In the Matter of:

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

PROSECUTING PARTY,

v.

BEST MIRACLE CORP., and THUY THI LE, an individual, and TOAN VAN NGUYEN, an individual,

RESPONDENTS.

ARB CASE NO. 14-097

ALJ CASE NO. 2008-FLS-014

DATE: August 8, 2016

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

***For the Administrator, Wage and Hour Division*:**
Ann Capps Webb, Esq.; Paul L. Frieden, Esq.; William C. Lesser, Esq.; Jennifer S. Brand, Esq.; M. Patricia Smith, Esq., *U.S. Department of Labor, Office of Solicitor*, Washington, District of Columbia

***For the Respondents, Best Miracle Corp., Thuy Thi Le, and Toan Van Nguyen*:**
Ashton R. Watkins, Esq.; *Law Offices of Ashton R. Watkins*, Los Angeles, California

Before: E. Cooper Brown, *Administrative Appeals Judge;* Joanne Royce, *Administrative Appeals Judge*, and Luis A. Corchado, *Administrative Appeals Judge*. Judge Corchado, *concurring*.

FINAL DECISION AND ORDER

This case arises under the Fair Labor Standards Act (FLSA), as amended, 29 U.S.C.A. § 201, et seq. (Thomson Reuters 2008), and its implementing regulations at 29 C.F.R. Part 578 (2008). Best Miracle, Thuy Thi Le, and Toan Van Nguyen (collectively "Best Miracle") appeal the August 12, 2014 Decision and Order (D. & O.) of a Department of Labor Administrative Law Judge (ALJ) assessing a civil money penalty of $54,931.25 against Best Miracle, under 29 U.S.C.A. § 216(e). The ALJ increased the penalty by $30,387.71 over the penalty initially assessed by the Administrator of the Wage and Hour Division, United States Department of Labor (WHD or Administrator). In response to Best Miracle's petition, the Administrator urges the Board to affirm the ALJ's conclusions and increase of the civil money penalty, with the exception of capping the per-employee penalty to the statutory maximum of $1,100.

For the following reasons, the Administrative Review Board (ARB or Board) reduces the ALJ's order of $54,931.25 in civil monetary penalties to $46,200 to reflect (1) capping the penalty at $1,100, the statutory maximum per violation, and (2) application of the per-violation maximum to only forty-two employees, the number charged in WHD's assessment, rather than to forty-seven employees, a figure taken from a related district court proceeding, but not alleged or argued for by WHD in this DOL proceeding concerning civil monetary penalties.

BACKGROUND

Thuy Thi Le opened Best Miracle in 2005.[1] Respondents Le and Toan Van 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 shipped the clothing to retailers. The Best Miracle employees regularly worked over 60 hours a week. Monday through Friday, they worked from 6:00 a.m. to 6:00 p.m., with a half-hour lunch break. They usually worked from 6:00 a.m. to 2:00 p.m. on Saturdays and also worked occasionally on Sunday mornings.[2]

With Nguyen's help, Le devised a system of falsifying records to avoid paying the overtime to their employees that the FLSA mandated. Le required the employees to punch their time cards for only 40 hours, regardless of how many hours they worked, and had them sign blank time cards that would be filled in with fake hours, so the time cards never showed that the employees worked over 40 hours. Respondent Nguyen had a separate time clock in his office that he used to prepare falsified time cards, and he required his employees to sign these falsified cards. Best Miracle paid its employees 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 they

---

[1] D. & O. at 4. In 1999, Le operated a garment store, Double T, owned by Le's sister. Toan Van Nguyen, Le's husband, was a supervisor at Double T. In 2005, DOL investigated Double T for FLSA violations. Le admitted that she operated the store and violated the FLSA by failing to pay employees overtime. Double T closed in 2005. Double T is not formally part of this case. *Id.*

[2] *Id.*

designed the fraudulent time cards to deceive the Department of Labor. They bribed and threatened the employees to keep them from reporting the violations to the Labor Department.[3]

WHD investigated Best Miracle in 2007 and concluded that it violated the FLSA by having workers consistently work overtime, but failing to pay them for overtime as the FLSA requires.[4] Best Miracle closed in 2007. On June 16, 2008, WHD issued a notice of determination assessing Best Miracle, Le, and Nguyen for $191,447.94 in unpaid overtime owed to forty-two employees. WHD also assessed $24,543.54 in civil monetary penalties.

