

**U.S. Department of Labor**

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**Issue Date: 12 August 2014**

CASE NO.: 2008-FLS-00014

*In the Matter of:*

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

vs.

BEST MIRACLE, a California corporation,  
THUY THI LE, an individual,  
TOAN VAN NGUYEN, an individual,  
Respondents,

Appearances: Daniel Chasek, Esquire  
For the Department of Labor, Wage and Hour Division

Ashton R. Watkins, Esquire  
For the Respondents

Before: Jennifer Gee  
Administrative Law Judge

**DECISION AND ORDER**

This case arises under the provisions of the Fair Labor Standards Act of 1938, as amended, (“FLSA”), 29 U.S.C. § 201, *et seq.* for alleged violations of its overtime provisions by Respondents’ business, Best Miracle Corporation (“Best Miracle”), and individuals, Thuy Thi Le and Toan Van Nguyen.

For the reasons set forth below, the civil money penalties assessed against Respondents by the Department of Labor’s Wage and Hour Division are INCREASED.

**PROCEDURAL BACKGROUND**

The Administrator, U.S. Department of Labor Wage and Hour Division (“Petitioner” or “Wage and Hour”) conducted an investigation into Respondents’ payroll practices for the period from December 2, 2004, through July 30, 2007. After the investigation was completed, Wage

and Hour notified Respondents in a letter dated June 16, 2008, that it had determined that Respondents owed 42 of their employees \$191,447.94 in unpaid overtime and was assessing a civil money penalty of \$24,543.54 for repeat and wilful violations of the overtime provisions of the FLSA. (Exhibit A) On July 2, 2008, Respondents filed exceptions to the civil money penalty notice with the Assistant District Director in Petitioner's Orange Area Office that and requested a hearing on the charges and penalty. (Exhibit C.)

In response to Respondents' request for a hearing, on September 8, 2008, the Petitioner served an Order of Reference on Respondents with a letter notifying Respondents that the Petitioner was filing the Order of Reference with Office of Administrative Law Judges ("OALJ"). The Order of Reference was filed on September 12, 2008, when it was received by the OALJ National Office. On September 8, 2008, the Petitioner also filed a civil action in Federal District Court in the Central District of California seeking to enjoin Respondents from withholding \$172,832.50 in unpaid back wages and from further violating the FLSA. *Solis v. Best Miracle Corp., et al.*, [Case No. SACV 08-00998-CJC\(MLGx\)](#).

On September 30, 2008, the parties filed a joint motion with the OALJ asking that the administrative proceedings be stayed pending the resolution of the Federal District Court litigation. OALJ Chief Judge John Vittone granted the stay request on October 17, 2008, and ordered the parties to file periodic status reports. The case was subsequently referred to the San Francisco OALJ office in July 2010 and assigned to me for hearing.

U.S. District Judge Cormac Carney conducted a bench trial in the civil matter from February 16, 2010, to February 25, 2010. On May 10, 2010, Judge Carney issued a decision finding that the Respondents "brazenly disregarded the FLSA by exploiting low-wage garment workers and requiring them to work long hours without proper compensation." *Solis v. Best Miracle Corp.*, 709 F. Supp. 2d 843, 846 (C.D. Cal. 2010), *aff'd* 2011 WL 6882942 (9<sup>th</sup> Cir. 2011) ("*Best Miracle*") (EX E.) Based on his findings that Respondents had willfully violated the FLSA, Judge Carney found that Respondents owed 47<sup>1</sup> employees back wages for unpaid overtime in the total amount of \$172,832 and enjoined them from further violating the FLSA. *Best Miracle Corp.*, 709 F. Supp. 2d at 859.

The Petitioner notified me on June 29, 2010, that the District Court case had concluded. After receiving this notice, I lifted the stay on July 12, 2010, but the parties jointly requested reinstatement of the stay after Respondents appealed the District Court judgment. I reinstated the stay on July 28, 2010, and required the parties to file regular status reports. The parties filed regular status reports but failed to file a report that was due January 17, 2012. On December 30, 2011, the Ninth Circuit affirmed the District Court's decision, stating that the "record contains overwhelming independent evidence that Best Miracle willfully violated the FLSA." *Solis v. Best Miracle Corp.*, 2011 WL 6882942 (9<sup>th</sup> Cir. 2011) (EX G.). I issued an order on January 24, 2012, ordering the parties to file a report informing me of how they wanted to proceed.

The Petitioner filed a status report on February 10, 2012, expressing the opinion that this case could be resolved through summary decision and asked for time to prepare and file a motion

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<sup>1</sup> By the time the case went to trial, the Petitioner had determined that there were five additional workers affected by Respondents' violations.

for summary decision. I issued an order on March 9, 2012, establishing a schedule for the summary decision motion and response. The Petitioner filed a motion for summary decision on March 19, 2012. However, I suspended the balance of the summary decision motion schedule on March 20, 2012, after being advised that Respondents had filed a motion for an *en banc* rehearing with the Ninth Circuit<sup>2</sup> and ordered Respondents to continue to file reports advising me of the status of the appeal.

The Petitioner notified me on May 31, 2012, that the Ninth Circuit issued an order on April 19, 2012, denying the petition for rehearing *en banc*. After receiving the notice, I issued an order on June 7, 2012, requiring Respondents to file their response to Petitioner's Motion for Summary Decision by July 9, 2012, and for the Petitioner's reply to be filed by July 27, 2012. Respondents filed an opposition to the Motion for Summary Decision on July 9, 2012, and the Petitioner filed a reply brief on July 27, 2012.

On September 18, 2012, I issued an order granting Petitioner's Motion for Summary Decision in part and denying it in part. I found that the legal and factual findings underlying the civil money penalty assessment had been litigated in the Federal District Court litigation and that further consideration of many issues in this case were precluded by the findings of Judge Carney. I specifically found that:

1. The actions of the Respondents were subject to the requirements of the FLSA;
2. Each of the Respondents is an "employer" under the FLSA;
3. The Respondents "wilfully" violated the FLSA's overtime provisions;
4. At least in the case of Ms. Le, the Respondents' violations of the FLSA's overtime provisions were also "repeat."

(Order Granting in Part Petitioner's Motion for Summary Decision, p. 9.)

However, I found that the Petitioner had failed to show that the civil money penalty assessed against Respondents was appropriate and subsequently set this case for hearing. The hearing was conducted on April 25, 2014, in San Francisco. Counsel for the Petitioner, Respondents, and counsel for Respondents all appeared and participated in the hearing. A Vietnamese interpreter was provided for Respondent Le during her testimony.

At the hearing, Petitioner's Exhibits ("EX") A through H were admitted. Respondents' exhibits ("RX") 1 through 6 were excluded, RX 7 and RX 8 were admitted, and RX 9 was withdrawn. On May 2, 2013, I admitted Petitioner's Exhibit I which was submitted pursuant to discussions at the end of the hearing.

The Petitioner's closing brief was filed July 29, 2013, and Respondents filed their closing brief on August 1, 2013. The Petitioner filed a reply brief on August 12, 2013, and Respondents filed a rebuttal on August 15, 2013.

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<sup>2</sup> Respondents had also filed a status report dated February 10, 2012, advising me that they had filed a petition for rehearing with the Ninth Circuit, but I did not receive the report until March 15, 2012, because Respondents sent the report to the address for the Department of Labor Courtroom in Long Beach, which has no staff. The report was somehow forwarded to me a month later.

## Issue

The only issue remaining in this case is what is the appropriate civil money penalty for Respondents' violations of the FLSA. (April 15, 2013, Order Summarizing Pre-Hearing Conference; HT,<sup>3</sup> p. 5.)

## Factual Background<sup>4</sup>

Beginning in 1999, Respondent Le operated a number of garment shops in Southern California, including one called the Double T. The Double T was owned by Respondent Le's sister, but Respondent Le played a significant managerial role in the Double T, advising her sister on business matters and supervising and training the employees. Respondent Nguyen, Respondent Le's husband, was a supervisor at the Double T. In 2005, the Department of Labor investigated the Double T for wage and hour violations, including failure to pay overtime to its employees. During the investigation, Respondent Le admitted that she operated the Double T and that she had violated the FLSA by failing to pay her employees overtime. The Double T was closed in 2005.

Respondent Le opened Best Miracle in June or July 2005. (HT, p. 68.) At Best Miracle, Respondents Le and Nguyen employed Asian and Hispanic workers, many of whom did not speak English, to trim, assemble, sew, and iron clothing for local garment manufacturers, who would, in turn ship the clothing to retailers. The workers at Best Miracle routinely worked over 60 hours a week. They would arrive at Best Miracle at 6:00 a.m. and leave at 6:00 p.m. with a half-hour lunch break in the middle. They generally worked from 6:00 a.m. to 2:00 p.m. on Saturdays and also worked occasionally on Sunday mornings.

However, with the help of Respondent Nguyen, Respondent Le devised a system of falsifying records at Best Miracle in order to avoid paying the overtime required by the FLSA to employees. The system involved using false time cards that showed the employees never worked more than 40 hours per week by having the employees punch the time cards for only 40 hours regardless of how many hours they worked and having the employees sign blank time cards that would be filled in with fake hours. Respondent Nguyen had a separate time clock in his office that he used to prepare false time cards. He prepared fraudulent time cards and had employees sign them. Employees were paid by check for 40 hours and paid in cash at straight time for the overtime worked. Respondents Le and Nguyen admitted to their employees that the fraudulent time cards were for the purpose of deceiving the Department of Labor and used bribery and threats to keep the employees from reporting the violations to the Department of Labor. The fraudulent time cards did sometimes show some overtime hours were worked.

The Department of Labor began investigating Best Miracle in 2007 and conducted surveillance of Best Miracle in July 2007. It also conducted an on-site investigation on July 30, 2007. On July 30, 2007, investigators found that numerous employees were working off the clock at the time of their on-site inspection. 47 employees were working at the time of the inspection, but inspectors found only 15 time cards. Respondent Le did not respond when asked for the remaining 32 time cards. Best Miracle shut down in September or October 2007. (HT, p.

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<sup>3</sup> References to "HT" are to the hearing transcript.

<sup>4</sup> These facts are taken from factual findings in the decision issued by Judge Carney after a bench trial. (EX E.)

73.) Respondent Le has not reopened Best Miracle since then. *Id.* After the investigation was completed, the Petitioner notified Respondents that they were being assessed \$24,543.54 in civil money penalties for their violations of the FLSA. (EX A.)

Judge Carney found after the bench trial that Respondents engaged in a deliberate campaign to falsify records at Best Miracle that included instructing employees to punch in for fewer hours than they actually worked and preparing fraudulent time cards and that they wilfully violated the recordkeeping and overtime requirements of the FLSA. *Best Miracle*, 709 F. Supp. 2d at 858. He granted the Petitioner's request for a permanent injunction prohibiting Respondents from continuing to further violating the FLSA's recordkeeping, overtime, and hot goods provisions and found the Petitioner's estimate of the back pay owed to the affected workers to be credible and reliable. *Best Miracle*, 709 F. Supp. 2d at 859.

### Applicable Law

This case is pending before the OALJ because Respondents challenge the \$24,543.54 in civil money penalties that the Petitioner assessed them for their violations of the FLSA. The civil money penalties were assessed against the Respondents pursuant to § 16(e) of the FLSA and Part 578 of the Code of Federal Regulations. (Exhibit A.)

The FLSA requires covered employers to pay their employees overtime pay. 29 U.S.C. § 207(a)(1). Section 16(e) of the FLSA provides that for violations that occur after January 7, 2002:

[a]ny person who repeatedly or willfully violated section 206 or 207 [the minimum wage or overtime provisions of the FLSA] shall be subject to a civil penalty not to exceed \$1,100 for each such violation.

29 U.S.C. § 216(e)(2); *see also* 29 C.F.R. § 578.3.

Section 16(e)(3) goes on to say, in part, that

In determining the amount of any penalty under this subsection, the appropriateness of such penalty to the size of the business of the person charged and the gravity of the violation shall be considered. ...

29 U.S.C. § 216(e)(3); *see also* 29 C.F.R. § 578.4.

A violation is repeated if an employer previously violated the minimum wage or overtime provisions of the FLSA and was notified by the Wage and Hour Division or a court had made a finding that the employer had committed such a violation. 29 C.F.R. § 578.3(b). A violation is willful if the employer knew its conduct was prohibited by the FLSA or it showed reckless disregard for the FLSA's requirements. 29 C.F.R. § 578.3(c).

The criteria for determining the appropriateness of a penalty are outlined at 29 C.F.R. § 578.4. To determine the amount of the civil money penalty for willful or repeat violations of Section 7 of the FLSA, the Administrator of the Wage and Hour Division ("Administrator") is

required to consider the size of the employer's business and the seriousness of the violation. 29 C.F.R. § 578.4(a).

The regulations also provide discretionary considerations in the assessment of a penalty. Specifically, 29 C.F.R. § 578.4(b) provides that “[w]here appropriate, the Administrator may also consider other relevant factors in assessing the penalty, including, but not limited to:”

- 1) good faith efforts to comply,
- 2) the employer's explanations for the violations,
- 3) previous history of violations,
- 4) the employer's commitment to future compliance,
- 5) the interval between violations,
- 6) the number of employees affected, and
- 7) whether there is a pattern to the violations.

29 C.F.R. § 578.4(b)(1)-(7) (emphasis added).

#### Calculation of the Civil Money Penalties

In addition to the regulations in 29 C.F.R. Part 578, the Wage and Hour Division has a Field Operations Handbook (“Field Handbook”) which provides guidance to its employees in computing the civil money penalties. It is produced by the Wage and Hour Division's national office. (HT, p. 15.) Civil money penalties are dependent on a number of factors, including whether the violations were repeated and/or willful, the employer's compliance status, whether the employer agreed to comply in the future, and the size of the business. Chapter 54F of the Field Handbook outlines the basic methodology for computing a civil money penalty assessment under the FLSA for minimum wage and/or overtime violations using these factors. (HT, pp. 15-16; EX H.)

The Field Handbook includes a table for determining the appropriate basic penalty before any adjustments are made. The table includes three rows. Row One lists the penalty for repeated violations, Row Two lists the penalty for willful violations, and Row Three lists the penalty for repeated and willful violations. (EX H.) The first row for “repeated” violations is used for situations where Wage and Hour conducted an investigation in the past, found violations, and finds violations in the current investigation. (HT, p. 17.) The second row for “willful” violations is applied when an employer knew their obligations under the law and/or showed a reckless disregard for the violations. (HT, p. 18.) The third row for “repeated and willful” violations is used for situations where there was a prior investigation and Wage and Hour has determined that the current violations were willful. *Id.*

The table includes six columns, three for violations that occurred before January 7, 2002, and three for violations that occurred on or after January 7, 2002. Each set of three columns is identified as “Col. I,” “Col. II,” and “Col. III.” The basic penalty increases as the chart moves from Column I to Column III because the columns indicate the severity of the violation. (HT, p. 22.) Column I is used in situations where Wage and Hour conducts an investigation, and during the investigative period violations were found, but the employer took corrective action before Wage and Hour intervened even though the violations were repeated, willful or repeated and willful. (HT, p. 19; EX H.) Column II applies to repeated, willful, or repeated and willful

violations where an employer agrees to comply with the FLSA after Wage and Hour has intervened. (HT, p. 20; EX H.) Richard Longo, the Director of Enforcement for the Wage and Hour Division's Western Region, explained that Column II can also be used where there is a verbal agreement from the employer with specific assurances, where there is a formal written agreement with the employer providing in writing the specific measure they are going to take to come into compliance, where there is an even more formal agreement generated by the Wage and Hour Division and agreed to by the parties; where there is a consent judgment with the employer which includes injunctive relief against the employer and responsible parties, and where an employer goes out of business. *Id.* Finally, Mr. Longo testified that Column III is used in situations where violations are found and the employer failed to take corrective action after being put on notice that the violations had occurred. (HT, pp. 21-22.)

The Field Handbook states that the penalties in Column III are for:

Repeated, willful, or repeated and willful violations where the employer refuses to comply with the FLSA in the future; or is under Injunction, Stipulation Agreement or Compliance Agreement; or is under previous administrative determination of "repeated" or "willful" – and [back wages] are due.

(EX H.) (emphasis in original).

After the basic penalty rate per violation is determined, the penalties are increased by 25% if the employer refuses to pay the back wages owed to the affected employees. (HT, pp. 22, 37.) With regard to the size of the business, the penalties against an employer with less than 100 employees can be reduced by 15%, and employers with less than 20 employees may have their penalties reduced by 30%. (HT, pp. 23, 37.)

The Wage and Hour Division has a computer program, WHISARD, which is used to calculate civil money penalties. (HT, p. 16.) Information about all the factors that are considered in determining the civil money penalties are entered into WHISARD which then calculates the civil money penalties. (HT, pp. 16-17.) The accuracy of the information that is entered into WHISARD is verified by a manager in the Wage and Hour Division. (HT, p. 24.) After the manager verifies the accuracy of the information entered into WHISARD, the manager decides whether the penalty is appropriate and whether or not adjustments have to be made to raise or lower the penalty. *Id.* Once that decision is made, a civil money penalty assessment letter is generated. (HT, p. 28.)

#### Petitioner's Calculation of Respondents' Civil Money Penalties

After the investigation of Best Miracle was completed, Eduardo Huerta, the Assistant District Director of the Department of Labor's Wage and Hour Division office in Orange, California worked with Deputy Regional Administrator Gerald Hall to determine the appropriate civil money penalty to impose on Best Miracle. (HT, p. 33.)

Mr. Huerta determined that Respondents' violations were repeat violations because Respondents Le and Nguyen were found to have committed the same violations in the earlier investigation of the Double T in which both of them had a major role. (HT, pp. 34, 45.) He also determined that the violations were willful because the Respondents had clear knowledge of the

law based on the earlier investigation of the Double T and opened Best Miracle after they closed the Double T and they had developed a system of falsifying time records at Best Miracle to avoid paying overtime. (HT, pp. 34-35.)

Mr. Huerta did not determine that Respondents had agreed to comply, but agreed with Mr. Hall's decision that Respondents should be deemed to have agreed to comply because Best Miracle had closed its doors. This was based on the theory that they could not continue to refuse to comply because they had no longer had any employees. (HT, pp. 35-36, 51.) This determination was also based on the fact that the Petitioner planned to seek injunctive relief because this case was referred to the Solicitor's Office for litigation. (HT, p. 36.)

Using the Field Handbook, Mr. Huerta decided that Respondents' civil money penalty should be \$550 for each violation. (HT, p. 37.) He then reduced the penalty by 15% because Respondents had less than 100 employees but more than 19, but he increased the penalty by 25% because Respondents had refused to pay their employees. (HT, pp. 37-38.) This yielded a final civil money penalty of \$584.37 per employee which he then multiplied by the 42 employees<sup>5</sup> identified in the investigation to arrive at the \$24,543.54 in total civil money penalties. (HT, p. 38.) After he determined that the civil money penalty calculations were accurate, Mr. Huerta issued a notice on July 16, 2008, that \$24,543.54 in civil money penalties were being assessed against Respondents for their violations of the FLSA. (HT, pp. 32-33, 57; EX A.) In conjunction with the calculation of the civil money penalties, Mr. Huerta prepared a "civil money penalty report" which memorialized the computations made to arrive at the penalties that were assessed against Respondent. (HT, p. 33; EX B.)

#### The ALJ Can Increase the Civil Money Penalty Assessed

In my order granting Petitioner's Motion for Summary Decision in part, I denied the part of the Petitioner's motion asking me to find that the civil money penalties that were assessed were appropriate. I found that the Petitioner had failed to establish the civil money penalties were appropriate and suggested that they might have been too low. I ordered the parties to address in their closing briefs the question of whether I have the authority to increase the civil money penalty if I finds it to be inappropriate.

The Petitioner argues that I have the authority to increase the penalty, citing 29 C.F.R. § 580.12(c), which says the ALJ is empowered to "affirm, deny, reverse, or modify, in whole or in part, the determination of the Administrator." Administrator's Closing Brief, p. 8. The Petitioner argues that this includes the power to determine the "appropriateness" of the civil money penalties assessed. The Petitioner further argues that "[i]t is well established that in determining a CMP's appropriateness, an ALJ can increase the penalty where 'warranted.' 'after all of the [statutory and regulatory] factors [have been] considered,'" citing *Administrator v. Thirsty's Inc.*, ARB No. 96-143, 1997 WL 453588, at \*4 (May 14, 1997), *aff'd sub nom. Thirsty's v. United States Dept. of Labor*, 57 F. Supp. 2d 431, 436 (S.D. Tex. 1999). *Id.*

*Thirsty's* involved civil money penalties imposed against the respondent for violations of the child labor provisions of the FLSA. The Wage and Hour Division determined the civil

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<sup>5</sup> During the District Court litigation, after Mr. Huerta made this calculation, the Petitioner identified five additional affected employees. (HT, pp. 38-39; EX F.)

money penalties using a penalty schedule similar to the table discussed above from the Field Handbook for FLSA violations. The ALJ rejected the use of the penalty schedule because he found that use of a penalty schedule denied individual employers the due process guaranteed by the applicable regulations. The ARB disagreed with the ALJ and found that the Wage and Hour Division's penalty schedule was a reasonable interpretation of the regulatory guidelines for determining the penalties for violations of the child labor provisions of the FLSA and was entitled to deference. *Thirsty's*, slip op. at 4. However, the ARB affirmed the ALJ's authority to review and modify the Administrator's civil money penalty assessment. More importantly, the ARB disagreed with the ALJ's contention that it would be inappropriate to increase the penalty if it was warranted in the case pending before the ALJ and after all the factors were considered. *Thirsty's*, slip op. at 6.

In opposition to the Petitioner's argument that I have authority to increase the civil money penalties, Respondents argue that I cannot substitute my judgment for that of the agency and that I can only set aside the Administrator's determination if it is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Citing *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 491 U.S. 281, 290 (1974) and *Ethyl Corp. v. EPA*, 176 U.S. App. D.C. 373 (1976), Respondents argue that I must affirm the agency's decision if a rational basis is presented for the agency's decision, even if I disagree with the decision. Respondent's Written Closing Arguments, p. 5. Respondents' arguments are unpersuasive and inappropriate at this stage of the process. They ignore the fact that the very regulations in 29 C.F.R. Part 580, under which they exercised their right to contest the civil money penalties, specifically provides that I can "affirm, deny, reverse, or modify, in whole or in part, the determination of the Administrator." 29 C.F.R. § 580.12. That determination by the Administrator includes the amount of the civil money penalties.

The authorities cited by the Respondents relate to review of Federal administrative agency decisions for the Federal courts and not my review of the Administrator's determination. Respondents completely ignore the fact that my authority is derived from the implementing regulations of the FLSA and as pointed out by the Petitioner, specifically authorizes me to modify the civil money penalties that were imposed by the Administrator. Respondents fail to recognize that my decision, if it is not appealed becomes the final order of the Secretary of Labor and the agency's decision. 29 C.F.R. § 580.12(e).

Thus, I reject Respondents' argument that I do not have authority to increase the civil money penalties that were imposed. As the Administrative Review Board stated in *Thirsty's*, I have the authority to increase the civil money penalty if I feel it is warranted after considering all the factors.

#### Can the ALJ Consider Conduct After the Civil Money Penalty Was Calculated?

On October 15, 2010, after the civil money penalty was assessed in this case, the civil trial was concluded and Judge Carney issued his decision, the Petitioner brought a contempt action against the Respondents for failure to comply with Judge Carney's orders. (EX I.) On March 18, 2011, Judge Carney found Respondents in civil contempt for failing to pay the restitution he had ordered plus post-judgment interest and ordered them to sell rental property they owned in Fountain Valley to satisfy their restitution obligation. (EX I.)

The Petitioner argues that I should consider this subsequent failure to comply with Judge Carney's order in determining the appropriateness of the penalty that was assessed. The Petitioner argues that I have inherent authority to consider facts revealed after the initial assessment to increase a civil money penalty. Administrator's Closing Brief, p. 8. In support of this position, the Petitioner points out that the ARB has upheld an ALJ's consideration of post-investigation evidence and pre-hearing witness coercion in determining the willfulness of the original violations when deciding whether an employer should be debarred from future government contracts under the Davis-Bacon Act. Administrator's Closing Brief, pp. 8-9. The Petitioner also points out that the ARB said in *Thirsty's* that the "ALJ's scope of authority to change the Administrator's assessment is *untrammelled*," suggesting that I have the authority to take any action I deem appropriate. Administrator's Closing Brief, p. 9.

Respondents, on the other hand, argue that I can only consider the administrative record that existed at the time the civil money penalties were assessed in June 2008 and cannot consider the District Court's contempt order which was filed in March 2011. Respondent's Written Closing Arguments, p. 5. Respondents cite *Environmental Defense Fund, Inc. v. Costle*, 657 F.2d 275 (D.D.C. 1981) and *Camp v. Pitts*, 411 U.S. 138 (1973) in support of their argument that my review is limited to the administrative record in existence at the time the civil money penalties were assessed. Respondents' authorities are unpersuasive. The problem with the authority they cite in support of their argument is that all the cases they cite refer to the scope of a review of an administrative decision by a Federal court. The Office of Administrative Law Judges is not a Federal court. As noted earlier, if my decision is not appealed or the ARB dismisses an appeal, my decision becomes the Secretary's decision and the final agency decision. 29 C.F.R. § 580.12(e).

I conclude that in my review of the appropriateness of the civil money penalties that were assessed, I can consider Respondents' subsequent conduct after the penalties were assessed.

#### The Civil Money Penalties Should Have Been Higher

Regardless of whether Respondents' conduct after the civil money penalty was assessed is considered or not, I find that the civil money penalties should have been higher.

##### *The Penalty Should Have Been Higher Based on the Existing Record in 2008*

Assistant District Director Huerta explained at the hearing that Deputy Regional Administrator Hall determined that Respondents' basic civil money penalty should be based on a determination that Respondents had agreed to comply with the FLSA in the future since Best Miracle had closed and because Wage and Hour had referred the case to the Solicitor's Office for litigation with plans to seek an injunction against Best Miracle. (HT, pp. 35-36, 51.)

The Wage and Hour Field Handbook penalty table for violations after January 7, 2002, provides that the unadjusted penalty for each violation where the employer agrees to comply with the FLSA after having been found to have engaged in willful and repeated violations of the FLSA is \$550 per violation, while the basic penalty is \$1,100 for employers who engaged in willful and repeated violations and refuse to comply with the FLSA in the future. (EX. H.)

Messrs. Huerta's and Hall's decision to treat Respondents as having agreed to comply with the FLSA reduced the unadjusted civil money penalty in this case to \$550 per violation. (HT, p. 37.)

I find that treating Respondents as having agreed to comply with the FLSA because they closed the business was in error in this case. The basic unadjusted penalty for these violations should have been taken from Column III of the table in the Field Handbook for employers who refuse to comply with the FLSA.

The Field Handbook specifically says, in part, that the penalties in Column III were to be used for repeated and willful violations where the employer refuses to comply with the FLSA in the future or is under injunction and back wages are due. The instructions in the Field Handbook say to use the Column II penalty where the employer agrees to comply with the FLSA in the future and emphasizes the word "agrees." When the explanations for Column II and Column III are read together, they can be interpreted to mean that the Column II penalty should only apply where an employer voluntarily agrees to comply with the FLSA in the future and not to situations where the employer is forced to comply by a court injunction or consent decree. [Exhibit H.]

Though Respondents were not under an injunction to comply with the FLSA at the time the penalty was assessed, Mr. Huerta testified that the case had already been referred to the Solicitor's Office for litigation and that it was Wage and Hour's intention to seek an injunction, clearly suggesting that any future compliance would not be voluntary. (HT, pp. 36, 52.) Mr. Huerta also explained that another consideration in the decision to apply the penalty in Column II was the fact that Best Miracle had closed, so Respondents could not continue to refuse to comply with the FLSA. (HT, p. 36.) This explanation is inconsistent with Wage and Hour's plan to seek an injunction forcing future compliance and suggests a concern on the part of Wage and Hour that Respondents would continue to violate the FLSA. If future compliance was not a concern because the business had closed, then there would be no need to seek an injunction.

More importantly, the Petitioner had ample evidence that closing down Best Miracle did not necessarily mean that Respondents would comply with the FLSA in the future. Respondents Le and Nguyen were both involved in the Double T which closed after the same FLSA overtime pay violations were found. The Petitioner presented evidence to Judge Carney that after closing the Double T, Respondents proceeded to open Best Miracle and immediately engaged in the same violations of the FLSA. That was the basis for Judge Carney's comment "Ms. Le apparently did not learn a lesson on how to treat workers from her experience at Double T." *Best Miracle*, 709 F. Supp. 2d at 847. Thus, Petitioner had evidence closing down one business after having violated the FLSA was not an assurance that Respondents Le and Nguyen would comply with the FLSA in their future endeavors.

As a matter of fact, that was the basis for Mr. Huerta's determination that the violations at Best Miracle were willful. He testified that Respondents Le and Nguyen had clear knowledge of the law based on the investigation of the Double T and they opened Best Miracle after closing the Double T and continued to violate the FLSA in the same way. (HT, pp. 34-35.) Mr. Huerta also testified that he did not feel qualified to determine whether Respondents would continue to operate garment shops and whether they would agree to comply with the FLSA since Best

Miracle was already closed and Wage and Hour was seeking an injunction to force future compliance. (HT, p. 52.)

Respondents Le and Nguyen's past conduct in closing Double T and opening Best Miracle with what appears to be more elaborate efforts to evade compliance with the FLSA provided a strong indication that they would not voluntarily comply with the FLSA without a court order and should have made them ineligible for the penalty reduction reflected in Column II for employers who voluntarily agree to comply with the FLSA.

Giving employers who close down their business after Wage and Hour finds they violated the FLSA the benefit of the doubt may be appropriate in some instances. However, routinely treating employers who close down their business after engaging in FLSA violations as agreeing to not violate the FLSA in the future leaves unsuspecting workers, especially non-English speaking workers such as those victimized by Best Miracle, at the mercy of employers like Respondents Le and Nguyen who close down one business after being investigated by Wage and Hour and immediately open a new business under a different name. This might not be true of an employer who truly shuts down the business, but in this instance, the Petitioner was assessing a penalty against respondents who had previously shut down a business after having been found to have violated the FLSA and then reopened under a different name with the same FLSA violations.

I also note that under the regulations, the only mandatory considerations in determining the appropriate penalty are the seriousness of the violations and the size of the business. 29 C.F.R. § 578.4(a). Consideration of the other factors, such as an employer's commitment to future compliance, which is reflected by Column II, is a permissive consideration. The regulation states that it is a factor that may be considered by the Administrator. 29 C.F.R. § 578.4(b).

Thus, I find that the basic, unadjusted, civil money penalty per violation in this case should have been \$1,110, not \$550. This determination is based solely on the record at the time the penalties were assessed in 2008 and does not include consideration of the contempt action that was brought against Respondents.

*Respondents' Subsequent Conduct Supports A Higher Penalty*

If Respondents' conduct after the civil penalties were assessed in 2008 are considered, there is overwhelming evidence that the assessed penalties were in appropriate because the subsequent conduct demonstrates Respondents unwillingness to comply with the FLSA.

Judge Carney issued his decision on May 3, 2010, and issued a permanent injunction on May 20, 2010. He amended the permanent injunction on July 8, 2010, to enjoin Respondents from continuing to withhold \$186,559.83 in unpaid overtime compensation plus prejudgment interest. (EX I.) On October 15, 2010, the Petitioner filed a petition for civil contempt because Respondents had continued to fail to pay any court-ordered restitution. In his March 18, 2011, Order Finding [Respondents] in Civil Contempt of [His] July 8, 2010, Restitutionary Injunction, Judge Carney found that as of January 2011, Respondents had failed to pay any restitution

whatsoever and had failed to demonstrate that they were unable to pay the restitution that was ordered. (EX I.)

Moreover, even at the hearing before me, Respondent Le refused to admit to the violations. She was very evasive when asked if she was willing to admit that she had violated the FLSA. She was asked if she had admitted to Mr. Huerta that she had violated the FLSA. Instead of answering, she responded that she had cooperated in the investigation. (HT, pp. 81-82.) When ordered to answer the question of whether she was willing to admit at the hearing that she had violated the FLSA, she continued her evasiveness as evidenced by this exchange between her and Petitioner's counsel:

Ms. Orlov: Ms. Le, I'm going to ask you the same question. As you sit here today to [sic] you acknowledge that you violated the Fair Labor Standards Act while you were operating Best Miracle?

...  
The Witness: Of all the documents I provided to you, did you find a violation?

Ms. Orlov: Move to strike as non-responsive, and I ask Your Honor to direct the witness to answer my question.

Judge Gee: Your request is granted. Mrs. Le, will you please answer the question.

The Witness: I've tried not to violate.

Judge Gee: That doesn't answer the question. The question is did you violate the Fair Labor Standards Act while you were operating Best Miracle?

The Witness: I complied as best as I can while I was at Best Miracle, as much as I know. I was investigated by the Department of Labor. I don't understand all the laws, but I've tried to comply. I have provided all of the documents they asked for, and as far as I'm concerned, I have tried not to violate, and I have not violated.

(HT, pp. 83-84.)

Judge Carney's contempt finding and Respondent Le's refusal to admit that she violated the FLSA lend additional support to my conclusion that Respondents should not have been treated as "agreeing" to comply with the FLSA.

#### Revised Civil Money Penalty Assessment

Respondents should have been assessed a civil money penalty of \$1,100 for each violation of the FLSA. With the 15% reduction because Respondents had less than 100 employees but more than 19 employees, the basic civil money is reduced to \$935.00<sup>6</sup> per violation. However, that penalty must be increased by 25% for Respondents' refusal to pay the wages, bringing the penalty per violation up to \$1,168.75.<sup>7</sup> Based on the 42 violations used for the penalty calculation in 2008, the original civil money penalty should have been \$49,087.50.<sup>8</sup>

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<sup>6</sup> \$1,100 x .85 = \$935.00.

<sup>7</sup> \$935 x 1.25 = \$1,168.75.

<sup>8</sup> \$1,168.75 x 42 employees = \$49,087.50.

Adding in the additional five affected workers who were identified at the time of the trial before Judge Carney, the civil money penalties should be \$54,931.25.<sup>9</sup>

### CONCLUSION

Respondents engaged in repeated and willful violations of the FLSA by failing to pay their workers the overtime wages required by the provisions of the FLSA. The civil money penalties assessed against them should have been on the penalty assessed against employers who had engaged in repeated, willful violations and refused to comply with the FLSA. That unadjusted penalty was \$1,100.00. As adjusted for the size of Respondents' business and their refusal to pay the back wages owed, Respondents are assessed a penalty of \$1,168.75 per violation.

### ORDER

Respondents Best Miracle Corporation, Thuy Thi Le, and Toan Van Nguyen are hereby ORDERED to pay the U.S. Department of Labor a total civil money penalty of \$54,931.25.

JENNIFER GEE  
Administrative Law Judge

**NOTICE OF APPEAL RIGHTS:** If you are dissatisfied with the administrative law judge's decision, you may file an appeal that is received by 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

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<sup>9</sup> \$1,186.75 x 47 employees = \$54,931.25.

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).