



Issue Date: 18 July 2013

CASE No: 2012-CLA-00005

In the Matter of:

**ADMINISTRATOR,
WAGE & HOUR DIVISION,**

Prosecuting Party,

v.

COLUMBIA FRUIT, LLC.,

Respondent.

Appearances: Evan H. Nordby, Esq.
For the Administrator

Timothy J. Resch, Esq.
For the Respondent

Decision and Order

Respondent, Columbia Fruit LLC (“Columbia”), owned by the Peterson family,¹ grows its own berries and processes berries grown by others. The Administrator of the Wage and Hour Division (“the Administrator”) alleges that on June 25, 2011, Columbia violated the Fair Labor Standards Act (“the Act”)² in two ways: it employed two children under the age of 12 to work in its strawberry fields, and failed to maintain proper records for them.

¹ Tr. at 207. This Decision and Order cites to the record this way: citations to the trial transcript are abbreviated at Tr. at [page number]; citations to the Prosecuting party’s exhibits are abbreviated as P. Ex.- [exhibit number] at [page number]; citations to the Respondent’s exhibits are abbreviated as R. Ex.-[exhibit number] at [page number].

² 29 U.S.C. § 201, *et seq.*

Columbia first argues that neither child worked on June 25, 2011. Alternatively, even if they did, Columbia contends the Administrator misapplied the aggravating and mitigating factors in setting a Civil Monetary Penalty (“penalty”) of \$16,350.³

I find that two children under the age of 12 picked berries for pay in Columbia’s fields, and that it failed to keep proper records. After weighing the relevant statutory and regulatory factors, \$16,350 is the appropriate penalty.

I. Summary of Findings

On the morning of June 25, 2011, Yohan Zenteno, age ten, and Alfredo Morales, Jr., age seven, were taken to Columbia’s strawberry fields by Silvia Mendoza and Benito Rodriguez respectively. Alfredo assisted Rodriguez in the field. Yohan assisted Mendoza and Efrain Quiroz Palomino. The children worked without their own identification badges; they used the badges of Mendoza and Rodriguez for the berries they brought to the weigh station. Columbia did not enforce its own workforce policies when it permitted them to work in the fields at all, and without badges. Columbia’s piece-rate payment structure for berries picked combined with workers working “off-badge” created a work environment conducive to this sort of abuse.

A penalty reduction for Columbia’s size is unwarranted, as it is not a small business under 29 C.F.R. § 579.5(b). Employing two children under the age of 12 in strawberry fields is no de minimis violation of child labor laws. The mitigating factors recognized in § 579.5(d)(2) were not all satisfied; Columbia exposed both children to obvious dangers that show it was heedless about their safety.

II. The Record

At the trial Victor Russell,⁴ Rudolfo Cortez, Jr.,⁵ Arthur Kerschner,⁶ Thomas Silva,⁷ Claudio Reyes,⁸ and Marty Peterson⁹ testified. The exhibits the Administrator and Columbia submitted were admitted, and both submitted posttrial briefs.

³ \$350 was assessed for failing to keep records of working children. A \$16,000 penalty was assessed for two children under 12 working in agriculture (\$8,000 per child).

⁴ Tr. at 12–79.

⁵ Tr. at 79–98.

⁶ Tr. at 99–148.

⁷ Tr. at 149–79.

⁸ Tr. at 179–95.

⁹ Tr. at 196–217.

III. Stipulations and Agreed Facts

1. Columbia Fruit LLC is subject to the Fair Labor Standards Act and the child labor regulations issued under the Fair Labor Standards Act at 29 C.F.R. Part 570.
2. Columbia Fruit LLC is engaged in the business of production of agricultural products, including strawberries, with a business address of 2526 Dike Rd. Woodland, WA, 98674.
3. Columbia had gross sales of \$11,480,191 in 2008; \$13,594,147 in 2009; \$16,082,952 in 2010; and \$19,606,539 in 2011.¹⁰
4. The inspection of the field at which the alleged under-age-12 employment occurred in this matter took place on Saturday, June 25, 2011. The average temperature at the closest available weather station (Kelso, WA) on June 25, 2011 was 56.3 Fahrenheit. The low temperature that day was 42.8; and the high was 69.8. June 25, 2011 was during the normal summer break from school. June 25 was the first day of the 2011 strawberry picking season for Columbia Fruit LLC.
5. The size of Columbia Fruit LLC's workforce fluctuates from season to season; Columbia Fruit LLC employs up to 140 workers during the height of the summer picking and processing season, and as few as 40 workers during the low season.
6. The children who are alleged to have been present and working in the field were accompanied by adults who, it is undisputed, were working in the field for Columbia. Yohan Zenteno was accompanied by his mother, Silvia Mendoza. Alfredo Morales, Jr., was accompanied by Benito Rodriguez, a friend of his mother.
7. Columbia has no history of violations of the Act.
8. The alleged violations were not willful.¹¹

¹⁰ The parties stipulated at trial to Columbia's gross sales figure for 2011. Tr. at 5.

¹¹ Administrator's Post Trial Brief at 1-2.

IV. Factual Findings

A. Summary of Relationships

1. Yohan

Silvia Mendoza is Yohan's mother.¹² Efrain Quiroz Palomino is Mendoza's boyfriend,¹³ but not Yohan's father.¹⁴ Palomino lives with Yohan and Mendoza.¹⁵

2. Alfredo

Yolanda Lopez is Alfredo's mother.¹⁶ Benito Rodriguez is a family friend.¹⁷ Alfredo Morales is Alfredo's father.¹⁸

3. Columbia Fruit

Marty Peterson operates Columbia.¹⁹ Claudio Reyes works at Columbia as a supervisor.²⁰ Scott is Marty Peterson's son and works at Columbia.²¹

4. Wage and Hour Division

Victor Russell is a Wage and Hour Investigator.²² Rudolfo Cortez, Jr. is an Assistant District Director with the Wage and Hour Division.²³ Thomas Silva is another Assistant District Director with the Wage and Hour Division.²⁴

B. Disputed Facts

The parties disagree over several material facts, including:

1. Whether the minors were working in the strawberry field on June 25, 2011;
2. Whether the violations of the Act occurred as alleged;

¹² R. Ex.-101 at 1.

¹³ Tr. at 23.

¹⁴ Tr. at 30; *see* R. Ex-101 at 5.

¹⁵ *Id.*

¹⁶ Tr. at 5.

¹⁷ Tr. at 5–6.

¹⁸ R. Ex.-102 at 1.

¹⁹ Tr. at 196.

²⁰ Tr. at 180.

²¹ Tr. at 204.

²² Tr. at 12–13.

²³ Tr. at 80.

²⁴ Tr. at 149.

3. Whether Columbia had an effective policy forbidding children from being present in the fields;
4. Whether Columbia took reasonable precautions to avoid children being present in the field by providing training on its policies to employees;
5. Whether the minors were exposed to any obvious hazards or detriments to their health or well-being; and
6. Whether Columbia has provided the Department of Labor with credible assurances of future compliance.²⁵

C. Wage and Hour Division Investigation

At about 9:00 a.m. on June 25, 2011, Wage and Hour Investigator Victor Russell (“Russell”) and Assistant District Director Rudolfo Cortez, Jr. (“Cortez”) arrived at Columbia’s farm in Woodland, Washington to conduct an investigation.²⁶ There were between 45 and 65 workers in the field before Russell and Cortez arrived.²⁷ Many workers fled when they saw Russell and Cortez, leaving as few as 27 workers in the field.²⁸ Cortez saw minors with some of the workers that left.²⁹

Russell and Cortez spoke with a field supervisor³⁰ and asked all the drivers and passengers to stand by the vehicles they arrived in, to help identify the vehicle for each worker.³¹ Russell photographed all the workers still present.³² Yohan was photographed with his mother Mendoza near a car.³³ Alfredo was photographed near a car with family friend Rodriguez.³⁴ Neither Russell nor Cortez observed either Alfredo or Yohan actually work in the strawberry fields.³⁵

Russell and Cortez conducted interviews as part of their investigation.³⁶ Both were in the field until approximately 11:00 a.m.,

²⁵ Respondent’s Pre-Hearing Statement of Position at 4; Administrator’s Pre-Hearing Statement at 3.

²⁶ Tr. at 15–16.

²⁷ Tr. at 16, 183.

²⁸ Tr. at 95–96, 183–84.

²⁹ Tr. at 95–96.

³⁰ Tr. at 19. Russell was unsure as to whether he spoke with Supervisor Jose or Supervisor Claudio.

³¹ Tr. at 19.

³² Tr. at 55–56.

³³ P. Ex.-2; Tr. at 56.

³⁴ P. Ex.-3 at 1; Tr. at 56.

³⁵ Tr. at 59, 89–90.

³⁶ Tr. at 82, 91–92.

when they left for Columbia's office.³⁷ They stayed at the farm until approximately 1:00 p.m.³⁸

D. Interviews Conducted by Investigator Russell and Ass't District Directors Cortez and Silva

Several days after the initial investigation, on June 28, 2011, Russell interviewed Palimino and Yohan.³⁹ On June 29, 2011, Russell and Assistant District Director Thomas Silva ("Silva") interviewed Mendoza over the telephone.⁴⁰ Rodriguez was interviewed on July 1, 2011.⁴¹ Approximately 13 months after the initial investigation, Yohan and Silvia Mendoza were interviewed a second time.⁴² The first and only time Alfredo was interviewed was on July 21, 2012, by Cortez.⁴³ Lopez, Alfredo's mother, was also interviewed on July 21, 2012.⁴⁴

1. Interviews Related to Yohan

a. Interviews with Yohan

Yohan was interviewed twice during the investigation.⁴⁵ Russell interviewed Yohan on June 28, 2011, and transcribed his statement.⁴⁶ Yohan stated, "I can pick one or two buckets an hour . . . I have picked in the fields twice for Petersons;"⁴⁷ he "do[es] it to help [his] mom."⁴⁸ Yohan said that his mother "mostly . . . tells [him] to work and stay busy"⁴⁹

³⁷ Tr. at 91.

³⁸ Tr. at 58, 77, 91. There is an apparent discrepancy with the amount of time the investigators were in the field. Russell stated that he was in the field with Cortez until 1 p.m., but when Cortez testified he stated they were in the field until 11 a.m. Cortez stated that they left the field "[s]omewhere between [9:00 a.m] and 11:00. I think we went to the office. We were there, so we went to the office after this." Tr. at 91. This inconsistency does not affect my analysis.

³⁹ Tr. at 30, 35.

⁴⁰ R. Ex.-101 at 6; Tr. at 36-37.

⁴¹ R. Ex.-102 at 11-12.

⁴² Tr. at 44, 48; R. Ex.-101 at 2-4.

⁴³ R. Ex.-102 at 2-3; Tr. at 48, 60.

⁴⁴ R. Ex.-102 at 7; Tr. at 44.

⁴⁵ Tr. at 33-36, 40.

⁴⁶ Tr. at 33-36, 40. Despite having both Mendoza's and Palomino's statements from 2011 and 2012, Yohan's 2012 statement has not been entered into evidence as an exhibit with the other exhibits. Tr. at 40.

⁴⁷ R. Ex.-101 at 5.

⁴⁸ *Id.*

⁴⁹ *Id.*

b. Interviews with Silvia Mendoza

In her 2011 statement, Mendoza explained “I usually don’t bring [Yohan] but I needed to watch him that day because my babysitter couldn’t watch him,”⁵⁰ and that,⁵¹ “[h]e only went to the field one time.”⁵² Then in her 2012 statement,⁵³ Mendoza stated that “Yohan worked with me from 6:00 in the morning until 12:00 p.m. in the afternoon.”⁵⁴ Silvia described with specificity what Yohan actually did: “Yohan ran with the buckets and poured it in the plastic bin . . . Yohan and I worked for 6 hours more or less.”⁵⁵

c. Interviews with Palomino

In two signed statements, one in June of 2011 and the other in July of 2012, Palomino asserted that Yohan went to the farm with his mother that morning.⁵⁶ In his July 2012 statement Palomino claimed that “Yohan helped [him] picking [strawberries]. . . .”⁵⁷ In June 2011, Palomino also stated that Yohan “pick[ed] one bucket or less [per hour].”⁵⁸ Palomino did not arrive at the farm until approximately 10:00 a.m.⁵⁹ At Columbia’s farm, Palomino “did not have a badge so I was using Sylvias [sic] badge.”⁶⁰ Palomino also discussed at length his concerns with Columbia’s weighing procedures.⁶¹

2. Interviews Related to Alfredo

a. Interview with Alfredo

Alfredo was interviewed once during this investigation, on July 21, 2012.⁶² Alfredo said he went with Rodriguez at 6:00 a.m.,⁶³ and he

⁵⁰ *Id.* at 7.

⁵¹ Interview taken by Russell, with Silva interpreting.

⁵² R. Ex.-101 at 7.

⁵³ Interview was by taken by WHI Russell in Spanish. WHI Russell translated into English.

⁵⁴ R. Ex.-101 at 2.

⁵⁵ *Id.*

⁵⁶ *Id.* at 3–4.

⁵⁷ *Id.* at 3.

⁵⁸ *Id.* at 4.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* (“I asked him, ‘How many pounds do you take off for the weight of the flats?’ He told me ‘10 pounds for four flats’ But when I weighed the flats empty, they were 9.5 pounds approximately.”)

⁶² Tr. at 60.

⁶³ R. Ex.-102 at 2.

“picked strawberries and put them in the bucket,”⁶⁴ picking about eight buckets of strawberries.⁶⁵ Besides picking his own strawberries, Alfredo would take Rodriguez’s bucket, when full, and pour it in the plastic bins for him.⁶⁶

b. Interview with Lopez

Lopez, Alfredo’s mother, stated that she “allowed [her] son Alfredo Junior to practice with and watch Benito Rodriguez in the field on one Saturday in June.”⁶⁷ Lopez further stated that she was “here in the morning and awake at 6:00 in the morning when Alfredo [sic] picked up Alfredo.”⁶⁸ Lopez also stated that “[she] was not worried Alfredo would get hurt . . . he was only picking strawberries, nothing more.”⁶⁹ Lopez felt that Alfredo working with Rodriguez was “not a problem.”⁷⁰

c. Interview with Rodriguez

In his signed statement, Rodriguez states that he “didn’t take the boy on Friday only on Saturday.”⁷¹ Rodriguez gave two reasons he took Alfredo with him to Columbia’s farm. First, Rodriguez said Alfredo came along so Rodriguez could “teach him how to pick.”⁷² Second, Rodriguez claimed that “[t]he main reason the boy was picking strawberries was so he could make milk shakes at home”⁷³

E. Testimony from Arthur Kerschner

Arthur Kerschner, chief of the branch of Fair Labor Standards Act and Child Labor in the Wage and Hour Division’s national office, testified at trial.⁷⁴ He is the lead enforcement officer, and his duties include: supervising the Administration’s Child Labor and Fair Labor Standards Act programs, policy enforcement positions, and “a strong role in regulatory activity.”⁷⁵

⁶⁴ *Id.*

⁶⁵ *Id.* Alfredo stated that he picked “about 4 buckets two times.”

⁶⁶ *Id.*

⁶⁷ R. Ex.-102 at 4.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ R. Ex.-102 at 12.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *See* Tr. at 99–148.

⁷⁵ Tr. at 101.

Kerschner explained the Department's policies and discussed how penalties are set.⁷⁶ The Department regards certain offenses as more serious than others;⁷⁷ it ranks various violations.⁷⁸ The most serious violation involves the death of a minor.⁷⁹ The next most serious category involves an injury to a minor.⁸⁰ The third most serious—employing a child under twelve—is nearly as serious as injuring a minor.⁸¹ These classifications of violations are used to make the initial penalty assessment.⁸² In this Administration the Department assesses an \$8,000 initial penalty for violations of child labor laws that involve children under the age of twelve; it focuses on the dangers inherent in work by such young children.⁸³ “We know they’re not little adults. They don’t think like adults. They don’t act like adults They have no background to rely on.” “[O]ur strategy to reduce the number of children who are just too young to work, an important tool of showing we are serious is a \$6,000 or \$8,000 assessment.”⁸⁴

F. Columbia’s Company Practices

Columbia provides its employees with some training on company policies and relevant labor laws.⁸⁵ Columbia’s supervisor, Claudio Reyes (“Reyes”), presents the approximately twenty-five minute training to employees.⁸⁶ Rodriguez received the training on June 23, 2011.⁸⁷ Mendoza received the training on June 26, 2011,⁸⁸ the day *after* she took her son Yohan into the fields.⁸⁹ The 11 topics covered in less than a half-hour include: contamination, allergens, no glass policy and glass breakage, heat stress, first aid, hand washing, no eating in the

⁷⁶ *See* Tr. at 104–23.

⁷⁷ Tr. at 109.

⁷⁸ *See* Tr. at 109.

⁷⁹ Tr. at 109.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ Tr. at 119–25. Kerschner and Deputy Administrator Nancy Lapink, with the approval of Secretary of Labor Hilda Solis, decided to increase the base penalty amount to \$8,000.

⁸⁴ Tr. at 119, 120–21, 127.

⁸⁵ *See* Tr. at 188–92.

⁸⁶ Tr. at 190; R. Ex.-103.

⁸⁷ R. Ex.-103 at 1–2.

⁸⁸ R. Ex.-103 at 3.

