In the Matter of:

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

PLAINTIFF,

v.

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

RESPONDENTS.

ARB CASE NO. 00-022

ALJ CASE NO. 99-CLA-5

DATE: November 27, 2002

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

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

For the Respondents:
Evan N. Pickus, Esq., ***Pickus & Landsberg, East Brunswick, New Jersey***

FINAL DECISION AND ORDER

This case arises under the child labor provisions of the Fair Labor Standards Act of 1938 (FLSA), as amended, 29 U.S.C.A. §§ 203(1), 212(c), and 216(e) (West 1998). The Respondents, Chrislin, Inc. and Walter Christensen (Chrislin), are appealing the decision of the Administrative Law Judge (ALJ) who concluded that Chrislin violated the child labor provisions of the FLSA and assessed a penalty of $56,762.50. We affirm the ALJ's decision as to the violations of the child labor provisions, with one exception, but reduce the penalties because the ALJ did not adequately consider the gravity of the violations and the size of the business in assessing the penalties.

Background

"Big Wally's" is a small sandwich shop in Parlin, New Jersey owned and operated by Respondent Chrislin, Inc., a corporation established by Walter A. Christensen and his wife. In 1997 the Wage and Hour Division of the Department of Labor (WHD) received a complaint regarding violations of the child labor provisions of the FLSA at the shop. The WHD investigated the Parlin,

New Jersey shop and learned that Chrislin also had owned a sandwich shop in Matawan, New Jersey in the previous year. That shop was sold in February, 1997 to a former employee. Under Labor Department regulations, an enterprise or establishment is covered by the Fair Labor Standards Act if its gross receipts during a 12-month period immediately preceeding the quarter in which the investigation is conducted exceeds the amount specified in the statutes. 29 C.F.R. § 779.266 (2002). Therefore the WHD included the Matawan shop in its investigation for the period of time it was owned by Chrislin.

The two shops employed a total of about 16 employees including a number of high school students between ages 16 and 18 and two students age 15 (with the school's and the parents' permission). At the time of the investigation Chrislin had 7 employees. Chrislin's combined gross income from the two shops in 1996 was $556,000 and in 1997, the year of the investigation, it was $299,000. P-11. The WHD defines a small business for the purpose of issuance of penalties as gross revenues of less than $800,000 and less than 100 employees. Mr. and Mrs. Christensen's 1996 and 1997 personal net taxable income was less than $10,000. They do not appear to have access to other income. Exhibit P-11.

Wage and Hour Administrator's Findings

The WHD found that Chrislin violated the child labor provisions of the Fair Labor Standards Act (FLSA) as follows: Two minors (Ryan Dickey, age 15 and Justin Lebowitz, age 15) were employed in violation of the child labor time/hours limitations; the firm failed to keep a record of date of birth on five minors; seven minors (Devon Cutrona, age 17; Danielle Martinez, age 17; Bryan Flegler, age 17; Richard Ferri, age 16; Mike Somers, age 16; Andrew Sobel, age 16 and Ryan Dickey when age 16) used or cleaned a meat slicing machine in violation of hazardous occupation order #10 and one minor (Dickey, when age 15) was employed in violation of the hazardous order relating to employment of minors under the age 16. T. 136-140; ALJ Decision and Order (D. and O.) at 2-3. One minor (Cutrona, age 17) suffered a laceration to her right thumb requiring nine stitches as a result of her operation of the machine. T. 137.

Penalties were assessed according to Form WH-266 in the W-H Field Operations Handbook (prepared by the Wage and Hour Division). Exhibit P-2. The form is used as a guide by the WHD investigator to initially determine penalties. WHD supervisors then review these penalties to assure their compliance with the child labor provisions of the FLSA and the implementing regulations.

According to Form WH-266 the penalty for the two hours violations was $450 per violation. Because the investigator found that Chrislin had knowledge of the child labor violations, he followed the Form WH-266 directions that these penalties be multiplied by a factor of 1.5. Thus the assessed penalty was $675 per violation or $1,350. The recordkeeping violation resulted in an assessment of $412.50.

