U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

IN THE MATTER OF:

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

PROSECUTING PARTY,

v.

ZOOM FLUME WATER PARK, LLC,

RESPONDENT.

ARB CASE NO. 2024-0025

ALJ CASE NO. 2023-CLA-00007
ALJ DREW A. SWANK

DATE: April 30, 2026

Appearances:

For the Administrator, Wage and Hour Division:
Seema Nanda, Esq.; Jennifer S. Brand, Esq.; Sarah Kay Marcus, Esq.; Maria Van Buren, Esq.; and Amelia B. Bryson, Esq.; *U.S. Department of Labor, Office of the Solicitor*; Washington, District of Columbia

For the Respondent:
Carlo A.C. de Oliveira, Esq.; *Cooper Erving & Savage LLP*; Albany, New York

Before JOHNSON, Chief Administrative Appeals Judge, and KIKO, Administrative Appeals Judge

DECISION AND ORDER

This case arises under the child labor provisions of the Fair Labor Standards Act (FLSA), as amended, and its implementing regulations.[1] The Administrator of the Wage and Hour Division of the United States Department of Labor (Administrator) pursues this action against Respondent Zoom Flume Water Park,

[1] 29 U.S.C. §§ 212, 215, 216; 29 C.F.R. Parts 579 and 580 (2025).

LLC (Zoom Flume) for violations of the child labor laws. On February 13, 2024, a United States Department of Labor Administrative Law Judge (ALJ) issued an Order Denying Respondent's Motion for Summary Decision and Granting Administrator's Motion for Summary Decision (ALJ Order), ruling that Zoom Flume violated the child labor laws and ordering it to pay $38,010 in civil money penalties (CMPs). For the reasons that follow, we affirm the ALJ Order.

BACKGROUND AND PROCEDURAL HISTORY

Zoom Flume is a seasonal water park located in East Durham, New York.[2] In July 2022, the United States Department of Labor's Wage and Hour Division (WHD) opened an investigation into Zoom Flume's employment of minor workers, covering the period of July 9, 2020, through July 8, 2022.[3]

WHD's investigation revealed that during the two-year investigatory period, 35 15-year-olds worked as dispatchers at the top of Zoom Flume's elevated water slides.[4] The water slides ranged in height from 12 to 44 feet and used electric pumps to convey water to the top of the slides, which then powered riders' descents down the slide.[5] Although the water slides were powered by a pump system, there was no machinery or equipment located at the top of the water slides where the 15-year-olds worked as dispatchers.[6]

As dispatchers, the minors monitored the line of riders, told riders when they could enter the slides' towers, instructed riders how to go down the slides, helped riders into flotation devices at the top of certain slides, dispatched riders down the slides, kept order at the top of the slides, and notified supervisors of problems with the slides.[7] Not all of the minors working as dispatchers were certified as

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2 ALJ Order at 3.

3 *Id.*

4 *Id.*

5 *Id.*; Respondent's Amended Response to Complainant's First Interrogatories (Resp. Am. Responses) at No. 4 (attached as Exhibit 4 to Declaration of Geoffrey L. Wertime in Support of Administrator's Motion for Summary Decision (Wertime Decl.)).

6 ALJ Order at 3.

7 *Id.*; Deposition of Glenn Aragona (Aragona Dep.) at 36-39 (attached as Exhibit 1 to Wertime Decl.).

lifeguards.[8] No minors were injured while working as dispatchers at the top of the slides.[9]

At the conclusion of the investigation, WHD determined that Zoom Flume violated 29 U.S.C. § 212(c) and 29 C.F.R. §§ 570.33(e) and 570.34(l)(1), which, as discussed in more detail below, prohibit persons under the age of 16 from serving as dispatchers at the top of elevated, power-driven water slides. WHD assessed CMPs of $1,086 per 15-year-old, for a total of $38,010.[10]

After WHD notified Zoom Flume of the violation, Zoom Flume committed to future compliance and agreed to change its practice so 15-year-olds were not assigned to dispatch duty at the top of the slides.[11] However, Zoom Flume challenged WHD's assessment, arguing that it did not violate the child labor laws and that CMPs were not warranted. The matter was assigned to an ALJ.

On February 13, 2024, the ALJ issued the ALJ Order determining that Zoom Flume violated the FLSA's child labor laws.[12] The ALJ also upheld the CMP assessment of $38,010.[13] Zoom Flume appealed the ALJ Order to the Administrative Review Board (ARB or Board) on February 22, 2024.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board the authority and responsibility to review decisions involving the assessment of CMPs under the FLSA's child labor laws.[14] The FLSA requires that administrative hearings in cases involving CMPs for violations of the child labor laws be conducted in accordance

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8 Resp. Am. Responses at No. 4.

9 ALJ Order at 21.

10 *Id.* at 4.

11 Declaration of Michael Milazzo in Support of Administrator's Motion for Summary Decision (Milazzo Decl.) at ¶12.a.

12 ALJ Order at 16-19.

13 *Id.* at 19-22.

14 Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 85 Fed. Reg. 13186 (Mar. 6, 2020); 29 C.F.R. § 580.13.

with Section 554 of the Administrative Procedure Act (APA).[15] The APA states, in relevant part, that "[o]n appeal from or review of the initial decision, the agency has all the powers which it would have had in making the initial decision . . . ."[16] Thus, the Board reviews the ALJ's decision de novo.[17]

DISCUSSION

1. Zoom Flume Violated the Child Labor Laws by Assigning 15-Year-Olds to Work as Dispatchers at the Top of Elevated, Power-Driven Water Slides

Zoom Flume does not dispute that it employed 15-year-olds to work as dispatchers at the top of its elevated, power-driven water slides. The FLSA and its implementing regulations clearly and unequivocally prohibit 15-year-olds from performing these duties. Thus, we agree with the Administrator and the ALJ that Zoom Flume violated the law.

The FLSA generally and broadly prohibits the employment of any person under the age of 16 from working "in any occupation."[18] The FLSA's implementing regulations elaborate on and provide examples of the myriad occupations that fall within this blanket prohibition. Among the list of occupations explicitly prohibited for minors under 16 is "operating, tending, setting up, adjusting, cleaning, oiling, or repairing any power-driven machinery . . . ."[19] This regulation, though, expressly states that it does not reflect "an exhaustive list" of all occupations that are prohibited by the FLSA.[20] Rather, the FLSA makes clear that minors under the age of 16 are presumptively precluded from *all* occupations, not just those specifically enumerated by regulation.

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15 5 U.S.C. § 554; 29 U.S.C. § 216(e)(4).

16 5 U.S.C. § 557(b).

17 *Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Halsey*, ARB No. 2004-0061, ALJ No. 2003-CLA-00005, slip op. at 3-4 (ARB Sept. 29, 2005) (citations omitted).

18 29 U.S.C. §§ 203(l) ("'Oppressive child labor' means a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer . . . in any occupation . . . ."); 212(c) ("No employer shall employ any oppressive child labor . . . .").

19 29 C.F.R. § 570.33(e).

20 *Id.* § 570.33.

While the FLSA broadly prohibits the employment of minors under 16 years of age in any occupation, the statute allows the Secretary of Labor to make exceptions in limited circumstances. Specifically, the Secretary may issue regulations or orders that permit 14- and 15-year-olds to work in certain occupations if the Secretary determines they are "confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being."[21] Importantly, though, "**[e]mployment that is not specifically permitted is prohibited**."[22] Thus, simply stated, there is generally a *blanket prohibition* on employing minors under the age of 16 in *any job*, unless the Secretary issues a regulation or order *explicitly permitting* a specific job.

In 2010, the Secretary amended the FLSA's implementing regulations to allow 15-year-olds to perform "permitted lifeguard duties at traditional swimming pools and water amusement parks."[23] While the regulations permit some lifeguarding work, the regulations expressly exclude and prohibit 15-year-olds from working on "the elevated areas of power-driven water slides," including as "dispatchers or attendants."[24] The regulations state:

> The term permitted lifeguard duties does not include the operation or tending of power-driven equipment including power-driven elevated water slides often found at water amusement parks and some swimming pools. **Minors under 16 years of age may not be employed as dispatchers or attendants at the top of elevated water slides** performing such tasks as maintaining order, directing patrons as to when to depart the top of the slide, and ensuring that patrons have begun their "ride" safely.[25]

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21 29 U.S.C. § 203(l).

22 29 C.F.R. § 570.32 (emphasis added).

23 *Id.* § 570.34(l)(1); Child Labor Regulations, Orders and Statements of Interpretation, 75 Fed. Reg. 28404, 28450 (May 10, 2010).

24 29 C.F.R. § 570.34(l)(1). As noted above, not all of the 15-year-old dispatchers working at the top of the water slides were certified as lifeguards. Resp. Am. Responses at No. 4. Thus, they would certainly not fall within the exception for "permitted lifeguard duties."

25 29 C.F.R. § 570.34(l)(1) (emphasis added).

If the regulations were not clear enough, the Secretary confirmed in the rulemaking associated with the regulations that working at the top of elevated, power-driven water slides is strictly prohibited for 15-year-olds:

> It is important to note that [the regulation] prohibits the employment of 14- and 15-year-olds in occupations involving the operation or tending of power-driven machinery, except office machines. **This prohibition has always encompassed the operation or tending of all power-driven amusement park and recreation establishment rides—including elevated slides found at water amusement parks**. Such slides, which often reach heights of over 40 feet, rely on power-driven machinery that pump water to the top of the slides which facilitates the descents of the riders to the "splash-down" areas at the base of the slides. **Minors less than 16 years of age may not be employed as dispatchers or attendants at the top of elevated water slides**—employees who maintain order, direct patrons as to when to depart the top of the slide, and ensure that ride patrons have safely begun their ride—because such work constitutes "tending" as used in Reg. 3.[26]

The regulatory language emphasized above, stating explicitly that "[m]inors under 16 years of age may not be employed as dispatchers or attendants at the top of elevated water slides," is determinative in this case. Zoom Flume does not dispute that it employed 15-year-olds to work as dispatchers at the top of elevated, power-driven water slides. The 15-year-olds performed the tasks explicitly and clearly disallowed by the Secretary—maintaining order, directing riders as to when to depart the top of the slide, and ensuring that riders have begun their ride safely. Thus, Zoom Flume violated the law.

On appeal, Zoom Flume concentrates on the portions of the regulations that generally prohibit minors under the age of 16 from "operating" or "tending" "power-

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26 Child Labor Regulations, Orders and Statements of Interpretation, 75 Fed. Reg. at 28418.

driven machinery."[27] Zoom Flume contends that there was no "power-driven machinery" or equipment at the top of the slides with its 15-year-old dispatchers.[28] Rather, it says that all controls were 100 or more feet away.[29] Zoom Flume argues "one may not attend to, oversee, take care of, or manage the operations of 'a power-driven equipment or machinery' that is not in close proximity to such person."[30]

Zoom Flume selectively cites and quotes the regulations, ignoring the language that determines the outcome of this case, which is absent from Zoom Flume's appellate brief. While it is true that the regulations broadly prohibit minors under the age of 16 from "operating" or "tending" power-driven equipment, including power-driven, elevated water slides, the regulations also make clear that the occupations specifically prohibited by that regulation are not "exhaustive," and that "[e]mployment that is not specifically permitted is prohibited."[31]

The regulations also expressly and specifically prohibit persons under the age of 16 from serving as "dispatchers or attendants" at the top of elevated water slides, performing precisely the duties the minors performed here. Again, the regulation states clearly and unambiguously that "[m]inors under 16 years of age may not be employed as dispatchers or attendants at the top of elevated water slides performing such tasks as maintaining order, directing patrons as to when to depart

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27 *E.g.,* Zoom Flume Water Park, LLC's Memorandum of Law in Support of Petition for Review (Zoom Flume Mem.) at 11 (citing 29 C.F.R. § 570.33(e) and stating "[t]he record undisputedly shows that the lifeguards at issue in this case did not operate or tended [sic] to any power-driven machinery"), 13 ("The language of [29 C.F.R. § 570.33(e)] is unambiguous. Minors 14 and 15 years of age are prohibited from working in occupations that require, among other things, tending to 'any power-driven equipment.'"), 14-15 ("Thus, the prohibition applies to occupations that involve the operation of or tending to power-driven equipment including power-driven equipment in 'elevated water slides' or in 'swimming pools' found at water amusement parks."), 17 ("The violation occurs only if the minors' occupation, whether a lifeguard or attendant, exposes such minors to any hazardous condition detrimental to their health or well-being, such as operating or tending to a power-driven equipment."), 20 ("Here, the regulation is unambiguous. The regulation only prohibits the employment of minors 14 and 15 years of age if the occupation involved the 'operating, tending, setting up, adjusting, cleaning, oiling, or repairing **any power-driven machinery**." (emphasis original)).

28 *Id.* at 9.

29 *Id*.

30 *Id.* at 19.

31 29 C.F.R. §§ 570.32, .33.

the top of the slide, and ensuring that patrons have begun their 'ride' safely."[32] Again, it is notable that Zoom Flume omitted this determinative regulatory language from its appellate brief.[33]

The regulation on its face is not limited to situations where the minors are near or using the mechanisms that power or control the slides. In fact, during the rulemaking associated with this regulation, the Department received a comment from the World Waterpark Association asserting that working as a dispatcher or attendant at the top of an elevated water slide does not constitute "tending" of "power-driven machinery" where there are no mechanized conveyance systems or emergency ride controls at the top.[34] A representative of a waterpark likewise opined that dispatchers are not in contact with any power-driven machinery.[35] The Department recognized these comments, but prohibited the work anyway because it "believes that continuation of its long-held position that such employment constitutes the prohibited tending of power-driven equipment—just as it is for attendants on roller coasters, merry-go-rounds, and ski-lifts—is both prudent and proper."[36]

Furthermore, it is clear that the regulations treat working as a dispatcher as a form of "tending" to the power-driven water slides prohibited by 29 C.F.R. § 570.33(e). The regulations state that "[t]he term permitted lifeguard duties does not include the **operation or tending** of power-driven equipment **including power-driven elevated water slides** . . . ."[37] The very next sentence states that

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[32] *Id.* § 570.34(l)(2).

[33] Zoom Flume suggests that "the regulation should read 'The term permitted lifeguard duties does not include the operation or tending of power-driven equipment including power-driven **[equipment on]** elevated water slides often found at water amusement parks and some swimming pools.'" Zoom Flume Mem. at 15 (emphasis original). The bracketed language added by Zoom Flume is inconsistent with the plain and unambiguous language of the next sentence of the regulation, which makes clear that serving as a "dispatcher or attendant" at the top of an elevated, power-driven water slide and performing duties like line-management is prohibited, without the added limitation that the minor is also exposed to the mechanisms that control the slide. 29 C.F.R. § 570.34(l)(2).

[34] Child Labor Regulations, Orders and Statements of Interpretation, 75 Fed. Reg. at 28419.

[35] *Id.*

[36] *Id.* at 28420.

[37] 29 C.F.R. § 570.34(l)(2).

minors under 16 years of age "**may not be employed as dispatchers or attendants** at the top of elevated water slides . . . ."[38] Read together and in context, the Secretary did not permit minors under the age of 16 to serve as dispatchers and attendants at the top of elevated water slides because such work constituted a form of "tending" to power-driven equipment, whether they were handling the slides' controls or not.[39]

The Department confirmed this natural reading in the rulemaking associated with the regulation. As quoted above, while the Secretary permitted some limited lifeguarding work, the Department explained that:

> **Minors less than 16 years of age may not be employed as dispatchers or attendants at the top of elevated water slides**—employees who maintain order, direct patrons as to when to depart the top of the slide, and ensure that ride patrons have safely begun their ride—**because such work constitutes "tending" as used in Reg. 3.**[40]

Zoom Flume also attempts to invert the nature of the FLSA's broad prohibitions on employing minors. It argues that "[i]n order for an occupation under Section 570.34 to be prohibited, there has to be a finding that such occupation creates a hazard to the health or well-being of the employee."[41] It then asserts that the work the 15-year-olds performed as attendants and dispatchers here did not expose them to hazards or harm, given their lack of proximity to machinery or

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38 *Id.*

39 Thus, we agree with the Administrator's assertion that "by referring to the prohibition against 'the operation [or] tending of power-driven equipment, *including* power-driven elevated water slides,' the regulations characterize a 'power-driven elevated water slide' in its entirety as a piece of 'power-driven equipment' that 15-year-olds are prohibited from tending." Administrator's Opening Brief (Administrator's Br.) at 18 (emphasis original).

40 Child Labor Regulations, Orders and Statements of Interpretation, 75 Fed. Reg. at 28418. Respondent states that the ALJ relied on this "ipse dixit" statement to expand the scope of the regulation beyond its natural reading. Zoom Flume Mem. at 12. We disagree. The statement is consistent with the natural and unambiguous reading of the regulation.

41 Zoom Flume Mem. at 13.

controls, and, therefore, is not and cannot be prohibited under the FLSA.[42] It suggests that the ALJ's ruling to the contrary is inconsistent with the purposes of the FLSA.[43]

Zoom Flume is incorrect. As emphasized above, the FLSA broadly and generally prohibits minors under 16 years of age from performing *all occupations*, unless *specifically allowed* by the Secretary. While the FLSA permits the Secretary to allow specific occupations for 14- and 15-years-olds if the Secretary determines that the occupations would not interfere with the minors' "health and well-being," the baseline rule of the FLSA remains that "[e]mployment that is not specifically permitted [by the Secretary] is prohibited."[44] In other words, the Secretary need not specifically find work is detrimental to a minor's health or well-being for it to be prohibited. Instead, if the Secretary has not expressly permitted 14- or 15-year-olds to perform a specific occupation by regulation or order, then that occupation is

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[42] *See id.* at 15. As discussed in Section 2.A.ii., below, we conclude that the dispatchers were exposed to obvious hazards working on elevated water slides 40 feet or more in the air, even if they were not in immediate proximity to the mechanisms that powered or controlled the slides.

[43] Zoom Flume Mem. at 11, 16. Below, the ALJ understood Zoom Flume to be arguing, at least in part, that the Secretary exceeded the scope of the FLSA to the extent the regulation prohibited the conduct at issue here. ALJ Order at 12. The ALJ correctly ruled that he lacked authority to rule on the validity of the regulations. *Id.* at 18-19. Respondent insists on appeal that it was not suggesting that the regulation exceeded statutory authority, but only that the Administrator's interpretation of the regulation was contrary to the FLSA and the plain language of the regulation. Zoom Flume Mem. at 19-22. We see why the ALJ understood Zoom Flume to be arguing that the regulations exceeded statutory authority. *See, e.g.,* Memorandum of Law in Support of Respondent's Motion for Summary Judgment at 8 ("To the extent [t]he Secretary's Regulation was intended to prohibit the employment of 15-year-old [l]ifeguards working at the top of elevated water slides, in the absence of a hazardous condition detrimental to their health and well-being, such Regulation is invalid because it is in excess of statutory jurisdiction."). We also agree with the ALJ that the ALJ and the Board may not rule on the validity of the regulations. Secretary's Order No. 01-2020, 85 Fed. Reg. at 13187 ("The Board shall not have jurisdiction to pass on the validity of any portion of the Code of Federal Regulations that has been duly promulgated by the Department of Labor and shall observe the provisions thereof, where pertinent, in its decisions."). In any event, the regulations are consistent with the FLSA's goal of broadly prohibiting oppressive child labor for the reasons set forth herein.

[44] 29 C.F.R. § 570.32.

prohibited as oppressive child labor under the FLSA, whether it is detrimental to their health or well-being or not.[45]

Zoom Flume has not shown that the Secretary has "specifically permitted" 15-year-olds to work as dispatchers or attendants at the top of elevated, power-driven water slides. To the contrary, the Secretary has clearly prohibited 15-year-olds from engaging in that work. Thus, we agree with the Administrator and the ALJ that Zoom Flume violated the FLSA.[46]

2. CMPs of $1,086 Per Minor Are Appropriate for Zoom Flume's Violations

Having determined that Zoom Flume violated the FLSA, we next consider CMPs. The FLSA provides that any person who violates the child labor provisions of FLSA "shall be subject to a civil penalty . . . for each employee who was the subject of such a violation."[47] At the time of the violations in this case, the maximum penalty that could be assessed was $14,050.[48]

The FLSA identifies two mandatory factors that we must consider in determining the amount of any penalty: (1) the size of the business of the person charged, and (2) the gravity of the violation.[49] The implementing regulations also

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45 Indeed, the FLSA makes clear that the Secretary must consider more than just the health and well-being of the 14- and 15-year-olds before permitting the work. The Secretary must also consider whether the work would be "confined to periods which will not interfere with their schooling." 29 U.S.C. § 203(l). Even then, the baseline remains that "[e]mployment that is not specifically permitted is prohibited." 29 C.F.R. § 570.32.

46 On July 1, 2024, Zoom Flume submitted a filing titled "Supplemental Authority," directing the Board to *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024), in which the Supreme Court overruled *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), and held that courts must exercise independent judgment in interpreting ambiguous federal statutes. Zoom Flume states "it is respectfully submitted that the Secretary's interpretation of the FLSA that was accepted by the ALJ impermissibly expanded the scope of the regulation to cover conduct that is otherwise not prohibited by the plain language of the FLSA or the regulation," again emphasizing the specific prohibition against "tending" power-driven equipment contained in the regulations. Supplemental Authority at 2. *Loper Bright* does not alter our analysis. For the reasons set forth above, the FLSA and regulations unambiguously do not allow the conduct performed by the 15-year-olds here, and Zoom Flume's arguments to the contrary are misplaced.

47 29 U.S.C. § 216(e)(1).

48 29 C.F.R. § 579.1(a)(1)(i)(A) (2002).

49 29 U.S.C. § 216(e)(3).

identify possible mitigating factors, discussed in more detail below, that we may consider and that could justify the reduction or elimination of any penalty.[50]

Zoom Flume argues that WHD and the ALJ misapplied the statutory and regulatory factors and that the CMP awarded by the ALJ should be reduced or eliminated. We conclude that $1,086 per minor—roughly 8% of the total possible CMP that could be awarded—is appropriate given the size of the business and gravity of the violation, and that reduction under the mitigating factors is not warranted.

A. Mandatory Factors

We begin with the mandatory factors: the size of Zoom Flume's business and the gravity of its child labor violations.

i. Size of Business

The first factor we must consider in determining the amount of the CMP is the size of Zoom Flume's business. In considering the size of the business, the regulations instruct us to examine: (1) the number of employees; (2) the dollar volume of sales or business done; (3) the amount of capital investment and financial resources; and (4) "such other information as may be available relative to the size of the business of such person."[51]

Zoom Flume is not a small business. In 2021 and 2022—the time period investigated by WHD—Zoom Flume had approximately 150 employees and over $1 million per year in annual dollar volume.[52] In 2021, its annual dollar volume was nearly $2.5 million.[53] Additionally, Zoom Flume did not present any evidence during the investigation regarding any financial hardship or lack of financial resources, or any other information regarding the company's capital investments relative to its ability to pay CMPs.[54]

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50 29 C.F.R. § 579.5(d)(1).

51 *Id.* § 579.5(b).

52 Milazzo Decl. at ¶10; Declaration of Gregg Harrington in Support of Administrator's Motion for Summary Decision (Harrington Decl.) at ¶9-11.

53 Harrington Decl. at ¶11.

54 Milazzo Decl. at ¶10.c.

Zoom Flume is much larger than businesses in other cases where the Board has recognized that the businesses were small and potentially deserving of a reduction in the CMP award. In one case, the business's total season earnings were just $11,357, roughly equal to the CMP assessed.[55] In another case, the business had just $250,000 in gross receipts or sales and 10 to 14 employees.[56] In a third case, the business had gross income of under $300,000 to $550,000 per year and just 7 to 16 employees.[57] In a fourth case, the business was in serious financial trouble and employed just three to four full-time employees.[58] Zoom Flume had significantly more employees and gross revenue than all of these businesses.[59]

Zoom Flume is more similar in size to, or even larger than, businesses in other cases where the Board has declined to reduce the CMP assessment based on the size of the business. For example, in one case, the Board declined to reduce a CMP award based on the size of the business where it had 10 to 12 regular employees plus part-time high school students, gross sales of over $3.5 million per year, and owned its own facilities and equipment.[60] Likewise, the Board declined to reduce a CMP award based on the size of the business in another case where the

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[55] *Halsey*, ARB No. 2004-0061, slip op. at 11-12. The Board ultimately did not reduce the CMP because the small size of the business was outweighed by the gravity of the violation. *Id.*

[56] *Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Keystone Floor Refinishing Co., Inc.*, ARB Nos. 2003-0056, -0057, ALJ No. 2002-CLA-00017, slip op. at 10-11 (ARB Sept. 23, 2004). The Board ultimately did not reduce the CMP because the small size of the business was outweighed by the gravity of the violation. *Id.* at 11.

[57] *Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Chrislin, Inc.*, ARB No. 2000-0022, ALJ No. 1999-CLA-00005, slip op. at 8 (ARB Nov. 27, 2002). The Board reduced the CMP by 30% based on the size of the business. *Id.* at 10-11.

[58] *Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Elderkin*, ARB Nos. 1999-0033, -0048, ALJ No. 1995-CLA-00031, slip op. at 14 (ARB June 30, 2000). The Board ultimately did not reduce the CMP because the small size of the business was outweighed by the gravity of the violation. *Id.* at 14-16.

[59] As an additional point of comparison, WHD's guidance documents at the time of the investigation in this case, which are by no means determinative, stated that a business would be considered small and CMPs would be reduced if its gross annual dollar volume of sales did not exceed $1,000,000 and it had less than 100 employees. Wage and Hour Division Field Assistance Bulletin No. 2016-5, at 16 (Dec. 19, 2016).

[60] *Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Fisherman's Fleet, Inc.*, ARB No. 2003-0025, ALJ No. 2001-CLA-00034, slip op. at 6-7 (ARB June 30, 2004).

business had 20 to 25 full-time employees, 40 to 50 part-time employees, and gross annual dollar volume of $1.7 million.[61]

Zoom Flume does not argue on appeal that it is a small business, that it was financially unable to pay the CMPs, that the CMPs assessed by WHD and awarded by the ALJ were disproportionate to its size, or that its size has any other bearing on the amount of CMPs awarded. While we recognize that Zoom Flume is not an exceptionally large business, it is also not a small business or apparently suffering from financial restrictions that would impact the CMP analysis or justify a reduction in the CMP award.

ii. Gravity of Violation

We next consider the gravity of Zoom Flume's violation. In considering the gravity of the violation, the regulations instruct us to examine: (1) any history of prior violations; (2) any evidence of willfulness or failure to take reasonable precautions to avoid violations; (3) the number of minors illegally employed; (4) the age of the minors and records of the required proof of age; (5) the occupations in which the minors were employed; (6) whether the minors were exposed to hazards and any resultant injuries to the minors; (7) the duration of the illegal employment; and (8) as appropriate, the hours of the day in which the violations occurred and whether such employment was during or outside school hours.[62]

Zoom Flume contends that WHD and the ALJ failed to consider and/or give proper weight to several of these factors that indicate that its violation was not grave.[63] We agree with Zoom Flume that some of the factors reflect favorably on Zoom Flume. For example, it is undisputed that WHD did not find that Zoom Flume acted willfully in violating the child labor laws and that Zoom Flume had no prior

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61 *Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Ahn's Mkt., Inc.*, ARB No. 1999-0024, ALJ No. 1997-CLA-00023, slip op. at 2, 7-8 (ARB July 28, 2000).

62 29 C.F.R. § 579.5(c).

63 Zoom Flume Mem. at 24-25. Zoom Flume likewise argues that because WHD stated the $1,086 penalty per minor was just a "starting point" for the type of violation involved, it must not have considered the "admittedly applicable mitigating factors that should have been considered to reduce such initial penalty . . . ." *Id.* at 22-23. The Administrator counters that WHD took these other factors into consideration and did not raise the CMP higher than the starting point as a result. Administrator Br. at 26-27. Because we consider this matter de novo, we need not specifically resolve whether WHD considered (or properly considered) the factors.

child labor violations.[64] Zoom Flume asserts, and WHD does not dispute, that it has been in operation for over 42 years, has been audited by federal and state agencies on a yearly basis, and has never been cited for a violation of any child labor law until this investigation.[65] Additionally, no minors were injured while working as dispatchers.[66] Although not directly addressed by the parties, it also appears that Zoom Flume did not employ minors in such a way as to interfere with school hours.[67]

We also recognize that upon being investigated and told of its violations, Zoom Flume immediately revised its practices and agreed to comply with the law.[68] WHD apparently believed that WHD's commitment to future compliance was sincere, and we have no reason to doubt it.[69] Zoom Flume's response to WHD's notice of its violations was commendable and must be taken into consideration when assessing a penalty in this case.

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64 ALJ Order at 21. Although Zoom Flume had never previously been found to have violated the child labor laws, as discussed below, the assignment of 15-year-olds to work as dispatchers at the top of elevated water slides was not a new practice. Thus, Zoom Flume in fact appears to have been violating the FLSA for years. *See Fisherman's Fleet*, ARB No. 2003-0025, slip op. at 7 ("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.").

65 Zoom Flume Mem. at 24. Zoom Flume also argues that it had a good faith basis to believe that it was not illegal to employ 15-year-old lifeguards to work as attendants at the top of its water slides, citing a decision of the State of New York Industrial Board of Appeals finding that it did not violate a state law stating that "[a]musement devices shall be operated only by competent operators at least 16 years of age for devices designed primarily for the use of small children and/or an accompanying adult and 18 years of age for all other devices." *Id.* at 24; N.Y. COMP. CODES R. & REGS., Tit. 12, § 45-2.8. The state regulation regulates different conduct ("operat[ing]" "amusement devices") than the laws and regulations at issue here ("tending" to "power-driven machinery," including water slides specifically, prohibiting "oppressive child labor" broadly, and expressly disallowing the work performed in this case). Whatever New York regulations proscribe, the FLSA proscribes something different here, and, even if there was overlap, the more protective federal law would apply. *See* 29 U.S.C. § 218. Nevertheless, we recognize that the New York decision could have caused some confusion for Zoom Flume as to the applicable standards.

66 Milazzo Decl. at ¶12.j.

67 Because Zoom Flume was a seasonal water park, it largely operated during the summer months when most minors would not be in school.

68 Milazzo Decl. at ¶12.a.

69 *See id.*

On the other hand, other regulatory considerations weigh against Zoom Flume. Most significantly, the number of minors illegally employed as dispatchers and the duration of such illegal employment both counsel in favor of a heightened penalty. The investigation revealed that Zoom Flume employed 35 minors in violation of the FLSA—nearly a quarter of its entire staff.[70] Although the record is not clear on how many total hours the minors spent at the top of the elevated slides in violation of the FLSA, the violations were clearly not infrequent, brief, or sporadic. Zoom Flume regularly rotated the 15-year-olds to serve as dispatchers on the slides as part of their daily rotations around the park, with assignments as dispatchers lasting an hour at a time.[71] Zoom Flume does not dispute that this practice was extensive, lasted for at least the two-year investigatory period, and apparently dated back much longer.[72] Frequent and extensive violations like these increase the gravity of the violations.[73]

The minors were also exposed to hazards. Zoom Flume assigned the 15-year-olds to work at the top of six elevated water slides—one stood 44 feet in the air, three others stood 30 or more feet in the air, and a fifth stood 20 feet in the air. While at the top of these slides, the 15-year-olds were tasked with managing and

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70 *Id.* at ¶10.a., 12.e.

71 *Id.* at ¶12.d., 12.i.; Harrington Decl. at ¶13, 18; Aragona Dep. at 26.

72 Milazzo Decl. at ¶12.d., 12.i.; Harrington Decl. at ¶13. It is not clear how long Zoom Flume had been assigning 15-year-olds to work as dispatchers at the top of elevated water slides, but the record reflects that the practice may have dated back at least to August 2014, when the incident giving rise to New York's investigation of Zoom Flume's compliance with state law took place. Resolution of Decision by the State of New York Industrial Board of Appeals at 2 (attached as Exhibit A to Affidavit of Glenn Aragona).

73 *E.g., Keystone Floor*, ARB Nos. 2003-0056, -0057, slip op. at 11 ("While only one minor was involved and no injury resulted, [the minor] admittedly immature, engaged in multiple uses of the prohibited tools over five months of sporadic employment."); *Fisherman's Fleet*, ARB No. 2003-0025, slip op. at 7 (violations involved 31 minors, 15 of whom were 14- to 15-year-olds; "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."); *Ahn's Mkt.*, ARB No. 1999-0024, slip op. at 8 (violations involved six minors; "[T]he number and age of the minor employees involved, duration of illegal employment, and when the violations occurred—do not, in our estimation, warrant a CMP any lower than $1,200 per violation."); *Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Thirsty's, Inc.*, ARB No. 1996-0143, ALJ No. 1994-CLA-00065, slip op. at 6-7 (ARB May 14, 1997) (modifying ALJ's 75% reduction of CMP to just a 25% reduction for case involving 32 minors; "The [ALJ's] penalty is not appropriate for an egregious work situation where some children were subjected to multiple violations over a period of months.").

assisting lines of riders while water jetted out of powered pumps. At those heights, under those conditions, and with the distractions that can easily be foreseen from dealing with and managing riders, one slip and fall could obviously be catastrophic.[74] Thankfully, no minors were injured from this work. But the fact remains that the work itself was obviously hazardous.[75]

Of course, WHD recognized—and we agree—that this was not the most dangerous work to which 15-year-olds could be exposed and for which a penalty at or approaching the statutory maximum should be assessed.[76] For example, this case contrasts with one in which the Board affirmed the then-statutory maximum CMP of $10,000 for violations involving minors working on a farm, one of whom had an arm severed in a piece of heavy equipment.[77] Likewise, the dangers here were not nearly so severe as in another case where the Board affirmed the then-statutory maximum CMP of $11,000 when a minor died while working on a commercial fishing vessel.[78]

In contrast, the work here was more dangerous than the work in other cases where lower or roughly equal penalties were awarded. In one case, for example, the Board assessed approximately $240 per minor for violations of the FLSA's hour limits for minors working at a retail business.[79] In another case, the Secretary of

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[74] *See Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Lynnville Transp., Inc.*, ALJ No. 1999-CLA-00018, slip op. at 14 (ALJ Aug. 29, 2000), *aff'd* ARB No. 2001-0011, ALJ No. 1999-CLA-00018 (ARB Nov. 27, 2002) ("However, I specifically find that the company's allowance of its minor employees to operate hazardous equipment to be serious, despite the fact that the minors involved in this case apparently used the equipment in a safe manner. The mere use of the equipment subjected them to potential harm which is to be avoided by compliance with the hazardous orders. As I have stated before in cases of this nature, it would take only one serious accident in the operation of the hazardous equipment for all concerned parties to understand the importance of enforcing the hazardous orders.").

[75] *See* Milazzo Decl. at ¶12.h. Zoom Flume contends that the minors were not exposed to hazards while serving as dispatchers because there were no controls or equipment at the top of the slides with them. Zoom Flume Mem. at 11, 15. Exposure to such mechanisms may have heightened the danger to the minors, but working as dispatchers up to 40 feet or more in the air was still dangerous.

[76] *See* Milazzo Decl. at ¶12.g.

[77] *Elderkin*, ARB Nos. 1999-0033, -0048, slip op. at 1-2, 4.

[78] *Halsey*, ARB No. 2004-0061, slip op. at 1-2.

[79] *Thirsty's*, ARB No. 1996-0143, slip op. at 1-2, 6-7. The ARB increased the penalty from just roughly $80 per minor awarded by the ALJ. *Id.* at 6.

Labor assessed $130 per minor where the minors processed goods for shipment (packing and labeling merchandise) in a warehouse.[80] In a third case, the Secretary penalized an employer $90 to $240 per minor for violations of hour limits for minors working at a restaurant.[81] In a fourth case, the Secretary affirmed the assessment of approximately $1,648 per minor for violations of age and hour limits for minors selling newspapers door-to-door.[82] And in a fifth case, the Secretary assessed $1,125 per minor for violations of age and hour limits for minors working at a restaurant.[83]

As the foregoing cases demonstrate, this case falls on the continuum between relatively harmless violations and the most severe and egregious violations of the child labor laws. While the minors here were not exposed to extremely dangerous conditions, the work they performed carried innate hazards and surely could have resulted in serious injury or death if engaged in without appropriate care. Thus, this factor weighs against Zoom Flume and calls for more than a nominal penalty.

In sum, we recognize and appreciate that several considerations weigh in favor of a relatively small penalty against Zoom Flume. No minors were injured, it did not have a history of child labor violations, it immediately corrected its practices, it agreed to future compliance, and it did not subject the minors to extremely hazardous or dangerous work. On the other hand, the violations were prevalent, occurred for years, and exposed the minors to at least some danger. Balancing all these considerations, we find the CMP assessed by WHD and affirmed by the ALJ of $1,086 per minor, which we emphasize is just approximately 8% of the penalty that could be assessed in this case, is appropriate.

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80 *Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Navajo Mfg.*, Case No. 1992-CLA-00013, slip op. at 2-5 (Sec'y Feb. 21, 1996).

81 *Adm'r, Wage & Hour Div., U.S. Dep't of Lab. U.S. Dep't of Lab. v. D. D. & D., Inc.*, Case No. 1990-CLA-00035, slip op. at 2, 7 (Sec'y Apr. 3, 1995).

82 *Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Circulation Promoters, Inc.*, Case Nos. 1992-CLA-00005, -00083, slip op. at 1-2, 7 (Sec'y Jan. 18, 1995).

83 *Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Q. & D.*, Case No. 1992-CLA-00021, slip op. at 1-4 (Sec'y May 11, 1994), *aff'd* No. CIV A. 94-MC-188, 1994 WL 637421 (E.D. Pa. Nov. 14, 1994).

B. Optional Mitigating Factors

Having set the CMP based on the mandatory statutory factors, we next consider whether it is appropriate to reduce or eliminate the CMP based on the optional mitigating factors identified in the regulation.

i. De Minimis

First, we may consider reducing or eliminating the CMP if: (1) the violation was "de minimis," (2) the violator has given credible assurance of future compliance; and (3) a penalty in the circumstance is not necessary to achieve the objectives of the FLSA.[84] All of these factors must be present to justify reducing the CMP.[85]

De minimis means "trifling" or "negligible," or something that is "so insignificant that a court may overlook it in deciding an issue or case."[86] The few cases in which the Board or the Secretary found violations were de minimis are instructive. In one, the Board concluded that a violation involving the employment of a 15-year-old for two to three months before her 16th birthday in violation of the FLSA's age and hour limits was de minimis.[87] In another case, the Administrator conceded that a violation involving the employment of a 17-year-old working as a trainee for a bank who drove to other bank branches and the post office in violation of the FLSA's driving restrictions was de minimis.[88] In a third case, the Secretary

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[84] 29 C.F.R. § 579.5(d)(1). While Zoom Flume argued below that its violation should be considered de minimis, it appears to have largely abandoned that argument on appeal, focusing instead on the alternative set of mitigating factors contained in 29 C.F.R. § 579.5(d)(2). *See* Zoom Flume Mem. at 5 ("The ALJ's conclusion [that the CMP should not be mitigated] is contrary to the regulations that recognizes circumstances when the need for a penalty is not dependent upon a finding that the violation was *de minimis*. 29 C.F.R. § 579.5(d)(2)."), 25-28 (explaining why Zoom Flume believes (d)(2) applies here).

[85] *Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Supermarkets Gen. Corp.*, Case No. 1990-CLA-00034, slip op. at 3 (Sec'y Jan. 13, 1993) (citation omitted).

[86] BLACK'S LAW DICTIONARY (12th ed. 2024).

[87] *Ahn's Mkt.*, ARB No. 1999-0024, slip op. at 2, 10 ("At most, the violation of the hours-of-work regulation, involving but one employee, lasted two to three months. This we weigh against the fact that the violation resulted from the simple error of not checking [the minor]'s working papers against his application form, and there is no evidence that [the minor] was exposed to any obvious hazard or threat to his health.").

[88] *Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Blackhawk State Bank*, Case No. 1993-CLA-00082, slip op. at 2 (Sec'y Nov. 20, 1995).

determined that violations involving children under the age of 14 stuffing envelopes was de minimis.[89] In all three cases, the violations were infrequent and did not expose the minors to harm.[90]

In contrast, the Board and the Secretary have repeatedly and consistently declined to find violations de minimis where the violations were frequent or pervasive or where the violations involve hazardous work.[91] Here, the violations involved 35 minors, occurred regularly, and continued over a period of years. The

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89 *Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Horizon Publishers & Distribs.*, Case No. 1990-CLA-00029, slip op. at 1-2, 7-8 (Sec'y May 11, 1994) ("They worked on the project in the Jones home, often while they watched television and ate snacks, and during a slumber party. . . . [They] set their own hours . . . [and] worked after school and during the summer. . . . [T]he children were not near hazardous equipment in the plant . . . . None of the work was strenuous, and there is no evidence that the work interfered with the children's schooling or health. . . . The amount of work done by the children also was minimal. It was stipulated that in the two year [investigatory period], the children worked a total of less than 203 hours, or an average of 17 hours per child. . . . [S]ome children . . . hardly worked at all.").

90 WHD guidance documents at the time of the investigation stated that violations may be considered de minimis if they involved limited recordkeeping violations or if they involved minimal violations of the FLSA's hour limits. Wage and Hour Division Field Assistance Bulletin No. 2016-5, at 10.

91 *See, e.g., Lynnville Transp.*, ALJ No. 1999-CLA-00018, slip op. at 13-14 (concluding that violations involving hour limits, use of skid loader, and other violations could not be de minimis "where, as here, there were numerous violations and some of the violations involved the use of hazardous equipment by minor employees, some of whom were only 13 years old"); *Ahn's Mkt.*, ARB No. 1999-0024, slip op. at 9 (finding violations involving six minors using a paper baler were not de minimis; "The evidence of record indicates that the violations involved the heedless exposure of minors to an obvious hazard."); *Navajo Mfg.*, Case No. 1992-CLA-00013, slip op. at 2-4 (reversing ALJ's conclusion that violations involving 13- and 14-year-olds processing goods for shipping (packing boxes, affixing labels) in a warehouse during school breaks were de minimis; "In this regard, I find it dispositive that there were actual violations involving underage children working in a warehouse—a working practice and a working environment that the Secretary of Labor has determined to be unacceptably hazardous."); *Q. & D.*, Case No. 1992-CLA-00021, slip op. at 5 (finding violations involving four minors under the age of 14 working at a restaurant in violation of hour limits was not de minimis; "Although there is not instructive case law on the reach of the term de minimis as used in this section, the violations in this case clearly do not qualify. Here we have multiple violations regarding each child . . . ."); *Supermarkets Gen. Corp.*, Case No. 1990-CLA-00034, slip op. at 2-5 (finding violations involving 23 minors working in violation of hour limits and eight minors using paper baler were not de minimis; "Given the high number of violations and the percentage of minors involved (seventeen of forty-six minors employed . . .), I conclude that the violations are not de minimis.").

violations also exposed the minors to hazards. Thus, the violations were not de minimis.[92]

ii. Exposure to Hazards

We may also consider reducing or eliminating the CMP if: (1) the violator has no previous history of child labor violations; (2) the violations involved no intentional or heedless exposure of any minor to any obvious hazard or detriment to health or well-being and were inadvertent; (3) the violator has given credible assurance of future compliance; and (4) a penalty in the circumstance is not necessary to achieve the objectives of the FLSA.[93] Again, all of these factors must be present to justify reducing the CMP.[94]

Once again, Zoom Flume contends that working as dispatchers at the top of water slides did not expose the minors to obvious hazards or conditions detrimental to their health or well-being.[95] For the reasons discussed above, we disagree. The minors worked at the top of elevated, power-driven water slides, two-thirds of which were 30 or more feet in the air. Zoom Flume knowingly assigned the 15-year-

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[92] Because all of the factors in paragraph (d)(1) must be present to justify mitigation, and because we find that the violations were not de minimis, we need not analyze the other factors contained in paragraph (d)(1).

[93] 29 C.F.R. § 579.5(d)(2).

[94] *Supermarkets Gen. Corp.*, Case No. 1990-CLA-00034, slip op. at 3 (citation omitted).

[95] Zoom Flume Mem. at 27. Zoom Flume refers to an email sent from a WHD investigator to Zoom Flume in August 2022, stating that he "didn't see anything to link [Zoom Flume's violation] to a Hazardous Occupation only the Child Labor Regulations is where I could find it specifically stating a 15 year old could not work at the top of a water slide." Email from G. Harrington to C. de Oliveira, Aug. 9, 2022, RE: Zoom Flume Water Park (attached as Exhibit F to Statement of Material Facts in Support of Motion for Summary Judgment). In context, it appears that the investigator was referring to Hazardous Occupations Orders, which may be issued by the Secretary banning anyone under the age of 18 from performing work that is "particularly hazardous." 29 U.S.C. § 203(l); 29 C.F.R. Part 570, Subpart E; *see also* Milazzo Decl. at ¶12.g. (noting that "[t]he violations fell under 29 C.F.R. § 570.34(*l*) rather than a Hazardous Occupations Order or the Child Labor Enhanced Penalty Program"). Although the Secretary has not issued a Hazardous Occupations Order stating that working as a dispatcher at the top of an elevated water slide is "particularly" hazardous and thus prohibited for all persons under the age of 18, that does not mean that the work is not hazardous or "detrimental to [15-year-olds'] health and well-being."

olds to this work repeatedly as part of their regular daily rotations for years.[96] As we explained above, at those heights and with the conditions under which they worked, Zoom Flume exposed the minors to obvious hazards that could have been catastrophic. Thus, this set of mitigating factors does not justify reducing the CMP award.[97]

CONCLUSION

For the foregoing reasons, we **AFFIRM** the ALJ and find that Zoom Flume violated the plain and unambiguous terms of the FLSA and its implementing regulations by assigning 15-year-olds to work as dispatchers at the top of elevated, power-driven water slides. Weighing the size of Zoom Flume's business and the gravity of the violation, we also **AFFIRM** the assessment of $1,086 per minor, totaling $38,010. Finally, we **AFFIRM** the ALJ's determination that the regulatory mitigating factors do not justify reducing the CMP award in this case.

SO ORDERED.

RANDEL K. JOHNSON
Chief Administrative Appeals Judge

PHILIP G. KIKO
Administrative Appeals Judge

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[96] *See Keystone Floor*, ARB Nos. 2003-0056, -0067, slip op. at 11 ("Nor were the infractions inadvertent. [The minor]'s co-worker, McDowell, who was also the foreman, testified credibly that he assigned [the minor] to use both tools and saw him carry out the tasks. . . . Also, Nacios testified that [the minor] used the two pieces of equipment 'as a regular part of his job.'"); *Ahn's Mkt., Inc.*, ARB No. 1999-0024, slip op. at 9 ("Moreover, in light of the fact that a supervisor directed at least one minor to load the baler, the violations cannot be considered 'inadvertent.'").

[97] Because all of the factors in paragraph (d)(2) must be present to justify mitigation, and because we find that the violations exposed the minors to obvious hazards or conditions that were detrimental to their health or well-being, we need not analyze the other factors contained in paragraph (d)(2).