

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 18 January 2012**

CASE NO.: 2011-CLA-00002

ADMINISTRATOR, WAGE AND HOUR  
DIVISION, UNITED STATES  
DEPARTMENT OF LABOR,  
Petitioner,

vs.

SHIRLEY HERRIDGE and TAMARA HERRIDGE,  
HERRIDGE & HERRIDGE, dba  
ANTIQUÉ SANDWICH COMPANY,  
Respondents.

Appearances: Jeannie Gorman, Esquire  
For the Petitioner

Tamara Herridge  
For the Respondents

Before: Jennifer Gee  
Administrative Law Judge

**DECISION AND ORDER REDUCING CIVIL MONEY PENALTY**

**INTRODUCTION**

This case arises under the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. §201 *et seq.*, (“FLSA”) and the regulations found at 29 C.F.R. Parts 579 and 580 for final administrative determination of violations of the child labor provisions of Section 12 of the Act, 29 U.S.C. §212, and assessment of the civil money penalty (“CMP”). The sole issue in this case is whether the \$3,960 civil money penalty assessed against Respondents should be reduced.

For the reasons set forth below, the civil money penalty is reduced to \$600.

**PROCEDURAL BACKGROUND**

On August 20, 2010, the District Director for the U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division, issued a decision assessing a civil money penalty of \$3,960.00 against Shirley and Tamara Herridge, Herridge & Herridge d/b/a Antique

Sandwich Company, Respondents, for a violation of the child labor provisions of the FLSA. Respondents wrote the Wage and Hour Division on September 3, 2010, asking that the civil money penalty be reduced due to mitigating circumstances. The Wage and Hour Division treated this request as an exception to the decision and referred this matter to the Office of Administrative Law Judges (“OALJ”) for hearing on December 10, 2010, pursuant to 29 C.F.R. § 580.6..

I conducted a hearing in this matter on November 28, 2011, in Seattle, Washington. Counsel for the Plaintiff and Shirley Herridge, one of the named Respondents, both appeared and participated in the hearing. Plaintiff’s exhibits 1 through 4 and Respondents’ exhibits were admitted into evidence at the hearing. At the hearing, I mistakenly referred to Respondents’ exhibits as Exhibits 1 through 3, and admitted them as Exhibits 1 through 3 though they were identified by letter. (HT,<sup>1</sup> p. 7.) I corrected this error in an order issued November 29, 2011, in which I admitted Respondent’s exhibits A through D into evidence.

For the reasons set forth below, the civil money penalty is REDUCED to \$600.

### ANALYSIS AND FINDINGS

#### Factual Background

Before the hearing, the parties agreed to a number of factual stipulations<sup>2</sup> which were approved on July 20, 2011, by OALJ Chief Judge Stephen Purcell before he transferred the case to San Francisco for hearing. (EX<sup>3</sup> 2.) These factual findings are based on the approved stipulations as well the testimony from the hearing and the evidence admitted into the record.

The Antique Sandwich Company (“Employer”) is owned by two sisters-in-law, Shirley and Tamara Herridge. They have owned the business for over 38 years. In August 2008, Demi Hutchins finished high school, and her sister, who had worked for the Antique Sandwich Company, suggested that she apply for a job with the Employer. She applied and was hired. (HT, p. 23.) Her work entailed an eight-hour work day starting at 6:00 a.m. (HT, p. 24.) Her duties included hand slicing vegetables, waiting on customers, and helping to prepare food. (HT, p. 24.)

On July 13, 2009, less than a month before her 18<sup>th</sup> birthday, Ms. Hutchins was not scheduled to work but substituted for another employee. The shift she took involved prep work which included slicing meat. (HT, p. 26.) While using an electric meat slicer, Ms. Hutchins cut her finger. She was working with Shirley Herridge, one of the co-owners, at the time. (HT, p. 26.) Ms. Herridge and Ms. Hutchins put Ms. Hutchins’ finger under some running water and decided she should go to a walk-in clinic to have it examined. (HT, p. 26.)

Ms. Herridge drove Ms. Hutchins to the clinic and stayed with her until she had to return to work. The doctor cleaned and bandaged the cut, which did not require any stitches, and gave

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<sup>1</sup> References to “HT” are to the hearing transcript.

<sup>2</sup> The parties actually filed two sets of stipulations. It was the Second Stipulation of the Parties, filed July 18, 2011, that was approved by Judge Purcell. These stipulations were also admitted into evidence as EX 1.

<sup>3</sup> References to “EX” are to the parties’ exhibits.

Ms. Hutchins a tetanus shot. Ms. Hutchins was told she could return to work and was not instructed to return for a follow-up examination.<sup>4</sup> (HT, p. 25.) Ms. Herridge picked Ms. Hutchins up and returned her to work, but Ms. Hutchins asked to leave work early because she did not feel well because of a tetanus shot she was given. (HT, pp. 26-27.) She left work early but returned to work the next day. (HT, p. 27.)

The injury resulted in an investigation by the Wage and Hour Division of the U.S. Department of Labor and the subsequent imposition of the civil money penalty for a violation of 29 U.S.C. § 212 that is the subject of this proceeding. The parties have stipulated that 29 C.F.R. § 579.61 prohibits a minor's use of the Employer's meat slicer and that Respondents violated § 212 of the FLSA. (EX 1, p. 2.)

### Applicable Law

The FLSA authorizes the assessment of civil money penalties for violations of the child labor provisions of the FLSA. It states:

Any person who violates the provisions of sections 212 or 213(c) of this title, relating to child labor, or any regulation issued pursuant to such sections shall be subject to a civil penalty of not to exceed —

(i) \$11,000 for each employee who was the subject of such a violation; or

(ii) \$50,000 with regard to each such violation that causes the death or serious injury of any employee under the age of 18 years, which penalty may be doubled where the violation is a repeated or willful violation.

29 U.S.C. § 216(e)(1)(A); *see also* 29 C.F.R. § 579.1(a)(i).

Regulations were promulgated to provide guidance for the assessment of penalties for these violations. 29 C.F.R. Part 579. The regulations mandate that the “administrative determination of the amount of the civil penalty will be based on the available evidence of the violation or violations and will take into consideration the size of the business of the person charged and the gravity of the violations as provided in paragraphs (b) through (d) of [29 C.F.R. § 579.5].” 29 C.F.R. § 579.5(a).

The regulation at 29 C.F.R. § 579.5(b) provides that:

[i]n 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

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<sup>4</sup> In responses to Requests for Admissions, Respondents answered “yes” to Request for Admission No. 8, “On a date after July 13, 2009, Demi Hutchins was required to follow-up with the same clinic who provided her treatment on July 13, 2009.” EX 3, p. 12. Ms. Hutchins, however, testified that she did not return for a follow-up appointment and that no one asked her to. (HT, p. .)

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).

The regulations also provide that based on the evidence available, including the investigation history and the degree of willfulness involved in the violation, consideration should be given to the following factors:

- (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 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, 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 civil money penalty (“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. Lynnville Transport, Inc.*, ARB No, 01-011 (2002); *aff’d Lynnville 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).

### Wage and Hour Division Procedures

In 2010, the Wage and Hour Division adopted new guidelines to assist its regional administrators and district directors in the assessment of Child Labor Civil Money Penalties. These guidelines were set out in Field Assistance Bulletin No. 2010-1 (“Bulletin”). (EX 5.) These guidelines were issued to incorporate changes made to § 16(e) of the FLSA, 29 U.S.C. § 216(e), in provisions of the *Genetic Information Nondiscrimination Act of 2008*, Pub. L. 110-233, 122 Stat. 881 (“GINA”). GINA increased the maximum child labor civil money penalty from \$11,000 to \$50,000 for any child labor violation that caused the death or serious injury of an employee under the age of 18 and provided that the penalties would be doubled for repeated or willful violations.

This Field Assistance Bulletin set out general rules for assessing civil money penalties for child labor violations, noting that many of the rules were unchanged from procedures the Wage and Hour Division (“WHD”) had followed before these 2008 amendments to § 16(e). Included in the “unchanged rules” was a provision that the WHD would continue to use a table that assigns a predetermined “initial assessment amount” to each type of violation for which a CL CMP may be assessed when the violation does not cause or contribute to the death or serious injury of a minor employee. (EX 5, p. 29.)

The Field Assistance Bulletin also stated that:

[a]s in the past, WHD will continue to consider the regulatory factors in 29 C.F.R. 579.5 to decide if the initial CL CMP amount should be reduced because of the small size of the employer’s business. ... Even if consideration of the gravity of the violation permits reduction for small business size, however, the initial CL CMP amount will be reduced for small businesses only if none of the violations were found to be willful or repeated; the employer did not falsify or conceal child labor violations; and the employer gave credible assurances of future compliance.

(EX 5, pp. 28-29.)

This Field Assistance Bulletin provided new guidelines for assessing CMP for violations after May 20, 2008. It provided that:

For every violation that causes the *nonserious injury* of a minor employee, WHD will generally determine an initial assessment amount based on the table of predetermined amounts discussed earlier in this document. Because the violation resulted in an injury, WHD will then apply a multiplier of “3” to that base amount. Such amounts may be reduced when the employer and the violation comport with the criteria established for reductions for small businesses (*see* last bullet of this document).

(EX 5, p. 33.)

## Penalty Assessment Against Respondents

The amount of CMP assessed against Respondents was determined by Donna Hart, the District Director for the Wage and Hour Division in Seattle, Washington. In assessing the penalty, Ms. Hart took into consideration the fact that Ms. Hutchins was employed in what was considered a hazardous occupation. (HT, pp. 13, 18.) She considered Ms. Hutchins' injury to be a serious one because it required immediate medical attention, Ms. Hutchins was unable to complete her work shift, and she had to return to the medical provider for follow-up to see how the healing was progressing. (HT, p. 13.) She took into consideration the criteria set out in 29 C.F.R. § 579(c). She specifically considered the fact that there was only one illegally employed minor,<sup>5</sup> only this one employee suffered an injury, she was 17 years old at the time of the injury, she was employed in a hazardous occupation, though there were no other minors employed in a hazardous occupation, this was a short time of employment, there were no hours worked violations involved, the Employer had 14 employees with a sales volume of \$510,000, the employer was committed to future compliance and had cooperated in the investigation, and the violation was not willful. (HT, pp. 17-19.) She also considered the fact that this was not a *de minimis* violation and that Ms. Hutchins had suffered a "serious" injury as a result of the violation. (HT, pp. 13, 19-20.)

Ms. Hart used a WHD document entitled "Initial Civil Money Penalty Assessment Amounts by Violation (Non-Agriculture) As Per 29 C.F.R. § 579.5," ("Civil Money Penalty Table"), EX 4, issued June 2010 to determine the initial assessment in this case. The Civil Money Penalty Table sets out the initial assessment amounts for violations before and after June 1, 2010, for various non-agriculture child labor violations. Using on this table, Ms. Hart determined that the appropriate initial assessment for the violation at issue here was \$1,320, which is the civil money penalty listed for non-agriculture minors between 16 and 17 years of age employed in hazardous occupations. (EX 4, p. 23; HT, p. 36.)

Ms. Hart then used Field Assistance Bulletin No. 2010-1 to determine that the initial assessment needed to be multiplied by three for the non-serious injury to Ms. Hutchins. (HT, p. 36.)

## The Civil Money Penalty Should Be Reduced

The Civil Money Penalty Table states that it was created pursuant to 29 C.F.R. § 579.5. (EX 4, p. 21.) The column entries in the Civil Money Penalty Table specifically state that they are "initial assessment amounts" for violations with the amounts depending on whether the violations were before or after June 1, 2010. The Table lists specific penalties for the different types of child labor violations without regard to any of the factors that 29 C.F.R. § 579.5 subsections (b), (c), and (d) mandate must be considered in determining the actual amount of the penalty.

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<sup>5</sup> Ms. Hart explained on cross-examination that she used the phrase "illegally employed minor" to refer to the fact that Ms. Hutchins was employed in what was considered a hazardous occupation and not that it was illegal to employ her. (HT, p. 21.)

The regulations in subsections (b), (c), and (d) of 29 C.F.R. § 579.5 specifically state that the factors enumerated in those subsections “shall” be considered in determining the appropriateness of the penalty to be assessed. These factors include:

1. The size of the business,
2. The number of employees,
3. The dollar volume of sales or business,
4. The amount of capital investment and financial resources,
5. The history of any prior violations,
6. Any evidence of willfulness or failure to take reasonable precautions to avoid violations,
7. The age of the minors so employed,
8. The occupations in which the minors were employed,
9. The duration of the illegal employment,
10. The hours of the day in which the violation occurred and whether it was during or outside of school hours,
11. Whether there is credible assurance of future compliance, and
12. Whether a civil penalty in the circumstances is necessary to achieve the objectives of the FLSA.

29 C.F.R. § 579.5(b)-(d).

I agree with Director Hart that the violation in question was not a *de minimus* one since Ms. Hutchins was injured as a result of the violation. However, all the factors set out above justify reduction of the civil money penalty that should be assessed. Antique Sandwich Company is a small business employing at most 14 employees with gross receipts of only \$313,627.93 in 2009 when the violation took place. (EX A, p. 1; EX B, p. 23.) It has been in business for 38 years with no history of prior violations. (HT, pp. 17, 29.) The injured minor was not regularly assigned to duties which required her to use the meat slicer. She was injured when she worked a shift for another employee. (HT, p. 26.) Despite Director Hart’s contradictory testimony<sup>6</sup> about the seriousness of the injury, it was not a serious injury. It did not require stitches, and contrary to Director Hart’s testimony, there was no follow-up medical appointment required for Ms. Hutchins. Though the Ms. Hutchins did not complete her work shift, it was not her injury that prevented her from doing so. She just did feel well because of the tetanus shot she was given, though I recognize that she got the shot because of her injury.

Ms. Hutchin’s illegal employment was brief. It only involved the one work shift she took for another employee. Ms. Hutchins was less than a month shy of her 18<sup>th</sup> birthday. Antique Sandwich Company has now put a prominent sticker on the meat slicing machine that warns that it is only to be used by persons who are at least 18 years old. (EX D.) The violation not only took place outside of school hours, it involved a minor who had already finished high school. (HT, p. 23.)

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<sup>6</sup> Though Director Hart initially testified that the injury to Ms. Hutchins was “serious,” she later contradicted herself and said the injury was not serious when she discussed application of the multiplier applied by the Bulletin to “non-serious” injuries. (HT, pp. 13, 36.)

The Civil Money Penalty Table lists the “initial assessment amount” for the child labor violation Respondents have admitted committing at \$1,320. (EX 4, p. 23.) However, I find the “initial assessment amount” of \$1,320 should be reduced when the criteria listed in 29 C.F.R. § 579.5 are considered in determining whether an assessment is appropriate.

Antique Sandwich Company favorably meets all the criteria listed in 29 C.F.R. § 579.5 for determining the appropriate penalty. Respondents clearly regret the injury to Ms. Hutchins who continues to work for Antique Sandwich Company and testified that she felt safe working there. (HT, p. 24.) Ms. Herridge testified extensively about the important role that Antique Sandwich Company plays in its community and the almost familial relationship it has with its employees and former employees. (HT, pp. 29-31.) While its gross receipts from 2007 through 2009 increased from \$284,628.84 in 2007 to \$313,627.93 in 2009, its tax returns for those years show that its taxable income has decreased from \$26,667 in 2007 to \$5,919 in 2008 to \$4,148 in 2009. (EX B.)

The fact remains that Antique Sandwich Company did violate the child labor provisions of the FLSA because Ms. Hutchins was allowed to use a meat slicing machine while still a minor. However, considering all the factors surrounding the violation, including the fact that Ms. Hutchins was within a month of her 18<sup>th</sup> birthday, the minor nature of her injury, Respondents’ obvious remorse over the fact that the injury happened, Respondents’ otherwise violation-free record, the size of the business, and the income the business has generated, I find the suggested initial assessment amount of \$1,320 is not needed to achieve the objectives of the FLSA in this case and that an initial assessment of \$400 will achieve those objectives.

The Field Assistance Bulletin that sets out the procedure for determining the appropriate civil money penalty specifically provides that for violations after May 20, 2008, that cause a non-serious injury of a minor employee, WHD will determine an initial assessment amount based on the table of predetermined amounts. The multiplier of “3” is applied to the base amount because there was an injury, but the Bulletin also specifically says that the “amounts” can be reduced when the employer and violation “comport with the criteria for reductions for small businesses.” (EX 5, p. 33.)

The criteria for the small business reductions include the following:

1. Employer’s gross annual dollar volume does not exceed \$1,000,000.
2. None of the child labor violations were willful or repeated.
3. The employer did not conceal or falsify child labor violations.
4. None of the child labor violations caused or contributed to the death of a minor employee.
5. None of the child labor violations caused or contributed to a serious injury or a minor that resulted in an initial assessment amount of \$40,000 for a CLEPP serious injury or \$10,000 for a Non-CLEPP serious injury.
6. The employer has given credible assurances of future compliance.

(EX 5, pp. 33-34.)

Antique Sandwich Company satisfies all the requirements for an adjustment to the civil money penalty as a small business. Its gross annual dollar volume of sales in 2009, when the violation occurred was \$313,627.93. (EX A, p. 1; EX B, p. 23.) Director Hart testified that the child labor violations were determined not to be willful, and they were no prior violations. (HT, pp. 17, 20.) There is no evidence that Antique Sandwich Company concealed or falsified its child labor violations. In fact, it cooperated with the investigator and freely admitted the violation. (HT, p. 19.) The child labor violations did not cause or contribute to the death of a minor employee and did not result in an initial assessment amount of \$40,000 or \$10,000. Antique Sandwich Company has not only given credible assurances of future compliance, it has offered evidence to show that it has already complied with the child labor provision that it violated.

The Field Assistance Bulletin provides that the initial CL CMP amount will be reduced by 50% if the employer has less than 21 employees. Antique Sandwich Company has at most 14 employees. Thus, I find the initial CL CMP amount should be reduced from \$400 to \$200.

While the initial CL CMP amount is reduced to \$200 because Antique Sandwich Company satisfies the requirements for reducing a small business adjustment to the base amount of the civil money penalty, the Field Assistance Bulletin still provides for a multiplier of “3” if there was an injury to the minor employee. As discussed earlier, the injury to Ms. Hutchin’s finger was not serious and did not even require stitches. However, it was still an injury that would not have happened if Antique Sandwich Company had complied with the FLSA.

Applying the multiplier of “3” to the adjusted initial penalty of \$200 that I have determined to be appropriate, I find that the civil money penalty assessed against Respondents should be reduced to \$600.

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JENNIFER GEE  
Administrative Law Judge

*San Francisco, California*