Again, using the Form WH-266, the investigator assessed penalties for unlawful operation of the meat slicer by seven minors with one minor suffering a serious injury. The WHD investigator applied the form's assessment of $8,500 for the injured worker. This penalty was multiplied by the 1.5 gravity factor bringing the penalty to $12,750. However, the regulations cap each individual's penalty at $10,000, so this penalty was assessed at $10,000. 29 U.S.C.A. §216(e)(1) (1990); 29 C.F.R § 579.1(a) (2002)

In accordance with the form, a penalty of $6,000 was assessed for each of six additional minors using/cleaning the meat slicer and multiplied by the 1.5 gravity factor (for knowledge)

bringing the total penalty to $9,000 per worker or a total of $54,000. The $6,000 penalty is based on the rationale that each of the six noninjured workers was exposed to the same injury hazard as the injured worker (if Devon Cutrona had not suffered an injury, the form would have required an assessment of $1,200 per worker multiplied by the gravity factor of 1.5 for a total per worker of $1800). In sum, the penalties assessed for those hazardous occupations violations totaled $64,000. Exhibit P-2.

Additionally, the investigator assessed a hazardous occupation penalty in the amount of $1500 against Chrislin because Dickey was a minor under age 16 when he cleaned parts of the meat slicer (not the slicing blade). This penalty was also multiplied by the 1.5 factor. *Id.* This total penalty assessed was $2250.

WHD cited Chrislin for three violations involving Dickey; one for allowing Dickey to clean the meat slicer; another for allowing Dickey to clean the meat slicer when under 16; and a third for an hours of work violation. The total of the penalties for Dickey was $11,925. Because of the $10,000 per employee cap WHD reduced the penalty by $1,925. Thus the total penalties assessed Chrislin were $66,088.

To summarize, WHD assessed the following penalties:

• Hours	2 minors	@ $ 675.00	= $ 1,350.00
· Recordkeeping	1	@ $ 412.50	= $ 412.50
· Hazardous occupation/serious injury	1 minor	@ $10,000.00	= $10,000.00
· Hazardous occupation/potential injury	6 minors	@ $ 9,000.00	= $54,000.00
· Hazardous occupation/under 16	1 minor	@ $ 2,250.00	= $ 2,250.00
		Subtotal	= $68,012.50
		LESS	= $ 1,925.00
(Total penalty for Dickey cannot exceed $10,000)			
		TOTAL	**= $66,088.00**

Chrislin timely appealed the findings of the WHD to the ALJ.

ALJ's Decision and Order

The ALJ held hearings in September 1999. The ALJ issued his Decision and Order on December 17, 1999, affirming the WHD Administrator in part and reversing in part.

The ALJ, with one exception, affirmed the WHD findings and the recommended assessment of penalties. D. and O. at 10. In particular, with respect to the hazardous occupation violations, the ALJ found that Chrislin permitted an employee under the age of 18, Devon Cutrona, to use an electric meat slicer resulting in a serious injury (the laceration of her right thumb requiring nine stitches). The ALJ found that Chrislin allowed five other minors to use or disassemble or clean the slicer. D. and O. at 6 n.10. He upheld WHD's assessment of a penalty of $8,500 for the minor who was injured and $6,000 for each of the five other minors, concluding that WHD's approach of grouping or "bundling" the penalties for these minors because they were all exposed to the same

hazard was "sensible and reasonable." *Id*. at 7.[1] The ALJ also affirmed WHD's enhancement of that total penalty by a factor of 1.5, finding that although there was conflicting testimony on the issue of whether Christensen had instructed minors not to use the machine, the record supported an "indifference to, and knowing disregard of, legal responsibilities under the Act." *Id*. at 8-9. He also noted that when Cutrona returned to work, she resumed use of the slicer while still under 18. D. and O. at 8 and n.14.

The ALJ found that a 15-year old minor (Dickey) only cleaned "already disassembled/harmless parts of the slicer… " and thus did not engage in the activity of cleaning the slicing machine. D. and O. at 5. Accordingly, the ALJ reduced the total penalty total to $56,762.50. D. and O. at 6 and n. 7.

Issues on Appeal

Chrislin has raised the following issues on appeal: (1) whether "bundling" the noninjured workers is proper; (2) whether the evidence in the record was adequately considered; and (3) whether the statutory and regulatory requirements for consideration of gravity of the violations and size of business were appropriately considered in the penalty determination.

