

U.S. Department of Labor

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Issue Date: 27 October 2004

CASE NO.: 2003-CLA-00035

In the Matter of

ADMINISTRATOR, WAGE AND HOUR DIVISION
U.S. DEPARTMENT OF LABOR
Plaintiff

v.

MAINJOY UNLIMITED, INC.
Respondent

Appearances: Natalie A. Appetta, Esq. Kirk L. Wolgemuth, Esq.
 For Plaintiff For Respondent

Before: Janice K. Bullard
Administrative Law Judge

DECISION AND ORDER

This is an action challenging the assessment of a civil money penalty by the United States Department of Labor (“Plaintiff”) against Mainjoy Unlimited, Inc. (“Respondent”) for alleged violations of the child labor provisions of the Fair Labor Standards Act of 1938 (“FLSA”) as amended, 29 U.S.C. § 201 et. seq., and the regulations issued pursuant thereto at 29 C.F.R. §§ 579 - 580 (2003).

I. BACKGROUND

A. Procedural History

By Notice of November 5, 2002, Plaintiff charged Respondent with violations of the FLSA, and assessed a civil money penalty (CMP) in the amount of \$27,170.00 against Respondent. ALJX-1¹. By correspondence received by Plaintiff on November 14, 2002, Respondent filed exceptions to the charges and assessment. ALJX-2. On August 29, 2003, Plaintiff filed with the Office of Administrative Law Judges (“OALJ”) an Order of Reference. ALJX-3. On September 10, 2003, OALJ issued a Notice of Docketing of the case. ALJX-4. Plaintiff filed Pre-hearing submissions on October 7, 2003, and Respondent filed Pre-hearing submissions on October 17, 2003. ALJX-5, 6. The case was assigned to me, and on November

¹ The amount of CMP assessed against Respondent was amended. See, PX-13.

14, 2003, I issued a Notice setting hearing in the matter for Tuesday, February 3, 2004. ALJX-7. The parties filed a joint request for a brief continuance, and hearing in this matter was rescheduled for March 16, 2004.

At a pre-hearing conference with the parties on December 16, 2004, the March 16, 2004 hearing date was confirmed. ALJX-8. At that time the parties advised that they expected to file cross-motions for Summary Decision and Order on the record. Respondent filed its motion on March 11, 2004. Plaintiff filed her motion on March 12, 2004. The parties filed a joint stipulation of facts on March 12, 2004. On March 18, 2004, Respondent filed a Reply Memorandum in Support of Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment. On March 26, 2004, Plaintiff filed a Response in Opposition to Respondent's Motion for Summary Judgment.

On May 17, 2004, I issued an Order bifurcating the proceeding into two separate parts, the first of which considered whether the Respondent's minor employees were subject to the agricultural exemption of § 12(c) of the FLSA. If this question had been answered in the affirmative, the case would have been resolved. In my Order of that date, I addressed the parties' cross motions and concluded that the exemption did not apply. My Order of Summary Judgment in favor of the Plaintiff is hereby incorporated in its totality. However, I have at times throughout this Decision and Order reproduced salient portions of the Summary Judgment Order for the purposes of cohesiveness.

On June 21, 2004 Plaintiff moved to amend its original complaint by including additional violations for four minors. PX 12. Plaintiff also moved to amend the assessed amount of CMP to \$23,210.00. PX 13. On June 28, Respondent filed an objection to the amendments. I deferred my ruling on the amendments until this Decision and Order.

On June 30, 2004, I held a hearing in Lancaster, Pennsylvania, at which time the parties appeared and presented testimonial evidence, as well as additional documentary evidence. At the hearing, through testimony of J. Michael Melhorn, Respondent introduced factual information regarding the scope of Respondent's business operations. Tr. at 165-167. Plaintiff objected, arguing that the information was relative to the issue central to my Order of Summary Judgment. Plaintiff further contended that the facts were beyond those to which the government had stipulated. I allowed the testimony in anticipation that Respondent would seek reconsideration of my Order on Summary Judgment. In fact, Respondent moved for reconsideration when it filed its written closing argument on September 15, 2004. I shall address this issue in the body of this Decision and Order. Plaintiff filed its written closing argument on September 16, 2004.

B. Factual History

In conjunction with their cross motions for summary judgment in this case, the parties filed stipulations of fact that are incorporated herein at Addendum "A" hereto, but which may summarized as follows:²

² Where it appears that a fact had not been among the parties' stipulations, I have referred to its source.

Mainjoy Unlimited (Respondent) was incorporated in 2001 by J. Michael Melhorn, who is the President and sole stockholder of the business. The core of Respondent's business involves loading and unloading poultry, although the company has performed other services such as housing chickens, vaccinating pigs, and gathering eggs. Tr. at 167, 169. Respondent does not own the farms at which chickens are caught, and does not provide instruction or direction to farmers, farm owners or other employees or personnel working at chicken farms on how to raise chickens. Respondent does not transport poultry, and does not own vehicles for such purpose, but does at times make transportation arrangements. Respondent does not own or operate a chicken farm, a chicken processing plant, or other processing facility, or a chicken slaughterhouse or other slaughtering facility.

Respondent provides services under contract to catch and/or load or unload poultry, and one of its biggest customers is Risser Poultry. The chickens that Respondent catches are broilers, or meat chickens, raised for consumption. Respondent is paid based on either the number of chickens caught and/or number of pounds of chickens caught and loaded or the amount of time employees spend catching and loading chickens plus the cost of materials.

The catching work is labor intensive, and since its inception in 2001, Respondent has employed minors to catch chickens. The chickens are loaded and then transported from locations in Pennsylvania to destinations in New York and New Jersey, including, frequently, Watkins Poultry Merchants, for distribution through live markets. The size of Respondent's workforce varies, but during the period relative to this proceeding, Respondent employed approximately 21 people, including eleven (11) minors between the ages of 14 and 16.

In order to perform their duties, the minors reported to Respondent's office and were driven by Mr. Melhorn in a company van to the various farms at which they caught chickens. They usually caught chickens in the late afternoon. The minors were required to catch or pick up a specific number of chickens that were loose in a chicken house, carry them to a truck and hand them to another employee who stood on top of a truck. This individual placed the chickens into cages or coops on the trucks that would be used to carry the chickens to their destinations.

The minors performed all of their chicken catching duties on a farm or at chicken houses. The minors did not feed, debeak, inoculate, or raise the chickens. Their inspection of the chickens was limited to assuring that they did not catch injured or otherwise undesirable chickens, and they were responsible for avoiding heating, smothering or injuring the chickens. Occasionally they placed chickens in chicken houses and removed dead laying chickens.

C. Exhibits

In conjunction with their motions for summary judgment, the parties offered exhibits that I identified as PX-1 through PX-11. These exhibits were admitted to the record, and are described in my Order on Summary Judgment and reproduced at Appendix "B" hereto. In addition, evidence identified as ALJX-1 through AJX-10 was admitted to the record and is reproduced at Appendix "B". At the hearing, Plaintiff submitted two additional documentary exhibits, Amended Order of Reference, WH 103 (PX 12), supported by statements of minor

employees, and amended CMP (PX 13). This evidence had been submitted previously with Plaintiff's motion for Summary Judgment and was received into the record. Tr. at 29.

D. Contentions of the Parties

Plaintiff alleges that Respondent violated the child labor provisions of Section 12(c) of the FLSA and the applicable regulations at 29 C.F.R. Part 570, by employing minors under the age of 16 in the prohibited occupations of processing and loading, and by requiring minors between the ages of 14 and 15 to work during prohibited hours. Plaintiff further contends that its computation of civil money penalties for the alleged violations is appropriate.

Although Respondent essentially agrees with the factual assertions involving its employment of minors in its operations, Respondent continues to contend that their work was agricultural in nature and therefore exempt from the child labor provisions, of section 12(c) of the FLSA. Plaintiff's Brief at 2. In the alternative Respondent contends that chicken catching is not processing, and that the child labor violations cited therefore, together with their attendant civil money penalties, should be dismissed. With respect to the other violations, Respondent argues that the penalty is disproportionate considering the factors I must review. Respondent further contends that abatement of the civil money penalties is appropriate because the violations were *de minimis* and inadvertent.

II. ISSUE

The primary issue to be decided is whether Respondent violated the child labor provisions of Section 12(c) of the FLSA and the applicable regulations at 29 C.F.R. Part 570, by employing minors under the age of 16 in the prohibited occupations of processing and loading, and by requiring minors between the ages of 14 and 15 to work during prohibited hours, and if so, the propriety and extent of assessment of civil money penalties.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Stipulations and Evidence

As I have observed, the stipulated facts and documentary evidence admitted for consideration of my Order of Summary Judgment are reproduced at Appendix A and B hereto. In addition, evidence was admitted to the record at the hearing that had been submitted in conjunction with Plaintiff's motion for Summary Judgment. The amended Notice of Controversion and amended Computation of CMP supersede the initially prepared versions of those two documents.

PX-12 Amended WH-103, Notice to Employer of Child Labor Violations

This form identifies those minors who were determined to be employed by Respondent in violation of the FLSA. Plaintiff equated the work of chicken catcher as a restricted processing occupation. The total assessed amount is \$23,210.00.

Minor	Violation
David Day	processing
Andrew Keck	processing, truck loading
Tyler Leber	processing, truck loading and transportation
William Raffensberger	processing, truck loading and transportation
Eric Roush	processing, truck loading and transportation
Adam Runion	processing
Paul Stoltzfus	processing, hours of work
Robert Stone, Jr.	processing, truck loading
Randy Wilkinson	processing, truck loading, hours of work
David Wilson	processing, truck loading
Jared Wilson	processing, truck loading

PX-13 Computation of FLSA Civil Money Penalties

Minor	CMP	Violation
David Day	\$1,430.00	non-agricultural but not hazardous occupation
Andrew Keck	\$1,430.00	non-agricultural but not hazardous occupation
Tyler Leber	\$1,430.00 \$1,430.00 (\$2860.00)	non-agricultural but not hazardous occupation non-agricultural but not hazardous occupation
William Raffensberger	\$1,430.00	non-agricultural but not hazardous occupation
Eric Roush	\$1,430.00	non-agricultural but not hazardous occupation
Adam Runion	\$1,430.00	non-agricultural but not hazardous occupation
Paul Stoltzfus	\$1,430.00 \$ 990.00 (\$2420.00)	non-agricultural but not hazardous occupation hours standards

Robert Stone, Jr.	\$1,430.00 \$1,430.00 (\$2860.00)	non-agricultural but not hazardous occupation non-agricultural but not hazardous occupation
Randy Wilkinson	\$1,430.00 \$ 990.00 (\$1300)	non-agricultural but not hazardous occupation hours standards
David Wilson	\$1,430.00 \$1,430.00 (2860.00)	non-agricultural but not hazardous occupation non-agricultural but not hazardous occupation
Jared Wilson	\$1,430.00 \$1,430.00 (2860.00)	non-agricultural but not hazardous occupation non-agricultural but not hazardous occupation

Testimony of Scott Royer

Mr. Royer has been an investigator with the United States Department of Labor's Wage and Hour Division ("Wage and Hour") since 1974. His primary duties are to enforce statutes and regulations that establish federal labor standards. Throughout the years, he has received training on statutory and regulatory changes, and through training and experience has achieved a level of expertise in matters involving the poultry business.

In August of 2002, Mr. Royer initiated an investigation of Respondent to determine the company's compliance with federal labor statutes. His investigation techniques included reviewing the company's books and records and interviewing employees. He also discussed the business' operations with its principal and owner, J. Michael Melhorn. As the result of his investigation, he concluded that Respondent had employed eleven (11) minors between the ages of 14 and 16 in violation of the FLSA. Mr. Royer described the minors' work: the employees met at a central location, and were transported by van to a site, usually a farm, where they would go to a chicken house and catch chickens. The minors then would put the chickens in a container and take them to a truck where another employee would load them. The only criteria that the minors used when deciding not to collect a chicken was if it was dead, or apparently sick, or had other obvious defects. They did not attempt to differentiate chickens by breed, or in any other manner.

Mr. Royer classified catching chickens as a prohibited processing occupation, because the chickens were all bound for market where they would be sold for processing into meat. Mr. Royer characterized the activity as processing because the chickens were finished growing, and had no other purpose than to be rendered into chicken for consumption as food.

Mr. Royer also found that Respondent had employed four minors in the prohibited occupation of loading goods that would be transported in commerce. In addition, two minors were found to have worked outside the hours permissible for minors under the FLSA. Mr. Royer

assessed Respondent with CMP for the violations, and presented Respondent with a notice of child labor violations, and the calculated CMP.

Mr. Royer also cited Respondent with other violations of the FLSA that were not related to the employment of minors. After being advised of the violations, Respondent terminated the employment of the minors, agreed to comply with the FLSA with respect to other employees, and agreed to pay back wages that Mr. Royer found due to employees who were paid in violation of the FLSA. However, Respondent disagreed with Mr. Royer's conclusions about the minors' employment, contending that they were exempt from the FLSA as agricultural workers. Respondent also disagreed with the assessment for CMP.

In January and February of 2004, Mr. Royer undertook additional investigation that disclosed that four additional minors had worked in the prohibited occupation of loading goods that would be transported in commerce. Mr. Royer amended his notice of child labor violations, and calculation of CMP. Mr. Royer reduced the penalty he had originally calculated for violations of hours standards. He did not find it appropriate to calculate additional CMP for the newly identified minors employed in loading, but did not articulate a policy reason for his determination.

Mr. Royer explained that he used a computer program provided by Wage and Hour that incorporates the regulatory standards for calculating CMP. He explained that he thought it was appropriate to increase the penalty for each cited violation because one of the minors was injured during the course of his duties, although he did not consider the injury serious. Mr. Royer did not distinguish between the activity that the minor was performing at the time of his injury in assessing the penalty, but concluded that an injury sustained during the performance of any duty supported an increase in the CMP for every violation. Mr. Royer further explained that he found no other factors that warranted an increase or decrease of the CMP. He did not find evidence of willfulness, and he looked at the size of the business and its annual revenue when making the determination that no adjustment off the base penalty was appropriate. Mr. Royer acknowledged that Respondent was cooperative and agreed to effectuate full compliance with the FLSA. However, he did not believe that the violations were inadvertent.

Testimony of Alan Davis

Mr. Davis has been an investigator with Wage and Hour since 1977. Mr. Davis was involved in the 2004 investigation of Respondent, which identified four minors who had worked in the prohibited occupation of loading goods for transportation. His investigation included speaking with minors who described what was entailed in their work for Respondent. The minors caught live chickens that were put into cages, and loaded onto trucks. The minors stood on the trucks and loaded the cages.

Testimony of Joseph Dietrick

Mr. Dietrick has been the District Director of the Wilkes Barre, Pennsylvania field office of Wage Hour since 1998. Before that he was Assistant District Director. His position requires him to assign investigator cases and review investigation findings. He prepares reports for his

regional and national offices. In the course of performing his duties, he reviewed Mr. Royer's investigation of Respondent, and agreed with his findings that Respondent had violated the FLSA by hiring minors in the prohibited occupations of processing and loading. He also agreed with the investigator's findings involving child labor hours violations, and other violations of the FLSA.

Mr. Dietrick considered the work of chicken catching as the first stage of processing because the chickens that were caught were made into food. Mr. Dietrick compared catching chickens to other activities that involved the gathering of raw materials for their eventual change into some other product. He also agreed that minors who put the chickens on trucks were employed in a prohibited loading occupation. Mr. Dietrick also agreed with Mr. Royer's initial assessment of CMP, as well as his revisions following his additional inquiries in early 2004.

Testimony of J. Michael Melhorn

Mr. Melhorn testified that he started the business of Mainjoy Unlimited, Inc. in late 2001. He is the sole corporate officer and shareholder of the business, and is responsible for its operations. Mr. Melhorn has always worked in the poultry business, and his father had a business that caught and transported chickens. That business used approximately 10 trucks to deliver chickens, and in his capacity as Vice-President of that business, Mr. Melhorn supervised approximately 45 persons, and was responsible for the maintenance of the trucks and the operation of the shop.

Mr. Melhorn's current business does not own trucks, but mainly provides the manpower for catching chickens under contract with growers. The number of chickens that needed to be caught to fulfill an order varied, but was typically 3,000. Trucks hold about 8,000 chickens. The work is labor intensive, and requires a large crew to complete. The minors who worked for Respondent worked on a part-time basis. Respondent performs other work for farmers, such as housing chickens, gathering eggs and inoculating pigs.

Mr. Melhorn paid the minors about \$8.00 an hour, and with bonuses they earned as much as \$10.00 an hour. Hiring minors was a goal of Mr. Melhorn's because he hoped to bring new people to an industry that is labor intense but requires limited training and pays fairly well. Mr. Melhorn was instrumental in effecting changes in Pennsylvania law that removed limitations on hiring minors to perform the work that Respondent typically performed.

Mr. Melhorn was surprised to learn that his business practices violated the FLSA. He believed that his operation was agriculture and was exempt. Nevertheless, he agreed to pay overtime that was determined to be due and also agreed to terminate minors under 16 years of age, and to remain in compliance with federal labor standards.

B. Evidentiary Rulings

1. Objection to testimony regarding minors' statements

At the hearing, Respondent objected to testimony that related information told to Investigator Royer on the grounds of hearsay. Plaintiff argued that an exemption to hearsay is provided for by the regulations controlling the conduct or hearings on exceptions to determinations of civil money penalties. 29 C.F.R. section 580.7(b) provides, in pertinent part:

Notwithstanding the provisions of [29 C.F.R. part 18], including the hearsay rule (§ 18.802), testimony of current or former Department of Labor employees concerning information obtained in the course of investigations and conclusions thereon, as well as any documents contained in Department of Labor files (other than the investigation file concerning the violations as to which the penalty in litigation has been assessed), shall be admissible in proceedings under this subpart.

29 C.F.R. § 580.7(b).

I allowed the testimony to be adduced at the hearing, and I find that it is admissible, despite its hearsay character.

2. Motion to Amend Order of Reference

Approximately one week before the hearing, Plaintiff moved to amend its Order of Reference to add additional violations, in reliance upon Rule 15(a) of the Federal Rules of Civil Procedure (Federal Rules). Respondent objected to the amendment on the grounds that its due process rights were violated. Although I deferred ruling on this issue until my Decision and Order (Tr. at 191), the parties did not fully brief this issue in their written closing arguments. Nonetheless, I must resolve it, as the outcome impinges on the question of the propriety of civil money penalties.

Generally speaking, Rule 15(a) of the Federal Rules allows for the amendment of complaints. Although no specific procedure for amendment is set forth in the Rules of Practice and Procedure before the Office of Administrative Law Judges, which apply in proceedings involving civil money penalties (29 C.F.R. § 580.7), those Rules incorporate the Federal Rules. 29 C.F.R. § 18.1(a). In deciding whether amendment of a complaint under Federal Rule 15(a) is appropriate, I must consider four factors: (1) whether the amendment is made in bad faith; (2) whether undue delay exists; (3) the prejudice to the opposing party; and (4) futility. DCD Programs Ltd. V. Leighton, 833 F.2d 183, 186 (9th Cir. 1987).

I find that the circumstances herein justify amending the Notice of Reference. Amendment is not prohibited by the FLSA or its implementing regulations. I find no evidence that the amendment is brought in bad faith or that untimely delay occurred. Testimony established that the charges were omitted from the original assessment inadvertently. Tr at 97. I further find no evidence of prejudice to Respondent, as the information was provided to Respondent before the pleadings on Plaintiff's motion were filed. Further, I find that Respondent would be prejudiced if I exclude these amendments, and the Respondent is put in the position of having to defend the charges in a separate proceeding. I also find that because the

charges are supported by the evidence gleaned in the Administrator's investigation, and facts to which the parties essentially stipulated, the amendment is not futile.

I reject Respondent's assertion that its due process rights would be violated by amending the Notice to include additional violations. In administrative proceedings under the Administrative Procedures Act (5 U.S.C. § 551), the due process guaranteed to parties has been interpreted to constitute notice and the right to be heard. In Mathews v. Eldridge, 424 U.S. 319 (1976), the Supreme Court adopted a cost-benefit approach to the question of whether due process in an administrative proceeding is sufficient. The Court has established factors that must be considered to determine whether the underpinnings of due process are satisfied: "the nature of the private interest, the efficacy of additional proceedings, and governmental interests". United States v. Raddatz, 447 U.S. 667, 677 (1980).

I find that Respondent is not deprived of due process by allowing amendment of the Notice of Reference. The nature and character of the additional violations are similar to those already cited in the initial Notice. In addition, the factual support for the amended violations was disclosed during the same investigation that disclosed the originally cited violations, and Respondent has stipulated to the facts. It would be an undue burden on the government and on Respondents to require a separate proceeding to establish whether the violations occurred.

I further find that Respondent was given the notice and opportunity anticipated by the guarantee of due process. Agencies are held to the procedural obligations expressly enumerated in governing statutes and regulations. Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978). The Department of Labor's authority to assess civil money penalties is found at section 16(e) of the FLSA, and in its implementing regulations, at 29 C.F.R. part 579. Part 580 of the regulations sets forth the procedures for assessing and contesting penalties. Section 580.3 requires a written notice of determination, and § 580.4 prescribes that the notice shall:

- (a) set forth the determination of the Administrator as to the amount of the penalty and the reason or reasons therefore;
- (b) set forth the right to take exception to the assessment of penalties and set forth the right to request a hearing on such determination;
- (c) inform any affected person or persons that in the absence of a timely exception to a determination of penalty and a request for a hearing received within 15 days of the date of receipt of the notice, the determination of the Administrator shall become final and unappealable; and
- (d) set forth the time and method for taking exception to the determination and requesting a hearing, and the procedures relating there, as set forth in section 580.6 of this part.

Section 580.3. Pursuant to section 580.5, the notice shall become final if the party charged with violation does not take exception to the determination within 15 days after its receipt. Parties who take exception to the determination of the penalty by the U.S. DOL shall request an administrative hearing not later than 15 days after the date of receipt of the notice.

In the instant circumstances, the notice provided to Respondent is sufficient to meet the regulatory scheme for due process. The government issued its amended notice of assessment on June 21, 2004, and since the hearing on the other related charges was scheduled less than 15 days later, Respondent had ample time within the regulatory scheme to take exception to the amended determination. I reject the notion that Respondent suffered prejudice as the result of the notice, since the amended violations are of similar character as others, and required no development of an additional defense. Moreover, the information was provided to Respondent weeks before the motion to amend was filed. The circumstances differ from those where the charges are first raised at the hearing, (see, Bierce v. NLRB, 23 F. 3d 1101 (6th Cir. 1994), or when the amendment was untimely filed under the regulatory scheme (see, Pioneer Hotel, Inc., v. NLRB, 182 F.3d 939 (Fed. Cir. 1999)).

Accordingly, the amendment is allowed, and the violations charged and under consideration herein are as identified at Exhibit PX-13.

3. Motion for Reconsideration

Together with its closing argument addressing the assessment of civil money penalties, Respondent moved for reconsideration of my determination that Respondent's activities do not constitute agricultural activities that are exempt from the FLSA. Because my interim Order in this matter is incorporated in this Decision and Order, Respondent's motion is not time barred, though it is not technically ripe. However, I find it administratively expedient to rule on the motion herein. In order to fully address this issue, I hereby repeat the discussion in my Order of Summary Judgment regarding that issue.

29 C.F.R. § 780.125(b) establishes that the primary agriculture activity of "raising of poultry includes the breeding, hatching, propagating, feeding and general care of poultry." The contractual agreement between farmers who raise and feed chickens for processors who retain title to them is described at 29 C.F.R. § 780.126. The regulations state that "the activities of the farmers and their employees in raising the poultry are clearly within § 3(f). The activities of the feed dealer or processor on the other hand are not "raising of poultry" and employees engaged in those activities cannot be considered agricultural employees on that ground. Employees of the feed dealer or processor who perform work on a farm as incident to or in conjunction with the raising of poultry on the farm are employed in secondary agriculture." 29 C.F.R. § 780.126.

I need not make a finding regarding whether Risser is engaged in primary agriculture in the circumstances presented herein, because the employees at issue are not Risser's. The contractual relationship between Risser and its contract farmers falls within the scope of 29 C.F.R. §§ 780.125 and 126, but the contract between Risser and Respondent is not. Therefore, a conclusion regarding the status of Risser shall not be instructive on classifying the status of Respondent, which is not engaged in raising poultry. Respondent cannot assume the color and status of another enterprise merely because it derives most of its business from contracts with that enterprise. Instead, I base

my finding that Respondent cannot be deemed to be engaged in primary agriculture because it is not involved with the raising of chickens. See, Bayside, at 302. Therefore, the minors employed by Respondent cannot themselves be considered to be engaged in primary agriculture.

In support of its contention that the minors were engaged in primary agriculture, Respondent alleged that they provided “additional care to the birds by inspecting and culling the ill or injured chickens.” Respondent’s Brief at pg. 6. I find that the evidence does not support this contention. The minors, in performing their catching duties, inspected the chickens for injury and made attempts to avoid over-heating, smothering and injuring them. *Id.* ¶¶ 43-44. The persons responsible for raising the chickens disposed of dead birds. PX-10. The minors employed by Respondent did not feed, debeak, inoculate or raise chickens. JX-1 at ¶¶ 37-40. (Cf. Jimenez v. Duran, 287 F. Supp. 2d 979 (N.D. Iowa 2003), which held that a contractor’s employees who inoculated, debeaked, crated and moved chickens from pullet site to layer barn were engaged in primary agriculture and were subject to FLSA’s agriculture exemption, even though they were not employed by the owner of the chickens and did not provide daily care to chickens.) The minors’ primary occupation was gathering chickens that were then crated for transportation to market. I find that the minors were not engaged in primary agriculture.

Therefore, I must determine whether these minors were engaged in secondary agriculture by performing work on a farm that is incidental to or in conjunction with farming operations. In Holly Farms, the Supreme Court concluded that where an employer produces and processes chickens, the activities relating to catching them, loading them and transporting them for processing are not incidental to or in conjunction with farming operations but instead are part of the processing activities of the poultry producer. Holly Farms, at 403, 407. However, since Respondent is not an integrated grower/processor, I cannot rely solely upon the Supreme Court’s distinctions between the farming and processing activities of the Employer to classify Respondent’s activities as being incidental to or in conjunction with farming operations. Nor do I find the decision of the 5th Circuit Court of Appeals in Sanderson Farms v. N.L.R.B., 335 F.3d 445 (5th Cir. 2003) of much precedential value, because the holding in that case applied to truck drivers, and reference to chicken catchers is mere dicta. Instead, I rely upon the statutory language, prevailing regulations, and the facts of this case to determine whether the employees were employed on a farm performing activities as an incident to or conjoined with a primary agriculture activity. Holly Farms, supra.

The regulations provide that “if a practice is not performed by a farmer, it must be performed “on a farm” to come within the secondary meaning of agriculture in § 3(f) [of the FLSA]”. 29 C.F.R. § 780.134. The regulations specifically provide at § 780.136 that “[e]mployees engaged in inspecting and culling flocks of poultry are examples of the types of employees who may be considered employed in practices performed on a farm.” 29 C.F.R. § 780.134. I am persuaded that the activity of catching chickens at the place where they were raised and loading them for eventual transportation is work performed

on a farm. I must now determine whether the minors' work activities were incident to or in conjunction with farming operations. Holly Farms, at 403.

The work of the minors in this case involves catching predominantly broilers, which are meat chickens raised for consumption. JX-1 at ¶ 34. The chickens are taken to Watkins for distribution. PX-5. After a chicken is selected by a customer "the chicken is slaughtered and processed at and by the individual store or market and sold to the customer." Plaintiff's Brief at 26. Although Respondent's employees primarily catch broilers, the "spent fowl or laying chickens or laying hens caught by Mainjoy employees were hauled to B&B Poultry in New Jersey for slaughter and processing. Mainjoy is not responsible for delivering the spent fowl or laying chickens to B&B." JX-1 at ¶ 48.

It is clear that Respondent's business involves catching chickens that are then transported to market, and does not involve raising or culling chickens. Therefore, I must determine whether the activity is more closely related to processing operations than farming operations. The definition of farming set forth in § 3(f) of the FLSA specifies practices "performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including **preparation for market, delivery to storage or to market or to carriers for transportation to market**". (Emphasis added). Because Respondent is contracted to catch chickens at farms for their eventual transportation to market, it would appear that Respondent is engaged in a practice that is incident to or performed in conjunction with farming operations. However, the regulations clarify the statutory language: "[g]enerally, a practice performed in connection with farming operations is within the statutory language only if it constitutes an established part of agriculture, is subordinate to the farming operations involved, and does not amount to an independent business". 29 C.F.R. § 780.144.

I find that Respondent's activities, and the work of its employees, fail to meet the requirements for secondary agriculture because Respondent has an independent business that is separate from the raising of the chickens. Although Respondent's activities may be construed to relate to the preparation of the chickens for delivery to market or carriers to market, I find that Respondent's activities "are tied to a 'separate and distinct business activity', the business of processing poultry for retail sale, not to the anterior work of agriculture". Holly Farms, at 407.

I note that "culling, catching, cooping and loading of poultry" are among those practices cited in 29 C.F.R. § 780.158(b) that may qualify as agriculture for the purpose of § 3(f) of the FLSA. However, I find that Respondent's activities do not fall within the regulatory definition of a farming practice because the activities are not limited to the farms of a particular farmer, and in fact are performed under contract with a "processor" that has contracted the farmer to grow the chickens. See, 29 C.F.R. § 780.158(c); cf. Jimenez v. Duran, supra.

In consideration of all of the evidence, I find that the minors employed by Respondent were not engaged in activities incidental to or in conjunction with farming activities and therefore, the minors were not engaged in secondary agriculture.

Order of Summary Judgment issued May 17, 2004.

Respondent urges reconsideration of this determination. I have given all possible deference to Respondent's arguments, but remain convinced that the determination I reached is directed by the Court's decision in Holly Farms. I have looked at the decisions of other courts that have considered this issue. Even before Holly Farms, courts concluded that the agricultural exemption does not apply to every employee whose work touched on a farming operation. The Eighth Circuit Court of Appeals held that employees who transported live poultry from an independent grower's farm to their employer's processing plant were not agricultural workers. NLRB v. Husdon Farms, Inc., 681 F.2d 1105, 1106 (8th Cir. 1980), cert. denied, 459 U.S. 1069 (1982). In Valmac Industries, Inc., v. NLRB, 599 F.2d 246 (8th Cir. 1979), the Court held that employees who transported products away from the farm were not performing work that was either primary or secondary agriculture. Employees who delivered dairy products were not engaged in primary or secondary agriculture. Skipper v. Superior Dairies, Inc., 512 F.2d 409, 411 (5th Cir. 1975). A tomato processor was not engaged in secondary agriculture. Marshall v. Gulf & Western Industries Inc., 552 F.2d 124, 126 (5th Cir. 1977). Employees of an employer who stored grain at elevators but did not plant or harvest the grain, or perform services directly for farmers, were not agricultural laborers within the meaning of § 2(3) of the FLSA. In re Davis Grain Corporation and Local 49, International Chemical Workers Union, NLRB 5-RC-8197 (1973).

The test for determining whether an activity is agricultural was clarified by Holly Farms, and subsequently adopted by other courts. In Herman v. Continental Grain Co., 80 F. Supp. 2d 1290 (M.D. Alabama 2000) the court discussed the Holly Farms decision at length, and concluded that it could not dismiss a complaint on the question of whether "live haul crews" are engaged in exempt agricultural activity because the determination is fact driven. *Id.* at 1295-1296. The court of the Eastern District of Texas relied upon the Holly Farms decision in holding that certain chicken catchers were not subject to the agricultural exemptions of the FLSA. Herman v. Tyson Foods, Inc., 82 F. Supp. 2d 631 (E.D. Texas 2000). In reaching its conclusion, the Court cited the rationale of the Court in Holly Farms, that despite the plausibility of finding such workers subject to the exemption, Congress's intent and the agency's administration of the statute required finding otherwise. *Id.* at 632. The district court further noted that the Holly Farms decision resolved a split in circuit authority over whether live haul workers were engaged in agriculture. *Id.*

Courts have looked at whether activities are exempt under the "secondary agriculture" definition embraced by Holly Farms. One court concluded that the exemption would apply to non-agricultural activities of a basically agricultural business if the business necessarily engaged "in a tiny amount of peripheral activity not strictly agricultural". Adkins v. Mid-American Growers, 167 F.3d 355, 359 (7th Cir. 1999)(case involving whether the agricultural exemption applied to the sale of foliage plants that were not grown by a plant producer, but that were stored and then resold). The court concentrated on the feasibility of separating out the non-agricultural activity from the exempt agricultural activity, maintaining that "the separation is essential to prevent agricultural enterprises from obtaining an artificial competitive advantage over enterprises that do not enjoy an exemption from the FLSA." *Id.* at 358.

Another court relied upon the Holly Farms two-prong inquiry into the nature of the activity to reach its determination that sow farm technicians were engaged in agricultural activity. Baldwin v. Iowa Select Farms, 6 F.Supp. 2d 831. In addition to Holly Farms, the court was guided by early Supreme Court decisions that looked at whether activities were agricultural. “The question is whether the activity in the particular case is carried on as part of the agricultural function or is separately organized as an independent productive activity.” Id. at 839, citing Farmers Reservoir & Irrigation Co. v. McComb , 337 US 755, 760-61. However, the court rejected the notion that all activities of raising of hogs should be broken down into discrete parts, but rather looked at all of the facts surrounding the particular activity to determine if it met Holly Farm’s definition of primary and secondary agriculture. Id. at 842.

I have found nothing in legal precedent or in Respondent’s arguments to warrant revising my determination that Respondent’s employees are not engaged in agriculture when they perform the duties of a chicken catcher. Despite the Internal Revenue Code’s definition of agricultural work as including the “handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural commodity.” 26 U.S.C. § 3121(g)(3) (adopted by the United States Department of Labor at 20 C.F.R. § 655.100(c)(1)(i)), Respondent is not engaged in primary or secondary agriculture, and its chicken catchers are not considered agricultural labors for purposes of application of the FLSA.

I now turn to the central issue of the case before me, which is whether violations of the child labor standards of the FLSA occurred and whether civil money penalties should be assessed.

C. Discussion

The FLSA authorizes the assessment of CMP for child labor violations:

Any person who violates the provisions of § 212 of this title or § 213(c)(5) of this title, relating to child labor, or any regulation issued under § 212 or § 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...In determining the amount of any penalty...the appropriateness of such penalty to the size of the business of the person charged and the gravity of the violation shall be considered.

29 U.S.C. § 216(e). Regulations were promulgated to provide guidance for the assessment of penalties. 29 C.F.R. § 579.5. The regulations mandate that in addition to the statutory factors, the nature of the violation coupled with assurance of future compliance and achieving the objectives of the FLSA should be considered. Id.

“In determining the amount of such penalty there shall be considered the appropriateness of such penalty to the size of the business of the person charged with the violation or violations, taking into account the number of employees employed by that person, dollar volume of sales or business done, amount of capital investment and financial resources and such other information

as may be available relative to the size of the business of such person.” 29 C.F.R. § 579(5)(b). With respect to the gravity of the violations, the regulation states:

In determining the amount of such penalty there shall be considered the appropriateness of such penalty to the gravity of the violation or violations, taking into account, among other things, any history of prior violations; any 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 the 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, as appropriate, the hours of the day in which it occurred and whether such employment was during or outside school hours.

29 C.F.R. § 579 (5)(c). It is further provided that consideration should be given to the following factors:

Based on all the evidence available, including the investigation history of the person so charged and the degree of willfulness involved in the violation, it shall further be determined, where appropriate,

- (1) Whether the evidence shows that the violation is “*de minimis*” and that the person so charged has given credible assurance of future compliance, and whether a civil penalty in the circumstances is necessary to achieve the objectives of the Act; or
- (2) Whether the evidence shows that the person so charged had no previous history of child labor violations that the violations themselves involved no intentional or heedless exposure to health or well-being and were inadvertent, and that the person so charged has given credible assurance of future compliance, and whether a civil penalty in the circumstances is necessary to achieve the objectives of the Act.

29 C.F.R. § 579(5)(d).

Pursuant to 29 C.F.R. § 580.12(c), in reviewing the appropriateness of a CMP, I may “affirm, deny, reverse, or modify, in whole or in part” the penalty imposed by the Wage and Hour Division. 29 C.F.R. § 580.12(c). My review is *de novo*, and I must evaluate the penalty factors independently. Administrator v. Lynnvile Transport, Inc., ARB No, 01-011 (2002); *aff’d Lynnvile Transport, Inc., v. Chao*, 316 F. Supp. 2d 790 (S.D. Iowa 2004). The Administrative Review Board (“ARB”) has held that “once a CMP has been challenged before an [administrative law judge], the issue is not whether the penalty assessed by the Administrator comports with the formula and matrix contained in Form WH-266” but “the question is whether the assessed penalty complies with the statutory provision regarding the CMP and the CMP regulations.” Administrator v. Elderkin Farm, ARB Case Nos. 99-033 and 99-048, 1995-CLA-31 (ARB June 30, 2000).

1. Violations for minors found to be employed in processing

The FLSA prohibits the employment of oppressive child labor in commerce, in the production of goods for commerce, or in any operation that qualifies as “enterprise” under the FLSA. 29 U.S.C. § 212 (c). Oppressive child labor is defined 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 and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well being. The 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(1). Regulations governing the weekly hours and times of day that minor employees between the ages of 14 and 16 are permitted to work, as well as their occupational restrictions, are set forth in Child Labor Regulations 3. 29 C.F.R. § 570.119. Pursuant to this regulation, minors between the ages of 14 and 16 are prohibited from working in

- (a) Manufacturing, mining or processing occupations;
- (b) Occupations requiring the performance of any duties in a workroom or workplace where goods are manufactured, mined, or otherwise processed;
- (c) Occupations involving the operation or tending of hoisting apparatus or of any power-driven machinery other than office machines;
- (d) Public messenger service;
- (e) Occupations declared to be particularly hazardous or detrimental to health or well being by the Secretary; or
- (f) Occupations (except office or sales work) in connection with (i) transportation of persons or property by rail, highway, air, water, pipeline, or other means; (2) warehousing and storage (3) communications and public utilities (4) construction (including demolition and repair).

29 C.F.R. § 570.119.

Plaintiff has alleged that Respondent’s minor employees who were engaged in chicken catching were engaged in prohibited processing. Plaintiff charged Respondent with eleven (11) violations of child labor regulation 3, and assessed CMP in the amount of \$1,430.00 for each violation of alleged prohibited processing, with a total penalty for those violations in the amount \$15, 730.00

Plaintiff asserts in the first place that a determination that the chicken catchers are engaged in prohibited processing is controlled by “the law of the case”, which it argues I established in my Order on Summary Judgment. This argument rests upon the government’s reliance upon one sentence in my rationale, wherein I cite the Court’s decision in Holly Farms, to wit: “I find that Respondent’s activities are tied to a ‘separate and distinct business activity’, the business of processing poultry for retail sale, not to the anterior work of agriculture.’ Holly Farms, at 407.” Even if I accepted Plaintiff’s legal theory as sound, I find the argument factually defective, as it ignores most of the decision, which focused upon whether chicken catchers in these circumstances were subject to the agricultural exemptions of the FLSA. Moreover, I reject Plaintiff’s argument that suggests by saying an activity is “tied to processing” is tantamount to saying the activity involves processing. I relied upon the Holly Farms language to determine whether the Respondent’s business was primarily or secondarily agricultural in nature. I concluded that Respondent’s business was an enterprise distinct from primary or secondary agriculture, and therefore not subject to the FLSA exemptions. However, I made no explicit or implicit finding that the minors were engaged in processing. That question is at the heart of my current inquiry.

Plaintiff next argues that the catching of chickens is “processing” because it is the first step in the process of turning live chickens into meat. Investigator Royer’s and District Director Dietrick assert that any activity relating to the collection of any product that will be changed into a different product is processing. Tr. at 91-95; 100-105; 140-156. Both allowed that the FLSA and the regulations provide an exemption for “processing” when it is of an agricultural nature. Id. Whether this interpretation is logical is immaterial to my examination of what constitutes processing. The regulations that address the agricultural exemption are industry specific, and the topic has been examined by many courts, including the Supreme Court. The Supreme Court in Holly Farms, and the Circuit Court in Sanderson, supra., looked at cases involving integrated chicken farming/processing enterprises and concluded that when employees collect chickens for delivery to the processing part of the business, then they are not engaged in the raising of chickens, and are therefore not exempt from the FLSA as agricultural workers. However, I am not persuaded that the Holly Farms decision was meant to suggest that all chicken catchers are engaged in processing. That question is answered by the facts underlying the case.

Respondent’s business is primarily a service oriented one that catches chickens under contract with other companies. As the parties have stipulated, it has no processing component. It does not transport the chickens to a processor. Its contracts are not with the markets that eventually sell the chickens or with the plants where they are processed. Unlike the employer in Holly Farms, which raised the chickens and processed them too, Respondent’s connection with the business of processing the chickens is limited to collecting the chickens that will eventually, by parties totally unrelated to Respondent, turn them into consumer goods. Respondent’s activities do not change the chickens from their natural state. I reject the proposition that because Respondent’s activities do not constitute agriculture, they automatically constitute processing, where Respondent’s business is confined to providing chicken catching and other services to farmers and other businesses.

As this case is clearly distinguishable from Holly Farms, because it is not an integrated farming/processing business, I turn to other sources to determine what constitutes processing for

purposes of determining if the minors at issue worked in an occupation prohibited by the FLSA. Plaintiff cites no on-point legal precedent (other than the misinterpretation of my Order of Summary Judgment) to support its argument. Plaintiff posits that because the chickens in question are raised for their meat, then processing begins as soon as they are caught. This argument would be meaningful if Respondent was engaged in an integrated business, or was a processor. Holly Farms, supra. However, I do not read Holly Farms to mean that chicken catching that cannot be classified as agricultural is necessarily processing, particularly in circumstances where there is no direct connection between the processing and the catching as in an integrated business. The Court did not have the opportunity to address whether a contractor who does nothing more than gather chickens is engaged in processing.

Plaintiff cites decisions where the court concluded that catching chickens is the first part of processing, but I find this case distinguishable because those cases involved integrated businesses. Moreover, the FLSA and its implementing regulations clearly anticipate that bringing chickens to market is integral to farming, and the agricultural exemption extends to those activities when conducted in the course of secondary or primary agriculture. In this case, I found that the Respondent's status as an enterprise distinct from the raising and cultivation of the chickens, and not its activities, per se, disqualifies it from the agriculture exemption. I do not find the guidance in Wage and Hour's Field Operation Handbook on livestock slaughtering and poultry dressing instructive, because the only activity at issue herein is the catching of the chickens.

Plaintiff suggests that the decision in Do v. Ocean Peace, Inc., 279 F. 3d 688 (9th Cir. 2002) supports finding that chicken catching is the first phase of processing. The court in Do found that the cleaning, rinsing, heading, gutting, grading, freezing and packaging of fish on the boat after they are caught is processing. Id. at 693. However, there was a glaring omission from the discussion of activities that the Court found constituted processing, and that is the activity that is most analogous to chicken catching--the catching of the fish. That activity is obviously excluded from the processing chain.

Neither does the Oregon Frozen Foods Co. decision provide ballast for Plaintiff's argument. Mitchell v. Oregon Frozen Foods Co., 264 F.2d 599 (9th Cir. 1958). The Court there found that the concept of "first processing" did not apply to the picking, gathering, or digging of vegetables or fruits because no significant change to the fruit or vegetable had taken place. Id. at 601. Another decision from that era deemed workers at a tomato packing plant as agricultural because the activities of the tomato packers did not transform the product. Mitchell v. Hornbuckle, 155 F. Supp. 205, 211 (M.D. GA 1957). I see little difference between the picking and gathering of fruits and vegetables and the picking and gathering of chickens. In each instance, the only change effected by the picking is that of location. Plaintiff distinguishes the two activities by arguing "contrary to crops, chickens which are alive at the time they are caught will be killed and processed once they arrive at markets or slaughtering facility, undergoing a change in form". Brief at 19. Plaintiff does not address the great volume of fruits and vegetables that are chopped, mixed, pureed, and ultimately packaged after harvest, thus undergoing an eventual change in form. Outside of the construct of an integrated farming/processing business, I find little difference between the activity involved in gathering chickens and gathering fruits and vegetables.

I find the Court's decision in Mitchell v. Burgess too dissimilar to provide any real guidance to my determination. Mitchell v. Burgess, 239 F.2d 484 (8th Cir. 1956). In this case, despite what appear to be activities that change the form of cottonseed, the Court found that the activities were more related to the ginning of the cottonseed, which is considered agricultural labor under 29 C.F.R. section 655.100(c)(i)(3). *Id.* at 485. In the present circumstances, Respondent did nothing to the chickens but catch them. Respondent's employees were paid to catch and load chickens. Respondent provides this service to anyone for any reason, and it makes no sense to conclude that the activity would constitute processing merely because the chickens are caught under the terms of a contract with a separate and unrelated company that will eventually transport them to market, where they will be sold and eventually made into food.

I regretfully am not instructed by the decision in In the Matter of Domaine Drouhin Oregon, ALJ 2004-TLC-8, June 7, 2004. The Administrative Law Judge in that case relied upon the Internal Revenue Code's definition of agricultural laborer that was adopted by the Department of Labor for purposes of determining whether alien workers are entitled to a labor certification. 26 U.S.C § 655.100(c)(1)(i); 20 C.F.R. § 3121(g). I am better guided by definitions pertaining to agriculture that are contained in the FLSA and its implementing regulations, as well as judicial construction of pertinent terms.

Although my finding that Respondent's chicken catchers are not involved in agriculture is based upon my determination that the Respondent's business may not be categorized as primary or secondary farming, I am unpersuaded that Respondent's chicken catching activities are processing. I find that Plaintiff has failed to demonstrate that the minors under age 16 were employed in prohibited occupation of processing. Therefore, I find that by employing minors to catch chickens, Respondent did not violate section 12(c) of the FLSA. Those violations, and the civil money penalties assessed for minors engaged in processing are, therefore, dismissed.

2. Violations charged for minors engaged in prohibited loading

Plaintiff charged Respondent with eight (8) violations of the child labor standards by employing minors less than 16 years of age in the prohibited occupation of loading goods that are transported. Although eight (8) violations were identified, Plaintiff assessed CMPs for only four of the minors, declining to assess penalties for those violations cited in its amended Notice. Respondent has not contested the fact that minors were involved in loading chickens onto trucks for their eventual transportation out of state. Stipulations of the Parties; Respondent's Brief at p. 8. I find that the evidence substantially establishes that minors worked in a prohibited occupation in violation of the FLSA. I now turn my inquiry into whether CMP should be assessed in this case.

Although Respondent did not contest that minors were loading trucks, the company urges that the assessment of a CMP is not warranted in these circumstances. Investigator Royer testified that in computing the CMP in this case, he relied upon a computer determination that establishes a base penalty per violation, and then enhanced the penalty by an additional factor because one minor suffered a slight injury. Tr. 71-72, 80, 89. Reliance upon the matrix schedule devised by the Administrator for Wage and Hour has been determined to be appropriate. Administrator v. Thirsty's Inc., 1994-CLA-65 (ARB May 14, 1997). The ARB granted

deference to the Administrator's interpretation: ". . . although the penalty schedule did not reference each criterion of the regulatory guidelines, nevertheless it is a reasonable interpretation of those guidelines and with the broad authority granted an agency charged with implementing those regulations." *Id.*, Slip op. at 4. The Board supported this conclusion by noting that the regulations did not provide guidance as to how to assess the weight or import of any particular factor to be considered when reviewing CMP. In another decision, the ARB concluded that the schedule used by investigators is appropriate, because it is merely a starting point. Administrator v. Ahn's Market, Inc., ARB No. 99-024, 1997-CLA-33 (ARB July 28, 2000).

During the period of time relative to the investigation that gave rise to the CMP assessed, Respondent employed approximately 21 persons and realized sales of approximately \$1,290,100. At the hearing, Respondent's sole officer testified that his business had grown quickly since its start in 2001, and was continuing to grow. Tr. at 169. Respondent's capital investment and physical assets are negligible, as the company owns only a van that it uses to transport workers. Stipulations of the parties. The company does not own the chickens it catches nor does it own a processing facility. Stipulations of the parties. Because the employees meet at offices, it may be found that the company leases or owns office space. Mr. Melhorn described his industry as being labor intensive (Tr. at 175; 178), and judging from the limited number of assets, it may be inferred that most of the company's costs and expenses are related to its workforce. Mr. Melhorn described paying competitive wages to attract employees to his business. *Id.* Indeed, I take official notice that Respondent's minor employees were paid well above the prevailing hourly minimum wage. It is true that Respondent cannot be classified as a large business. However, it is clear that it is a thriving concern, and the assessment of a CMP, even the amount assessed by Plaintiff, would exact the pain that a penalty is designed to inflict but would not cause Respondent's economic ruin.

With respect to the gravity of the violations, the testimony is uncontroverted that there is no history of prior violations. Moreover, the record establishes that they were not willful, and indeed, I accord weight to Mr. Melhorn's credible testimony that because of his lifelong involvement in the poultry industry, he considered his employees exempt as agricultural workers. Tr. at 179-180. The evidence establishes that the minors were well-paid, did not consistently work during prohibited hours, and performed work that, if classified as agricultural, would be exempt from the FLSA. In addition, none of the minors were below the acceptable age for limited employment of minors under the FLSA, as all were at least 14 years of age. Although one minor suffered an injury while performing his duties, his injury was not considered serious by the Pennsylvania Department of Workers' Compensation, or by Investigator Royer. The Investigator used the injury as an enhancement factor when computing the injury, but he used the lowest possible factor. Tr. at 55. Respondent kept accurate records of employees' work hours. I find these factors weigh in Respondent's favor.

However, I find it significant that minors comprised at least half of Respondent's workforce. Respondent employed minors as chicken catchers almost from the inception of the business, and the minors worked until they were fired during Investigator Royer's investigation. Joint Stipulations; Testimony of J. Michael Melhorn. Mr. Melhorn testified that the work was not hard, but he wanted to attract minors by offering a generous wage, at least when compared with the minimum wage. 171; 177-178. It is equally clear that but for the investigation, the

company would continue to employ minors. Mr. Melhorn testified about his role in the promulgation of legislation that assured that his business activities would be exempt from Pennsylvania child labor restrictions. Tr. at 172. The fact that Respondent came into immediate compliance mitigates these other factors. With respect to the two violations involving hours worked outside of permissible times, I note that neither of the violations occurred during school hours. ST. 57, 58.

Overall, in consideration of all of the factors, I find no aggravating factors that would support enhancing the basic CMP set by the Administrator. I further find that the circumstances do not warrant using a very minor injury as an aggravating factor for every violation charged. However, I do not find that the violations are *de minimis* or inadvertent. Respondent depended on the work of minors and sought to assure that it could hire them. Its president has worked in the poultry business all of his life, and although his company is of recent vintage, he is not a new-comer to the industry. With a minimum of inquiry, Respondent could have familiarized itself with the developments that the Holly Farms decision surely precipitated in the poultry business. Respondent's expertise and specialization, together with the efforts it made to change state law for its benefit, suggest that it was in its interests to use minors and defend any charges of violation of federal standards by asserting an agricultural exemption. Had Respondent applied a little diligence in ascertaining the federal requirements, and then complying with them, it may have experienced a labor shortfall in a business, which Respondent admits is labor intensive.

While acknowledging that there is little case law regarding what constitutes a *de minimis* violation under § 579.5(d)(1), the Secretary of Labor found that multiple violations that affected four minors were not *de minimis*. Administrator v. Lamplighter Tavern, 1992-CLA-21, sl.op. at 4 (Sec'y May 11, 1994). In order to qualify for an exception to the imposition of CMP on the grounds of inadvertent conduct, Respondent would need to establish that it "had no previous history of child labor violations, that the violations themselves involved no intentional or heedless exposure of any minor to any obvious hazard or detriment to health or well-being and were inadvertent, and that the person so charged has given credible assurance of future compliance . . ." 29 C.F.R. § 579.5(d)(2). As I have explained, Respondent's effort to insulate itself from state child labor limitations demonstrates that it did not act heedlessly or ignorantly. It went out of its way to assure that it could hire minors, at least under state law. This hardly demonstrates that its use of child labor was inadvertent. Moreover, Respondent relied upon the work of minors on a consistent basis, and I therefore do not consider the steady employment of eleven minors in violation of the FLSA *de minimis*.

In consideration of all of the factors, I find that the assessment of CMP in these circumstances is appropriate. I further find that the evidence supports the reduction of the assessed CMP by removing the aggravating factor from the assessment for violations that arose from minors performing prohibited loading of goods for transportation. I note that an assessment was made only with respect to four of the eight employees employed in violation of the FLSA. However, I find that Plaintiff's decision to not assess a CMP for the four violations identified in the amended Notice of Controversion is not well reasoned or consistent. The purposes of the FLSA can hardly be furthered by the decision to assess penalties in only half of the identical violations that were disclosed in the same investigation that spanned the same period of time.

Accordingly, I find it appropriate to assess the basic CMP, or \$715.00, identified by the Administrator, and that forms the basis for its computer programmed computation matrix, for each of the eight identified loading violations. Accordingly, I find it appropriate to assess CMP in the amount of \$5,720.00. (\$715.00 x 8)

3. Violations charged for minors working impermissible hours

As noted in my Order for Summary Judgment, at JX-1, ¶ 59, Respondent admitted to have violated the child labor provisions of the FLSA:

The parties agree that if the Court finds that Respondent does not qualify for the agricultural exemption under the Fair Labor Standards Act, as amended, 29 U.S.C. § 201, et. seq. (hereinafter referred to as “the Act” or “FLSA”), Respondent violated the child labor provisions of the Act with respect to number of hours and times worked for minors Randy Wilkinson and Paul Stoltzfus.

I find that the record supports this stipulation, and that the assessed CMP’s are appropriate. As I have observed, Respondent made efforts to assure that it would benefit from state exemptions on the employment of minors, but did not make any effort to familiarize itself with federal requirements. Accordingly, I find it appropriate for Respondent to pay the assessed CMP of \$495.00 per violation, in the total amount of \$990.00.

IV. CONCLUSION

In consideration of the foregoing, I find that the minor employees of Respondent employed as chicken catchers are not subject to the agriculture exemptions of 29 U.S.C. § 203(f). However, I find in the circumstances underlying this case, catching chickens is an independent industry, and not necessarily the first step in processing. Therefore, I find that Respondent did not employ minors in the prohibited occupation of processing, and violations of the FLSA cited for those employees are dismissed.

I find that Respondent violated the child labor provisions of the FLSA with respect to the number of hours and times during which certain minors performed work duties on behalf of Respondent. I further find that Respondent employed minors in a prohibited occupation, loading and transportation, in violation of the FLSA.

My consideration of the factors relative to the appropriateness of CMP indicates that no aggravating factors are present to warrant the assessment of an enhanced penalty. However, I find that a CMP in the amount of \$715.00 for each of eight violations of prohibited loading is appropriate, notwithstanding Plaintiff’s decision to assess penalties for only four of the identified violations. I additionally find the assessed penalty of \$495.00 for each of two violations of hours standards is appropriate. The total amount of penalty (\$6,710.00) is a small fraction of the Employer’s annual gross earnings of record.

ORDER

The violations alleging employment of minors in prohibited processing are hereby DISMISSED. The assessed civil money penalty for violations of alleged prohibited processing are also DISMISSED.

For violations of § 12(c) of the FLSA, Respondent is directed to pay a civil money penalty of \$6,710.00.

A

Janice K. Bullard
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: Pursuant to 29 C.F.R. § 580.13, any party dissatisfied with this Decision and Order may appeal it to the Administrative Review Board within 30 days of the date of this decision, by filing a notice of appeal with the Administrative Review Board, U.S. Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, D.C. 20210. The Administrative Review Board has been delegated authority and assigned responsibility by the Secretary to issue final decisions in Fair Labor Standards Act cases. Secretary's Order 1-2002, 67 Fed. Reg. 64272 (2002). A copy of the notice of appeal must be served on all parties to this Decision and Order and on the Chief Administrative Law Judge, U.S. Department of Labor, 800 K Street, N.W., Suite 400, Washington, D.C. 20001-8002. If no timely appeal is filed, this Decision and Order shall be deemed the final agency action.

APPENDIX A

PARTIES' STIPULATIONS ADMITTED TO RECORD IN CONJUNCTION WITH MOTIONS FOR SUMMARY JUDGMENT

A. Stipulated Facts

1. The relevant time period and time period for which all stipulated facts apply, unless otherwise stated, is from November 25, 2001 to the present.
2. Respondent, Mainjoy Unlimited, Inc., ("Mainjoy") is a Pennsylvania corporation, incorporated on August 21, 2001 in the Commonwealth of Pennsylvania and maintains its primary place of business at 604 West Main Street, Mount Joy, PA 17552.
3. For the year 2001 Mainjoy Unlimited, Inc. had sales of \$190,041.
4. For the year 2002 Mainjoy Unlimited, Inc. had sales of \$1,290,100.
5. Mainjoy is a "for hire" company to any poultry business that has need for catching or loading and/or unloading poultry. Mainjoy provides such services on a year-round basis.
6. As a for hire company, Mainjoy receives verbal requests from their customers to catch and/or load or unload poultry.
7. Mainjoy employees, including minors, catch chickens and load them onto trucks which usually travel through interstate commerce. The chickens are transported from locations in Pennsylvania to destinations in New York and New Jersey.
8. The majority of Mainjoy's business and income is derived from Risser Poultry. Risser Poultry contacts and uses Mainjoy to catch and/or load poultry on a daily basis. Risser Poultry pays Mainjoy for its services. Risser pays Mainjoy based on the number of chickens Mainjoy catches and/or the number of pounds of chickens caught and loaded.
9. Mainjoy also receives income from other customers and is paid either based on the number of chickens caught and/or number of pounds of chickens caught and loaded by Mainjoy or based on amount of time Mainjoy employees spent catching and loading chickens and Mainjoy's cost for materials.
10. J. Michael Melhorn is the president and sole owner and stockholder of Mainjoy.
11. As president and owner of Mainjoy, J. Michael Melhorn manages the daily operations of the company, makes employment and termination decisions and determines company policy.
12. Mainjoy employs approximately 21 employees, however, the number fluctuates depending on the month or week.
13. From November of 2001 through October of 2002, Mainjoy employed two crews of employees, one consisting of full-time, non-minor employees and the other consisting of part-time, minor employees.
14. At various times from November of 2001 through October 2002, the minors employed by Mainjoy worked with the non-minor employees.

