

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 13 February 2014

Case No.: 2013-CLA-00002

In the Matter of:

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

Complainant,

v.

BODY PANELS COMPANY and
SCOTT D. MARSHALL, *pro se*,

Respondents.

DECISION AND ORDER – MODIFYING THE CIVIL MONEY PENALTY

This case arises under the child labor provisions of the Fair Labor Standards Act (FLSA) 29 U.S.C. §216(e), as amended, and its implementing regulations found at 29 CFR Parts 579 and 580.

By correspondence dated April 24, 2013, and filed with the Office of Administrative Law Judges on April 30, 2013, the Solicitor filed an “Order of Reference” on behalf of the Administrator for the Wage and Hour Division, Employment Standards Administration, (Administrator), alleging that the Respondents had violated 29 CFR §570.2 “during the period from June 1, 2012 through June 25, 2012, at a worksite in Davidson County, Tennessee, ... by employing two minors under the age of 14 in non-agricultural employment.” The Respondents were directed to pay \$13,800.00 in civil money penalties. The Solicitor noted that the Respondents had taken timely notice to the Administrator’s underlying determination of September 14, 2012.

A “Notice of Docketing” was issued on May 3, 2013. This Order directed the Parties to make initial disclosures of witness identities, documents and exhibits. Subsequently, this case was assigned for hearing and decision to this Administrative Law Judge.

On June 13, 2013 a prehearing conference was held with the Solicitor’s counsel and Respondent S.D. Marshall present. During the prehearing conference the Respondents were advised of the

right to representation, the availability of lawyer referral services for individuals through the Tennessee Bar Association, the issues to be addressed at hearing, presentation of testimonial and documentary evidence at a hearing, availability of entering into stipulations of fact, and opportunity to submit a closing argument on how to resolve the issues at hearing. Also discussed were the identification of witnesses to be presented at the hearing, telephonic hearings, decisions based on the record of submitted evidence, and settlement judge procedures. The Parties agreed to a telephonic hearing where the Parties could either participate in person in Newport News, Virginia or participate in the formal hearing by telephone conference from their respective office/location and to have witnesses testify at the formal hearing by telephone conference pursuant to Federal Rule of Civil Procedure (FRCP) Rule 43(a).

A prehearing telephonic conference was held on November 13, 2013 related to the logistics of the scheduled formal hearing. A formal hearing was held on November 21, 2013. Counsel appeared for the Complainant. Mr. S.D. Marshall knowingly and voluntarily appeared without representation and in his individual capacity and as President of Respondent Body Panels Co. (TR 5). During the hearing ALJX¹ 1 through 6 and GX 1 through 12 were admitted without objection (TR 5, 10-12). The Respondent did not submit additional documents for consideration. The Parties each made oral argument at the close of the formal hearing.

STIPULATIONS OF FACT

The Parties entered into the following agreed facts (TR 7-9)

1. The Respondent is subject to the Fair Labor Standards Act, including the Child Labor provisions.
2. The Respondent engages in interstate transportation and sale of after-market auto parts.
3. On September 14, 2012, the U.S. Department of Labor, Employment Standards and Administration, Wage and Hour Division, Nashville, Tennessee assessed the civil money penalty in the amount of \$13,800.00 against Body Panels Company, doing business as Body Panels, and Scott D. Marshall of Memphis, Tennessee, for violation of the Child Labor provisions and Fair Labor Standards Act during the weeks ending June 3, 2012; June 10, 2012; June 17, 2012; and June 24, 2012.
4. The violations involved H.G. and L.G.² working in the warehouse, loading and unloading delivery vans and riding in a delivery van during deliveries in a non-agricultural setting at the Body Panel's Nashville, Tennessee, place of business, in violation of Child Labor regulations set forth in the Code of Federal Regulations, Title 29, Part 570, §570.13.
5. During the month of June 2012, the Body Panels' Nashville, Tennessee, place of business was supervised by M. Goforth.
6. M. Goforth is the father of both L.G and H.G.
7. L.G. was born July 21, 1998 and was 13-11/12 years old in June 2012.
8. H.G. was born on January 13, 2000 and was 12-5/12 years old in June 2012.
9. During the relevant period in June 2012, public school was not in session.

¹ "ALJX" refers to Administrative Law Judge exhibits; "GX" refers to Government exhibits; "TR" refers to hearing transcript.

² Initials are used for the identity of the minors involved.

10. Neither L.G. or H.G. suffered any personal injury while on the premises of Body Panels' Nashville, Tennessee, place of business or in the company of M. Goforth and the company delivery van.
11. Respondent S.D. Marshall was aware from a conversation with M. Goforth that L.G. and H.G. would be present, on an occasional basis, in the break room at the Body Panel's Nashville, Tennessee, premises in June 2012 under the supervision of M. Goforth, as an accommodation for daycare.
12. Respondent Body Panels Company, doing business as Body Panels, and Respondent S.D. Marshal of Memphis, Tennessee, have no prior violations of Child Labor regulations.
13. Violation of Child Labor regulations of the Fair Labor Standards Act in weeks ending June 3, 2012; June 10, 2012; June 17, 2012; and June 24, 2012, involving L.G. and H.G., were not wilful violations by the Respondents.
14. Respondents have cooperated fully with the Wage and Hour Division during investigation and mediation, including posting notice in three business sites of Body Panels Company as well as paying \$34.00 each to H.G. and L.G. for 2.0 hours of work performed in work weeks ending on June 3, 2012; June 10, 2012; June 17, 2012; and June 24, 2012, during daylight operating hours.
15. Respondents did not falsify or conceal violations of the Child Labor provisions and the Fair Labor Standards Act involving work during the weeks ending June 3, 2012; June 10, 2012; June 17, 2012; and June 24, 2012.
16. Respondents represent they are presently in compliance with the Child Labor provisions of the Fair Labor Standards Act and the cited part of the regulations thereunder, and will continue to comply therewith in the future.
17. Body Panels employs a total of 40 full-time employees and 30 part-time employees at any one time at three business locations in Memphis, Tennessee; Nashville, Tennessee; and Evansville, Indiana.
18. S.D. Marshal and M. Marshall are the sole owners of the sole proprietorship of Body Panels Company.

ISSUE

The issues in this case are (TR 10) –

1. What penalty is appropriate for the violations committed ?
2. Is Respondent S.D. Marshall individually and personally liable for the penalty appropriate for the violations committed ?

SUMMARY OF RELEVANT EVIDENCE

Testimony of W.T. Gray (TR 14-26)

Mr. W.T. Gray testified that he is a DOL Wage and Hour investigator who investigated Respondent Body Panels in June 2012. He reported that Body Panels builds bumpers, rearview mirrors, and different automobile accessories and is owned by Respondent S.D. Marshal. He stated that the main office is in Memphis, Tennessee and that business records are maintained in the main office and payroll is processed in the main office. He testified that a lot of times auto

body parts arrive from overseas in shipping containers that are picked up by a company representative and taken to a company warehouse.

Mr. Gray testified that he conducted video surveillance of Body Panels Nashville location on or about June 22, 2012. He reported seeing two minors “bringing parts up to the loading dock and setting them down and also [seeing] the two minors loading and unloading trash and parts into a loading van.” He also reported seeing M. Goforth and a delivery driver at the loading dock.

Mr. Gray testified that on June 25, 2012 he entered the Body Panels office in Nashville and asked to see the manager, but had to wait for the manager to finish with a customer. He then introduced himself to M. Goforth and showed his credentials before entering M. Goforth’s office. He reported that soon after entering the office M. Goforth received a telephone call and read off his business card to the caller who M. Goforth identified as the owner located in Memphis, Tennessee. He reported that M. Goforth explained the existence of video cameras in the business and that the owner was calling to see who the individual was that had been seen on the video camera. He reported that he did not interview M. Goforth at that time.

Mr. Gray testified his investigation is usually in four parts with an initial conference where information about the business is gathered with pre-printed forms. He stated that after he completed an initial conference with M. Goforth he interviewed M. Goforth. During the interview M. Goforth reported his eldest son and daughter had moved parts out of the warehouse and had helped to straighten up the warehouse, including his eldest son arranging bumpers on a rack in the back of the warehouse. M. Goforth reported his eldest son and daughter had occasionally ridden with him in the company delivery van during deliveries and provided invoices for those delivery trips (GX 10). Mr. Gray testified that he confirmed the dates of birth for both minors from their mother as well as confirmation from the local school board (GX 6).

Mr. Gray testified he found violations of “occupational standards in connection with working in a warehouse and also occupations involving working on a motor vehicle” by two minors under the age of 14. He stated that during the final conference in Nashville, he provided M. Goforth with a copy of the “Notice to Employer of Employment of Minors Contrary to the Fair Labor Standards Act” (GX 1) and that S.D. Marshall decline to drive to Nashville for the final conference.

