In the Matter of:

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

ARB CASE NO. 00-022

ALJ CASE NO. 99-CLA-5

PLAINTIFF,

DATE: August 27, 2001

v.

CHRISLIN, INC. D/B/A BIG WALLY'S and WALTER A. CHRISTENSEN,

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Claire Brady White, Esq., Linda Jan S. Pack, Esq., Steven J. Mandel, Esq., *U.S. Department of Labor, Washington, D.C.*

For the Respondent:
Evan N. Pickus, Esq., *East Brunswick, New Jersey*

ORDER DIRECTING SUPPLEMENTAL BRIEFING

Pursuant to 29 U.S.C.A. §216(e) (West 1998), the Administrator of the Wage and Hour Division ("Administrator") assessed $68,012.40 in civil money penalties against Respondents Chrislin, Inc., d/b/a Big Wally's and Walter A. Christensen (collectively "Chrislin") for violation of various child labor provisions of the Fair Labor Standards Act ("FLSA" or "Act"), 29 U.S.C.A. §201 *et seq.* (West 1998), and the regulations promulgated thereunder. Respondents objected to that assessment and the matter was referred to an Administrative Law Judge ("ALJ") who subsequently reduced the assessment to $56,762.50. Decision and Order (D&O) at n.7. Chrislin petitioned for review. As we discuss below, having reviewed the record and the parties' briefs, we have determined that supplemental briefing regarding the penalty assessment is necessary.

Before the ALJ, a Department of Labor Wage and Hour Division investigator, John Warner, testified extensively about the penalty assessment process. He noted that the penalty calculus set out on the WH-266 form automatically applies a 150% multiplier to individual penalty amounts for violations that involve aggravating factors such as a serious injury or documentary proof that the employer had knowledge of the child labor laws. Because there were several aggravating factors in this case, including a serious injury and the fact that Chrislin had received documents from some of the minors' schools describing child labor law requirements, the 150% multiplier was applied, resulting in a total penalty amount of $66,000.

Warner testified that the 200% multiplier set out in WH-266 was not applied because Chrislin had no prior violations, had not falsified records, and in the investigator's judgment, was not likely to violate the child labor laws in the future. The fact that Chrislin was not likely to commit future violations also meant that the agency did not need to go to federal district court to secure a permanent injunction. *Cf. Martin v. Funtime, Inc.*, 963 F.2d 110 (6th Cir. 1992) (The Administrator is justified in seeking a permanent injunction against a violator when evidence indicates a likelihood of future noncompliance).

Warner also testified that he thought the $66,000 penalty was likely to push Chrislin into bankruptcy and that it was the informal practice of his area office to reduce penalties when employers showed financial inability to pay the full amount. However, Warner decided the full penalty should be assessed because Chrislin was contending that it should not have to pay any penalty amount and because Warner considered the purpose of penalties to be not just deterrence, but also punishment:

> The purpose [of child labor penalties] is to insure future compliance but it's also punitive, to punish people who have substantial violations and as I mentioned before there's nothing that says[,] our normal procedures has [sic] often been to take into account, you know the effect that this might have and to possibly work towards an accommodation for an administrative resolution [i]f the company said that's what they're interested in and at no time did your client ever express to my office that they would pay some fine. Your [Chrislin's attorney] statement this morning that some fine might be appropriate was never made to my office.

Transcript (T.) at 165-166.[1/]

Section 202 of the FLSA sets forth the "congressional finding and declaration of policy," which provides in pertinent part, "[i]t is declared to be the policy of this [Act] . . . to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power." 29 U.S.C.A. §202(b) (West 1998). The

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[1/] At the Board's request, errors in the transcript were corrected by the stenographic service. References are to the corrected transcript.

Wage and Hour Division's child labor civil money penalty regulations do not require for all penalty assessments a determination whether the amount of a penalty is necessary to achieve the objectives of the Act, including eliminating conditions which violate the FLSA without substantially curtailing employment or earning power. The only references to the objectives of the FLSA and the concept of limiting penalties where future compliance seems likely appear in subsections 579.5(d)(1) and 579.5(d)(2), which stipulate that "it shall be determined" whether any "civil penalty is necessary to achieve the objectives of the Act" when violations are negligible and the employer has given credible assurances of future compliance. 29 C.F.R. §579.5(d)(1).

In reviewing the factors that must be considered in a penalty assessment, the ALJ stated, "[a]ssurances of future compliance and an alignment of the penalty amount to the Act's objectives, are also to be considered." D&O at 7. Nonetheless, the ALJ affirmed the Division's assessment[2/] on the ground that, "[n]othing surrounding the imposition of the subject penalties suggests an objective other than achieving the purpose of the Act, the deterrence of like conduct, and Respondents' alleged inability to pay the fines cannot serve to reduce the penalties due in light of the circumstances of this case" – *i.e.*, the aggravating factors. *Id.* at 9.

Chrislin challenges the $56,762.50 assessment on the ground that it threatens the company's continued viability unnecessarily and is therefore inconsistent with the Act's general policy of achieving compliance without causing unnecessary curtailment of employment and earning power:

> It was not the intention of the Act that the Administrator should be able to assess fines against a first time offender, operating an exceedingly small enterprise, which would put the company out of business and its owners into Bankruptcy. Indeed, Section 2(b) of the Act states that the purpose of the Act is "to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power."

Opening Brief at 11.

The Administrator defends the penalty amount in this case on the ground that the penalty calculations, in which the WH-266 computations dealt with injury and exposure to unsafe working conditions, are comparable to the WH-266 computations based on wage and hour violations that this Board affirmed in *Administrator, Wage and Hour Division v. Thirsty's, Inc.*, No. 96-143, slip op. at 5 (ARB May 14, 1997) ("The grid and matrix schedule incorporated in form WH-266 is an appropriate tool to be used by a field Compliance Officer to recommend penalties through the enumeration and determination of the gravity of factual violations");

[2/] The ALJ reduced the assessment from $70,762.50 to $56,762.50 because he found that one of the cited violations had not been proved. D&O at 6.

Thirsty's v. United States Dept. of Labor, 57 F. Supp. 431 (S. D. Texas 1999) (same). This argument is not responsive to Chrislin's claim that §202(b) of the Act requires child labor penalties to stop short of driving an employer out of business unnecessarily.[3/] We think Chrislin's argument warrants a response from the Administrator. *Compare SEC v. Opp Cotton Mills, Inc.* 312 U.S. 126, 143, 61 S.Ct. 524, 532 (1941) (wage rates must reflect "due regard to economic and competitive conditions" and "not substantially curtail employment in the industry").[4/]

We emphasize that by issuing this order we do not mean to suggest any particular view on the merits of Chrislin's argument. We conclude only that the argument is sufficient to warrant a response from the Administrator and that such a response is a necessary predicate to review. *Cf. Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420, 91 S.Ct. 814, 826 (1971) (remanding to District Court to afford the Secretary of Transportation an opportunity to explain whether and how his challenged action comported with the statutory mandate).

Accordingly, we afford the Administrator an opportunity to respond to this issue by supplemental briefing. The Administrator may file a supplemental brief not to exceed 20 pages within 33 days from the date of this order. Chrislin may file a supplemental reply brief not to exceed 15 pages within 15 days of service of the Administrator's supplemental brief.

SO ORDERED.

CYNTHIA L. ATTWOOD
Member

E. COOPER BROWN
Member

RICHARD A. BEVERLY
Alternate Member

[3/] We note that in promulgating the child labor civil money penalty regulations, the Administrator did not discuss whether or why calculations are subject to, and if so comply with, §202(b) of the Act. 40 Fed. Reg. 25792 (1975), as amended at 56 Fed. Reg. 8679 (1991).

[4/] The Administrator also argues that Chrislin put on no evidence whatsoever to support its bankruptcy claim. Administrator's Statement at 24. However, the employer did testify that Chrislin's profit margin was so small he would be unable to pay the fine. Whether the employer's testimony, apparently corroborated by the investigator, was sufficient to support a finding of fact to this effect is a question that must be reserved for consideration until the legal question whether financial viability is a material factor in penalty calculations is resolved.