15. All minors employed by Mainjoy were between the ages of 14 and 16 during the relevant time period.
16. David Day was employed by Mainjoy Unlimited, Inc. as a chicken catcher for the time period April 14, 2002 through August 11, 2002 and at that time was 15 years of age. David Day's date of birth is December 18, 1986.
17. Andrew Keck was employed by Mainjoy Unlimited, Inc. as a chicken catcher for the time period May 5, 2002 through August 11, 2002 and at that time was 14 years of age. Andrew Keck's date of birth is May 21, 1987.
18. Tyler Leber was employed by Mainjoy Unlimited, Inc. as a chicken catcher for the time period May 2, 2002 through August 9, 2002 and at that time was 15 years of age. Tyler Leber's date of birth is September 21, 1986.
19. William Raffensbuger was employed by Mainjoy Unlimited, Inc. as a chicken catcher for the time period June 13, 2002 through August 1, 2002 and at that time was 15 years of age. William Raffensburger's date of birth is September 8, 1986. (inconsistent spelling in original)
20. Eric Roush was employed by Mainjoy Unlimited, Inc. as a chicken catcher for the time period June 13, 2002 through August 21, 2002 and at that time was 14 years of age. Eric Roush's date of birth is October 17, 1987.
21. Adam Runion was employed by Mainjoy Unlimited, Inc. as a chicken catcher for the time period August 7, 2002 through August 15, 2002 and at that time was 14 years of age. Adam Runion's date of birth is June 22, 1988.
22. Randy Wilkinson, Jr. was employed by Mainjoy Unlimited, Inc. as a chicken catcher for the time period December 27, 2001 through April 16, 2002 and at that time was 15 years of age. Randy Wilkinson, Jr.'s date of birth is May 21, 1986.
23. David Wilson was employed by Mainjoy Unlimited, Inc. as a chicken catcher for the time period July 18, 2002 through July 25, 2002 and at that time was 14 years of age. David Wilson's date of birth is April 14, 1988.
24. Robert Stone was employed by Mainjoy Unlimited, Inc. as a chicken catcher for the time period June 27, 2002 through August 29, 2002 and at that time was 14 years of age. Robert Stone's date of birth is November 18, 1987.
25. Jared Wilson was employed by Mainjoy Unlimited, Inc. as a chicken catcher for the time period June 25, 2002 through July 30, 2002 and at that time was 14 years of age. Jared Wilson's date of birth is April 14, 1988. (AUF 10)
26. Paul Stoltzfus was employed by Mainjoy Unlimited, Inc. as a chicken catcher for the time period June 13, 2002 through August 29, 2002 and at that time was 14 years of age. Paul Stoltzfus' date of birth is June 30, 1987.
27. The minors met at Mainjoy's office and rode in a company van driven by Michael Melhorn to the various farms at which they caught chickens.
28. The chickens that the minors employed by Mainjoy caught were running loose on the floor of the chicken houses when the minors would catch or pick up a specific number of chickens in their hands, carry them to a truck and hand the chickens to another Mainjoy employee standing on top of the truck who placed the chickens into cages or coops on the trucks.
29. Respondent does not own the trucks used to transport chickens caught by its minor employees to various entities, but does at times arrange for the transportation of the chickens.

30. The minors employed by Mainjoy Unlimited, Inc. caught predominantly broiler chickens owned by Risser and occasionally red fowl chickens owned by individual farmers.
31. Mainjoy does not own the chickens that its minor employees catch.
32. Respondent neither owns nor operates a chicken farm, a chicken processing plant, or other processing facility or a chicken slaughterhouse or other slaughtering facility.
33. Broiler chickens are caught in the late afternoon. Once the broiler chickens caught by Mainjoy employees were loaded onto the trucks, they were hauled to Watkins Poultry Merchants, a poultry warehouse in New York City, where they were then sold live to various markets.
34. Broilers are meat chickens, raised for consumption. Grays, babies and reds are types of broilers raised for sale to specialty markets, for their meat and consumption.
35. Mainjoy is not responsible for delivering the chickens to the market in New York City.
36. The broiler chickens caught by the minor employees were not sold to or hauled to B&B Poultry for slaughter and processing.
37. The minors employed by Mainjoy did not feed the chickens.
38. The minors employed by Mainjoy did not debeak the chickens
39. The minors employed by Mainjoy did not inoculate the chickens.
40. The minors employed by Mainjoy did not raise the chickens.
41. On rare occasions, the minors employed by Mainjoy placed red fowl chickens into floors of chicken houses. Red fowl chickens are a type of spent fowl or laying hen, red in color and are a type of chicken owned by individual farmers.
42. The minors employed by Mainjoy did not move chickens to a layering [sic] facility. However, on one occasion, July 3, 2002, they did remove dead layers or laying chickens from a chicken house.
43. While catching and carrying the chickens for loading into wooden crates on trucks, the minors employed by Mainjoy Unlimited, Inc. inspected the chickens for irregular growth, injury and removal of any undesirable or injured chicken.
44. While catching chickens, all of Mainjoy's employees, including the minor employees, are responsible for the health of the chickens. "Responsible for health" means that the employees must avoid over heating, smothering and injuring the birds during this activity.
45. All of the duties performed by the minor employees were performed on a farm or at chicken houses.
46. Mainjoy also has non-minor employees that predominantly catch spent fowl or laying chickens or hens and pullets. On July 3, 2002 minor employees were employed to remove dead layers from a chicken house.
47. Laying chickens or laying hens and spent fowl are chickens that are at the end of their egg producing and life cycle. These chickens are typically raised in cages and the Mainjoy employees catch and load these chickens by removing them from their cages and loading them into cages or crates on top of trucks. These chickens are caught in the morning hours of the day.
48. The spent fowl or laying chickens or laying hens caught by Mainjoy employees were hauled to B&B Poultry in New Jersey for slaughter and processing. Mainjoy is not responsible for delivering the spent fowl or laying chickens to B&B.

49. Other than the company van used to transport employees, Mainjoy's principal business office at 604#1 West Main Street, and certain materials consisting of dust masks and sometimes "chicken wire" which are provided to all Mainjoy employees, including the minors, Mainjoy neither owns nor provides any additional equipment or materials for its employees.
50. Mainjoy does not provide instruction or direction to farmers, farm owners or other employees or personnel working at chicken farms on how to raise chickens the minors employed by Mainjoy catch.
51. The chicken farmers themselves or the owners of the chickens are responsible for raising the chickens and for determining how to raise the chickens on their farms.
52. At least four minors employed by Mainjoy, Tyler Leber, Robert Stone, David Wilson and Jared Wilson, loaded caught chickens onto trucks. These four minors loaded the chickens while standing on top of the flat-beds of trucks.
53. Tyler Leber, David Wilson, Robert Stone, Jr., and Jared Wilson loaded chickens into coops while on a tractor trailer.
54. In workweeks during the relevant time period, Respondent permitted Tyler Leber, Robert Stone, Jr., David Wilson and Jared Wilson to load trucks while they were between the ages of 14 and 16 years of age.
55. Between December 27, 2001 and April 14, 2002, minor Randy Wilkinson, Jr. worked for Mainjoy Unlimited, Inc. for a period of 5.5 hours and as late as 9:30 p.m. on a school day.
56. On February 9, 2002, Randy Wilkinson worked more than three hours in one day.
57. On December 27, 2001 minor Randy Wilkinson worked until 7:15 p.m.
58. On July 5, 2002, minor Paul Stoltzfus worked until 9:45 p.m.
59. The parties agree that if the Court finds that Respondent does not qualify for the agricultural exemption under the Fair Labor Standards Act, as amended, 29 U.S.C. § 201, et. Sea. (hereinafter referred to as "the Act" or "FLSA"), Respondent violated the child labor provisions of the Act with respect to number of hours and times worked for minors Randy Wilkinson and Paul Stoltzfus.
60. The parties stipulate to the authenticity of Respondent's "job tickets" or what is also referred to as "time sheets," provided by Respondent in response to the Administrator's First Request for Interrogatories and the Production of Documents

APPENDIX B

EXHIBITS ADMITTED TO RECORD WITH PARTIES'
MOTIONS FOR SUMMARY JUDGMENT

- PX-1 Declaration of Wage and Hour Investigator W. Scott Royer
- PX-2 Declaration of Wage and Hour District Director Joseph F. Dietrick, Jr.
- PX-3 Statement of Jeff Risser, President of Risser Poultry
- PX-4 Deposition of John Michael Melhorn
- PX-5 Statement of Jake Helfrich, President of Watkins Poultry Markets
- PX-6 Statement of Kerek Musser, proprietor of Kerek Musser Farm
- PX-7 Order of NLRB, Draper Farms, Inc. and United Food and Commercial Workers Union, Local 44, Case No. 19-RC-12562
- PX-8 Opinion Letter of January 14, 1977 of Wage and Hour Division
- PX-9 Minors' Time Sheets
- PX-10 Contract Grower Statements
- PX-11 Statements by Minor Employees of Respondent