⁸⁹ *Id.*

fields, no garbage in the fields, field food security, minimum wage requirements, and no children in the field.⁹⁰

Reyes oversees the workers that are in the field; it is his job to know who is working in the fields.⁹¹ He identified Alfredo to the investigators from the photographs they took as “Benito’s kid.”⁹² Columbia’s policy requires people to sign in before entering the fields to work.⁹³ Yet in the investigation both Russell and Cortez saw workers come into the fields without signing in.⁹⁴ Columbia’s managers also monitor the fields for people they do not know or recognize.⁹⁵ Columbia assigns badges to its workers in the field.⁹⁶ The badges seem to have a magnetized strip which is run through a reader like a credit card at the weighing point set up in the field, to keep track of the berries each worker has picked.⁹⁷

G. Verification of Minors’ Ages

On the date of the violation Yohan was ten years old, Alfredo seven,⁹⁸ facts Russell verified through forms sent to Woodland Primary School.⁹⁹ The school faxed the completed forms on July 5, 2011.¹⁰⁰

H. Hazardous Conditions in the Field

The field had numerous tire tracks, showing vehicles were driven along and through the field.¹⁰¹ In two photographs Russell took,

⁹⁰ Tr. at 190.

⁹¹ Tr. at 187.

⁹² Tr. at 195.

⁹³ Tr. at 210.

⁹⁴ Tr. at 211.

⁹⁵ Tr. at 210.

⁹⁶ Tr. at 210–11.

⁹⁷ Tr. at 202, 211, 216.

⁹⁸ R. Ex.-101 at 1; R. Ex.-102 at 1.

⁹⁹ Tr. at 52. Both WH-9 forms are dated “07/05/2011” and both were faxed back to Russell on July 5, 2011. The confirmation of the minors’ ages took less than one day. *See* R. Ex. 101 at 1; R. Ex. 102 at 1.

¹⁰⁰ It appears from the record that the final assessment may have been sent to Columbia 30 minutes before the Department received the WH-9 forms from the school that confirmed the ages. Had school records showed the minors were older than 12, the assessment would have been corrected. Tr. at 178. Columbia does not offer any proof that the two children were over 12 on the day the investigators saw and photographed them at Columbia’s fields.

¹⁰¹ Tr. at 50.

a flatbed truck can clearly be seen in the background.¹⁰² The field also contained pallets that are typically loaded with the use of a forklift.¹⁰³

I. Columbia's Assurances of Future Compliance

Columbia has agreed to conduct a self-audit for the next three years.¹⁰⁴ Additionally, Columbia has already sent its supervisors to wage and hour training.¹⁰⁵ Peterson has stated that he takes the issue of children working in his farm “[v]ery seriously.”¹⁰⁶ Russell found Peterson “[c]redible, honest, straight-forward, for the most part.”¹⁰⁷

J. The WH-266 Form and the Initial Penalty Assessment

The Wage and Hour Division begins the process of setting a penalty when it finds violations of regulations found in 29 C.F.R. Parts 579 and 580 by using a computer program named “Wizard,” that uses data entered on the WH-266 penalty form.¹⁰⁸ The initial computation does not take into account whether the penalty will accomplish the goals of the agency’s mission and whether or not the employer can pay the penalties.¹⁰⁹ The information entered into Wizard includes the annual revenue of the employer and the number of employees, amongst other data.¹¹⁰ After Wizard generates a recommended penalty, the assessing official has discretion to modify that amount.¹¹¹

Silva considered the severity of the violations, Columbia’s immediate steps to comply with the Act, and the lack of previous violations,¹¹² all factors that are not part of the Wizard program.¹¹³ Silva saw that the evidence substantiated the penalty.¹¹⁴

V. Witness Credibility

While I generally find the trial testimony and the statements the investigators took credible, several statements at trial and certain elements of the signed statements are not.

¹⁰² P. Ex. -4; P. Ex.-3 at 1.

¹⁰³ Tr. at 50.

¹⁰⁴ Tr. at 208.

¹⁰⁵ Tr. at 209.

¹⁰⁶ Tr. at 203.

¹⁰⁷ Tr. at 72.

¹⁰⁸ Tr. at 51, 154–55.

¹⁰⁹ *Id.*

¹¹⁰ Tr. at 151.

¹¹¹ Tr. at 156.

¹¹² Tr. at 157.

¹¹³ Tr. at 156–57.

¹¹⁴ *Id.*

A. Wage and Hour Investigator Russell and Assistant District Director Cortez

Both Russell and Cortez are generally credible witnesses. The interviewing techniques Russell used were questionable, however. When I asked Russell about the techniques he used to question Alfredo, Russell testified that Alfredo's statement was "[i]n his own narrative"¹¹⁵ replying to "broad questions" during the interview.¹¹⁶ While I do not doubt that Russell allowed Alfredo to give a narrative, I question the level of detail contained in Alfredo's statement. For an eight year old to recall events from over a year ago in such detail seems unlikely,¹¹⁷ especially the exact times of arrival and departure. A seven year old will generally not remember that he left at exactly 6:00 am on a specific date. Nor is it likely that a seven year old will have the presence of mind to check a clock or watch—if he has one—to see when he left a location.

Despite that shortcoming, I find Russell and Cortez otherwise credible witnesses.

B. Alfredo Morales, Jr.

I find Alfredo credible. Columbia argues that timing inconsistencies raise doubts about both minors' narratives.¹¹⁸ Columbia challenges Alfredo's statement that he worked three and a half hours after Russell and Cortez arrived at Columbia's property.¹¹⁹ The investigators' hurried pace as they tried to complete their work and the fact that they were not in the field the entire time they were at the farm leads me to believe it is not only possible, but likely that the investigators did not see the children in the field. As discussed above, the level of detail in Alfredo's statement does raise some concern. However, I find the core of Alfredo's statement to be credible. While small details may be beyond the cognitive abilities of a young child, a child remembering that he picked strawberries for several hours early on a Saturday morning is not only plausible, but likely.

C. Yohan

I find Yohan credible. Nothing in the record causes me to question the truthfulness of Yohan's statement. Yohan's statement that

¹¹⁵ Tr. at 65–66.

¹¹⁶ *Id.*

¹¹⁷ Alfredo was seven years old at the time of the investigation and was eight years old when he was interviewed.

¹¹⁸ Columbia's Closing Brief at 6.

¹¹⁹ *Id.*

he had “picked in the fields twice for Petersons,”¹²⁰ does not cast doubt on Yohan’s credibility. I find this potential inconsistency insignificant.

D. Silvia Mendoza

Columbia argues that Mendoza’s story is contradictory because Mendoza stated that Yohan worked either six hours, or possibly three to four hours.¹²¹ Mendoza’s perception of time does not need to be exact for her to be credible on the issue of whether the child worked in the strawberry field. The difference between four hours and six hours is legally insignificant. Mendoza’s general recounting of the events is credible.

E. Efrain Quiroz Palomino

I find Palomino credible. Columbia argues that Palomino’s statement regarding his arrival at 10:00am is difficult to square with Cortez’s testimony because Cortez “saw lots of people leaving” when he arrived at the strawberry field.¹²² The two propositions are not incompatible. It is possible that many workers left when the investigators arrived and then approximately an hour later Palomino arrived. No evidence has been presented which suggests that no new workers arrived after the investigators began their investigation.

F. Benito Rodriguez

While Rodriguez is generally credible, I do not find his “milkshake” statement credible. The amount of time Alfredo spent at the farm and the early time of day he went to the farm suggests that Rodriguez was disingenuous when he stated the primary purpose for Alfredo being at the farm was to gather strawberries for milkshakes. I do not believe that a young child would be brought to a farm at six in the morning for the purpose of gathering strawberries for milkshakes.

¹²⁰ R. Ex.-101 at 5; *see* Columbia’s Closing Brief at 4.

¹²¹ Columbia emphasized the contradiction in its Closing Brief at 5 (“Ms. Mendoza’s statement that she and Yohan worked for 6 hours in difficult (if not impossible) to square with Investigator Russell’s testimony that he never personally observed Yohan actually working in Columbia’s Fruit’s field on June 25, 2011. And Mr. Mendoza’s [sic] statement is facially contradictory: Was Yohan working with her for 6 hours? Or was it 3-4 hours? Without the opportunity to cross examine Ms. Mendoza, it is impossible to unravel (or at least shed some light) on her contradictory story.”)

¹²² Columbia’s Closing Brief at 3.

G. Columbia's Critique of the Evidence

Columbia argues that the Petitioner's evidence is "simply too confusing and inconsistent to meet its burden of proof."¹²³ Columbia is also critical of the Administrator's failure to call Alfredo, Yohan or Mendoza as witnesses at the hearing.¹²⁴ They argue that without their testimony at the hearing, the parties were not able to "test their recollection."¹²⁵ The record does not indicate that Alfredo, Yohan or Mendoza were unable to testify. If Columbia sought to impeach any of these individuals or test the credibility of their signed statements, it could have called them as witnesses. I believe the signed statements of Yohan, Alfredo, and Mendoza, despite any minor inconsistencies.

VI. Columbia Violated the FLSA

A. Applicable Law

The FLSA was enacted in 1938 for the purpose of "protect[ing] all covered workers from substandard wages and oppressive working hours, 'labor conditions [that are] detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers.'"¹²⁶ "The child labor provisions of the FLSA were enacted to protect working children from physical harm and to limit their working hours to prevent interference with their schooling."¹²⁷

Under section 12(c) of the Act, "[n]o employer shall employ any oppressive child labor in commerce or in the production of goods for commerce or in any enterprise engaged in commerce or in the production of goods for commerce."¹²⁸ The FLSA defines "employ" broadly, and includes "to suffer or permit to work."¹²⁹ Oppressive child labor includes, "a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer . .

¹²³ *Id.* at 6.

¹²⁴ *Id.* at 5–6.

¹²⁵ *Id.* at 5.

¹²⁶ *Barrentine v. Arkansas-Best Freight Systems Inc.*, 450 U.S. 728, 739 (1981) (citing 29 U.S.C. § 202(a)); see also *Overnight Motor Transp. Co. v. Missel*, U.S. Md. 1942, 316 U.S. 572, 577–78 (1942).

¹²⁷ *Administrator v. Thirsty's, Inc.*, ARB No. 96-143, ALJ No. 1994-CLA-65 (ARB, May 14, 1997); see also *Administrator v. Lynnville Transport, Inc.*, 1999-CLA-18 (ALJ, Aug. 29, 2000) *aff'd*, ARB No. 01-011 (ARB Nov. 27, 2002); *Administrator, Wage & Hour Division v. Tacoma Dodge, Inc.*, 1994-CLA-80, 88, 91, 112 (ALJ on remand, Dec. 15, 1999).

¹²⁸ 29 U.S.C. § 212(c).

¹²⁹ 29 U.S.C. § 203(g).

. in any occupation.”¹³⁰ The subjective intent of the employer is not controlling.¹³¹ Rather, “it is sufficient that one person suffer or permit (another) to work.”¹³²

B. Analysis

Both Alfredo and Yohan were employed and worked within the meaning of the Act.

1. Yohan was Employed and Worked in Columbia’s Field

Yohan was working in the field on June 25, 2011. The three signed statements and one unsigned statement¹³³ establish that Yohan was working in Columbia’s fields. Yohan himself claimed that he has been a picker and had helped his mom. Yohan’s assertion was echoed by Mendoza, and was also corroborated by Palomino. Columbia argues that each statement is not sufficient to establish that Yohan worked in Columbia’s fields.¹³⁴ Taken together, these three statements, along with Columbia’s failure to regulate who came into its fields, establishes by a preponderance of the evidence that Yohan was working in the farm on the morning of June 25, 2011.

