In the Matter of

SCHULTZ MFG., INC.

Case No. 10-12

Final Order of Commissioner Brad Avakian

Issued April 4, 2012

SYNOPSIS

Respondent violated Oregon child labor laws by employing a minor in 2008 and 2009 without first obtaining a validated employment certificate, pursuant to ORS 653.307. The minor was seriously injured while engaged in hazardous work prohibited by Oregon's child labor laws and Respondent was assessed a civil penalty in the amount of $1,000. ORS 653.307; ORS 653.370; OAR 839-019-0010, OAR 839-019-0020, OAR 839-019-0025, OAR 839-021-0104.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on March 19, 2012, in the W. W. Gregg Hearing Room of the Oregon Bureau of Labor and Industries, located at 800 NE Oregon Street, Portland, Oregon.

Case presenter Chet Nakada, an Agency employee, represented the Bureau of Labor and Industries ("BOLI" or "Agency"). Matthew Schultz represented Schultz Mfg., Inc., as its authorized representative.

The Agency called as witnesses: Matthew Schultz, Respondent's authorized representative; Margaret Trotman, BOLI Wage and Hour Division compliance specialist; Karen Gernhart, BOLI Wage and Hour Division Child Labor administrative specialist; and Trevor Weller, former Respondent minor employee.

Respondent called Matthew Schultz as its only witness.

The forum received as evidence:

a) Administrative exhibits X-1 through X-6;

b) Agency exhibits A-1 through A-11 (filed with the Agency's case summary);

c) Respondent exhibits R-1 through R-7.

Having fully considered the entire record in this matter, I, Brad Avakian, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On August 8, 2011, the Agency issued a Notice of Intent to Assess Civil Penalties ("Notice") alleging that Respondent violated Oregon's child labor law, specifically ORS 653.307(2), by employing Trevor Weller, a minor, without first obtaining an Annual Employment Certificate ("Certificate"). The Agency alleged that Respondent's violation was aggravated by the fact that Weller suffered a serious injury while employed by Respondent, Respondent knew or should have known of the violation, the violation was serious and of great magnitude, and applying for and obtaining a Certificate would not have been difficult. The Agency sought to assess a $1,000 civil penalty.

2) Respondent was served with the Notice and timely filed an answer and a request for hearing through its designated authorized representative Matthew Schultz. In its answer, Respondent admitted it did not have a Certificate when Weller was hired, but contended that Weller's injury was "non-serious" and that $1,000 was an excessive civil penalty, and that already paid a civil penalty to the U.S. Department of Labor related to the same injury.

3) On October 10, 2011, the Hearings Unit issued a Notice of Hearing stating the hearing would commence at 11:00 a.m. on March 19, 2012. The Notice of Hearing

included a copy of the Notice of Intent to Assess Civil Penalties, a document entitled "Summary of Contested Case Rights and Procedures" containing the information required by ORS 183.413, a document entitled "Servicemembers Civil Relief Act (SCRA) Notification, a multi-language notice explaining the significance of the Notice of Hearing, and a copy of the forum's contested case hearings rules, OAR 839-050-000 to 839-050-0445.

4) On January 10, 2012, the ALJ issued an order requiring the Agency and Respondent each to submit a case summary by March 9, 2012, and notified them of the possible sanctions for failure to comply with the case summary order.

5) The Agency and Respondent timely submitted case summaries.

6) At the start of hearing, the ALJ verbally informed the participants of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

7) On March 28, 2012, the ALJ issued a proposed order that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Respondent timely filed exceptions on April 2, 2012, that are addressed in the Opinion section of this Final Order. On April 3, 2012, the Agency filed objections to Respondent's exceptions.

FINDINGS OF FACT – THE MERITS

1) At times material, Respondent was an Oregon corporation that manufactured motocross parts in Oregon City. At times material, Matthew Schultz was Respondent's corporate president.

2) In October 2008, Respondent, through Schultz, hired Trevor Weller. Prior to being hired, Weller filled out an employment application. On the application, Weller wrote his date of birth is July 8, 1991, a date that is his actual date of birth.

3) Schultz knew that Weller was only 17 years old at the time he hired Weller.

4) Until May 6, 2009, Weller's job duties with Respondent included operating a power-driven band saw. Schultz trained him how to use the band saw. When Weller used the band saw, he used his hands to guide a plastic part against the saw's blade.

5) On May 6, 2009, Weller was operating Respondent's band saw when the middle finger of his right hand came in contact with the blade of the band saw. As a result of the contact, the top knuckle of the middle finger of Weller's right hand was fractured and he suffered a cut around the same knuckle that bled considerably.

6) When Weller was injured, "911" was called and Weller was transported by ambulance to Willamette Hospital in Oregon City. At the hospital, he spent approximately 90 minutes in the emergency room, where his wound was cleaned, his cut was sewn shut with 12 stitches and bandaged, and a padded metal splint was put on his finger. He kept the injury bandaged for about a month.

7) Weller filed for and received workers compensation benefits related to his May 6, 2009, injury.

8) Weller continued to work for Respondent after his injury, but did not operate the band saw again until after his 18th birthday.

9) At the time of hearing, Weller's injury only bothered him when he hits the injured finger against a hard object. His doctor expects the injury to heal completely with no residual effects.

10) Respondent did not apply for or obtain an Annual Employment Certificate ("Certificate") from BOLI at any time while Weller worked for Respondent. Obtaining a Certificate would not have been difficult.

11) When employers apply for a Certificate, BOLI's application requires them to list the machinery that will be operated by the minor employee. Had Respondent applied for a Certificate and stated that Weller would be operating a band saw, BOLI's Child Labor administrative specialist Karen Gernhart would have immediately called Respondent to inform Respondent that it was unlawful for a minor to operate a band saw. Gernhart would not have issued a Certificate to Respondent if Respondent planned to have a minor employee operating a band saw.

12) Had Respondent obtained a Certificate, Weller would not have been allowed to operate the band saw because Schultz would have learned that minors under the age of 18 are not legally allowed to operate a band saw and would have obeyed the law.

13) Schultz cooperated with the Agency's child labor investigation.

14) Respondent has had no other violations of Oregon's child labor laws.

15) Respondent paid a civil penalty of $1,485.00 to the U. S. Department of Labor ("USDOL") on February 26, 2010, based on the USDOL's finding that Respondent had employed a minor "contrary to the child labor provisions of the [FLSA]."

16) All of the witness testimony was credible and undisputed.

ULTIMATE FINDINGS OF FACT

1) At all times material, Respondent was an Oregon corporation operating a manufacturing facility that employed one or more persons in Oregon.

2) In October 2008, Respondent hired Trevor Weller, a minor who did not turn 18 years old until July 8, 2009. Respondent, through Schultz, knew that Weller was only 17 years old when he was hired.

3) Until May 6, 2009, Weller's job duties included operating a power-driven band saw. On May 6, 2009, Weller was operating Respondent's band saw when the middle finger of his right hand came in contact with the blade of the band saw and he

fractured his top knuckle and suffered a cut around the same knuckle that bled considerably. Weller was transported by ambulance to a hospital, where his wound was cleaned, his cut sewn shut with 12 stitches and bandaged, and a padded metal splint put on his finger.

4) Respondent did not apply for or obtain an Annual Employment Certificate from BOLI at any time while Weller worked for Respondent.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent was an employer subject to the provisions of ORS 653.305 to 653.370. ORS 653.010(3); OAR 839-019-0004(5)

2) The actions, inaction, statements, and motivations of Matthew Schultz, Respondent's corporate president, are properly imputed to Respondent.

3) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and Respondent herein. ORS 652.310.

4) Respondent violated ORS 653.307(2) by employing a minor under 18 years old in Oregon during 2008 and 2009 without first obtaining a validated annual employment certificate to employ minors.

5) Under the facts and circumstances of this record, and according to the applicable law, the Commissioner of the Bureau of Labor and Industries is authorized to assess a civil penalty against Respondent for its violation of ORS 653.307. ORS 653.370, OAR 839-019-0010(1), and OAR 839-019-0025.

OPINION

In its Notice of Intent, the Agency alleges that Respondent committed a single violation of Oregon's child labor laws by employing a minor without first obtaining the Employment Certificate ("Certificate") required by ORS 653.307. Under ORS 653.370, the Agency seeks to assess a civil penalty of $1,000 for that violation. Although Respondent does not dispute that it committed the alleged violation, the forum sets out

the pertinent statute and rule to provide additional context to the amount of civil penalty assessed in this proposed order.

ORS 653.307 provides, in pertinent part:

> "(1) In accordance with the applicable provisions of ORS chapter 183, the Wage and Hour Commission shall adopt rules governing annual employment certificates required under this section. * * *
>
> "(2) An employer who hires minors shall apply to the Wage and Hour Commission for an annual employment certificate to employ minors. The application shall be on a form provided by the commission and shall include, but not be limited to:
>
> "(a) The estimated or average number of minors to be employed during the year.
>
> "(b) A description of the activities to be performed.
>
> "(c) A description of the machinery or other equipment to be used by the minors.
>
> "(3) Once a year, the Bureau of Labor and Industries shall provide to all employers applying for an annual employment certificate an information sheet summarizing all rules and laws governing the employment of minors."

A "minor" is "any person under 18 years of age." OAR 839-019-0004(7).

OAR 839-021-0220 contains the rules promulgated by the Wage and Hour Commission pursuant to ORS 653.307 governing annual employment certificates. Those rules provide:

> "(1) Unless otherwise provided by rule of the commission, no minor 14 through 17 years of age may be employed or permitted to work unless the employer:
>
> "(a) Verifies the minor's age by requiring the minor to produce acceptable proof of age as prescribed by these rules; and
>
> "(b) Complies with the provisions of this rule.
>
> "(2) An employer may not employ a minor without having first obtained a validated employment certificate from the Bureau of Labor and Industries. Application forms for an employment certificate may be obtained from any office of the Bureau of Labor and Industries or by contacting the Child Labor Unit, Wage and Hour Division, Bureau of Labor and Industries, 800 NE Oregon Street Suite 1045, Portland OR 97232, 971-673-0836.

> "(a) The Bureau of Labor and Industries will issue a validated employment certificate upon review and approval of the application. The validated employment certificate will be effective for one year from the date it was issued, unless it is suspended or revoked.
>
> "(b) If, after the issuance of a validated employment certificate, the duties of the minors are changed from those originally authorized under the employment certificate or the employer wishes to employ minors at an additional establishment, the employer must submit a 'Notice of Change (to Annual Employment Certificate)' form to the Child Labor Unit, Wage and Hour Division of the Bureau of Labor and Industries. The '"Notice of Change (to Annual Employment Certificate)' form must be submitted within 15 days of the change on a form provided by the bureau. The bureau will approve or deny any change(s) in duties and notify the employer. If the bureau denies the changes, the employer must immediately reassign any affected minor to approved duties or terminate the minor's employment."

The statute and rule leave no doubt that a primary purpose of the Employment Certificate requirement is to protect minors by ensuring they are not allowed to perform job duties or work in occupations deemed hazardous to minors by requiring that BOLI screen all minor's stated job duties prior to their commencement of work. Respondent did not apply for and obtain a Certificate, thereby violating ORS 653.307(20) and exposing Weller to injury.

CIVIL PENALTY

In its amended answer, Respondent admitted its violation of ORS 653.307, but alleges immunity from a civil penalty under ORS 653.307(5)(a). In the alternative, Respondent alleges several mitigating factors that make the Agency's proposed civil penalty of $1,000 excessive.

First, Respondent contends that its payment of a civil penalty to the U. S. Department of Labor ("USDOL") for a violation of the child labor provisions of the Federal Fair Labor Standards Act ("FLSA") makes Respondent immune from an civil penalty pursuant to ORS 653.370(5)(a). Respondent introduced evidence that it paid a penalty of $1,485.00 to the USDOL on February 26, 2010, based on the USDOL's

finding that Respondent had employed a minor "contrary to the child labor provisions of the [FLSA]." ORS 653.370(5)(a) provides:

> "(5)(a) Notwithstanding subsection (1) of this section, the commissioner may not impose a civil penalty pursuant to this section upon any person who provides evidence satisfactory to the commissioner that:
>
> "(A) The person has paid a civil penalty to the United States Department of Labor for violation of the child labor provisions of the Federal Fair Labor Standards Act (29 U.S.C. 201 et seq.); and
>
> "(B) The civil penalty involved the same factual circumstances at issue before the commissioner."

There is no evidence in the record as to the specific factual circumstances on which the USDOL based its assessment of civil penalties. Without evidence that the USDOL's penalty was based on the "same factual circumstances" as those before the Commissioner in this case, Respondent's defense must fail.

Respondent, through Schultz, presented undisputed testimony that Respondent cooperated with BOLI's investigation, that it has had no prior or subsequent violations, that its employees have suffered no other serious injuries, and that it did not allow Weller to operate the band saw after his injury until he was 18 years old. Respondent also did not dispute the Agency's contention that it would have been relatively simple for Respondent to apply for and obtain a Certificate, an action that would have prevented Weller's injury from occurring.[i]

Finally, Respondent contends that Weller's injury was "non-serious." Respondent argues that Weller's injury was "non-serious" because he was released to return to work the day after the injury, a fact not disputed by the Agency. For added support, Respondent cites ORS 161.015(8), a provision of the Oregon Criminal Code that defines "serious physical injury" as "physical injury which creates a substantial risk of death or which causes serious and protracted disfigurement, protracted impairment of

health or protracted loss or impairment of the function of any bodily organ." That definition relates only to crimes and is inapplicable to this proceeding.

Whether or not Weller's injury was "serious" is particularly significant based on the following rules adopted by the Wage and Hour Commission in its schedule of civil penalties for child labor violations:

OAR 839-019-0025(4) provides:

> "When a minor incurs a serious injury or dies while employed in violation of any of the following statutes and rules, the violation is considered to be so serious and of such magnitude that the maximum penalty will be imposed when the Commissioner determines to impose a civil penalty:
>
> "* * * * *
>
> "(d) Employment of a minor in violation of * * * OAR 839-021-0104."

OAR 839-021-0104 provides:

> "(1) Except as provided in OAR 839-021-0285, an employer may not employ a minor under 18 years of age in any occupation declared particularly hazardous or detrimental to their health or well-being, except under terms and conditions specifically set forth by rules of the Wage and Hour Commission.
>
> "(2) Those occupations set out in Title 29 CFR, Part 570.51 to and including Part 570.68 as amended July 19, 2010 are hereby adopted as occupations particularly hazardous or detrimental to the health and well-being of minors 16 and 17 years of age and the regulations pertaining to these occupations set out in Title 29 CFR, Part 570.51 to and including Part 570.68 as amended July 19, 2010 are hereby adopted and incorporated by reference herein and are attached as Appendix 1."

Title 29 CFR, Part 570.65 - Occupations involved in the operations of circular saws, band saws, and guillotine shears (Order 14) provides:

> "(a) Findings and declaration of fact. The following occupations are particularly hazardous for the employment of minors between 16 and 18 years of age:
>
> "(1) The occupations of operator of or helper on the following power-driven fixed or portable machines except machines equipped with full automatic feed and ejection:
>
> "* * *
>
> "(ii) Band saws.
>
> "* * *

> "(b) Definitions. As used in this section:
>
> "*Band saw* shall mean a machine equipped with an endless steel band having a continuous series of notches or teeth, running over wheels or pulleys, and used for sawing materials.
>
> "*Operator* shall mean a person who operates a machine covered by this section by performing such functions as starting or stopping the machine, placing materials into or removing them from the machine, or any other functions directly involved in operation of the machine."

There is no dispute that Weller's injury occurred while he was the operator of machinery that fits within the above definition of band saw. The very fact that Weller was hand-feeding the plastic piece to be cut at the time he was injured demonstrates that Respondent's band saw was not equipped with "full automatic feed and ejection." Given these facts, under OAR 839-019-0025(4) the forum has no choice but to assess the maximum civil penalty of $1,000 if it determines that Weller's injury was "serious."

The term "serious injury" is not defined in Oregon's child labor statutes, BOLI's administrative rules, or any prior BOLI Final Orders, including three BOLI Final Orders assessing a maximum civil penalty when a minor died or was injured during their employment.[ii] The "injury" in this case was a fracture to the top joint of Weller's middle finger on his right hand and a cut that bled a considerable amount and required immediate medical attention. Weller had to be driven by ambulance to a local hospital, where he received 12 stitches, a bandage that had to be changed for a month, and a metal splint. Although Weller's doctor anticipates no residual effects, the finger is still painful whenever Weller accidentally bumps it against a hard object. It is also apparent to the forum, given the type of machinery Weller was operating and the particular injuries he suffered, that his finger could have been severed instead of fractured and cut. Under these facts, the forum concludes that Weller suffered a "serious injury" within the meaning of OAR 839-019-0025(4).

As alluded to earlier, there have been three previous cases in which the forum has assessed civil penalties when a minor employee was injured or killed while performing the minor's job duties. In 1992, the commissioner imposed the maximum civil penalty of $1,000 when a minor was killed[iii] while employed in the hazardous occupation of driving a motor vehicle on a public road or highway in violation of OAR 839-21-104 (subsequently renumbered as OAR 839-021-0104). In 1994, the commissioner imposed the maximum civil penalty of $1,000 when a minor suffered a "devastating back injury" while employed in hazardous occupation of logging in violation of Oregon law.[iv] In 2009, the commissioner again imposed the maximum civil penalty of $1,000 in the case of *In the Matter of Spud Cellar Inc.,* 30 BOLI 185, 189, 192-93 (2009) based on the respondent's failure to obtain a validated Certificate, when a minor employee sliced off the tip of her thumb on a meat slicer and was taken to the hospital, where she received seven to nine stitches, was left with a permanently scarred thumb, and still suffered discomfort two years later from the injury. Following its precedent, the forum exercises its authority under ORS 653.370 to assess a $1,000 civil penalty against Respondent for its single violation of ORS 653.307(2).

RESPONDENT'S EXCEPTIONS

Respondent's exceptions argues two points. First, that the civil penalty of $1,000 proposed by the ALJ is excessive and should be reduced to $100 because Weller's injury was "non-serious" and Respondent's first offense. Second, that the USDOL already assessed a penalty based on similar facts. The forum rejects Respondent's exceptions for the reasons stated below.

First, Respondent attached an exhibit to its exceptions that was not offered at the hearing and requested that it be considered as evidence. That exhibit is the USDOL's "Notice to Employer-Employment of Minors Contrary to the Fair Labor Standards Act"

that advised Respondent that USDOL's investigation to determine that Weller had been employed by Respondent to operate a band saw. The Notice further indicated the USDOL's conclusion that Weller had sustained a "Nonserious" injury "in illegal employment." Respondent gave no reason for not offering this exhibit at hearing and the forum will not reopen the record to consider it now. Even if the forum did reopen the record to consider this exhibit, the USDOL's conclusion that Weller sustained a "Nonserious" injury would not be binding on the forum. For the reasons stated in the proposed order, the forum stands by its conclusion that Weller's injury was "serious" as defined by OAR 839-019-0025(4).

Second, forum rejects Respondent's argument that the USDOL already assessed a penalty based on similar facts. The penalty assessed in this case is based on Respondent's failure to obtain an Employment Certificate, not Weller's injury. The injury is relevant to the amount of penalty assessed but is not the reason a penalty was assessed. In contrast, according to Respondent's statement, the USDOL's penalty was assessed based on the fact that Weller suffered an injury.

ORDER

NOW THEREFORE, as authorized by ORS 653.370, and as payment of the penalties assessed for Respondent Schultz Mfg., Inc.'s violation of ORS 653.307(2), the Commissioner of the Bureau of Labor and Industries hereby orders **Schultz Mfg., Inc.,** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, a certified check payable to the Bureau of Labor and Industries in the amount of ONE THOUSAND DOLLARS ($1,000), plus any interest thereon that accrues at the legal rate between a date ten days after the issuance of the Final Order and the date Schultz Mfg., Inc., complies with the Final Order.

[i] It is undisputed that Weller would not have been allowed to operate the band saw, had Schultz known the law prohibits minors from operating a band saw, something Schultz would have learned almost immediately from Gernhart if he had applied for an Employment Certificate on Respondent's behalf at the time Weller was hired.

[ii] *See* discussion of these cases*, infra.*

[iii] *In the Matter of Panda Pizza,* 10 BOLI 132, 144 (1992).

[iv] *In the Matter of Ronald Turman,* 13 BOLI 166, 174-75.