Mr. Gray testified that civil money penalties of \$6,000.00 were computed and assessed for each of the two minors involved (GX 5) and that back wages of \$34.00 was computed to be paid to each of the two minors (GX 9). He reported that each minor was paid \$34.00, less required deductions of \$1.92 each (GX 7, 8, 9).

Mr. Gray testified that from his interviews with the minors’ parents he understood “both parents worked and they did not want to pay for daycare so they brought their kids there to the establishment so that they could supervise them throughout the day.” He indicated M. Goforth stated that “with [the children] being confined to the break room for several hours a day, they would go stir crazy so he would assign them duties to teach them work ethic and to occupy the time that they were there.”

Testimony of M.K. Hensley (TR 27-35, 49-52)

Ms. M.K. Hensley testified that she was a former employee of Body Panels, Nashville location, and worked the front office and helped manage the front office and warehouse from approximately October 2011 to June 2012. She reported that the company's main office was in Memphis, Tennessee, and that a van would come from the Memphis office every day with parts delivery and would pick up parts for the return trip.

Ms. Hensley testified that 3 or 4 video cameras were inside the Nashville office and multiple cameras were inside and outside the warehouse, including the loading dock. She reported that they were monitored because they were called from Memphis usually once a week, or every other week, to adjust the cameras.

Ms. Hensley testified that S.D. Marshall was the company owner and M. Goforth was the manager from the February/March 2012 period. She reported seeing 3 Goforth children at Body Panels beginning the end of May 2012. She reported the eldest son would go off with M. Goforth in the truck on sales and deliveries and that the younger boy "would help Bubba" in the warehouse pull parts out onto the dock for loading into the truck. She reported seeing the child in flip-flops climb ladders in the warehouse similar to that in GX 11. She reported remembering the eldest son moving a bunch of bumpers one day when a shelf broke and remembered the youngest daughter playing a lot in the office area. She reported that once summer came, the children "were there pretty much every day."

On cross-examination, Ms. Hensley testified that she was not aware that M. Goforth had recommended firing her but that she had discussed with S.D. Marshall her reluctance to work in the warehouse as asked by M. Goforth and stated that if M. Goforth continued to push for her to work in the warehouse; she would look for other work. She stated she found other employment and left the company.

On redirect examination, Ms. Hensley testified that she had taken medical leave to care for her mother when M. Goforth brought his wife into the office for receptionist duties and that after her mother died, M. Goforth pushed her to move to the warehouse so she would quit.

When recalled for direct examination, Ms. Hensley testified that video cameras would be adjusted "once a week, if not once a week, once every other week." She reported that S.D. Marshall would come to Nashville, view each camera's video tape and direct how the cameras were to be adjusted. She reported that she knew she had been watched on the Nashville office video camera because one time she used the restroom and was told by a woman answering telephones that a call had come in from Memphis asking where she was at the time.

On cross-examination, Ms. Hensley testified she was unaware that a customer had complained to the Memphis office that no one was answering the phone in the Nashville location.

Testimony of S.D. Marshall (TR 36-45, 47-48, 57-59)

Mr. S.D. Marshall testified that on June 25, 2012 he was called into the Memphis business office by R. Simmons who had received a telephone call from the Nashville office that an official looking man was there at the office. He reported looking at the single monitor which had the Nashville office area and M. Goforth's office displayed. On the monitor he saw the man and called the Nashville office and spoke to M. Goforth and the investigator. He reported being stunned that the issue involved "children being employed at my business." He stated that at the time he had forgotten giving permission for M. Goforth to have his children in the break room; company policy forbids anyone in a company vehicle not an employee, and he would never give permission for children to be in the warehouse.

Mr. Marshall testified that there were up to 16 cameras at the Nashville location but that they do not look at the cameras unless there is a problem, or his every few weeks' look at the cameras to determine if they are still pointed in the right directions. If the cameras were not pointed right, he would call the location to have the cameras repositioned. He reported that they do not monitor what's happening in the stores because the Memphis store is so busy.

Mr. Marshall testified that he talked with Mr. Gray several times after June 25, 2012. He reported that the employees are like family and what had happened in Nashville spread throughout the company quickly. He directed that no one under the age of 21 was to be employed and that there were to be no children on any premises without specific permissions and strictly enforced limitations. He reported personally speaking about the Nashville incident with all managers and the employees in the Memphis location.

Mr. Marshall testified that the gross sales for all three offices were several million dollars; but there was a net loss, with the Nashville and Evansville stores the worse.

On cross-examination, Mr. Marshall testified that he started Body Panels in 1986 with his wife as sole owners. Body Panels sells after-market fenders, hoods, bumpers, grills and pipes which are primarily shipped from overseas in containers. He reported opening the Nashville location in 1993 and that M. Goforth is still the manager in Nashville, even though he broke company rules by allowing the children to leave the office area.

Mr. Marshall testified that there are 16 cameras installed at the Nashville location "to give additional security to the employees and to record incidents of theft." He reported that there are cameras for the loading dock area. He stated there are approximately 43 Body Panel employees and that 4 or 5 work at the Nashville location, where Mrs. Goforth "fills in a few hours a week sometimes." He indicated he thought the gross sales for the Nashville location was \$784,670.97 in 2012. He indicated that "apparently", before Mr. Gray's investigation, employees had times deducted from their paychecks if they took breaks of less than 20 minutes and that as a result of the investigation approximately \$1,100.00 was paid to employees for improper deductions.

Mr. Marshall testified that the purpose of the video cameras "was because of theft. We would have break-ins and about once a year we'd have a break-in where someone would smash the glass of the door and come in and it was useful in apprehending criminals."

Mr. Marshall testified that he had no prior knowledge that M. Goforth was working his children at the Nashville location and that he does not monitor the cameras on a daily basis. He stated that “I am so humbled and intimidated by this whole process ... It’s been a source of tremendous mental anguish this last year ... I am fully committed to abide by everything that the Department of Labor wants done for the rest of whatever short time I’m still in business.

Notice to Employer / Employment of Minors Contrary to the Fair Labor Standards Act (GX 1)

This exhibit indicates violations involving H.G. and L.G. during the period from June 1, 2012 to June 25, 2012 for “Minor was working in a warehouse that was not merely incidental to a retail establishment. Minor was helping to load/unload delivery van and accompanied father when making deliveries.” H.G. entries indicated violations for work in a warehouse under 14 years of age, record keeping, and work under legal age for employment. L.G. entries indicated violations for work in a warehouse under 14 years of age, record keeping, and work under legal age for employment.

September 14, 2012 Wage and Hour Assessment of Civil Money Penalty for Child Labor Violations (GX 2)

This exhibit indicates that a total civil money assessment was levied on Respondent in the amount of \$13,800.00. The individual violation assessments were:

- (a) Two - Under age 14 Regulation 3 violations \$ 1,800.00
- (b) Two - Not keeping records for two minor children \$ 0.00
- (c) Two – Under legal age of employment \$ 12,000.00

September 22, 2012 letter from S.D. Marshal and M. Marshal to Administrator, Wage and Hour Division (GX 3)

This exhibit was treated as a request for a formal hearing. In the letter the declarants state, “We (my wife and I) are devastated by this penalty ... we are on the verge of losing our business after 26 years of hard work and now this has hit us hard. ... we had no knowledge of [M.] Goforth’s children doing any work at our business. This would be strictly prohibited because of insurance reasons alone ... No one but regular employees are allowed in company vehicles. This was a direct violation of company rules. ... We never hired anyone under 18, and our insurance company does not allow drivers under 25, so we rarely hire under 25. ... We have been in business since 1986 with no labor complaints before. ... If I had any idea that the children were involved in work, I would have banned them from stepping foot on the property.”

WH-266(a) CL CMP Computation Summary Sheet of August 21, 2012 (GX 5)

This exhibit indicates that the base civil money penalty (CMP) computation for “Under age 14 Regulation 3 violations” was \$900.00 for each minor and that the aggravation and reduction factors used were 1.00, such that the CMP for the violation was \$900.00 per minor. The exhibit also indicated the base CMP for “Under legal age of employment” as \$6,000.00 for each minor and that the aggravation and reduction factors used were 1.00, such that the CMP for the

violation was \$6,000.00 per minor. No CMP was assessed for the “Not keeping records for two minor children” violations. The total CMP assessed was \$6,900.00 per minor, for a combined total CMP of \$13,800.00.

Wage Transcription and Compensation Worksheet (GX 9)

This exhibit indicates that H.G. and L.G. both worked 2.00 hours per week for the weeks ending on June 3, 2012; June 10, 2012; June 17, 2012; and June 24, 2012 and were entitled to wages at the rate of \$4.25 per hour.

STATUTORY FRAMEWORK

The Child Labor provisions of the FLSA involving working children “were enacted to protect children from physical harm and to limit their working hours to prevent interference with their schooling.” *Administrator v. Thirsty’s, Inc.*, No. 96-143, 1997 WL 453588, *1 (ARB May 14, 1997) *aff’d sub nom. Thirsty’s v. U.S. Department of Labor*, 57 F. Supp 2d 431 (S.D. Tex. 1999); citing 29 U.S.C. §203(l) [work period will not interfere with schooling and work conditions will not interfere with health and well-being]; 75 Fed.Reg. 28404 (May 20, 2010)

Federal regulations provide that “The employment of minors between 14 and 16 years of age in the occupations, for the periods, and under the conditions specified in [29 CFR] §570.34 and §570.35, does not interfere with their schooling or with their health and well-being and shall not be deemed to be oppressive child labor.” 29 CFR §570.31 Employment that is not specifically permitted is prohibited. 29 CFR §570.32 While the FLSA permits the employment of minors between the ages of 14 and 16 in occupations pursuant to stringent regulations established by the Secretary of Labor, the employment of minors under the age of 14 in occupations not involving agricultural or actor/performer in movies, theater, radio, and television or newspaper delivery, is generally “oppressive child labor.” 29 U.S.C. §203(l); 29 U.S.C. 213(c)

Federal regulations at 29 CFR §570.34 sets forth the specific occupations in which a 14-year old or 15-year-old may be employed. Work in any occupation connected with warehousing and storage is prohibited as a hazardous occupation constituting “oppressive child labor.” 29 CFR §570.34(n)(2) It is specifically noted that children under the age of 16 may not load or unload items for sale into or from a motor vehicle (29 CFR §§570.33(k) and 570.34(k)) and may not ride in a motor vehicle when their presence is in connection with the transportation of property (29 CFR §§570.33(l) and 570.34(o)).

Civil money penalties in Child Labor violations are governed by federal regulations set forth in 29 CFR Part 579. Where, as in this case, the Child Labor violations do not involve death or serious injury, as defined by the regulations, the maximum civil money penalty is \$11,000.00 per child employee, 29 CFR §759.1. Under 29 CFR §579.5, the determination of an appropriate civil money penalty must be based on the available evidence of the violation(s) and must take into consideration –

- (1) The appropriateness of the penalty to size of the business of the person charged, including the number of employees employed, 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;

- (2) The appropriateness of the penalty to the gravity of the violation(s), including any history of prior violations, evidence of willingness or failure to take reasonable precautions to avoid violations, the number of minor illegally employed, the age of the minors so employed, records of the required proof of age, the occupations in which the minors were so employed, exposure of such minors to hazards, resultant injury to such minors, duration of such illegal employment, the hours of the day such employment occurred, and whether such employment was during or outside school hours; and,
- (3) Either –
 - (a) Whether the evidence show that the violation is “de minimis” and that the person so charged has given credible assurance of future compliance and whether a civil money penalty in the circumstances is necessary to achieve the objectives of the FLSA; or,
 - (b) Whether the evidence shows that the person so charged had no previous history of child labor violations, 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, the person so charged has given credible assurance of future compliance, and whether a civil money penalty in the circumstances is necessary to achieve the objectives of the FLSA.

DISCUSSION

When a civil money penalty imposed by the Administrator has been appealed for review by an Administrative Law Judge, “the proper inquiry for an ALJ when reviewing a child CMP is whether the penalty assessed by the Administrator is appropriate in light of the statutory and regulatory factors, and not whether the penalty comports with the [Administrator’s penalty computation matrix/worksheet].” *Administrator v. Merle Elderkin*, No. 99-033, 2000 WL 960261, *9 (ARB Jun. 30, 2000) reaffirming *Administrator v. Thirsty’s, Inc.*, No. 96-143, 1997 WL 453588, *4 (ARB May 14, 1997) *aff’d sub nom. Thirsty’s v. U.S. Department of Labor*, 57 F. Supp 2d 431 (S.D. Tex. 1999) “A critical analysis is required by those who assess the penalties as well as those whose job it is to review the assessor’s work.” *Administrator v. Navajo Manufacturing*, No. 92-CLA-13, 1996 WL 171399, *3 (Sec. Feb. 21, 1996)

I. A civil money penalty in the total amount of \$1,000.00 is appropriate for the violations committed.

a. Appropriateness of the penalty to size of the business of the person charged

The Parties have stipulated that Respondent company employs 40 full-time employees and 30 part-time employees at three locations in two states. The majority of the employees are at the main Memphis, Tennessee location. The company is in the business of selling after-market auto body parts, the majority of which are received by the company at U.S. ports-of-entry in overseas

shipping containers from foreign manufacturers. The company was founded by the sole proprietors in 1986 and opened the Nashville, Tennessee location in 1993. The number of employees at the Nashville location is in the 4-5 regular employees with 1 part-time employee. The Nashville location had gross sales in 2012 of approximately \$784,670.97; but, operated at a net loss, as did the Evansville, Indiana location. While there was no specific information concerning capital investment, evidence indicates that the company has been on the verge of going out of business for some time, including the time of the 2012 child labor violations.

After deliberation on the evidence of record, this Administrative Law Judge finds that Respondent Body Panels Company is a small business for the purposes of reviewing the assessed the civil money penalties

b. Appropriateness of the penalty to the gravity of the violations

The Parties have stipulated that the Respondents have no history of prior child labor violations; that the two minors involved did not suffer any personal injuries while on Respondent's Nashville premises; and that the violations were not wilful on the part of the named Respondents. The Parties have also stipulated at the time of the child labor violations, one minor was 13-11/12 years old and the other was 12-5/12 years old, and that public school was not in session during the time the two minors were on Respondent's premises.

The evidence established that the manager of the Nashville location permitted his two oldest minor children to work at the Nashville location during the month of June 2012, in the warehouse, to move inventory to and from a loading dock and into and out of a delivery vehicle, and to ride in the delivery vehicle use to transport property to buyers. The Administrator has determined that this work amounted to a total of eight hours over a four week period. Warehouse work, loading and unloading delivery vans, and delivery by motor vehicle work are classified as hazardous occupational work for minors under the age of 18.

The evidence also established that Respondent had a policy not to hire individuals under the age of 18 or drivers under the age of 25. The evidence also established that the Respondent owner had no knowledge of the work being performed by the two minors until approached by the Wage and Hour Investigator on June 25, 2012. The actions of the Nashville manager were without the knowledge and consent of the Respondent owner, who had granted the Nashville manager permission to have his children in the local break room of the premises only to accommodate child-care costs.

The evidence established that after Respondents became aware of the child labor violations in the Nashville location, all managers were personally informed by Respondent of the incident in Nashville, all employees in the Memphis location were personally informed by Respondent of the Nashville incident, and the employees of the Evansville location were informed by their manager of the Nashville incident. Respondent directed that no one under the age of 21 was to be employed by the company and that no children were to be on the premises without specific permission and strictly enforced limitations on location and activities. There is no evidence that the Nashville manager permitted his minor children to perform any work activity after June 25, 2012.

The evidence of record established that Respondent company did not routinely employ individuals under the age of 18, that employment of minors was not a common practice,³ and that the actions of the Nashville manager in permitting his two minor children to work in a warehouse, on a loading dock, and accompany him on parts deliveries, was without the personal knowledge of Respondent owner and a violation of company policy. Accordingly, the assessment of no civil money penalty for failure to keep age/employment records for the two minors involved is appropriate to the gravity of the violation.

The remaining violations involved Regulation 3 violations (work in hazardous occupations) and employment of underage individuals (minors under the age of 14). Here the minors performed limited work activity in a working environment that the Secretary of Labor has found to be unacceptably hazardous. Additionally, even though one minor was within one month of attaining the age of 14 at the time of the violations, both were under the age of 14 at the time of the violations. Accordingly, a civil money penalty assessment is appropriate to the gravity of these two violations.

c. Mitigation considerations

In addition to the size of the business and the gravity of the violations, federal regulations at 29 CFR §570.5(d) “set forth two alternatives for further consideration. If either alternative is satisfied, a reduction of the penalty is appropriate.” *Administrator v. City of Wheat Ridge*, No. 91-CLA-22, 1995 WL 847969, *4 (Sec. Apr. 18, 1995)

(i) The violations involving Regulation 3 violations and employment of children under 14 years of age violations are not “de minimis” violations.

The violations in this case involved two minors over a short period of time, in a limited manner, and while under the direct control of their father or a trusted family friend. However, the minors were exposed to the hazards of falling from ladders, being struck by auto body parts falling from the shelves, falls from the loading dock, injuries from lifting auto body parts, and injury from motor vehicle accidents. It is noted that violations involving underage children working in a warehouse environment have been determined to be unacceptably hazardous and of such a serious nature that such violations are not generally considered “de minimis”. See *Navajo Manufacturing*, supra.; *Merle Elderkin*, supra.; *Administrator v. Chrislin*, No. 00-022, 2002 WL 31751948 (ARB Nov. 27, 2002); *Administrator v. Ahn’s Market, Inc.*, No. 99-024, 2000 WL 1074299 (ARB, 2000); *Administrator v. Horizon Publishers & Distribution*, No. 90-CLA-29, 1994 WL 897223 (Sec. Jul. 21, 1994). It is also noted that employment of children under the age of 14 in the work environments similar to that in this case is oppressive child labor, 29 CFR §570.1(b) and §570.1(c).

After deliberation on the evidence of record, this Administrative Law Judge finds that the violations involving Regulation 3 violations and employment of children under 14-years of age violations are not “de minimis” violations.

³ See *Thrist’y, Inc.* supra at *4, for obligation “to emphatically advise its local managers with regard to the legal restrictions of hiring children younger than sixteen” when employment of such youth is a common practice.

(ii) The circumstances surrounding the violations in this case warrant reduction in the assessed civil money penalty.

Here the Administrator assessed \$900.00 per child for the Regulation 3 violations and \$6,000.00 per child for the under age of employment violation.

The Respondents have no prior history of child labor violations and do have a history of not employing anyone under the age of 18. The violations occurred while the two minors were present on the Nashville premises under the control of their father, and at times also their mother. The minor's father was the Respondent's manager at the Nashville location and advised the Wage and Hour investigator that because both parents worked and wanted to avoid day care costs, they brought their children to work where they could supervise them. The father stated that with the children "being confined to the break room several hours a day, they would go stir crazy so he would assign them duties to teach them work ethic and to occupy the time that they were there." The evidence established that the actions of the Nashville manager in involving his minor children in work activity violated company policy of work by anyone under 18 years of age, violated the break room limitations placed on the minor's presence at the Nashville location, and was done without the knowledge or consent of Respondents. The evidence of record creates the permitted inference that the father and mother provided for immediate oversight of the minors so that they were not intentionally or heedlessly exposed to hazards adverse to their health and well-being while at the Nashville location and that any such exposure was inadvertent.

The evidence demonstrates that the Respondents cooperated fully with the Wage and Hour investigator, took immediate steps to ensure another episode involving children being able to perform work activity at one of Respondents' locations would not recur, and has given credible assurances that no future child labor violations will occur.

After deliberation on the credible evidence of record, this Administrative Law Judge finds that the circumstances warrant a civil money penalty to achieve the objectives of the FLSA; but that a reduction in the assessed penalty is warranted.

After deliberation on the credible evidence of record and consideration of the factors required by 29 CFR §570.5, this Administrative Law Judge finds that the objectives of the FLSA are best served in this case where the civil money penalty for the Regulation 3 violation is reduced from \$900.00 per child to \$350.00 per child and the underage violation is reduced from \$6,000.00 per child to \$150.00 per child. This is a total civil money penalty of \$1,000.00.

II. Respondent S.D. Marshall is jointly liable with Respondent Body Panels Company for the civil money penalty appropriate for the violations committed.

The Respondents question the extent of liability when they had no actual or constructive knowledge of H.G. and L.G.'s actions outside the Nashville location break room until notified by the Wage and Hour investigator on June 25, 2012.

In this case Respondent Body Panels Company is a sole proprietorship owned by the named Respondent S.D. Marshall and his wife, who was not a named Respondent. The sole proprietorship employed managers to supervise and run the Nashville and Evansville business locations. Except for limited exclusions not relevant in this case, “any person acting directly or indirectly in the interests of an employer in relation to an employee” is an “employer” under the FLSA, 29 U.S.C. §203(d). As such, the managers of the remote locations were the agents of the sole proprietorship and actions they took regarding the commerce of Respondent Body Panels Company and employment of minors are considered actions of the Respondent Body Panels Company. Additionally, “a corporate officer who has operational control of the corporation’s covered enterprise is an ‘employer’ under the FLSA, along with the corporation itself.” *U.S. Dept. of Labor v. Cole Enterprises, Inc.*, 62 F.3d 775, 778 (6th Cir. 1995) citing *Fegley v. Higgins*, 19 F.3d 1126 (6th Cir. 1994) *cert denied* 513 U.S. 875 (1994). In this case S.D. Marshall has a significant ownership interest in the sole proprietorship, controls significant functions of the business, issues employment policies, and has operational control. Accordingly, he is an employer under the FLSA in this case.

An employer-employee relationship under the FLSA may be created even if the people involved have no intention of creating a formal employer-employee relationship. An employer-employee relationship under the FLSA is more expansive than that used in common law and includes suffering or permitting an individual to perform work activities. *Horizon Publishers & Distributors*, *supra*; *Administrator v. Ronald and Debbie Halsey*, No. 04-061, (ARB Sep. 29, 2003) *aff’d sub nom. Halsey v. Administrator, Wage and Hour Division*, 2007 WL 4106268 (USDC D. Alaska Nov. 16, 2007) *unpub.* Whether a minor is an employee under the FLSA depends on the circumstances of the activity involved as a whole; and, generally, involves consideration of six factors: (1) control over the manner in which the work is to be performed, (2) alleged employee’s opportunity for profit or loss depending on his managerial skills, (3) alleged employee’s investment in equipment or materials required for the task, (4) whether the service rendered requires a special skill, (5) degree of permanence of the working relationship, and (6) whether the service rendered is an integral part of the employer’s business. *Ronald and Debbie Halsey*, *supra*.

Under the facts of this case, (1) the minors’ father as manager of the Nashville location had complete direction and control over the two minors’ work and non-work activities during their presence at the Nashville location, (2) the two minors had no managerial skills or opportunity for profit or loss in the business, (3) the two minors had no investment in equipment or material required to perform work in the warehouse, on the loading dock, or in the delivery van, (4) no specialized skills were required for the work performed by the two minors, (5) the work performed by the two minors was intermittent, of short duration, and at the convenience of their father as manager of the Nashville location, and (6) the work performed by the two minors of pulling parts in the warehouse as well as loading and unloading parts into delivery vans at the loading dock were an integral part of the Respondent’s business.⁴

⁴ The evidence does not support a finding that the minors loaded or unloaded parts at the delivery points reached by the delivery van or that their presence was necessary for the integral business action of parts delivery to be completed.

After deliberation on the credible evidence of record finds that the two minor children were employees of Respondent Body Panels Company under the FLSA during June 2012 and that Respondent S.D. Marshall was a joint employer with Respondents Body Panel Company of the two minor children during June 2012. Accordingly, S.D. Marshall is jointly liable for the appropriate civil money penalty imposed in this case along with Respondent Body Panels Company.

ORDER

It is hereby **ORDERED** that –

1. A civil money penalty is approved as follows:
 - a. For suffering the employment of two minors in work environments deemed hazardous to their health and well-being in violation of Child Labor Regulation 3, 29 CFR Part 570, Subpart C, during the month of June 2012, a civil money penalty in the amount of \$350.00 per child is approved, said total being \$700.00.
 - b. For failure to maintain appropriate employment records in violation of 29 CFR Part 570, Subpart B, related to the suffered employment of two minors during the month of June 2012, no civil money penalty is assessed.
 - c. For suffering the employment of two minors under the age of 14 in violation of 29 U.S.C. §212(c) and 29 CFR Part 570, Subpart A, during the month of June 2012, a civil money penalty in the amount of \$150.00 per child is approved, said total being \$300.00.
2. The Respondents are directed to deliver a certified check or money order in the total amount of \$1,000.00 made payable to the “Wage and Hour Division, U.S. Department of Labor” no later than 2:00 PM, Monday, March 31, 2014, to the Administrator, Nashville District Office, U.S. Department of Labor – Wage and Hour, 1321 Murfreesboro Pike, Suite 511, Nashville, Tennessee 37217-2648.
3. Post-judgment interest at the underpayment rate set forth at 26 USC §6621(a)(2) compounded on a calendar monthly basis commencing on April 1, 2014, shall become due and payable by the Respondents if the civil money penalty amount of \$1,000.00 is not paid in full by March 31, 2014.

ALAN L. BERGSTROM
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Administrative Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days of the date of issuance of the administrative law judge's decision. *See* 29 C.F.R. § 580.13. The address for the Board is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

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

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