Jurisdiction and Standard of Review

The Secretary's Order No. 1-2002, 67 Fed. Reg. 64272 (Oct. 17, 2002), § 4.c(13), delegates to the Administrative Review Board authority and responsibility to act for the Secretary in civil money penalty cases arising under Section 216(e) of the Fair Labor Standards Act and 29 C.F.R. Part 580. We review the ALJ's decision *de novo.* 29 U.S.C.A. § 216(e) (West 1998); 5 U.S.C.A. § 544 (West 1996). *Administrator, Wage and Hour Division v. Sizzler Family Steakhouse*, 90-CLA-35, slip op. at 4. (Sec'y 1995).

Applicable statutes and regulations

The Statute

The Fair Labor Standards Act prohibits employment of "oppressive child labor." 29 U.S.C.A. § 212(c). The Act defines "oppressive child labor" as

> a condition of employment under which . . . (2) any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Secretary of Labor shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being …. The Secretary of Labor shall provide by regulation or by order that the employment of employees between the ages of fourteen and sixteen years in occupations other than manufacturing and mining shall not be deemed to constitute oppressive child labor if and

[1] A Wage and Hour representative testified at the hearing that bundling "refers to a higher penalty, a more severe fine for an employer where other workers have been exposed to a hazardous situation" but have not been injured themselves. T. 141-142.

> to the extent that the Secretary of Labor determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and safety.

29 U.S.C.A. § 203(l). 29 U.S.C.A. § 216(e) provides for civil penalties for child labor violations:

> Any person who violates the provisions of section 212 . . . relating to child labor, or any regulation issued under section 212 . . . shall be subject to a civil penalty of not to exceed $10,000 for each employee who was the subject of such a violation . . . . 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.

The Regulations

The regulations implementing the child labor provisions of the FLSA are contained in 29 C.F.R. Part 570. Specifically the regulations relating to assessment of penalties for child labor violations are contained in 29 C.F.R. § 579.

Discussion

The propriety of "bundling"

Legality of "bundling" - We reject Chrislin's argument that "bundling" of similar violations is not authorized by either the statute, the regulations or case law. The Secretary has the discretion under the FLSA to impose penalties up to $10,000 for "each employee who was the subject of . . . a violation." The process of "bundling" or treating all similar violations alike and enhancing the penalty where a number of underage employees have been exposed to the same hazard, is consistent with the statute and regulations. *See* 29 C.F.R. § 579.5(c) ("In determining the amount of the penalty there shall be considered the appropriateness of such penalty to the gravity of the violation or violations, taking into account . . . the occupations in which the minors were . . . employed [and] exposure of such minors to hazards . . ."). Where minors are exposed to the same hazard and one minor is injured, it is reasonable to recognize that the injury could also have occurred to any of the other minors so exposed. Moreover, the bundling process is employed at the initial phase of assessing the penalty during the completion of the WH-266 form. The penalty amount assessed through use of the form is subject to review by WHD officials and may be adjusted.

The penalty assessment may be reviewed further by an ALJ and this Board. We note that the amount determined as a consequence of bundling represents only an initial indication of what the penalty should be, and is subject to the appropriate refinement. We therefore conclude that bundling is a reasonable process to employ in the initial phase of penalty development, and is consistent with the statute and pertinent regulations.

Bundling and Chrislin's Intent – Chrislin argues that WHD improperly bundled violations because not all of the minors were similarly employed. According to Christensen's testimony only two employees (Cutrona and Martinez) were hired with the intent to permit them to use the slicer; he intended none of the others to slice. Respondent's Initial Brief 5-6. However, Chrislin's intent

is irrelevant as to whether a violation of the law occurred. The statute prohibits the "employment of oppressive child labor," and Chrislin indisputably "employed" minors in such work, that is, Chrislin "permitted" S*ee* 29 U.S.C.A. § 203(g), definition of employ the minors to work in prohibited occupations.

Exposure to Similar Hazards – Chrislin argues that Andrew Sobel was not exposed to the same level of hazard as the other minors that were "bundled" in the hazardous occupation violations. Sobel did not use the slicer but did clean the slicer, with a brush. The probability of suffering a serious injury was therefore minimal. We agree. Sobel should not have been bundled with the others. His exposure to the blade was minimal, and the penalty assessed for this part of the violations should be reduced from $9,000 to $1,800 (hazardous operation violation with little likelihood of serious injury).