2. Alfredo Was Employed and Worked in Columbia’s Field

Alfredo was working in the field on June 25, 2011, where he picked multiple buckets of strawberries and transported Rodriguez’s buckets of strawberries to the scales. Three separate statements support the proposition that Alfredo was in the field picking strawberries in June 2011. I find by a preponderance of the evidence that Alfredo picked multiple buckets of strawberries and assisted in carrying Rodriguez’s buckets of strawberries to the scales.

3. Columbia Employed Oppressive Child Labor

Yohan and Alfredo are under the age of 16. Therefore, if they are employed, then they are employed in oppressive child labor. Under the Act, absent the application of a few limited exceptions, any employment of a minor under the age of 16 is considered oppressive child labor.¹³⁵ Columbia did not affirmatively seek out children to pick

¹³⁰ 29 U.S.C. § 203(l).

¹³¹ *Brennan v. Partida*, 492 F.2d 707, 709 (5th Cir. 1974).

¹³² *Id.* (citations and internal quotation marks omitted).

¹³³ Investigator Russell did not want Yohan to sign the statement without the permission of Yohan’s parents. R. Ex.-101 at 5.

¹³⁴ Columbia’s Closing Brief at 3–5.

¹³⁵ *See* 29 U.S.C. § 203(l).

strawberries. Columbia permitted both Yohan and Alfredo to work in its strawberry field by assisting the adults who brought them there.

4. The Lack of Direct Observation of Minors Working Does Not Negate My Findings

The failure of Columbia's employees and the investigators to personally witness the two children picking in the field is not dispositive. Columbia's field supervisor Reyes and Mr. Peterson stated that they never saw Yohan or Alfredo in the field, let alone working.¹³⁶ This does not establish that the children were not working. Reyes' and Peterson's failure to observe the minors in the field is not inexplicable. At best, Reyes and Peterson did not see the two children among the 45 to 65 other workers. With that number of workers in the field, both Reyes and Peterson could have overlooked them. At worst, Reyes and Peterson failed to describe what they actually saw that morning. When the evidence is considered in its totality, it is more likely than not that both Yohan and Alfredo were in the field and working.

VII. Failure to Keep Records

Columbia violated the record keeping provision of the Act. In *Administrator, Wage and Hour Division v. Chrislin*, the ALJ upheld the imposition of a \$412.50 penalty assessment for a record violation when the respondent presented no defense or argument against it.¹³⁷ Here, Columbia has not presented any argument and has not contested the penalty assessment for the record keeping violation. Columbia does not dispute that they failed to keep proper records for both children. I find Columbia guilty of the recordkeeping violation. The \$350 penalty is proper.

VIII. The Civil Money Penalties Were Appropriate

A. Applicable Law

When reviewing the penalty in a FLSA case, an administrative law judge's decision and order "may affirm, deny, reverse, or modify, in whole or in part, the determination of the Administrator."¹³⁸ This *de novo* review evaluates the penalty factors independently.¹³⁹ The Administrative Review Board ("ARB") has held that "once a [penalty] has been challenged before [an administrative law judge], the issue is

¹³⁶ Tr. at 183–84, 205–06.

¹³⁷ *Frazer v. Chrislin, Inc.*, 1999-CLA-5, at 5 (ALJ Dec. 17, 1999) *modified*, ARB Case No. 00–022 (ARB Nov. 27, 2002).

¹³⁸ 29 C.F.R. § 580.12(c).

¹³⁹ *Administrator v. Lynnville Transport Inc.*, ARB No. 01-011 (ARB Nov. 27, 2002) *aff'd* *Lynnville Transport, Inc. v. Chao*, 316 F. Supp. 2d 790 (S.D. Iowa 2004).

not whether the penalty assessed by the Administrator comports with the formula and matrix contained in Form WH-266” but “whether the assessed penalty complies with the statutory provisions regarding the [penalty] and the [penalty] regulations.”¹⁴⁰

Violations of the child labor provisions of the Act result in a penalty. Section 216 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 not to exceed—

(i) \$11,000 for each employee who was the subject of such a violation¹⁴¹

Regulations guide the assessment of penalties for these statutory violations.¹⁴² The penalty is “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 violation as provided [in this section]”¹⁴³ Section 579.5(b) lists factors to be considered in evaluating the size of the business, including:

the number of employees employed by that person (and if the employment is in agriculture, the man-days of hired farm labor used in pertinent calendar quarters), 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.¹⁴⁴

Section 579.5(c) lists factors that relate to the gravity of the violation. These aggravating factors include:

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

¹⁴⁰ *Administrator v. Elderkin Farm*, ARB Nos. 99-033 and 99-048, ALJ No. 1995-CLA-31 (ARB June 30, 2000). In a different context, the Tenth Circuit upheld the administrative law judge’s *de novo* assessment of a penalty larger than the Department requested, after applying the factors the relevant statute prescribed. *Cordero Mining LLC v. Sec. of Labor*, 699 F.3d 1232, 1238–1239 (10th Cir. 2012).

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

¹⁴² 29 C.F.R. Part 579.

¹⁴³ 29 C.F.R. § 579.5(a).

¹⁴⁴ 29 C.F.R. § 579.5(b).

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.¹⁴⁵

Mitigating factors include whether there is no history of violations, the degree of willfulness involved, and the following:

(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.¹⁴⁶

B. Sufficiency of the Assessment Process

The WH-266 form considers the regulatory factors of 29 C.F.R. § 579.5.¹⁴⁷ The ARB has held that “although the [WH-266] penalty schedule d[oes] not reference each criterion of the regulatory guidelines, nevertheless it is a reasonable interpretation of those guidelines and within the broad authority granted an agency charged with implementing those regulations.”¹⁴⁸ Assistant District Director Silva considered the regulatory factors that are not part of the WH-266 calculation:¹⁴⁹ whether the penalty accomplishes the goals of the agency’s mission and whether or not the employer can pay the penalty.¹⁵⁰ He also considered whether there was sufficient evidence to substantiate the penalty amount.¹⁵¹ Silva acted within his discretion in

¹⁴⁵ 29 C.F.R. § 579.5(c).

¹⁴⁶ 29 C.F.R. § 579.5(d).

¹⁴⁷ Tr. at 154. The WH-266 form does not consider the employer’s ability to pay and whether the penalty would achieve the objectives of the Act. *see* 29 C.F.R. § 579.5(d).

¹⁴⁸ *Thirsty’s*, 1994-CLA-65 (ARB May 14, 1997).

¹⁴⁹ Tr. at 156–57.

¹⁵⁰ Tr. at 154.

¹⁵¹ Tr. at 156.

assessing \$16,350.¹⁵² For the reasons given in the next section, I have determined *de novo* that a penalty of \$16,350 comports with the relevant statutory and regulatory provisions.

C. The Appropriate Penalty

A penalty of \$16,350 is appropriate. In determining the penalty I must consider the relevant factors set out above, but:

[the regulations] are ambiguous with regard to the utilization of these factors to determine the appropriateness of a [penalty]. There is no guidance as to the weight or import of any particular factor, nor do the regulations prescribe any numerical or percentage factor to guide an increase in the assessment for an aggravated violation or a mitigation of the assessment where appropriate.¹⁵³

1. Size of the Business

I must consider the size of the business when determining the appropriateness of the penalty.¹⁵⁴ Columbia is large—its gross sales in 2011 were \$19,606,539. From 2009 through 2011 Columbia’s average gross sales were \$15,190,964 per year. The parties stipulated that Columbia employs anywhere from 40 employees to 140 employees depending on the time of year. A business of this size does not warrant a reduction in penalties. Furthermore, Columbia would not be put out of business by paying the complete assessed amount.¹⁵⁵

2. Gravity of the Offense

Second, looking to the factors found in 29 C.F.R. § 579.5(c), I find the violations to be grave. This case does not involve adolescents nearing majority, but a seven and a ten year old. Both were much too young to work.

Additionally, the evidence suggests that Columbia failed to take reasonable precautions to avoid violations. Columbia did not train all of its workers before they went into its fields—Yohan’s mother was trained the day after the violation. Columbia’s practice of allowing individuals into the fields to pick who were not Columbia employees

¹⁵² In affirming the penalty assessed by ADD Silva, I recognize that there were several inconsistencies in when the assessment form was considered and signed. However, as discussed below, I find these inconsequential in my *de novo* review.

¹⁵³ *Administrator v. Thirsty’s Inc.*, 94-CLA-65 (ARB May 14, 1997), *aff’d Thirsty’s, Inc. v. U.S. Department of Labor*, 57 F. Supp. 2d 431 (S.D. Tex. 1999)(granting the Department of Labor’s motion for summary judgment).

¹⁵⁴ 29 C.F.R. § 579.5(b).

¹⁵⁵ Tr. at 211.

without their own badge, as was the case with Palomino, created a work environment where there was a strong incentive to bring extra sets of hands into the field, no matter their age.

Furthermore, both children were exposed to significant hazards. Motor vehicles operated in the fields could injure a child.¹⁵⁶ Stacked pallets could fall onto a young child.¹⁵⁷ The specific work both children did was hazardous. The children carried full buckets of about twelve to thirteen pounds each to the weighing station.¹⁵⁸ Allowing seven and ten year olds to transport heavy buckets may result in injury.¹⁵⁹ Lastly, as discussed by Arthur Kerschner, permitting a child under the age of twelve to work is inherently hazardous. Children under twelve do not have the cognitive ability to properly assess workplace risks.¹⁶⁰

While Columbia did not act willfully, has no history of past violations, nor were there any injuries in this incident, these facts are outweighed by the other considerations of section 579.5(c).

Columbia would equate this case with *Administrator v. Triton Industries, LLC*,¹⁶¹ but it isn't an apt comparison. In *Triton*, a sixteen year old who worked as a "helper" occasionally violated the law by driving a forklift while working.¹⁶² He was legally eligible to work, the employer had no history of violations, and had no knowledge of any of the illegal activities. The ALJ considered the fact that the teenager had a valid driver's license, never lifted anything more than a foot off the ground, only worked at the shop for eight days where he mostly swept, and the forklift had a roll cage.¹⁶³ The ALJ ultimately concluded that the penalty should be reduced from \$2,400 to a total of \$200.¹⁶⁴ These two children never should have been working in the first place. The Department of Labor has determined that when children under the age of twelve enter the workforce, the hazards are so great that a

¹⁵⁶ Tr. at 17–18.

¹⁵⁷ P. Ex.-3 at 1; Tr. at 17–18.

¹⁵⁸ Tr. at 17. Bucket weight was described by Russell. It is unclear from the record whether Russell actually knew the weight or was just estimating based on what he saw, but I accept his estimate as reasonable. Regardless of the actual weight of a full bucket, I find that the buckets were heavy for a child under the age of 12.

¹⁵⁹ Tr. at 128 (“Their size makes it difficult. Because none of the equipment used in the work place are designed, and rightfully so, for a seven-year-old. They are subject to strains because the buckets are heavier for them.”).

¹⁶⁰ Tr. at 128.

¹⁶¹ 2006-CLA-2 (ALJ May 3, 2006); see Columbia's Pre-Hearing Statement of Position at 9.

¹⁶² 2006-CLA-2 (ALJ May 3, 2006).

¹⁶³ *Id.*

¹⁶⁴ *Id.*

significant penalty is necessary to address the severity of the violation.¹⁶⁵ The \$8,000 assessment per child is appropriate in a case like this involving young children.

Columbia relies on *Echaveste v. Navajo Manufacturing*,¹⁶⁶ which is distinguishable too. There five thirteen and fourteen year olds were employed by Navajo for no more than a month, processing goods for shipment.¹⁶⁷ The Secretary weighed the mitigating factors and concluded that the penalties should be decreased by 75%.¹⁶⁸ As with *Tritron*, the children in *Navajo* were older, which makes the decision an inappropriate comparator.¹⁶⁹ Columbia has failed to cite to any authority that supports its position that a violation for employing minors under twelve warrants a reduction of penalties below \$8,000 per violation.

3. The Circumstances Do Not Warrant a Penalty Reduction

a. The Violations Were Not De Minimis

Work by seven and ten year old children is no de minimis violation. While no decision has established a definitive list of factors to weigh when determining if a violation is de minimis,¹⁷⁰ several are instructive. In *Administrator, Wage and Hour Division v. Shrock Road Markets, Inc.*,¹⁷¹ the ALJ articulated a series of factors in finding violations were not de minimis: the age of the minors, the repetitive nature of the violation, the employer's inability to keep track of its employees, and the large percentage of child employees. In other cases emphasis has been placed on other factors.¹⁷²

¹⁶⁵ Tr. at 119–22.

¹⁶⁶ 92-CLA-13, 1996 WL 171399 (Feb. 21, 1996).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *See* Tr. at 127–30 (Kerschner discussing the cognitive development of minors under twelve, and their inability to adequately assess risk).

¹⁷⁰ *Administrator, Wage and Hour Division v. Lamplighter Tavern*, 1992-CLA-21 (Sec'y. May 11, 1994).

¹⁷¹ 2001-CLA-73 (ALJ May 19, 2003).

¹⁷² *Shrock*, 2001-CLA-73; *see also Administrator, Wage and Hour Division v. City of Wheat Ridge, Colorado*, 1991-CLA-22 (Sec'y. Apr. 18, 1995) (minors distributing towels at public swimming pool was de minimis); *U.S. Dep't. of Labor v. J. Rental, Inc. d/b/a Hank Parker's Rental*, 2006-CLA-17 (ALJ June 6, 2007) (focusing on the number of minors and the fact that the same children were involved in multiple violations to conclude that violations were not de minimis); *Acting Administrator, Wage and Hour Division v. Supermarkets General Corp.*, 1990-CLA-34 (Sec'y. Jan. 13, 1993) (Secretary holding that violations were not de minimis "given the high

For several reasons Columbia's violations were not de minimis. First, more than one type of violation occurred. Columbia employed children under the age of twelve and also failed to keep proper records of those minors. Second, at least two children worked that day Columbia's fields, brought by two separate adults. The ages of these children makes Columbia's violations extremely serious.

While Columbia took some steps to prevent children from working in its fields, its measures were ineffective. Mendoza did not receive any training until after she had brought her son into the field.¹⁷³ Columbia's training on eleven distinct training topics is done in twenty-five minutes. Assuming that all topics received an equal apportionment of time, each could only be discussed for approximately 2 minutes and 27 seconds. Some of these topics are complex and most likely require significantly more time to be meaningfully taught.¹⁷⁴

Columbia did not enforce its badge policy, which resulted in unauthorized workers (*i.e.*, people who were not actually Columbia employees) in its fields. In at least one photograph taken on June 25, 2011, a worker without a badge can be seen near one of Columbia's weighing stations with a Columbia employee.¹⁷⁵ Palomino stated in his signed statement that he "did not have a badge so [he] was using Sylvias [sic] badge."¹⁷⁶ Palomino was present at the scales because he was there to work. Palomino's unauthorized work demonstrates that Columbia did not regulate effectively who entered its fields to work.¹⁷⁷ Ineffectively monitoring its fields for badged workers contributed to an environment where children were able to work.

There were obvious dangers in the field. Vehicles and pallets created obvious dangers to children under twelve. These facts when taken in their totality establish that Columbia's violations were not de minimis.

number of violations and the percentage of minors involved (seventeen of forty-six minors employed)); Administrator, Wage and Hour Division v. Lamplighter Tavern, 1992-CLA-21, slip op. at 5 (Sec'y. May 11, 1994) (holding that the violations were not de minimis when there were age, records, and hour violations for multiple minors).

¹⁷³ See R. Ex.-103 at 3.

¹⁷⁴ Tr. at 191-92.

¹⁷⁵ P. Ex.-4; Marty Peterson acknowledged that Efrain Quiroz Palimino was in the field without a badge, but did not know whether he was picking. ("Q: You hear that witness testify about Efrain picking on Silvia's ticket, correct? A: He was there without a badge. Was he picking? I can't say.") Tr. at 215-16.

¹⁷⁶ R. Ex.-101 at 4.

¹⁷⁷ See Tr. at 185-187 ("Q: And also part of your job is to know who is working out in the fields, right? [Claudio Reyes]A: Yes, I do.")

b. The Violations Do Not Meet the Criteria for Reduction Under Section 579.5(d)(2)

Four requirements must be met to warrant a reduced penalty.¹⁷⁸ First, the evidence must show that there is no previous history of child labor violations.¹⁷⁹ Second, the violations “involved no intentional or heedless exposure of any to minor to any obvious hazard or detriment to health or well-being and were inadvertent.”¹⁸⁰ Third, there must be a “credible assurance of future compliance.”¹⁸¹ Lastly, it must be determined if the penalty is “necessary to achieve the objectives of the Act.”¹⁸²

Columbia has satisfied two of the four requirements. Columbia has no previous history of child labor violations and has given credible assurance of future compliance. But it heedlessly exposed minors to obvious dangers, and the penalty is necessary to achieve the objectives of the Act. As noted above, Columbia failed to adequately train its employees before they worked on the prohibitions against child labor. The training that some workers did receive was too brief to adequately train them. Columbia’s failure to enforce a nominal policy prohibiting children from entering its fields heedlessly exposed both Yohan and Alfredo to dangers. The imposition of a \$16,350 penalty is necessary to achieve the objectives of the Act.

IX. Conclusion

Columbia must pay a civil money penalty of \$16,350.

So Ordered.

William Dorsey
ADMINISTRATIVE LAW JUDGE

San Francisco, California

¹⁷⁸ 29 C.F.R. § 579.5(d)(2).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*