On July 2, 2008, Best Miracle requested a hearing concerning civil monetary penalties. WHD filed an Order of Reference with the Office of Administrative Law Judges, which it received on September 12, 2008. On September 8, 2008, WHD filed a petition in the U.S. District Court for the Central District of California seeking to enjoin Best Miracle from withholding unpaid back wages.

Upon joint motion, the Office of Administrative Law Judges stayed proceedings before it pending resolution of the proceedings before the district court. On May 3, 2010, the district court issued a decision in which it concluded that Best Miracle "brazenly" disregarded FLSA's overtime requirements. *Solis v. Best Miracle*, 709 F. Supp. 2d 843 (C.D. Cal., 2010). Based on the evidence presented, the district court determined that Best Miracle owed $172,832.50 in overtime wages for forty-seven employees.[5] The district court enjoined Best Miracle from withholding the unpaid back wages and from committing future FLSA violations. Best Miracle appealed, and the Ninth Circuit affirmed. *Solis v. Best Miracle Corp.*, 464 F. Appx. 649, 2011 WL 6882942 (Dec. 30, 2011).

Several months after the district court enjoined Best Miracle from withholding the owed back wages, WHD moved for a contempt order because Best Miracle had not complied with the district court's order. On March 18, 2011, the district court issued a Civil Contempt Order against Respondents and ordered Le and Nguyen to sell a rental property to pay the back wages along with post-judgment interest. *Solis v. Best Miracle Corp, Thuy Thi Le, and Toan Van Nguyen*, Case No. SACV 8:08-00998-CJC (C.D. Cal. Mar. 18, 2011).

ALJ Proceedings and Summary Judgment Motions

After the Ninth Circuit's affirmance and subsequent denial of a motion for rehearing *en banc*, the ALJ lifted the stay that he had imposed. The assessment of the civil monetary penalty was the only issue before the ALJ, and the Administrator moved for summary decision. In support, the Administrator argued that the district court had decided necessary facts relevant to

---

3 *Id.*

4 D. & O. at 4.

5 The district court determined that Nguyen was an employer for purposes of the FLSA.

the civil money penalty litigation and thus, Best Miracle was collaterally estopped from relitigating these facts before the ALJ.

On September 18, 2012, the ALJ granted the Administrator's motion, in part, and denied it, in part. The ALJ concluded that the following district court findings were matters already decided and thus precluded from relitigation: (1) The Respondents' actions were subject to the FLSA; (2) Each of the Respondents (Best Miracle, Le, and Nguyen) was an "employer" within the meaning of the FLSA; (3) Respondents willfully violated the FLSA's overtime provisions; and (4) Le's violations were repeat violations.[6]

The ALJ nevertheless held that the Administrator was not entitled to summary decision because the Administrator failed in his summary decision motion to show that the civil money penalty assessed against Respondents was appropriate. Therefore, the ALJ set this case for hearing. According to the ALJ, the Administrator's motion for summary decision failed to adequately explain how WHD calculated $24,543.54 in relation to the regulations. Without ruling on the matter, the ALJ stated that logic dictated that Respondents be assessed at or near the maximum $1,100 per-violation penalty rather than the lesser $550 per-violation penalty upon which the Administrator's assessment was based. The case proceeded to hearing where the only remaining issue was the amount of the penalty.

ALJ Decision and Order

At hearing before the ALJ and in post-hearing briefing, the Administrator explained the basis for WHD's civil monetary assessment. The WHD uses the Field Operations Handbook (Field Handbook) to guide its determination of civil monetary penalties. Field Handbook Section 54f01 provides a grid distributing the maximum penalty assessment of $1,100 over three columns and three rows.[7] As demonstrated in the following chart, the rows move down based on the attributes of "repeated," "willful," and "willful and repeated." The columns are based on compliance with the assessment and the Respondent's commitment to comply with the FLSA in the future. The first column discusses violations that have already been paid before WHD enforcement began. The second column is based on commitment to comply with the FLSA after WHD commences enforcement or intervenes. The third column is for violators who have not committed to future compliance with the FLSA.

---

[6] ALJ Sept. 18, 2012 Order, at 4.

[7] Section 54f01 of the Field Operation Handbook is from Rev. 650, dated October 8, 2004. Resp. Ex. H. The Field Handbook states that columns and rows for offenses are not to be mixed, and that the WHD is to use the column and row that is most appropriate for the violations in a given case.

No civil monetary penalty if the employer has corrected violations and paid back wages more than 90 days before WHD entry and investigation	Column I: employer is in compliance for the current work-week, but one of the following exists: (1) employer corrected violations within the 2-year investigation period, but, before WHD contact, and has not paid back wages or (2) employer corrected violations and paid back wages within 90 days before WHD entry	Column II: employer agrees to comply with FLSA in the future	Column III: 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. The intent here is to hold an employer who is currently under a former agreement or order to comply under a higher standard for the violation
repeated	$55	$220	$660
willful	$110	$440	$880
Repeated and willful	$165	$550	$1,100

The WHD assessed Best Miracle with a $550 base-level penalty from Column II because Best Miracle closed its business, which WHD concluded was a form of committing to comply with the FLSA. WHD then reduced the base penalty by 15% because the number of employees was less than 100 and increased that amount by 25% because Best Miracle had not paid the fine. This resulted in an assessed $584.37 penalty per employee, for a total civil money assessment against Best Miracle in the amount of $24,543.54, which is $584.37 for forty-two employees.

The Administrator agreed that the ALJ was permitted to increase the civil monetary penalty and could consider the district court's post-assessment contempt order as grounds to do so. At hearing, however, the Administrator reaffirmed its civil money penalty assessment based on forty-two employees. The Administrator also maintained that Best Miracle had committed to future compliance with the FLSA per Column II of the Field Handbook by closing the business.

The ALJ concluded that Best Miracle's overtime violations were both repeated and willful.[8] The ALJ found that the base penalty per violation should have been doubled, to $1,100, per Column III of the Field Handbook because Best Miracle failed to demonstrate a commitment to future compliance.[9] The ALJ concurred with WHD that it was proper to consider the district court's post-assessment contempt order in increasing the penalty award.[10] However, the ALJ doubled the base penalty based on the record as of 2008, at the time of WHD's assessment, without consideration of the subsequent contempt order. Starting with $1,100 for each violation, the ALJ reduced the base amount by 15% because there were fewer than 100 employees and then increased it by 25% because of the refusal to pay. The base rate that the ALJ used was $1,168.75. The ALJ also used the district court's forty-seven employees rather than WHD's forty-two employees. With the five additional employees, the ALJ's total order was $1,168.75 for forty-seven employees, or $54,931.25 in civil money penalties. Best Miracle petitioned the ARB for review.

JURISDICTION AND STANDARD OF REVIEW

Statutory provision 29 U.S.C.A. § 216(e)(4) affords any party, against whom civil money penalties have been assessed under the FLSA, the opportunity to challenge any such assessment through administrative procedures. These procedures include the opportunity for a hearing, established by the Secretary of Labor in accordance with section 554 of Title 5 (the APA). Consistent with Section 216(e)(4), the Secretary has delegated to the ARB the authority and responsibility to act for the Secretary in civil money penalty cases arising under the FLSA's overtime provisions.[11] The APA provides, at 5 U.S.C.A. § 557(b), that "[o]n appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision . . . ."

DISCUSSION

The FLSA, at 29 U.S.C.A § 216(e)(2), provides that "[a]ny person who repeatedly or willfully violates [the FLSA's overtime provisions] shall be subject to a civil penalty not to

---

8 D. & O., at 7-8, 14.

9 *Id*. at 11.

10 *Id*. at 10; see also Hearing Transcript (Tr.) at 87.

11 Secretary of Labor 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 also 29 C.F.R. § 580.13 (establishing the procedures for appeal and review by the ARB).

exceed $1,100 for each such violation."[12] An employer will be deemed to have committed a repeat violation of FLSA's overtime provisions where, inter alia, the employer has committed a previous overtime violation, "provided the employer has previously received notice, through a responsible official of the Wage and Hour Division or otherwise authoritatively, that the employer allegedly was in violation of the provisions of the Act."[13] An employer will be deemed to have committed a willful violation "where the employer knew that its conduct was prohibited by the Act or showed reckless disregard for the requirements of the Act."[14]

29 U.S.C.A. § 216(e)(3) requires that "[i]n 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."[15] Other discretionary factors that may be considered in determining the amount of penalty to be assessed include but are not limited to: (1) good faith efforts to comply, (2) the employer's explanation 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 any pattern to the violations.[16]

The ALJ concurred with the Administrator that the overtime violations were both repeated and willful within the meaning of 29 C.F.R. § 578.3 and upon taking into consideration the Field Handbook grid.[17] Respondents contend on appeal that insufficient evidence exists to

---

[12] *See also* 29 C.F.R. § 578.3(a), (b), (c) (defining a "repeated" violation as where an employer previously violated the FLSA's overtime provisions and previously received notice of the violation from the Administrator, and defining a "willful" violation as "where the employer knew that its conduct was prohibited by the Act or showed reckless disregard for the requirements of the Act").

[13] 29 C.F.R. § 578.3(b)(1).

[14] 29 C.F.R. § 578.3(c)(1). An employer's conduct will be deemed "knowing" if, among other situations, "the employer received advice from a responsible official of the Wage and Hour Division to the effect that the conduct in question is not lawful." 29 C.F.R. § 578.3(c)(2). An employer's conduct will be deemed to be in "reckless disregard" of the requirements of the Act if, among other situations, "the employer should have inquired further into whether its conduct was in compliance with the Act, and failed to make adequate further inquiry." 29 C.F.R. § 578.3(c)(3).

[15] *See also* 29 C.F.R. § 578.4(a).

[16] 29 C.F.R. § 578.4(b).

[17] The Field Handbook grid the Administrator used, as modified by the percentage increases and decreases, gauged the assessment to both the gravity of the violation and the size of Best Miracle's business, mandatory considerations under 29 U.S.C.A. § 216(e)(3). *See also* 29 C.F.R. § 578.4(a).

support finding that any of Respondents were "repeat" offenders under 29 C.F.R. § 578.3 because (1) Best Miracle, owned by Thuy Thi Le, did not exist before 2005; (2) Double T, not Best Miracle, committed the prior FLSA violations; and (3) Nguyen, according to Respondents, was not connected to Double T's violations and was not an owner of either Double T or Best Miracle. Respondents' arguments ignore the fact that, as the ALJ found, the district court decided these issues and thus precluded them from relitigation. The fact that Best Miracle did not exist prior to 2005 is irrelevant. The district court found Respondents Le and Nguyen to have committed the same overtime violations in the earlier investigation of Double T, in which both played major roles—Le as owner of Double T and Nguyen in his role as a Double T employer.[18] Moreover, the district court found the violations to be willful because both individuals had clear knowledge of the law based on the prior Double T investigation, and as the WHD investigator testified (without contradiction) before the ALJ, upon opening Best Miracle after closing Double T, Respondents developed a system of falsifying time records to avoid paying overtime. Aside from the fact these issues are collaterally estopped from relitigation, we find that the record supports finding that Le and Nguyen were repeated and willful offenders.

The question is thus whether Respondents' closing of Best Miracle constituted an agreement to comply with the FLSA in the future, thereby subjecting Respondents to the civil money penalty for repeated and willful violations under Column II of the Field Handbook as the Administrator determined, or whether the ALJ correctly rejected the Administrator's interpretation of Respondents' action in closing Best Miracle and properly assessed civil money penalties for repeated and willful violations of the FLSA under Column III of the Field Handbook. We agree with the ALJ that the Administrator erroneously interpreted the closing of Best Miracle as demonstrating a commitment to comply with the FLSA in the future. The record evidence supports the ALJ's finding that closing the business was not a voluntary act warranting limiting the civil monetary penalty. As the ALJ noted, when the explanations for Column II and Column III of the Field Handbook are read together, the Column II penalty (applicable to employers who agree to future compliance) 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.

Although Respondents were not under an injunction to comply with the FLSA when Wage and Hour Division assessed the penalty, the evidence of record does not support the Administrator's contention of voluntary compliance on Respondents' part. Indeed, the evidence of record, and, in particular, the Wage and Hour Division's actions, support just the opposite conclusion. When the Division assessed the civil money penalty, it was already in the process of taking actions to assure compliance that suggest a concern on the Division's part that Respondents would continue to violate the FLSA. The Wage and Hour Division had referred the case against Respondents to the Solicitor's office for litigation with the intent of seeking an injunction. If, as the ALJ pointed out, future compliance was not a concern because Best Miracle had closed, there would have been no need to seek an injunction. More importantly (and

[18] D. & O. at 7-8.

again as the ALJ noted), ample evidence existed when WHD assessed the penalty that closing Best Miracle did not necessarily mean that Respondents would comply with the FLSA in the future. In particular, the evidence regarding Le and Nguyen's prior action in closing Double T, followed by opening Best Miracle and immediately again engaging in similar FLSA violations, indicated that Respondents were predisposed to violate the FLSA. We thus agree with the ALJ's conclusion that, while giving an employer who closes down his or her business after Wage and Hour finds that he or she has violated the FLSA the benefit of the doubt may be appropriate in some instances, that benefit of the doubt does not apply to this case. As the ALJ reasoned, "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."[19]

In further support of their challenge to the ALJ's decision, Respondents argue that the ALJ erred in not deferring to WHD and reiterated its argument below that the ALJ could only consider the administrative record and Respondents' conduct as of June 2008, when the WHD assessed the civil money penalties; that the ALJ was not permitted to consider the district court's contempt order filed in March of 2011. As previously noted, however, the ALJ concurred with WHD that the district court's post-assessment contempt order was a proper consideration for increasing the penalty award, but that the ALJ's decision doubling the base penalty was based on the record as of 2008, at the time of WHD's assessment, without consideration of the subsequent contempt order.[20]

Best Miracle further argues that the ALJ was not permitted to increase the civil money penalty beyond the WHD's initial assessment. ARB precedent is to the contrary.[21]

---

[19] D. & O. at 12. Le's denial of wrongdoing at the hearing before the ALJ is additional support, as the ALJ found, for concluding that Best Miracle did not satisfy Column II's criteria. See D. & O. at 13 (citing Tr. at 83-84).

[20] See D. & O. at 10. Nevertheless, Respondents' failure to comply with the district court's judgment, resulting in the subsequent civil contempt order, provides additional grounds in support of the award of the higher civil money penalty.

[21] See *In re Thirsty's Inc.*, ARB No. 96-143, ALJ No. 1994-CLA-065 (ARB May 14, 1997) (affirming the ALJ's authority to increase the penalty award in FLSA cases). See also, 29 C.F.R. § 580.12(c) (providing that the ALJ may "affirm, deny, reverse, or modify, in whole or in part, the determination of the Administrator"). Respondents also argue on appeal that the ALJ erroneously excluded testimony and key exhibits. However, as the Administrator pointed out, the testimony and exhibits pertained to issues decided by the district court that, as previously noted, are precluded from relitigation under the collateral estoppel doctrine. Consequently, the ALJ did not commit reversible error in rejecting the admission of the disputed testimony and exhibits into evidence.

Finally, while the Board affirms the ALJ's increase in the base civil money penalty to $1,100 per violation, we do not affirm the amount of the ALJ's assessment, which requires modification. The ALJ assessed a civil money penalty of $1,168.75 per violation, which the ALJ multiplied by the forty-seven employees the district court identified, for a total assessment against Respondents of $54,931.25 in civil money penalties. However, the governing statute, 29 U.S.C.A. § 216(e)(2), places a cap on the amount of the civil money penalty that can be assessed for a violation: "Any person who repeatedly or willfully violates section 206 or 207, relating to wages, shall be subject to a civil penalty *not to exceed* $1,100 for each such violation." (emphasis added). Accordingly, the Board modifies the per-violation amount to reflect the statutory cap of $1,100. Moreover, the per-violation penalty at $1,100 is applied to only forty-two employees, the number of employees charged to Best Miracle in WHD's assessment, thereby reducing the total civil money penalty to $46,200.

CONCLUSION

For the above stated reasons, the Administrative Review Board **AFFIRMS** the ALJ's Decision and Order, as modified, and **ORDERS** Respondents to pay civil monetary penalties in the total amount of **$46,200.00**.

SO ORDERED.

E. COOPER BROWN
Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

Judge Corchado concurs, in part, and dissents, in part:

I concur with the ultimate ruling as a minimum penalty that could be assessed against Best Miracle, but I would have affirmed the ALJ's penalty award as the factfinder who conducted the evidentiary hearing, heard and observed the witnesses, and provided a rational and lawful basis for the penalty assessed against Best Miracle for violations of the law. First, the record overwhelmingly supports the ALJ's finding that (1) Best Miracle flagrantly disregarded the law in many ways, including fraudulent actions, and (2) it was not entitled to a reduced penalty, even looking at the facts that existed in June 2008. Second, given the facts of this particular case, I am not convinced that the ALJ erred or abused her discretion in deciding the amount of the penalty. The ALJ reasonably relied on the federal district court's ruling that there were actually 47 employees that were underpaid, as the federal court cited to record evidence for this conclusion.[22] Best Miracle should not benefit from the fact that WHD inadvertently

[22] *Solis v. Best Miracle Corp.*, 709 F. Supp. 2d 843, 848 (C.D. Cal. 2010).

missed five employees while trying to sort through Best Miracle's fraudulently created documents. Moreover, Best Miracle committed so many flagrant violations that the record easily supports an additional $8,700 in penalties, more specifically, the ALJ's award of $54,931.25 penalty.

Lastly, as to the standard of review, I am not convinced that we have "all the power that the Secretary might have in the *initial hearing*." (Emphasis added). I say this for many reasons but time does not permit full discussion now. In short, given (1) the Secretary's delegation of authority to an independent central panel of ALJs, (2) the extensive evidence presented at an evidentiary hearing before the ALJ, and (3) the delegation of appellate authority to the Board in FLSA cases, it seems the time has come to revisit the "standard of review" question under current principles of procedural due process. It seems fundamentally unfair to have parties appear before an administrative law judge, present evidence for days, and then permit a reviewing panel to simply review appellate briefs and a cold record to find a separate set of facts without giving the ALJ some deference. The standard of reviewing ALJs after an evidentiary hearing should be more deliberately and clearly set out in Department regulations, expressly adopting a substantial evidence review or perhaps a modified de novo standard that permits some flexibility but not complete de novo review of fact findings. For example, a modified standard could permit the Board to make fact findings where particular ALJ findings lack substantial evidence or where the ALJ failed to make a critical finding and the parties had ample opportunity and reason to submit record evidence before the ALJ as to such critical finding. Again, this is a topic for another day and hopefully soon.

LUIS A. CORCHADO
Administrative Appeals Judge