



In the Matter of:

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

ARB CASE NO. 13-027

ALJ CASE NO. 2012-CLA-008

PLAINTIFF,

DATE: May 19, 2014

v.

MOONWALKS FOR FUN, INC. d/b/a
MOONWALKS FOR FUN;
MOONWALKS FOR FUN, INC.
d/b/a PURE ENTERTAINMENT;
DUANE ZOGLEMAN; JESSEE ZOGLEMAN,
Individually,

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Plaintiff:

M. Patricia Smith, Esq; Jennifer S. Brand, Esq; William C. Lesser, Esq; Paul L. Frieden, Esq.; Andrea Lindemann Gilliam, Esq; *U.S. Department of Labor*, Washington, District of Columbia

For the Respondents:

Duane L. Zogleman, *pro se*, Wichita, Kansas

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge*; Lisa Wilson Edwards, *Administrative Appeals Judge*

FINAL DECISION AND ORDER

This case arises under the Fair Labor Standards Act of 1938 (FLSA), as amended, 29 U.S.C.A. § 201, *et seq.* (West 1998 & Supp. 2013), and its implementing regulations, 29 C.F.R. Parts 579, 580 (2013). On November 19, 2012, the Administrative Law Judge (ALJ) entered a Decision and Order (D. & O.) ordering Respondent Moonwalks For Fun et al. (Respondents or Company) to pay a civil money penalty in the amount of \$14,645.00, for violating the FLSA's child labor provisions. The Company petitions the Administrative Review Board (ARB) for review. We amend the ALJ's Decision and Order to reflect the correct civil money penalty amount of \$7,232.00, and affirm the order on default.

BACKGROUND

A. Statutory and Regulatory Framework

This Wage and Hour Division (WHD) investigation was brought under the FLSA's child labor provisions (29 U.S.C.A. § 212), the civil money penalty provisions (29 U.S.C.A. § 216(e)), and the record-keeping provisions (29 U.S.C.A. § 211(c)), and implementing regulations, 29 C.F.R. §§ 575-580, 516.2(a)(3). The Department of Labor prohibits and strictly regulates hazardous occupations by minors aged 16-18, including the operation of power-driven industrial trucks and motor-vehicle driver and outside helper on any public road or highway. 29 C.F.R. Part 570, Subpart E. The FLSA requires employers to maintain records of dates of births of minors working for them (29 U.S.C.A. § 211(c) and 29 C.F.R. § 516.2(a)(3)), and children ages 14-15 are restricted in the hours and times they are permitted to work (29 C.F.R. § 570.35).

B. Facts and proceedings below

Moonwalks For Fun, a company owned by Duane Zogleman and managed by Jesse Zogleman, transports toys and bounce-houses to private residences for parties and celebrations. The WHD began investigating the Company in May 2009 after receiving a complaint from a mother that her 17-year old son was driving a vehicle to local residences to set up inflatable toys and bounce-houses. The WHD investigation disclosed various FLSA violations, including minors operating fork-lifts and driving Penske trucks with a hydraulic lift gate. The WHD informed the Company about child labor laws and provided relevant FLSA publications in April 2011. One month later, the WHD found a minor driving a truck with a power lift-gauge, and the Company gave the WHD investigator misleading information about the driver's age.

On November 22, 2011, following a two-year investigation (May 2009 to May 2011), the WHD assessed a civil money penalty against the Company in the amount of \$14,645.00. The Company sought an exception to the assessed penalty and requested a hearing on December 1, 2011. 29 C.F.R. § 580.6. The WHD, through the Office of the Solicitor, issued an Order of Reference on June 11, 2012, referring the matter to the Chief ALJ for a determination in an

administrative proceeding. 29 C.F.R. § 580.10. The Order of Reference the WHD filed reflected a lower penalty amount of \$7,232.00. Order of Reference at 1.¹

The case was docketed on June 20, 2012. On June 25, 2012, the Chief ALJ issued a Notice of Docketing ordering the parties to submit, exchange, and file Prehearing Exchange information within 30 days. The WHD filed a Prehearing Exchange of documents on July 25, 2012, and certified as having served the Company, Duane Zogelman, and Jesse Zogelman.

On August 24, 2012, the WHD moved the ALJ to issue an Order to Show Cause under 29 C.F.R. § 18.6 whether the case should be dismissed for Respondents' failure to respond to the Notice of Docketing ordering parties to exchange documents. The ALJ granted the motion, and on September 14, 2012, issued an Order to Show Cause for Respondents to respond within 30 days "why a default judgment should not be entered in this matter." Order to Show Cause at 2. The ALJ's Order stated:

Failure to comply with this Order may result in an entry of a default decision against Respondent. Entry of a default decision may result in an assessment of a civil money penalty in the amount of \$14,645.00.

Id. at 2, citing 29 C.F.R. § 18.6(d)(2)(v).

The record reflects that on October 8, and again on October 15, 2012, Duane Zogleman faxed the attorney for the WHD the following note:

Kim – I have tried to make contact with you and thank you for calling me back but still have not been able to visit with you. I would like to make you an offer to close out this file. We have already paid all funds due to employees and most are now away at school. We have lost over \$50,000.00 last year and this year is going about the same. I can provide documents and hope you will waive the fine as I am sure you can see this would be an extreme hardship.

Thank you . . . Duane Zogleman

On November 19, 2012, the ALJ entered a Decision and Order holding Respondents in default based on their "nonparticipation" in proceedings, and ordered Respondents "to pay a civil money penalty in the amount of \$14,645.00 for violating the child labor provisions of the FLSA." D. & O. at 2.

¹ The Order of Reference the WHD filed assesses a civil penalty amount of "\$7,232,000," but this amount is a typographical error. The correct penalty amount is \$7,232.00. WHD Brief filed with ARB (dated Mar. 7, 2013) at 1, n.n. 1, 4.

JURISDICTION AND STANDARD OF REVIEW

The Secretary has delegated to the Administrative Review Board the authority and responsibility to act in civil money penalty cases arising under the child labor provisions of the FLSA. Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012); *see* 29 U.S.C.A. § 216(e). The Board has jurisdiction, inter alia, to hear and decide appeals taken from an ALJ's decisions and orders. 29 C.F.R. § 580.13. We review the ALJ's entry of a default order for abuse of discretion. *Sisfontes v. Kuchana*, ARB Nos. 07-107, 07-114; ALJ No. 2007-LCA-014, slip op. at 6 (ARB Aug. 31, 2009).

DISCUSSION

Under the Rules of Practice and Procedure for Administrative Hearings, the ALJ has "all powers necessary to the conduct of fair and impartial hearings." 29 C.F.R. § 18.29(a) (2013). The Rules state that where a party

fails to comply with . . . an order . . . the administrative law judge, for the purpose of permitting resolution of the relevant issues and disposition of the proceeding without unnecessary delay despite such failure, may take such action in regard thereto as is just, including but not limited to the following:

. . . (v) Rule that . . . a decision of the proceeding be rendered against the non-complying party

29 C.F.R. § 18.6(d)(2)(v). "[D]ismissing a complaint for failure to comply with an ALJ's order is a very severe penalty to be assessed in only the most extreme cases." *Matthews v. LaBarge, Inc.*, ARB No. 08-038, ALJ No. 2007-SOX-056, slip op. at 3 (ARB Nov. 28, 2008) (internal quotations and citations omitted). Here, the ALJ acted well within his authority to dismiss Respondents' request for hearing for failure to comply with the Notice of Docketing Order and the Order to Show Cause.

First, there is no dispute that Respondents failed to file a Prehearing Exchange document. The ALJ entered the Notice of Docketing Statement on June 25, 2012. The record reflects that on October 8 and 15, 2012, Duane Zogleman faxed the attorney for the WHD to "make an offer to close out this file" (*supra* at 3), but this correspondence is not responsive to the Notice of Docketing Statement and was not filed with the ALJ. While this fax states that Duane Zogleman will "provide documents" and "hope[s] [the WHD attorney] will waive this fine" (*supra* at 3), the correspondence makes no reference to filing Prehearing Exchange documents with the ALJ pursuant to the Notice of Docketing Statement, or responds to the Order to Show. Moreover, there is no other correspondence in the record indicating Respondents' intent to comply with the ALJ's Notice or Order to Show Cause, nor is there correspondence indicating that Respondents did not receive either orders. Indeed, there was no response from Respondents on these pending

Orders until they filed the petition for review in December 2012. This lack of response warrants an order of default. *See Sisfontes*, ARB No. 07-107, 07-114 (ARB affirms an ALJ's default judgment where respondent filed pre-hearing report 77days late and failed to show good cause why such failure should be excused).

Second, Respondents' petition for review (filed December 18, 2012) does not explain the failure to respond to the Notice of Docketing Statement and Order to Show Cause. In the petition, company owner Duane Zogleman stated that payment of a \$7,232.00 fine would be a financial hardship, and proposes to submit 2011 tax returns to demonstrate his financial status. Zogleman's response to the ARB briefing order is a letter dated February 1, 2013. The letter states that after the fine was reduced to \$7,232.00, Zogleman "spoke to [the WHD attorney] and requested an additional reduction in the fine." Zogleman Response at 1.

We recognize that parties such as Moonwalks and owner Duane Zogleman are "appearing pro se in this proceeding and that a certain degree of latitude should be afforded such unrepresented parties." *Butler v. Andarko Petroleum Corp.*, ARB No. 12-041, ALJ No. 2009-SOX-001, slip op. at 3 (ARB June 15, 2012)(citing *Peck v. Safe Air Int'l, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-003, slip op. at 19 (ARB Jan. 30, 2004)). "But ALJs and this Board must be able to impose appropriate sanctions even against *pro se* parties when they fail to comply with the orders and procedures in the administrative process." *Id.*, slip op. at 3. "We have previously affirmed the use of sanctions and entry of judgment against a *pro se* party who failed to comply with an ALJ's discovery orders." *Id.* (citing *Supervan, Inc.*, ARB No. 00-008, ALJ No. 1994-SCA-014, slip op. at 5-8 (ARB Sept. 30, 2002) (Board affirmed ALJ's entry of default judgment pursuant to 29 C.F.R. § 18.6(d)(2)(v) against *pro se* party who failed to comply with discovery requests and orders.)). Given the proceedings in this case, the ALJ here was well within his authority to enter an order of default against Respondents under 29 C.F.R. § 18.6(d)(2)(v) for failing to respond to the Notice of Docketing or the Order to Show Cause.

Finally, while the ALJ was within his authority to enter the default order, the record reflects that the civil money penalty the ALJ ordered was in error. The ALJ's November 19, 2012, Decision and Order assesses a penalty of \$14,645.00. The WHD's June 11, 2012, Order of Reference, issued by the Office of the Solicitor, contained a civil money penalty in the amount of \$7,232.00. The WHD explains (Br. at 1-2 n.1):

[B]ecause the D. & O. contained an error (apparently ministerial in nature) concerning the amount of the civil money penalty, the Administrator requests that Respondents be ordered to pay the proper amount of \$7,232 rather than the \$14,645 ordered by the ALJ.

CONCLUSION

For the foregoing reasons, the civil money penalty required by the ALJ's November 19, 2012, Decision and Order is corrected to require payment by Respondents of \$7,232.00, and the default order is **AFFIRMED**.

SO ORDERED.

LISA WILSON EDWARDS
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge