent review by the District Director, the ALJ, and the Board. See Chrislin, supra; Elderkin, supra; and Thirsty's, supra. Keystone does not challenge, per se, the Administrator's use of the grid or a computerized version thereof. Rather, Keystone appears to be asserting that the ALJ erred by not providing a sufficient explanation as to the appropriateness of the assessed CMPs in this case as required by the regulation at 29 C.F.R. 580.12(c), which 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.

A fair reading of the ALJ's decision, however, reveals that the ALJ carefully reviewed the stipulations, as well as the testimony of the Wage-Hour investigator concerning how the CMPs

were computed in light of the size of Keystone's business and the gravity of its violations. With regard to size of business, the stipulations address several of the regulatory criteria. Keystone's stipulated annual gross receipts or sales from 1990 to 2000 was in excess of $250,000, and it employed 10 to 14 employees (full-time and part-time) between July and November 1999 (Dec. 3, stips. 12, 16). Also mentioned in the ALJ's decision is the investigator's conclusion that Keystone was on solid financial footing, and was therefore able to pay the assessed penalty (Dec. 5). Furthermore, through its discussion of Keystone's violations of HO Nos. 5 and 14, the decision is replete with statements going to the gravity of the violations, It is, therefore, apparent from the entire decision that the ALJ considered the relevant penalty factors when evaluating the appropriateness of the CMPs for the two dangerous HO violations, thereby satisfying the statutory and regulatory requirements in that regard.

3. Considered de novo by this Board, no reduction in the CMPs should be made. Keystone's violations of the Act were serious, were committed by a company with annual gross sales exceeding $250,000, and were neither de minimis nor inadvertent. The penalties assessed for the HO violations, which are far below the maximum of $10,000 available for each employee subject to a violation, see 29 U.S.C. 216(e), are appropriate.

Multiple violations regarding the same child have been found not to be de minimis.[10] See Administrator v. Q. & D. d/b/a Lamplighter Tavern, Case No. 92-CLA-21 (Sec'y May 11, 1994). This clearly applies to the instant case where Martin used two pieces of hazardous machinery on a repeated basis. Keystone's own expert witness testified about the likelihood of serious bodily injuries caused by inexperienced persons operating these tools (tr. at 201), and Liez acknowledged the occurrence of a serious injury requiring one of his own employees to be taken to the hospital after operating the same circular saw that Martin operated (tr. at 260). Thus, Keystone clearly committed serious violations which may in no way be characterized as de minimis in nature.

Similarly, the continued exposure of a minor to an obvious hazard, as existed in the present case, supports a finding that the violations of the child labor provisions of the Act were not inadvertent. See Chrislin, supra. Working for Keystone, Martin was continually exposed to hazard through the repeated use of the dangerous power tools. Keystone was in possession of Martin's social security number at the time of his hire and

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[10] The regulation at 29 C.F.R. 579.5(d)(1) and (2) provides that, when appropriate, considerations of whether the violations were de minimis or inadvertent should be taken into account in assessing the penalty.

thus, at minimum, could have ascertained his correct date of birth (Dec. 3, Stip. 11).

In light of the overwhelming evidence of record in this case revealing the great danger to which Martin was continually exposed, the CMPs should be upheld by the Board.

IV. KEYSTONE HAS BEEN ACCORDED A FULL AND FAIR OPPORTUNITY TO PRESENT ITS CASE

Keystone claims that it was treated unfairly when the investigator refused to interview certain additional employees at Keystone's prompting after having completed his investigation. The employees in question claimed they did not see Martin use the prohibited power tools or thought it highly unlikely that Martin would ever be allowed to use the tools. These employees, however, all testified at the hearing where the violations and the penalties were considered de novo.[11] Therefore, Keystone's argument that the investigation was unfair on this basis is without merit.

The regulation at 29 C.F.R. 580.6(a) provides that "[a]ny person desiring to take exception to the determination of penalty shall request an administrative hearing pursuant to this part." Keystone timely requested and participated in just such a hearing on August 28 and 29, 2002, where the Administrator's

[11] The ALJ also carefully read the depositions of Bostic and Kolpac that critiqued the interviewing process (Dec. 9).

earlier findings of child labor violations under the FLSA and her assessment of CMPs were at issue. In that proceeding, the ALJ proceeded to consider "whether the respondent has committed a violation of section 12 . . . and the appropriateness of the penalty assessed by the Administrator" (Dec. 4, citing 29 C.F.R. 580.12(b)). The ALJ was free to "affirm, deny, reverse, or modify, in whole or in part, the determination of the Administrator." 29 C.F.R. 580.12(c). Keystone, in effect, received at the hearing what it wanted in the investigation: to have the statements of certain employees considered and weighed, and made part of the record. Moreover, because this Board will now consider the full record de novo, Keystone cannot plausibly argue that it is being denied the opportunity to fully and fairly present its case.[12]

[12] Indeed, should the ARB for any reason determine that the record has been insufficiently developed, it can remand the case to the ALJ for further development. We do not believe such further development is warranted in this case.

CONCLUSION

For the foregoing reasons, that part of the ALJ's decision concluding that two HO violations occurred, and that the attendant CMPs assessed by the Administrator were appropriate, should be affirmed.

Respectfully submitted,

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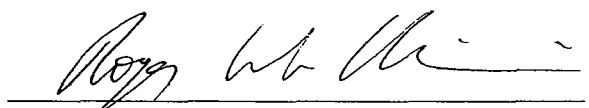

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CERTIFICATE OF SERVICE

I certify that on this 17th day of October, 2003, a copy of the foregoing Administrator's Brief In Response To Respondents' Opening Brief was sent by first class United States mail to:

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