Reliability of employees' testimony

Chrislin contends that the ALJ relied upon unreliable evidence in that oral testimony contradicted some statements in employees' interview sheets and one of the interview sheets was unsigned. Our review of the record leads us to conclude that the ALJ properly weighed the testimony of employee witnesses against their written statements taken by the investigator. We find specific support in the hearing record that these minors used/dissembled/cleaned the slicer. D. and O. at 9. We agree with the ALJ that "[t]he inconsistencies [between oral testimony and written statements] do not materially negatively affect the weight and credibility" of the testimony." *Id.* The ALJ acted within his discretion in admitting the unsigned interview statement of one of the underage employees, which was corroborated by employee testimony. T. 254-55; 295; D. and O. at 6 n.8; 29 C.F.R. § 580.7(b).

Chrislin also objected to some of the ALJ's findings because they were based in part on the testimony of two former employees whom Chrislin alleges were motivated by animus against Respondents. The ALJ, however, had the discretion to assess the credibility of their testimony in the context of the record as a whole, as he explicitly found, D. and O. at 9-10, and review of the record does not demonstrate that he abused that discretion. It is an "established legal principle that the fact finder's credibility determinations are to be given great deference, particularly where the trier of fact has had the opportunity to observe variations in demeanor and tone of voice." *Administrator, Wage and Hour Division v. Q. & D. d/b/a/ Lamplighter Tavern*, No. 92-CLA-21, slip op. at 3-4, (Sec'y May 11, 1994); *Administrator, Wage and Hour Division v. Merle Elderkin d/b/a Elderkin Farm*, ARB Nos. 99-033, 048, slip op. at 11 (ARB June 30, 2000).

Evidence of willfulness

We find that the ALJ properly weighed the evidence on the willfulness of the violations. 29 C.F.R. § 579.5(c). It is undisputed that copies of the child labor bulletin 101 were attached to the working papers sent by Sayreville High School to Chrislin relating to the employment of its students. In addition, although Christensen contended that he thought Cutrona and Martinez were participating in a state-sponsored internship program which would allow them to operate the slicer, he admitted that he had no documentation to that effect. T. 428-29. Although there were some conflicts in the testimony, the ALJ had a solid basis to discredit Christensen's explanation that he was not at the Parlin Shop store often and that he relied on his managers without knowing that they permitted underage workers to perform a prohibited occupation. Beginning in May 1996, when one of his managers left, Christensen spent most of his time at the Parlin store, and there was no dispute

that he was at the store when Cutrona was injured and when she returned to work and resumed using the slicer. D. and O. at 8; T. 219. In addition, there were a number of occasions when all the employees working in the Parlin were under 18, meaning at least one of them used or cleaned the slicer after the store closed. T. 255. The record therefore supports the ALJ's findings of "indifference to, and knowing disregard of, legal responsibilities under the Act, " and "heedless exposure of minors to an obvious hazard, and the continued and persistent occurrence of not inadvertent violations." D. and O. at 8-9.

Consideration of regulatory factors

The child labor provisions of the FLSA and the implementing DOL regulations are clear that in assessing penalties for child labor violations the WHD "*shall take into consideration the size of the business and the gravity of the violation*." 29 U.S.C.A. § 216 (e); 29 C.F.R. § 579.5 (a) (emphasis added.) The implementing regulations further state that in considering the size of the business the following factors shall be taken into account: number of employees, dollar volume of sales or business done, amount of capital investment and financial resources and such other information that may be available relative to the size of the business. 29 C.F.R. § 579.5 (b).

The regulation also requires the WHD to consider information related to gravity including history of past violations, any evidence of willfulness or failure to take reasonable precautions, the number of minors, the age of the minors, records of required proof of age, the occupations in which the minors were employed, the exposure of the minors to hazards, resultant injuries, the duration of the illegal employment, and, as appropriate, the hours when it occurred. 29 C.F.R. § 579.5(c). The regulations also require, where appropriate, that credible assurance of future compliance and certain other matters be determined. 29 C.F.R. § 579.6 (d). Chrislin argues that the ALJ failed to consider any of the factors in 29 C.F.R. § 579.5.

Gravity considerations

The ALJ found that the WHD considered gravity and related information including: willfulness, indifference to and heedless exposure, and serious injuries. D. and O. at 8. The ALJ notes and we agree that Chrislin was aware of the child labor requirements. D. and O. at 7. Christensen permitted Cutrona to return to work on the meat slicer after suffering her serious injury, and many of the hazardous occupation violations occurred when he was at the store. D. and O. at 8-9.

Chrislin challenges the ALJ's finding that Cutrona's injury was "serious." The record supports the ALJ's conclusion. The ALJ states that the record is clear – that the cut required nine stitches and that Cutrona still experiences numbness in the thumb. D. and O. at 8, n.14. Although the payroll records and the work schedule establish that Cutrona was off work for less than five days (contrary to Cutrona's testimony that she was off work for longer and that the work schedule was not always accurate), Cutrona's testimony that she continued to experience numbness along the laceration as of the time of the hearing (more than two years after the injury) indicates that there was permanent damage.

WHD Form 266 defines serious injury as one causing permanent damage or five days or more off work. There is support in the record for the WHD's and the ALJ's determination that the injury is serious. We affirm this determination.

Based on the serious injury suffered by Cutrona, WHD's Form 266 requires an assessed penalty for Cutrona of $8500 multiplied by 1.5 (the willfulness factor) for a total of $10,000 (due to the individual penalty cap of $10,000). If Cutrona had not been seriously injured the assessment under the Form 266 would have been $1200 multiplied by the 1.5 factor for a total of $1800. The WHD investigator testified at the hearing that no consideration is given to the degree of seriousness of the injury. All serious injuries are given the identical penalty, $8500, and then multiplied by a gravity factor of 1.5 or 2 depending on the willfulness, past history of violations and likelihood of future compliance. The Supervisor or the ALJ has the authority to adjust the amount of the penalty based on seriousness of the injury but in this case they chose not to adjust.[2]

We find the injury to Cutrona's thumb was borderline and thus was on the lower end of the scale. In *Elderkin* slip op. at 1, 2000 WL 960261, *1, for example, a minor suffered the loss of his arm, a life threatening and life altering injury. A cut on the finger and life threatening and life altering loss of an arm are not even close to similar in severity. We conclude that the penalty should have been above $1200 but far less than the $8500 assessed. We assess a penalty of $3000 multiplied by the 1.5 gravity factor for a total penalty of $4500 for the hazardous occupation violation resulting in a serious injury to a minor.

For the same reason we also adjust the penalty assessed those minors exposed to the same hazard. We reduce each of their penalties to $2,500 multiplied by a gravity factor of 1.5 for a total penalty of $3750 each. The total for these individuals is $15,400.

Small Business Reduction

The child labor provisions of the FLSA and implementing regulations require the WHD to consider the size of the business in assessing penalties for violations of the Act. The evidence establishes that the "Big Wally's" sandwich shops constituted a small business. During the early timeframe of the WHD investigation, in late 1996 and early 1997 Chrislin owned two sandwich shops (in Parlin and Matawan, New Jersey) with a gross income in 1996 of about $550,000. Exhibit P-3. Chrislin sold the Matawan store in February, 1997 and at the time of the investigation in August 1997, Chrislin owned only one store, in Parlin, New Jersey Chrislin, Inc. reported a gross income of under $300,000 in 1997. Exhibit D-9. Big Wally's had 16 employees at the beginning of 1997 but at the time of the investigation had 7 employees. Exhibit P-2. WHD Form 266 defines a small business as a business with gross revenues under $800,000 and less than 100 employees. According to WHD's own definition Chrislin, Inc. is a *very small business.*

WHD initially contended that no reduction in the penalty for size of business was necessary because the Form WH-266 instructions make no adjustment for business size when a serious injury occurs. It cited the ALJ's statement in his D. and O. ("Nothing 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 in light of the circumstances of this case." D. and O. at 9) as agreeing with this approach. In its Supplemental Brief, WHD contends that the ALJ considered size of business and was correct to make no adjustment in the penalty based on business size because he found Chrislin's violation was willful and there was a serious injury.

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[2] The regulations do not speak of "whether there was an injury," or "whether there was a serious injury." Instead, they refer to "any resultant injury." Therefore, the specific injury is to be considered.

There is little if any evidence that either WHD or the ALJ weighed the small size of Chrislin's business against the gravity of the violations, other than mechanically applying the instructions for completing the WH-266. The only references in the record to consideration of the size of the business are: the directions on the WH-266 form and in the instructions to disregard size of business when there is a serious injury; the ALJ's passing reference to the size of the business where he enumerated all the factors required by statute and regulation to be considered, D. and O. at 7; and the ALJ's unexplained conclusion that "Respondents alleged inability to pay the fines cannot serve to reduce the penalties due in light of the circumstances of this case." *Id.* at 9. Because the statute mandates that size of the business be considered in determining the penalty, this factor cannot be treated so lightly.

WHD argues:

> The *Thirsty's* holding is that the use of a standardized method of penalty assessment, utilizing a penalty "grid' system combined with a review within the assessing agency and by the ALJ is in accordance with the statute and regulations which set the standards for child labor penalties. The instant case, without doubt, is controlled by *Thirsty's* in the same context of child labor penalties.
>
> *Thirsty's* establishes that the Form WH-266 is an "appropriate tool" to be used by the investigator to calculate a recommended assessment, in that the Form comports with the intent of the FLSA and the applicable regulations. The Board held that "although the [WH-266] penalty schedule did not reference each criterion of the regulatory guidelines, nevertheless it is a reasonable interpretation of those guidelines and within the broad authority granted as an agency charged with implementing those regulations." 1997 WL 453588, *2. Furthermore, as the Board observed, "a presiding administrative law judge has the authority to review the case and duly consider all the factors delineated by the pertinent regulations. An ALJ's scope of authority to change the Administrator's assessments is untrammeled, and specifically includes determination of the appropriateness of the assessed penalty." *Id*. at *4.

Statement of the Administrator in Opposition to Petition for Review at 20.

However, *Thirsty's* approved use of the WH-266 form to *recommend* penalties, subject to review. It did not absolve reviewing officials or the ALJ of the responsibility to ensure that the statutory and regulatory requirements are met. *See Adminstrator v. Thirsty's*, *Inc.*, ARB Case No. 96-143, ALJ Case No. 91-CLA-65 (ARB May 10, 1997, slip op. at 51997 WL 453588, *4 ("The grid and matrix schedule incorporated in form WH-266 is an appropriate tool … to recommend penalties …. As noted above, the recommended determination is subject to approval by a reviewing official." Also, "An ALJ's scope of authority to change the Administrator's decision…specifically includes a determination of the appropriateness of the assessed penalty." *Id.* The ARB held *Elderkin* ("once a CMP assessment has been appealed, the ALJ is not required to use the Form WH-266 schedule to determine a civil money penalty[,] [rather] the proper inquiry for an ALJ when reviewing a child labor 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 Form WH-266 schedule.") slip op. at 2000 WL 960261, *9. The ARB may also review and modify the

penalty "taking into account the size of the business and the gravity of the violations." *Id.* at 14. In other words, the WH-266 is a starting point of a process in which the statutory and regulatory factors should be weighed at each step.[3]

WHD's brief also suggests that it did not consider the size of the business here because its investigator felt the burden was on Chrislin to request a reduction in the penalty or to seek an accommodation, or because WHD did not have the financial information available to determine the effect of the penalty on Chrislin. Supplemental Brief of the Acting Administrator at 10-12. However, the FLSA and the implementing regulations require the WHD to consider the size of the business as well as the gravity of the violation. It was incumbent upon WHD to ask for the data needed to evaluate the size of the business, particularly when dealing with an obviously small business. Similarly, it was incumbent upon the ALJ to evaluate the evidence relating to Chrislin as a small business in determining an appropriate penalty in this case.

We will now proceed to do what the WHD and the ALJ failed to do: consider the evidence relevant to the size of Chrislin's business. Under the regulations on assessing penalties for child labor violations, we are enjoined to consider the appropriateness of the penalty to the size of the business taking into account the following factors – the number of employees, 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. 29 C.F.R. § 579.5(b).

As noted above, Chrislin had 16 employees at the outset of the period relevant to the investigation, and 7 at the close of that period. Its gross income in 1996 was $556,000 (when Chrislin owned two stores) Exhibit P-3, which was reduced to $ 299,000 in calendar year 1997.

The Parlin store is Chrislin's sole source of income. T. 200. It was purchased for $200,000. The funds for purchase were obtained by remortgaging the Christensens' home, use of their savings, a business loan, and paper held by the store's previous owner. The paper held by the seller has been paid off; however, the Christensens have not been repaid for the loans they made to the business and, as of the time of the ALJ hearing, $35,000 remained due on the business loan. T 237. Chrislin generally has no more than $4,000-$5,000 on hand in its checking account. T. 237-238. The 1996 and 1997 personal net taxable income for Christensen and his wife was less than $10,000 Exhibit P-11.

The evidence in the record thus establishes that Chrislin is a small business with limited financial resources upon which it may draw. Similarly, the evidence does not indicate that Christensen, a principal in Chrislin, has substantial resources. Based on the financial record presented, it is clear that a penalty of the amount which would apply based solely on the gravity of the violations here, without regard to the size of Chrislin's business, would cause Chrislin very significant financial difficulty. Under 29 C.F.R. 279.5, we must consider the appropriateness of the penalty relative to the size of Chrislin's business. When business size is considered using the instructions for Form WH-266, a 30 percent in penalty is applied. This would make the penalty here $16,143.75.

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[3] We note that the instructions for preparing the WH-266, Wage and Hour Field Operations Handbook, Chapter 54, Child Labor Civil Money Penalty Report," (CMP Report) pp. 5-15, do address size of the business in the instructions for completing Part E of the form for Reduction of penalties. *See, e.g.,* §§ (a) (2) and (h). However, the instructions themselves contemplate review of the CMPs calculated on the form WH-266 and, for the reasons discussed in the text, those assessments are subject to further review by the ALJ and the Board.

WHD contend, however, that the gravity of the violations in this case warrants assessment of the penalty without regard to the small size of Chrislin's business and the devastating effect which a penalty so derived would have. It cites the Board's decision in *Elderkin* as authority for this proposition.

In *Elderkin*, the Board weighed the gravity of the violations against the small size of the business, as required by the statute and regulations. It found that the violations were of very high gravity, including the extremely severe nature of the injury to one minor, severing of his arm by a piece of farm machinery that had no safety guard. The Board concluded that "[a]lthough the Elderkin Farm is small, and the evidence indicates serious financial difficulties, those facts, when weighed (as they must be) against the gravity of the violations, support a civil money penalty of $71,100 [as originally assessed by WHD]." *Elderkin,* slip op. at 15.

Elderkin was a case of extremely serious violations of the Act warranting the unusual measure of not specifically reducing the penalty amount based on business size because to do so would have brought the penalty amount below the appropriate level (*i.e.* the level appropriate considering *both* gravity of the violations and business size). That is not this case. The injury in *Elderkin* was a twelve-year old's life-threatening loss of an arm. The injury here was a seventeen year-old's much less serious cut on the thumb. The minors in *Elderkin* began working with inherently hazardous machinery when they were as young as 7, 10, and 11 years old. The minors using or cleaning the slicer in this case were 16 and 17 years of age. The employer in *Elderkin* misled the investigator and concealed evidence. There is no indication here that Christensen has been anything other than fully cooperative. There were 41 violations of the Act in *Elderkin*, a significantly higher number than in the instant case.

Unlike the employer in *Elderkin*, who persisted in violating the law by hiring a twelve year old to do hazardous work even after the investigator advised him of the requirements of the child labor provisions, Chrislin has made significant changes in its operation to ensure compliance. Since the Department of Labor's investigation either Christensen or his wife has been scheduled to work each shift. Student interns are no longer employed, and Christensen no longer hires anyone under the age of seventeen, and only then if the employee will shortly be eighteen. T. 402, 406. Additionally, Chrislin had no record of violating the Act prior to this investigation. Moreover, although we have held that Chrislin acted "willfully," in large measure because we have deferred to the ALJ's credibility findings, we note that there was conflicting evidence as to Christensen's instructions to his employees[4] and that Christensen contends that he authorized Martinez and Cutrona to use the slicer because he mistakenly believed that they were participating in a state-authorized training program which made their operation of the slicer lawful (*i.e.* it was not his intent to violate the law).

Under the circumstances of this case, we determine that the penalty arrived at by considering the gravity of the specific violations of the Act here and applying a 30 percent reduction based on the small size of Chrislin's business is appropriate.

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[4] There was testimony from several employees, who were minors during the period under investigation, that Christensen instructed the minor employees, other than Cutrona and Martinez, not to use the slicer and that he did not know that minors other than Cutrona and Martinez were using the machine (*e.g.*, T. 322, 356, 377), as well as testimony that he advised employees that they could operate the slicer if they were 16 (T. 262-3); the investigator testified that an unidentified minor employee told him that Christensen said to cease use of the slicer if an official might be present (T. 87-8, 99).

Accordingly, the penalties have been re-calculated and are set forth on the attached chart; Chrislin is assessed a Civil Money Penalty of $16,143.75.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge