In the Matter of:

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

PLAINTIFF,

v.

FISHERMAN'S FLEET, INC. d/b/a
MAPLEWOOD FISH MARKET, and
MICHAEL GRAFFEO,

RESPONDENTS.

ARB CASE NO. 03-025

ALJ CASE NO. 01-CLA-034

DATE: June 30, 2004

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

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

***For the Respondants*:**
Keith L. Miller, Esq., ***Boston, Massachusetts.***

FINAL DECISION AND ORDER

Pending before this Board is the Wage and Hour Administrator's (Administrator) petition for review of an Administrative Law Judge's Recommended Decision and Order (R. D. & O.) finding that Fisherman's Fleet (FFI or Company) violated the child labor provisions of the Fair Labor Standards Act (FLSA), as amended, 29 U.S.C.A. §§ 212(c) and 216(e) (West 1998), and the implementing regulations at 29 C.F.R. Parts 570, 579 and 580 (2003), and reducing by twenty-five per cent the civil money penalty imposed on the Company. We affirm the ALJ's finding that FFI violated the child labor provisions of the FLSA and reverse the twenty-five per cent reduction in penalties.

BACKGROUND

Fisherman's Fleet was, at all relevant times, a fish processing company which sold to both the retail and wholesale markets. Tr. at 34.[1] Michael and Andy Graffeo owned and ran the Company founded by their father Larry Graffeo, who had retired. *Id.* at 57, 60. The Company's plant, which was open six days a week, was located in Malden, Massachusetts. *Id*. At the front of the facility was a retail fish store behind which were offices. *Id*. At the back of the facility were the processing plant and the parking lot where the Company's four trucks were loaded, unloaded, and parked overnight. Tr. at 36-39, 42. To process the fish, FFI used specialized equipment such as deboning, skinning, and scaling machines. *Id.*

FFI employed 10 to 12 workers full time as processors and drivers and a number of high school students part-time to clean the plant. Tr. at 41, 90-91. On October 20, 2000, Joseph Marzullo, one of the Company's 16-year-old cleaners, died from injuries sustained when a forklift he was operating overturned and pinned him beneath it. R. D. & O. at 2.

After the local authorities notified it of the minor's death, the Wage and Hour Division of the U. S. Department of Labor conducted an investigation of the Company's employment practices. *Id*. As a result of its investigation, which included meetings with the Company principals and their attorney, the Administrator notified FFI that it was assessing $177,375 against it in civil money penalties for child labor violations involving 26 minors employed during the investigative period, October 1998 through October 2000.[2] *Id*.; Resp. Exh. 10. Specifically, the Administrator alleged that FFI had violated the child labor provisions by: (1) failing to maintain accurate birth date records; (2) employing minors for excessive hours and at improper times of the day; and (3) employing minors in hazardous occupations.

FFI filed exceptions to the penalty assessment and requested an administrative hearing. R. D. & O. at 2. At the hearing, which was held in Boston on October 10, 11, and 12, 2001, the Administrator withdrew both the allegations and the corresponding penalties for several of the minor employees. Tr. at 18-19. The withdrawn penalties were $31,900 and reduced the total civil money penalties to $145,475.

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[1] Documentary evidence will be referred to herein as "Sec. Exh." for an exhibit offered by the Secretary, and "Resp. Exh." for an exhibit offered by FFI. References to the hearing transcript are designated as "Tr."

[2] During investigations under the child labor provisions of the FLSA, the Administrator audits a company's employment practices for the two-year period immediately preceding the first visit of the investigator. Tr. 598-599.

On October 24, 2002, the ALJ issued a recommended decision affirming the violations underlying all but $12,900 of the assessed penalties.[3] R. D. & O. at 14. With this reduction, the total penalty assessment amounted to $132,575. *Id*. at 16-20. After arriving at this final penalty figure, the ALJ analyzed the appropriateness of the total assessment. *Id*. He ultimately concluded that the penalty should be reduced further because the penalty was "somewhat disproportionate in relation to the small size of the [Company's] business" and because there was no evidence of prior child labor violations. *Id*. at 20. Accordingly, the ALJ reduced the civil money penalty by $33,143.75 or twenty-five per cent and assessed FFI a total of $99,431.25. *Id*. at 21.

On November 22, 2002, the Administrator appealed the ALJ's decision to this Board. Although it replied to the Administrator's petition, FFI did not appeal the ALJ's findings.

ISSUES PRESENTED

We consider (1) whether the Company's arguments that this case is moot and that use of the penalty multiplier is inappropriate are properly before this Board; and (2) whether the ALJ erred in reducing by twenty-five per cent the civil money penalty assessed against FFI.

JURISDICTION AND STANDARD OF REVIEW

The Secretary has delegated to the Administrative Review Board the authority and responsibility to act for her in civil money penalty cases arising under the child labor provisions of the FLSA. Secretary's Order No. 1-2002, 67 Fed. Reg. 64272 (Oct. 17, 2002); *see* 29 U.S.C.A. § 216(e). The Board has jurisdiction, inter alia, to hear and decide appeals taken from the ALJ's decisions and orders. 29 C.F.R. § 580.13.

Section 16(e) requires that administrative hearings in cases involving civil money penalties for violations of the child labor provisions be conducted in accordance with Section 554 of the Administrative Procedure Act (APA). 5 U.S.C.A. § 554 (West 1996). *See* 29 U.S.C.A. § 216(e). Section 557(b) of the APA states, in pertinent part, that "[o]n appeal from or review of the initial decision, the agency has all the powers which it

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[3] The ALJ reduced the penalty because he found that the Admnistrator's evidence was insufficient to prove all of its allegations. Specifically, the ALJ found that of the 14 minors alleged to have worked excessive hours, the evidence was adequate with regard to only two of them, and that of the 19 minors alleged to have driven the forklift, the evidence was adequate with regard to 18 of them. R. D. & O. at 14.

would have in making the initial decision . . . ." 5 U.S.C.A. § 557(b). Thus, the Board has the authority to review the ALJ's decision under a de novo standard. 5 U.S.C.A. §§ 554, 557; *see Administrator v. Sizzler Family Steakhouse*, 90-CLA-35, slip op. at 4 (Sec'y 1995).

DISCUSSION

Section 12 of the FLSA provides that covered employers may not employ children under "oppressive child labor" conditions. 29 U.S.C.A. § 212(c). The Act defines "oppressive child labor" as including, for minors under the age of 18, "any occupation which the Secretary of Labor shall find and by order declare to be particularly hazardous" to such children or "detrimental to their health or well-being." The Secretary has promulgated Hazardous Occupation Orders that prohibit or strictly regulate certain activities by employed minors between the ages of 16 and 18. *See* 29 C.F.R. Part 570, Subpart E. The applicable regulation in this case is Hazardous Occupation Order No. 7, 29 C.F.R. § 570.58, which prohibits the use of forklift trucks. In addition, the Secretary has also prohibited specifically the employment of minors under the age of 16 in a workplace where goods are being processed. See 29 C.F.R. § 570.33(a). The ALJ affirmed the Administrator's findings that FFI had violated these and other portions of the child labor provisions of the FLSA, and therefore, the issue on appeal to this Board involves only the ALJ's reduction in the amount of the civil money penalty assessed against the Company.

I. FFI's arguments that this case is moot and that use of the penalty multiplier is inappropriate are not properly before this Board.

FFI failed to appeal the ALJ's decision to this Board, but it nonetheless requests that the Board address two issues. First, it argues that the Administrator's assessment of civil money penalties is moot because the Administrator failed to "commence an action to enforce the penalties" within two years of October 20, 2000, the date of Joseph Marzullo's death. Resp. Reply Brief at 7-8. Second, the Company argues that the ALJ erred by approving a broad definition of the term "similarly employed." The Company is mistaken.

First, FFI failed to petition this Board for review of the ALJ's decision and instead raised the two issues in its brief in reply to the Administrator's petition for review. The ARB generally does not consider issues raised for the first time on appeal. *Bauer v. United States Enrichment Corp.*, ARB No. 01-056, ALJ No. 2001-ERA-9, slip op. at n.3 (ARB May 30, 2003); *Thomas and Sons Building Contractors, Inc.*, ARB No. 98-164, ALJ No. 1996-DBA-33 (ARB Oct. 19, 1999). In the instant case, FFI has clearly failed to file a cross-petition in which to raise these two arguments. Therefore, we decline to consider these newly raised arguments.

Even if these arguments were properly presented in a petition for review, they would still fail. The Portal-to-Portal Act, which the Company argues rules this action, is applicable "to enforce any cause of action for *unpaid minimum wages, unpaid overtime compensation, or liquidated damages*, under the Fair Labor Standards Act." (Emphasis added). 29 U.S.C.A. § 255(a) (West 1998). As the instant action is not one for unpaid minimum wages, unpaid overtime compensation or liquidated damages, the Portal-to-Portal Act by its own language does not apply. *See generally* 29 U.S.C.A. § 216(b). Furthermore, the Board has consistently held that the limitations in the Portal-to-Portal Act are not applicable to administrative proceedings such as this. *Cody-Zeigler v. Administrator*, ARB Case Nos. 01-014, 01-015, ALJ No. 97-DBA-17, slip op. at 32 (ARB Dec. 19, 2003). *See also Unexcelled Chemical Corp. v. United States*, 345 U.S. 59, 64 (1953).

Second, FFI objects to the ALJ's application of the "similarly employed" element in the penalty calculation. Specifically, FFI argues that the ALJ erred by including as "similarly employed" all minors employed during the investigation period. Without citation to authority, the Company insists that only the two minors employed on October 20, 2000, the day Mr. Marzullo died in the forklift accident, are "similarly employed." Resp. Reply Br. at 12. FFI is in error.

When a child is seriously injured or killed while working in violation of child labor standards, the Administrator increases by a factor of 5.0 the base penalty for every other child who is "similarly employed." R. D. & O. at 16. This enhancement is informally referred to as "bundling." Adm. Reply Br. at n.4; Tr. at 802. To be "similarly employed," the Administrator's penalty schedule does not require that a minor must actually be employed at the time that the serious injury or death occurs; rather, she considers any minor exposed to the same hazard at any time during the investigation period[4] to be "similarly employed." R. D. & O. at 16. This practice is consistent with the child labor provisions of the FLSA and with its implementing regulations. *See Administrator v. Chrislin, Inc. d/b/a Big Wally's*, ARB No. 00-002, ALJ No. 99-CLA-5, slip op. at 5-6 (ARB Nov. 27, 2002) ("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.").

Consistent with our case precedent, the ALJ correctly found that all minors who drove the forklift truck during the two-year investigation period were exposed to the same hazard as Mr. Marzullo and correctly enhanced the assessed penalty for each such minor. R. D. & O. at 16.

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[4] *See* Section 54 WH-266-14, Vol. III, Wage & Hour Field Operations Handbook 7/9/94.

II. The ALJ erred in reducing by twenty-five per cent the civil money penalty assessed against FFI.

In a timely filed petition for appeal, the Administrator argued that the facts of this case warrant the maximum penalty and that the ALJ erred in reducing the penalty amount.

Under Section 16(e) of the FLSA, an employer who violates the child labor provisions shall be subject to civil money penalties for each minor employed in violation of the statute or the regulations. 29 U.S.C.A. § 216(e). The maximum penalty for each employee is $10,000. *Id*. In determining the amount of the civil money penalty, "the appropriateness of [the] penalty to the size of the business of the person charged and the gravity of the violation shall be considered." *Id*. The regulation lists several factors to be considered in weighing the "appropriateness" of the penalty in relation to both the size of the business and the gravity of the violation:

> With regard to the size of the business, one should take into account the number of persons employed, the dollar volume of sales or business done, the 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).

> With regard to the gravity of the violation, one should take into account, any history of prior violations; any evidence of willfulness or failure to take reasonable precautions to avoid violations; the number of minors illegally employed; the age of minors so employed and records of required proof of age; the occupations in which the minors were so employed; exposure of such minors to hazards and any resultant injury to such minors; the duration of such illegal employment; and, as appropriate, the hours of the day and whether such employment was during or outside school hours.

29 C.F.R. § 579.5(c). Using these factors, we analyze the "appropriateness" of the civil money penalty.

Size of the Business - FFI was a closely held business with approximately 10 to 12 regular employees plus a number of part-time high school students who worked as

cleaners.[5] Tr. at 91, Resp. Exh. 9 at 3. For the years 1998, 1999, and 2000, the Company's gross sales were over $3.5 million each year on which the Graffeo's claimed a profit of $100,000 annually. Tr. at 36, 92. Michael Graffeo, the Company president since 1991, testified that FFI was mid-sized, "not one of the big boys, but . . . no longer a mom-and-pop." Tr. at 56, 93. FFI's facility consisted of a retail shop, a processing plant, offices and a parking lot. In addition, the Company owned four trucks plus a forklift as well as processing equipment.

Based on all these facts, we conclude that FFI was not a small business. Given its yearly multimillion dollar sales and its ample facilities and equipment, FFI is clearly a medium-sized company. Because workforce size is only one of the factors to be considered, the relatively small FFI workforce does not compel a different conclusion. The Field Operations Handbook instructs Wage and Hour investigators not to reduce the assessed penalty for a company "if the employer's gross annual dollar volume of sales . . . exceeds $800,000 . . . even if the employer has fewer than 100 employees. Sec. Exh. 3 at 3; Section 54:WHH-266-15, Wage and Hour Division Field Operations Handbook, Vol. III 7/11/94. Reducing the money penalty because of the size of FFI's business is not appropriate.

Gravity of Violations - FFI's violations of the child labor provisions resulted in the most severe consequence, the death of a 16-year-old boy. Given this fact and the result of our analysis review of the other factors, we find that the penalty assessed against FFI should not be reduced because its violations of the law were truly grave.

FFI did not have a history of prior child labor violations at the time of the minor's death; however, this appears to be the result primarily of its having not been audited before. The Company has not argued that the employment of students under 18 was a new practice; in fact, FFI has apparently been employing minors as cleaners since Michael Graffeo became FFI's president, a period of some ten years at the time of the investigation. As the regulations strictly prohibit the employment of a minor under 16 in any "processing" plant such as FFI's, the Company violated the child labor provisions every time it hired 14 and 15 year olds to clean its plant. 29 C.F.R. §§ 570.32, 570.33.

The number of minors illegally employed and the ages at the time of employment are factors that accentuate the gravity of the Company's violation. The Administrator found that 31 students were hired over the period 1998-2000 so 31 minors were exposed to the hazards of working in a processing plant and also to the obvious hazards associated with driving a forklift truck. In addition, the students FFI hired were very young. Eight of the 26 youngsters were only 14 years old when they were hired and seven were only 15. Sec. Exh. 2.

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[5] Over the two-year investigation period, the Administrator determined that FFI had hired a total of 31 minors. R. D. & O. at 19.

By making the use of a forklift truck part of the cleaner job, FFI willfully and heedlessly exposed its underage employees daily to obvious and lethal hazards. R. D. & O. at pp. 3-4. One of the jobs of the cleaners at FFI was to remove the trash at the end of the workday. This required the cleaners to place the trash on pallets, wrap the pallets with plastic, and then place the pallets onto the back of one of FFI's delivery trucks. Tr. at 160. Of course, the only way the pallets could be lifted onto the truck was by using the 5,500 pound forklift. *Id*. Joe Marzullo lost his life while attempting to lift a pallet of trash on to a truck.

The Company failed to take reasonable precautions to protect the minors. In addition to permitting the youngsters to use the forklift, FFI failed to take the precaution of training them in its safe use. The Company stipulated that none of FFI's employees were given formal safety training on the use of the forklift. Tr. at 184-185. Typically, the children were shown how to use the machine by another child. Tr. at 162-165. Furthermore, although the managers observed minors driving the forklift truck, none of them bothered to instruct, let alone require, the children to use the forklift seatbelt. Tr. at 104-106, 970-971.

Based on our analysis of the relevant factors regarding the size of FFI and the gravity of the violations, we conclude that FFI is not a small company and that the gravity of the violations is such that no reduction in the penalty is appropriate.

ALJ's Analysis - The ALJ's analysis of the appropriateness of the penalty involves many of the same facts as those marshaled by the Board. However, based on these facts the ALJ determined that FFI was a "small" company and that the $132,575 penalty was "somewhat disproportionate" in relation to the size of the company. R. D. & O. at 20. In addition, the ALJ determined that, because there were no prior child labor violations, willful violations, employment of grossly underage children or employment during school hours, it would be appropriate to reduce the penalty. Characterizing the penalty of $132,575 as "one of the largest penalties ever assessed in a child labor case, "[6] the ALJ reduced it by 25 per cent. We believe that this was error.

The essence of FFI's defense is that its officials did not know there were laws regarding employment of minors. Tr. at 61. This is difficult to understand given that the Company clearly was aware that underage employees had to get "working papers" before they could start work.[7] *Id*. Mr. Graffeo testified in detail about his requiring the students to get the necessary certifications. Tr. at 64-65.

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[6] To the extent that the ALJ was influenced to reduce the penalty because it may have been the largest, we believe he erred. The regulations do not include this as a factor to be considered when determining the appropriateness of a penalty. See 29 C.F.R. § 579.5.

[7] Mr. Graffeo testified that he did not know where he got the information that minors needed working papers. Tr. at 65.

In addition, the Company officials knew enough about federal labor laws to realize that paying an employee for overtime work at the straight time rate was wrong. If they did not know it was illegal, why would the Company have made the payments in cash and off the books? Resp. Exh. 9 at 5. These "under the table" payments involved not only the Company's full-time employees but also included some of the underage workers. *Id*. at 2.

Michael Graffeo ignorance of the law often ran to the Company's benefit. FFI's practice of routinely destroying the workers' time cards violated the requirement that such records be kept for two years. 29 U.S.C.A. § 211(e); 29 C.F.R. § 516.6. Mr. Graffeo testified that he destroyed the employee's time cards as soon as he had called the payroll processing firm with the information on each individual's work hours for the previous two weeks. Resp. Exh. 9 at 2. By doing this, he made it impossible for an employee to verify the correctness of his paycheck because, without the time cards, the employee would be unable to prove that he worked more hours than he was being paid for.

Furthermore, the behavior of Michael Graffeo at the time of the first visit by the investigator did little to boost our view of his trustworthiness. Initially, Michael Graffeo told the investigator that Sean Donovan, who was the co-worker and best friend of Joseph Marzullo and who was at the scene when the accident occurred, told Graffeo that, on the day of the accident, "Joe was speeding and burning rubber on the forklift in the alley." Resp. Exh. 9 at 3. On the stand, Sean Donovan denied both that Joe was fooling around on the forklift on the day of the accident, and that he had ever told Michael Graffeo that Joe had been. Tr. at 192.

At this same interview, Michael Graffeo also told the investigator that he was "not aware of any minor operating the forklift" Resp. Exh. 9 at 3. At the hearing, however, Mr. Graffeo reversed his story and testified about the cleaner's daily use of the forklift to put the trash pallet on the trucks and the "rare" occasion when these minors used the forklift to load or unload buckets of fish. Tr. at 73-75.

Finally, Michael Graffeo failed to tell the investigator the complete truth. When, at the initial visit by the investigator, he was asked how many underage employees FFI had hired during the two-year investigation period, and he answered, "we've only employed five minors in the last two years." Resp. Exh. 9 at 3. In fact, FFI had hired 31 minors during that period. *Id.*

We do not believe that the ALJ gave sufficient attention to the above examples of FFI's behavior to get an accurate picture of the Company. The ALJ found that FFI was not officially charged with concealment, and that Michael Graffeo was "completely cooperative and forthcoming at the hearing." R. D. &. O. at 20. We do not refute these findings but believe that our analysis provides a clearer picture of the Company, and this picture does not tempt us to reduce the penalty. We find that reducing the penalty assessed against FFI is not appropriate and reverse the ALJ's twenty-five per cent penalty

reduction. Accordingly, we reinstate the assessment of a civil money penalty against FFI for its child labor provision violations in the amount of $132,575.

CONCLUSION

For the foregoing reasons, we **REVERSE** the ALJ's twenty-five per cent reduction of the civil money penalty. Fisherman's Fleet d/b/a Maplewood Fish Market is **ORDERED** to pay a civil money penalty of $132,575.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge