No. 05-3647

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ELAINE L. CHAO, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,

Plaintiff/Appellee,

v.

AKRON INSULATION AND SUPPLY, INC.,
and DINO L. LOMBARDI,

Defendants/Appellants.

On Appeal from the United States District Court
For the Northern District of Ohio, Eastern Division

FINAL BRIEF FOR THE SECRETARY OF LABOR

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STATEMENT OF JURISDICTION

The district court had jurisdiction over this case under section 17 of the Fair Labor Standards Act ("FLSA" or "Act"), 29 U.S.C. 217. Subject matter jurisdiction was also vested in the district court under 28 U.S.C. 1331 (federal question jurisdiction) and 28 U.S.C. 1345 (suits commenced by an agency or officer of the United States). A final order of the district court granting judgment to the Secretary of Labor ("Secretary") was entered on May 5, 2005 (District Court Civil Docket ("R.") 37; Joint Appendix ("Apx.") 447), from which a timely notice of

appeal was filed on May 16, 2005 (R. 38 Notice; Apx. 472). This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT REGARDING ORAL ARGUMENT

The Secretary believes that oral argument would be helpful to this Court in this case.

STATEMENT OF THE ISSUE

Whether the district court correctly concluded that the shop time, including waiting time, and the travel time between the shop and the job sites are compensable under the FLSA, as amended by the Portal-to-Portal Act.

STATEMENT OF THE CASE

A. Course of Proceedings

The Secretary filed this action under section 17 of the FLSA, 29 U.S.C. 217, on March 4, 2004, to enjoin Akron Insulation Supply, Inc. and its president and sole owner, Dino L. Lombardi (collectively "the employers") from violating the overtime pay and recordkeeping provisions of the FLSA, and from withholding back wages due. See 29 U.S.C. 207, 211(c), 215(a)(2), and 215(a)(5) (R. 1 Complaint; Apx. 6).[1]

District Court Judge James S. Gwin conducted a one-day bench trial in Akron, Ohio on October 21, 2004. In a Findings of Fact and Conclusions of Law Granting Judgment for Plaintiff,

[1] Relevant parts of the pertinent statutes and regulations cited in this brief are set out in an addendum.

dated May 5, 2005, the court issued a restitutionary injunction against the employers for the company's violations of the Act's overtime requirements. (R. 37 Decision; Apx. 447). The court concluded that back wages were due 45 employees in the amount of $94,830.96, plus interest. (*Id.* at 471). The court also granted the Secretary's request for a prospective injunction enjoining further violations of the Act's recordkeeping and overtime provisions. (*Id.*).

The employers filed a timely notice of appeal on May 16, 2005 (R. 38 Notice; Apx. 472).

B. Statement of Facts

1. Akron Insulation and Supply, Inc. ("Akron") is an Ohio corporation located in Akron, which installs insulation into residential and commercial structures. (Tr. 239; Apx. 248). Dino L. Lombardi ("Lombardi") is the president and sole owner of Akron. (Tr. 238; Apx. 247).

2. Beginning in July, 2003, the Department of Labor's ("Department") Wage and Hour investigator Dale Zimmerman conducted an investigation of Akron's practices covering a two-year period from September 1, 2001 to August 31, 2003. (R. 37 Decision at 2; Apx. 448; Tr. 97; Apx. 106). The investigation revealed that Akron violated the overtime and recordkeeping provisions of the FLSA; Akron failed to pay its full-time

employees for required "shop" time and travel time during the relevant period. (Tr. 100-01; Apx. 109-10).[2]

3. At the trial held on October 21, 2004, five current or former employees of Akron who were found by the Department to be due additional overtime compensation testified. Tevell Moss, a former carpenter, and Mitchell Westfall, a former crew chief, testified for the Department; Jacob Weyrick and Bill Kreitzburg, both current installers, and John DiMichele, a current foreman, testified for Akron. (Decision at 2; Apx. 448).

Akron employees were required to report to a designated meeting place, the employers' shop, and clock in before traveling to the actual job site each day. (Decision at 4; Apx. 450; Tr. 20, 28, 55; 61, 70, 89; 160; 174; 190; Apx. 29, 37, 64; 70, 79, 98; 169; 183; 199). Employees were required to be at the shop to receive instructions, assemble work crews, get the job assignment for the day, and load trucks before traveling to the job site. (Decision at 4; Apx. 450; Tr. 21, 28, 42; 61-62; 180; 204; Apx. 30, 37, 51; 70-71; 189; 213). Lombardi testified that he is the person who assembles the crews to send out to the jobs (Decision at 5; Apx. 451; Tr. 275-77; Apx. 284-86) and he "gets the people out" each morning. (Decision at 4; Apx. 450; Tr. 260; Apx. 269). Moss testified that, depending upon who

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[2] Some of the employees are members of unions. (Decision at 4; Apx. 450; Tr. 99; Apx. 108).

showed up on a given day, he could possibly "switch crews." (Tr. 25, 56-57; Apx. 34, 65-66); Westfall testified that employees would wait around at the shop "for Dino to decide who's going where and who's taking who." (Tr. 61-62; Apx. 70-71); DiMichele testified that he would wait to see who was coming in each day because he was "supposed to have so many people to a crew," and that "a lot of people say they're coming in and they don't." (Tr. 197; Apx. 206).

The employees would be given their job assignments for the day after clocking in each morning at the shop. Sometimes the assignment would be in the form of a "job ticket." (Decision at 5; Apx. 451; Tr. 62; 166; 180; Apx. 71; 175; 189). Kreitzburg testified that he could not show up at 7:30 a.m. (the official start time) because he wanted to find out what he needed for that particular job, discuss the job with the rest of his crew, and establish what his routine would be for the day. (Tr. 179-80; Apx. 188-89). Employees also were required to load trucks with materials, insulation, mixing machines, and other equipment needed for the day's job before leaving for the job site. (Decision at 5; Apx. 451; Tr. 21; Apx. 30). Akron has one loading dock and three or four company-owned trucks (*Id.*); consequently, sometimes employees would need to wait for the loading dock to become available. (Tr. 21; 180; 204; Apx. 30; 189; 213).

During the time that the employees were at the shop in the morning, some of them would drink coffee or socialize while waiting for their assignments, waiting for their crewmembers to arrive, or waiting for the loading dock to become available so that they could load their trucks. (Decision at 5; Apx. 451; Tr. 21; 61-62; 160; 179; Apx. 30; 70-71; 169; 188). The waiting time could range from as little as ten minutes to as long as one hour. (Decision at 5; Apx. 451; Tr. 61-62, 64, 67; Apx. 70-71, 73-76). Although Lombardi claimed that the employees reported to the shop early simply to socialize and were not working (Tr. 250; Apx. 259), the district court found it "incredible that employees would voluntarily clock-in early to socialize and drink coffee for that much time." (Decision at 6; Apx. 452). "Ample testimony shows that Lombardi required employees to report at specific times and perform several required tasks before departing from the shop for the job site." (*Id.*).

Several employees called to testify by the employers testified that they clocked in "voluntarily" and drank coffee at the shop. (Decision at 5; Apx. 451; Tr. 161; 173-74, 176, 179; 189, 192; Apx. 170; 182-83, 185, 188; 198, 201). However, these employees further testified that they also performed job-related tasks in the shop such as picking up job tickets, receiving job

assignments, obtaining gas money from the employer,[3] and loading trucks. (Decision at 5-6; Apx. 451-52; Tr. 166, 170; 179; 191, 197; Apx. 175, 179, 188; 200, 206).

At the end of the day, Akron's full-time employees would travel from the job site back to the shop to return the trucks, and materials and equipment, and to report back to Lombardi on the progress of the day's work. (Decision at 7; Apx. 453; Tr. 64; 84; 202; Apx. 73; 93; 211). For example, Moss testified that the employees would sometimes wait for Lombardi, from ten minutes up to an hour, because Lombardi wanted to talk to them about what had transpired during the day (for instance, how the job went and any problems such as equipment breaking down). (Tr. 64; Apx. 73). Lombardi would also give instructions for the next day's work, and would consult with the crew leaders. (*Id.*).

4. The official start time was 7:30 in the morning. (Tr. 249; Apx. 258). However, a number of employees testified that Lombardi routinely instructed the employees to arrive at the shop before 7:30 a.m. (Decision at 10; Apx. 456). Sometimes Lombardi would instruct the workers to arrive earlier than 7:30 for a particular job (Tr. 28, 55; 61, 63; 177; Apx. 37, 64; 70,

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[3] At Lombardi's request, employees sometimes drove other crew members to the job site. Lombardi would give these employees money for gas. (Decision at 7; Apx. 453; Tr. 49; 163, 170; 251; Apx. 58; 172, 179; 260).

72; 186). Indeed, as noted supra, workers would often clock-in before 7:30 in order to perform certain essential tasks and to ensure that they arrived at the job site on time. (Tr. 61, 63, 70; Apx. 70, 72, 79). Crews would generally depart from the shop before 7:30 a.m., and an employee arriving at that time would likely miss the crew; to avoid this eventuality, Moss would arrive at the shop between 6:00 a.m. and 6:15 a.m. (Tr. 21, 28; Apx. 30, 37). Kreitzburg, for example, testified that he needed to arrive earlier than 7:30 a.m. in order to be able to discuss the needs of the job with Lombardi, talk to his crew, and get himself organized before traveling to the work site. (Tr. 179-80; 188-89).

5. The employees clocked in each day upon arrival at Akron's place of business using the employers' time clock. (Decision at 4; Apx. 450; Tr. 21, 28; 61-62; 160; 177; 190; Apx. 30, 37; 70-71; 169; 186; 199). In addition, the employees wrote in work times spent at the job site on their time cards; the handwritten times indicated the times spent on the particular job site for that day. (Decision at 7; Apx. 453; Tr. 20-24; 61, 65; 160-61; 173-74, 181; 190; Apx. 29-33; 70, 74; 169-70; 182-83, 190; 199).[4]

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[4] The employer's witnesses -- Lombardi, Weyrick, Kreitzburg, and DiMichele -- testified that the handwritten times represented the times that the employees left and returned to the shop, i.e., included travel time. (Tr. 163; 178-79; 191; 255, 265;

Moss, for example, would clock in upon arrival at the shop at 6:00 to 6:15 a.m. At the end of the day, he would clock out and write in the job site for the day, and the times spent on that job site, on his time card. (Decision at 10; Apx. 456; Tr. 20, 24, 27-28, 37; Apx. 29, 33, 36-37, 46). Kreitzburg also testified that the handwritten times on the time cards indicate time spent at the job site. (Tr. 181; Apx. 190). Kreitzburg also stated that Akron's office closed at 5:00 p.m. Therefore, if employees returned to the shop after 5:00 p.m., they would not clock out, and the times would be written on the time cards the following morning. (Tr. 175, 181; Apx. 184, 190).

6. Employees were paid only for the times written on the time cards by the employees, which represented the hours that the employees spent at the job site, unless Lombardi approved additional hours by initialing the time card. (Tr. 214-15; Apx. 223-24). Significantly, however, this practice was not consistently followed inasmuch as many of the time cards show that Lombardi paid employees for hours worked before 7:30, even though those cards were not initialed. (Decision at 10; Apx. 456; Tr. 183-84; 233; Apx. 192-93; 242; Pltf's Ex. 3 (sample

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Apx. 172; 187-88; 200; 264, 274). However, the district court found that this testimony was not credible. (Decision at 9; Apx. 455).

timecards for each employee) at 11-12 (Dennis); 41-42 (Kreitzburg); Apx. 315-16; 345-46).

Based on Akron's practice of paying only for handwritten times appearing on the timecards, time spent working in the shop in the morning or afternoon, as well as any travel time to the job sites and back, was not compensated (even if the time in the morning occurred after 7:30). (Decision at 11; Apx. 457; Tr. 43, 46; 63-64, 91; Apx. 52, 55; 72-73, 100; Pltf's Ex. 3 (sample timecards) (Apx. 305-92) and Pltf's Ex. 4 (all timecards)).

7. Lombardi testified that he pays non-union employees for all hours worked, including travel time. (Decision at 8; Apx. 454; Tr. 249, 255, 265; Apx. 258, 264, 274). However, the time cards do not indicate payment for all hours non-union employees were clocked in. (Decision at 8-9; Apx. 454-55; Pltf's Exs. 3 and 4).[5] But travel time was not paid to employees who were members of labor unions. (Decision at 8; Apx. 454; Tr. 247; Apx. 256). These employees were paid only for time spent on the job sites. (Decision at 8; Apx. 454; Tr. 247-48; Apx. 256-57). In this regard, Lombardi claimed that travel time is not required by the applicable collective bargaining agreements

[5] Some of the time cards indicate that the employees were paid for hours worked in excess of the handwritten times. To the extent that some of this time was paid travel time, the Wage and Hour investigator credited Akron with these payments. (Decision at 9 n.3; Apx. 455; Tr. 236; Apx. 245).

("CBAs"). (Decision at 8; Apx. 454; Tr. 241-45, 270-73; Apx. 250-54, 279-82).

8. The Wage-Hour investigation revealed that many hours recorded on the timecards, as taken from the time clock, were uncompensated. (Decision at 11; Apx. 457; Tr. 101-02; Apx. 110-11). The uncompensated hours, when added to the compensated hours, often resulted in a workweek of more than 40 hours. (Tr. 99-108; Apx. 108-17). Based on investigator Zimmerman's interviews with the employees, and his examination of Akron's payroll records, he concluded that the large number of unpaid hours on the time cards were for required shop and travel time. (Decision at 7, 11, 23; Apx. 453, 457, 469; Tr. 102, 133; Apx. 111, 142; Pltf's Exs. 3 and 4).[6]

Zimmerman testified that he computed the back wages by reviewing all of Akron's time cards for the investigation period of September 1, 2001 to August 31, 2003, using a formula for each calculation. (Decision at 2; Apx. 448; Tr. 103-05; Apx. 112-14). Utilizing a computer spreadsheet for each time card, he determined the total hours worked based upon the clock-

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[6] The employees consistently clocked in before 6:30 in the morning. In many instances, the handwritten times (reflecting work at the job sites) began one to two hours later. (Decision at 8-9; Apx. 454-55; Tr. 261-62; Apx. 270-71; Pltf's Ex. 3 at 27 (Grable); Apx. 331). Some of the job sites were located far from the shop, sometimes requiring the workers to travel for more than an hour each way. (Tr. 253-54; Apx. 262-63).

in/clock-out times. (Decision at 2; Apx. 448; Tr. 104, 132; Apx. 113, 141).[7] If there was no clock-out time on the card, Zimmerman used the handwritten time. (Decision at 2; Apx. 448; Tr. 116; Apx. 125). The hours were totaled; from that figure, Zimmerman then subtracted half an hour for lunch. (Decision at 2; Apx. 448; Tr. 105; Apx. 114). He then compared that number to the number of hours that the employee was paid for that day. (Tr. 105; Apx. 114). If there was a difference between the clocked-in hours and the paid hours, then the unpaid hours were calculated at the employee's regular rate of pay for hours worked under 40 per week and time and one-half the employee's regular rate of pay for hours worked over 40 in a workweek. (Tr. 104-18; Apx. 113-27; Pltf's Ex. 2 (an individualized computation sheet for each employee summarizing the back wage calculation).

Akron regularly paid employees at two different pay rates for work performed in the same workweek. (Tr. 105-06; Apx. 114-15). Akron's payroll records reflect that on some occasions, Akron did pay overtime, but not at the correct rate in those workweeks in which more than one rate was paid. (Decision at

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[7] Zimmerman did not compute any back wages for days when an employee drove directly from home to the job site and from the job site back home without clocking in or out at the employer's premises. (Decision at 4 n.2; Apx. 450; Tr. 115, 121-22; Apx. 124, 130-31).

24; Apx. 470; Tr. 107; Apx. 116). Akron would pay time and one-half the lower rate for the overtime hours (Tr. 112; Apx. 121), as opposed to a weighted average or "blended" rate as required by the regulations. (Decision at 24; Apx. 470). Therefore, it was necessary for Zimmerman to recalculate the overtime compensation in those workweeks. (Tr. 107; Apx. 116; Pltf's Ex. 2).[8]

As a result of the review of the time cards, it was determined that Akron owed overtime compensation in the amount of $95,426.74 to 45[9] past and present employees (Pltf's Ex. 1 (summary of unpaid wages); Apx. 302-04), representing 4,724.8 unpaid hours. (Tr. 6; Apx. 15).[10]

Akron's bookkeeper, Eileen Smoot, testified at the trial that she reviewed Zimmerman's calculations and, based on a

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[8] In its opinion, the district court noted that "[e]ven when Defendants paid overtime compensation, they sometimes paid overtime at the wrong rate, paying overtime compensation at the lower of the employees' two rates rather than at the blended rate. *See* 29 C.F.R. 778.115." (Decision at 24; Apx. 470).

[9] Zimmerman obtained interview statements from 18 employees. (Tr. 130; Apx. 139).

[10] Zimmerman testified that at the outset of the investigation, when it was anticipated that the case would be resolved administratively, the back wages were calculated based upon an estimate of one hour per day for shop and travel time (Tr. 102; Apx. 111), which resulted in an estimated total of $65,000 due (Tr. 123; Apx. 132). However, during the course of discovery, Zimmerman was instructed to make precise calculations of the back wages owing. (Tr. 103; Apx. 112).

sample of the timecards, prepared a recalculation. (Tr. 223; Apx. 232; Dfts' Ex. G-1). However, in an affidavit submitted by Zimmerman in response to Smoot's calculations, Zimmerman stated that Smoot's recalculations were based on the use of the employees' hand-written times spent at the job site rather than the time clock times, which is the central legal dispute in this matter. Smoot, though, did identify some mathematical errors (Tr. 227; Apx. 236), which Zimmerman then corrected; the revised total found due by Wage-Hour was $94,830.96, a reduction of approximately $600. (Decision at 3 n.1, 25; Apx. 449, 471; R. 35 Zimmerman Affidavit at ¶ 4 and Ex. A (attached); Apx. 434, 436-37).

C. The District Court's Decision

In its May 5, 2005 decision, the district court held that Akron violated the FLSA by failing to compensate its insulation installers for their pre- and post-shift work at Akron's shop and their travel time between the shop and the job sites, resulting in unpaid hours worked in excess of 40 in a workweek for which the employees were due compensation at the overtime rate. (Decision at 1; Apx. 447). In addition, the court held that Akron violated the recordkeeping requirements of the Act by failing to accurately record the employees' pre- and post-shift times. (*Id.* at 2; Apx. 448).

The district court rejected Akron's argument that the shop and travel time constituted preliminary or postliminary activities within the meaning of the Portal-to-Portal Act ("Portal Act"), 29 U.S.C. 254(a), exception to the FLSA. Relying on Steiner v. Mitchell, 350 U.S. 247, 256 (1956) (Decision at 13; Apx. 459), the court concluded that the work performed by Akron's employees at the shop, before and after traveling to and from the job sites, also was compensable under the FLSA. (*Id.* at 14; Apx. 460).

The district court found that Lombardi requires his full-time employees to report to the shop before traveling to the job site; there, the workers complete various tasks at Lombardi's request. (Decision at 4; Apx. 450). The court determined that the workers performed essential activities at the shop, which benefited Akron, including receiving crew assignments, loading tools and equipment onto trucks, driving the company trucks to the job sites, and returning the trucks to the shop at the end of the day, where the employees reported to Lombardi about the day's work. (*Id.* at 16; Apx. 462). In finding these activities compensable, the district court stated that they did not come within the Portal Act because they "are integral to the employees' predominant activities associated with installing insulation, [and therefore] they are not excluded as preliminary

or postliminary activities under the Portal-to-Portal Act." (*Id.*).

The district court also rejected Lombardi's claim that the employees reported to the shop voluntarily and clocked-in early simply "to drink coffee and socialize"; "[t]o the extent that the employees were waiting (and drinking coffee or socializing) in the morning, they [were] waiting for the employer's benefit and could not use the time for their own purposes." (Decision at 16; Apx. 462). Observing that the time cards show that employees would sometimes clock-in one hour earlier than the official start time of 7:30 a.m. established by Lombardi, the court found it "incredible that employees would voluntarily clock-in early to socialize and drink coffee for that much time." (*Id.*).[11]

Citing the Secretary's "waiting time" regulations at 29 C.F.R. 785.14 and 29 C.F.R. 785.15, as well as the Supreme Court's decision in Armour & Co. v. Wantock, 323 U.S. 126, 133 (1944), the district court concluded that any waiting time at the shop was compensable because the time spent waiting was predominantly for the employer's benefit, inasmuch as Akron required the employees to report to the shop before departing

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[11] The court found the testimony of Akron's witnesses in response to questioning by the court was not credible concerning the voluntary nature of the unpaid hours. (Tr. 179-80; 199-208; 253-58; Apx. 188-89; 208-17; 262-67).

for the job sites, and that the employees "could not effectively use the time for their own purpose." (Decision at 17; Apx. 463).[12]

The district court further concluded that the workers' travel time from the shop to the job site and back again was compensable under the FLSA, as being "all in a day's work." (Decision at 18-19; Apx. 464-65). The court cited to the Department's regulation at 29 C.F.R. 785.38, which provides that where an employee is required to report at a meeting place to perform work, the subsequent travel time to the work site is compensable. (*Id.* at 18). The court also found that when the employees traveled from the shop (to which they were required to report in order to review assignments, assemble crews, and load trucks) to the job site, they transported equipment, materials, company-owned trucks, and other employees on their crews, and that "[u]nder these circumstances, travel is an indispensable

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[12] The court noted that testimony established that several of the employees lived in apartments above the shop and often spent time in the shop socializing. The district court found that even for those employees living on the premises, the evidence established that they were working after clocking in and not simply socializing. (Decision at 16; Apx. 462). "Even for employees living on the premises, the Court heard sufficient evidence that they were working in the shop after clocking-in and were not merely clocking-in voluntarily for their own benefit." (*Id.* at 6; Apx. 452).

part of the employees' principal activities, and the travel time constitutes hours worked." (*Id.* at 18-19).[13]

The district court rejected Akron's argument that it need not compensate its employees for work done before its official start time of 7:30 a.m., because this was a custom or practice. (Decision at 20-21; Apx. 466-67). Citing cases decided by this Court, the district court stated that Akron's "custom or practice" "cannot trump" the FLSA, because the employees were actually working during the shop time and travel time, which often occurred before 7:30, and that the FLSA required the employers to pay for all hours worked. (*Id.*). In the court's words, "Defendants cannot cower behind an official start time as an excuse for refusing to pay employees for work that they required." (*Id.* at 20).

The district court similarly rejected Akron's contention that certain CBAs to which the employers were signatories did not require compensation for travel time, thereby preempting the requirements of the FLSA. (Decision at 21; Apx. 467). The court concluded that Akron's argument failed for three reasons.

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[13] The district court also stated in regard to travel that "[g]iven the amount of travel time necessary to get from the shop to the job site, the clock-in times represent the time that the employees reported to the shop, and the hand-written times represent time spent at the job site"; and that the employees were paid only for the handwritten times, not the travel time. (Decision at 9; Apx. 455).

First, the text of the agreements at issue did not "expressly exclude compensation for travel time." (*Id.*). Second, the record did not establish that Akron was signatory to any of the CBAs. (*Id.* at 21-22; Apx. 467-68). And third, assuming arguendo that the agreements did exclude payment of travel time from and to the shop, the agreements would be unenforceable because they conflicted with the FLSA. (*Id.* at 22-23; Apx. 468-69). As the court explained, "Just as the employer cannot have a custom or practice that violates the FLSA, so an employer cannot violate the FLSA by contract, including collective bargaining agreements"; "[s]uch an agreement would be impermissible and unenforceable." (*Id.* at 23).

Finally, the district court rejected Akron's argument that the Wage-Hour investigator's back wage computations were flawed because Zimmerman had overestimated the number of hours worked and that the clock-in times were not accurate. (Decision at 23-24; Apx. 469-70). Noting that the employers had failed to keep proper records, the district court explained that "it is reasonable for Plaintiff to infer that the clock-in times reflect the amount of hours worked because it includes shop time and travel time." (*Id.* at 23). Relying on Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 688 (1946), to support the back wage estimates, the district court stated that in view of the employers' failure to maintain accurate records, Akron could

not "complain that the calculation of back wages lack[s] exactness and precision," and that to deny recovery "because proof of the number of hours worked is inexact" would "penalize the employee." (*Id.* at 24).

The district court considered the consistent testimony that Akron did not routinely pay for shop and travel time. (Decision at 24; Apx. 470). Determining that a reasonable inference could be made that Akron owed back wages established by the clock-in times on the time cards, the district court concluded that the employers had failed to rebut that inference because it could not offer any evidence of the actual number of hours worked or to negate the reasonableness of the inference. (*Id.*). The court also noted that even when the employers paid overtime, they paid at the lower of the employee's two rates, which was a violation of the Department's interpretation at 29 C.F.R. 778.115, which requires payment at a weighted average rate. (*Id.*).

The court thus concluded that back wages were due in the amount of $94,830.96, plus interest, for a two-year period prior to the commencement of the lawsuit. (Decision at 25; Apx. 471). Having found the employers in violation of the recordkeeping and overtime pay provisions of the Act, the court granted the Secretary's request for a prospective injunction. (*Id.* at 24-25; Apx. 470-71).

SUMMARY OF ARGUMENT

In its thoroughly reasoned decision, the district court correctly concluded that Akron violated the FLSA when it failed to compensate its employees properly for the time they spent between commencing their "integral and indispensable" duties at the shop in the morning (before traveling to their job sites) and completing such duties at the shop in the afternoon (after traveling from their job sites), i.e., for work performed during the "workday." The employees were required to report to the shop in the morning in order to receive assignments, form crews, and load materials onto trucks that they then rode to the job sites. The performance of these requisite duties at the shop, which were integral and indispensable to the employees' principal activity of installing insulation into residential and commercial structures, was compensable. It also triggered the beginning of the workday, which only ended upon the employees' return to the shop at the end of the day and the completion of their duties. Compensability was correctly determined by the district court to be measured by the confines of the workday, as set by the employees' first and last principal activity or activities.

The FLSA generally requires compensation for "all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace."

Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 690-91 (1946). The Portal Act creates a limited exception to that general rule, excluding from compensation "walking, riding, or traveling," and other "preliminary" and "postliminary" activities, but only when they occur outside the workday -- either before an employee commences or after he completes his "principal activity or activities." 29 U.S.C. 254(a). In this case, consistent with the Supreme Court's decision in Steiner v. Mitchell, 350 U.S. 247 (1956), which addressed what constitutes a "principal activity or activities," the employees' "shop time" was an integral and indispensable part of their principal insulation activity, and thus a principal activity in itself. Therefore, the travel time to the job sites that occurred after the employees had reported to the shop, as well as the travel time from the job sites back to the shop, was also necessarily compensable as being "all in a day's work." See 29 C.F.R. 785.38. Any CBAs or industry custom or practice cannot excuse Akron's noncompliance with the dictates of the FLSA.

The waiting time at the shop was also compensable. The district court correctly determined that the employees were "engaged to wait" at the shop. The time there was spent predominantly for Akron's benefit, and the employees could not use the relatively short periods of waiting time for their own purposes.

Finally, in light of Akron's failure to keep proper records or offering evidence of specific hours actually worked, the district court correctly concluded under Mt. Clemens that the compensable hours worked should be computed from the actual clock-in time to the actual clock-out time. The employees did not have control over when they were to report to the shop; when they were not instructed to report to the shop at a specific time (which they sometimes were), they were certainly expected to report there before 7:30 a.m. (Akron's ostensible official start time) in order to perform certain specific requisite duties. Absent other evidence, the clock-in and clock-out times provided the best available evidence of hours worked in this case.

ARGUMENT

AKRON VIOLATED THE FLSA WHEN IT FAILED TO COMPENSATE ITS INSULATION INSTALLERS FOR THE TIME THEY SPENT AT AKRON'S SHOP PERFORMING CERTAIN INTEGRAL AND INDISPENSABLE ACTIVITIES, AND FOR THE TIME THEY SPENT THEREAFTER TRAVELING FROM THE SHOP TO THE WORK SITES AND BACK TO THE SHOP

A. Standard of Review

The question whether activities performed either before or after an employee's work at the actual job site are compensable under the FLSA is ultimately a question of law, to be reviewed de novo. See Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728, 738-739 n.13 (1981); Brock v. City of Cincinnati,

236 F.3d 793, 800 (6th Cir. 2001); Myers v. The Copper Cellar Corp., 192 F.3d 546, 550 n.7 (6th Cir. 1999); Kline v. Tennessee Valley Authority, 128 F.3d 337, 341 (6th Cir. 1997). The specific duties that employees perform, as well as when those duties are performed and the amount of time spent performing the duties, are factual questions to be reviewed for clear error under Federal Rule of Civil Procedure 52(a) ("Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."). See Myers, 192 F.3d at 550 n.7; Kline, 128 F.3d at 341.

B. Compensable Time Commenced with the Performance of the Employees' Requisite Pre-Shift Activities at the Shop and Ended with the Performance of their Post-Shift Activities at the Shop; Travel to the Job Sites and Back to the Shop was Compensable Because it was "All in the Day's Work."

1. The FLSA requires that an employee must be paid a specified minimum wage for all "hours worked,"[14] see 29 U.S.C.

[14] See Alvarez v. IBP, Inc., 339 F.3d 894, 902 (9th Cir. 2003), cert. granted, 125 S. Ct. 1292 (2005) ("It is axiomatic, under the FLSA, that employers must pay employees for all 'hours worked.'"). The Supreme Court has also granted certiorari in a related case, Tum v. Barber Foods, Inc., 360 F.3d 274 (1st Cir. 2004), cert. granted, 125 S. Ct. 1295 (2005). Oral argument was held in both cases on October 3, 2005. Both cases present the question whether the time employees spend walking between the places where they don and doff required protective clothing (or safety equipment) and their work stations is compensable when such donning and doffing are integral and indispensable parts of the employee's principal work activities. In Tum, a second

206(a), and overtime compensation for those hours worked in excess of 40 in a workweek, see 29 U.S.C. 207(a)(1).[15] Although the term "work" is not defined in the statute, the Supreme Court has defined work as "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 598 (1944) (footnote omitted); see also City of Cincinnati, 236 F.3d at 801. Work under the FLSA does not require a threshold level of exertion; even waiting time is compensable if it predominantly benefits the employer. See Armour & Co. v. Wantock, 323 U.S. 126, 132-33 (1944) ("[A]n employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen. Refraining from other activity often is a factor of instant readiness to serve, and idleness plays a part in all employments in a stand-by capacity."). In Skidmore v. Swift & Co., 323 U.S.

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question before the Supreme Court is whether employees have a right to compensation for time they must spend waiting at required safety equipment distribution stations. The government filed amicus briefs, and presented oral argument, in both cases. The positions set out in the instant brief are consistent with those set out by the government in those two cases.

[15] Under the overtime provisions of the FLSA, an employer is required to pay an employee "for a[ny] workweek longer than forty hours . . . at a rate not less than one and one-half times [the employee's] regular rate . . ." 29 U.S.C. 207(a).

134, 138-39 (1944), a companion case to Armour, the Supreme Court reiterated that "hours worked" under the FLSA is not limited to "active labor." See also 29 C.F.R. 785.7.

2. The FLSA generally requires compensation for "all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace." Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 690-91 (1946); see also 29 C.F.R. 785.7 (same). This general rule reflects Congress's judgment that an employee should generally receive compensation for all the time that he is under the direction and control of the employer. See Tennessee Coal, 321 U.S. at 598.

The Portal Act, passed in 1947, 29 U.S.C. 251 et seq., creates a limited exception to this general rule. It excludes from compensation "walking, riding, or traveling to and from the actual place of performance of the principal activity or activities [of an employee]," and other "preliminary" and "postliminary" activities, but only when they occur outside the "workday" -- "either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities." 29 U.S.C. 254(a).[16] Travel that occurs

[16] The Senate Report that accompanied the passage of the Portal Act in 1947 illustrates this bedrock principal of the

during the workday -- after the employee commences his first principal activity and before he concludes his last principal activity -- is not affected by the Portal Act. Instead, such travel is compensable in accordance with the general rule that compensation is required for all the time the employee is required to be "on the employer's premises, on duty or at a prescribed workplace." Mt. Clemens, 328 U.S. at 691.

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compensability of activities taking place in the course of the workday, i.e., between the performance of the first and last of an employee's principal activities. It states that "[a]ny activity occurring during a workday will continue to be compensable or not compensable in accordance with the existing provisions of the [FLSA]." S. Rep. No. 48, at 48 (80th Cong., 1st Sess.) (emphasis added). The Report defines the "workday" as

> that period of the workday between the commencement by the employee, and the termination by the employee, of the principal activity or activities which such employee was employed to perform. [Section 4] relieves an employer from liability or punishment under the [FLSA] on account of the failure of such employer to pay an employee minimum wages or overtime compensation, for activities of an employee engaged on or after [1947], if such activities take place outside of the hours of the employee's workday.

Id. at 46-47 (emphases added); see also 93 Cong. Rec. 4269 (statement of Senator Wiley). For prospective claims, Congress, in enacting the Portal Act, sought to preserve the existing law that had required compensation for all activities during the workday and had included within the workday pre- and post-shift activities that are closely connected to an employee's principal work activities. The only way in which Congress sought to cut back on existing law was by excluding from compensation walking, riding, or traveling, and certain other pre- and post-shift activities that take place before the workday begins and after it ends.

3. Thus, in the present case, determining the "principal activity" will be dispositive of what time is compensable. If, as the district court held, employees engaged in compensable principal activities at the shop, then that time and the subsequent travel time to the job sites, as well as the travel time back to the shop, also are compensable.

The Supreme Court addressed the meaning of the term "principal activity" in Steiner v. Mitchell, 350 U.S. 247 (1956). In that case, the Court held that "principal activity or activities" in the Portal Act "embraces all activities which are an integral and indispensable part of the principal activities." Steiner, 350 U.S. at 252-53 (citation omitted). Thus, the Court held in Steiner that clothes changing and showering that are integral and indispensable parts of an employee's principal job activities are themselves encompassed within the category of principal activities and therefore fall outside the scope of the Portal Act's exclusion for preliminary and postliminary activity. *Id.* at 256; see also Mitchell v. King Packing Co., 350 U.S. 260, 261-63 (1956) (knife sharpening by meat packers at the beginning and end of their shifts is an integral and indispensable part of their principal activities and therefore is compensable); Alvarez, 339 F.3d at 903 ("Plaintiffs' donning and doffing of job-related protective gear

satisfies Steiner's bipartite 'integral and indispensable' test.").

4. Applying these principles to the facts of this case supports the district court's conclusion that the employees engaged in compensable activity from the time they began performing integral activities at the shop until the time they finished performing their integral activities at the shop. At the beginning of the day, the employers required the employees to be at the shop to clock in, receive their assignments, gather or join a crew, and load the necessary materials and equipment onto the trucks for purposes of transporting them to the job sites; at the end of the day, most employees returned the equipment and trucks back to the shops and reported to Akron's president, Lombardi, about the day's work. (Decision at 4-7; Apx. 450-53).

Steiner teaches that this required "shop time" is integral and indispensable to the performance of the employees' principal activity of performing insulation work at the job sites (and was clearly deemed as such by the employers) and is thus compensable; therefore, all activity that occurs between the commencement of integral activity subsequent to reporting to the shop and the completion of integral activity after returning to the shop (including the traveling time to, and back from, the

job sites) is necessarily compensable.[17] In other words, all activity between the first and last principal activities of the day is compensable because it occurs during the "workday." The plain language of the Portal Act and the Supreme Court's holding in Steiner require no less.

5. The Department's regulations, as buttressed by case law, support the conclusion that all the employees' time between their first and last principal activities is compensable. The Department has issued interpretive regulations setting forth the principles for determining hours worked, see 29 C.F.R. Part 785, and the effect of the Portal Act on such a determination, see 29 C.F.R. Part 790. The hours-worked regulations have their origin in Interpretive Bulletin No. 13, which was originally issued in 1939 (shortly after the enactment of the FLSA), and which was in effect when Congress enacted the Portal Act. The Portal Act regulations were originally issued in 1947, immediately after enactment of that Act. See 12 Fed. Reg. 7655 (Nov. 18, 1947). Those contemporaneous and longstanding regulations, which have been left undisturbed by Congress in its numerous subsequent

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[17] Whether employees' "waiting time" at the shop is compensable, or is to be excluded from compensable "workday" activities, will be discussed infra. The employers largely argue that the employees voluntarily came to the shop to socialize. As discussed below, the district court made factual findings to the contrary, which have not been shown to be clearly erroneous, thereby making the waiting time at the shop compensable as well.

reexaminations of the FLSA and which reflect the considered and detailed views of the agency charged with enforcing the FLSA and the Portal Act, are entitled to deference. See Barnhart v. Walton, 535 U.S. 212, 221-22 (2002) (Chevron deference appropriate absent notice-and-comment rulemaking in light of "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given to the question over a long period of time); cf. Skidmore, 323 U.S. at 140 (Administrator's FLSA interpretations "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance").[18]

As noted supra, the FLSA regulations state that compensable work generally includes all time "during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed work place." 29 C.F.R. 785.7 (citation omitted); see also 29 C.F.R. 785.38 ("Where an employee is required to report at a meeting place to receive instructions or to perform other work there, or to pick up and to carry tools,

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[18] Moreover, in 1949, as the Supreme Court indicated in Steiner, Congress amended the FLSA but specifically retained the Portal Act regulations, without expressing any disagreement with the provisions relevant here. See 350 U.S. at 255 & n.8; Fair Labor Standards Amendments of 1949, ch. 736, § 16, 63 Stat. 920.

the travel time from the designated place to the work place is part of the day's work, and must be counted as hours worked regardless of contract, custom, or practice."). Thus, receiving instructions or picking up and loading equipment are integral and indispensable parts of the employees' principal activity or activities, and accordingly qualify as principal activities for purposes of the Portal Act. See 29 C.F.R. 790.8(b) and (c) (preparatory activities, including being required to report to work 30 minutes early to distribute work items and prepare machinery, are integral to principal activities).

In the instant case, the employees were required to be on the employers' premises -- at the shop -- prior to 7:30 a.m. (Akron's "official" starting time) in order to perform certain necessary duties; that "shop time" was therefore compensable because the requisite activities performed at the shop were integral and indispensable to the employees' insulation work. See Barrentine v. Arkansas-Best Freight System, Inc., 750 F.2d 47, 50 (8th Cir. 1984) (time spent by truck drivers on pre-shift safety inspections was an integral and indispensable part of the principal work activity), cert. denied, 471 U.S. 1054 (1985); Dunlop v. City Elec., Inc., 527 F.2d 394, 401 (5th Cir. 1976) (pre-shift filling out of daily time sheets, removing trash accumulated during the previous day's work, and fueling trucks was compensable); Hodgson v. American Concrete Construction Co.,

Inc., 471 F.2d 1183, 1185 (6th Cir. 1973) (substantial evidence of uncompensated overtime work was found sufficient to withstand a motion to dismiss when, in part, "several employees testified that in practice they were required to report to the employer's garage as early as 7 A.M. in order to load trucks and travel to the construction site, arriving by 8 A.M. Yet, work time was calculated as beginning at 8 A.M."); Dole v. Enduro Plumbing, Inc., 30 WH Cases (BNA) 196, 200; 1990 WL 252270, at *4-*5 (C.D. Cal. Oct. 16, 1990) (relying on the "express terms" of the Portal Act and 29 C.F.R. 785.38, the district court stated that where an employee is required to arrive at a designated shop to receive instructions or pick up tools, prior to going to the job site, the workday begins at the designated meeting place); see also Herman v. Rich Kramer Constr., Inc., 163 F.3d 602 (Table) (unpublished), 1998 WL 664622, at *2 (8th Cir. 1998) (time spent at shop prior to going to job sites, during which the foremen loaded trucks, received crew assignments, and studied blueprints, as well as time spent at the shop after returning from the job sites, during which the foremen filled out timesheets, unloaded and locked the trucks, and secured equipment, was compensable). The commencement of the employees' integral activities at the shop in the instant case (the first principal activity) triggers the workday, making all subsequent activities until the end of the workday compensable. In this

case, the last principal activity occurred, thereby ending the workday and the compensable hours worked, when the employees returned the trucks and materials to the shop and reported back to Lombardi.

The general rule -- that an employee is entitled to compensation for activities that occur while the employee is on the employer's premises, on duty, or at a specified work station -- applies not only to the time that an employee in involved in productive work, but also to required waiting time, see 29 C.F.R. 785.7, 785.14-785.17, normal rest periods, see 29 C.F.R. 785.18, and travel time during the course of the workday, see 29 C.F.R. 785.38. The regulations except from that general rule, and treat as noncompensable, "bona fide meal periods," 29 C.F.R. 785.19, and "[p]eriods during which an employee is completely relieved from duty and which are long enough to enable him to use the time effectively for his own purposes." 29 C.F.R. 785.16. The question of whether waiting time is time worked under the FLSA is fact-intensive, and the key is whether those facts show "that the employee was engaged to wait, or . . . that he waited to be engaged." See 29 C.F.R. 785.14 (quoting Skidmore, 323 U.S. at 137); see also Armour & Co., 323 U.S. at 133 (an employee is engaged to wait when the "time is spent predominantly for the employer's benefit," rather than for the employee's).

The regulations state that "[a] stenographer who reads a book while waiting for dictation, a messenger who works a crossword puzzle while awaiting assignments, [a] fireman who plays checkers while waiting for alarms and a factory worker who talks to his fellow employees while waiting for machinery to be repaired are all working during their periods of inactivity." 29 C.F.R. 785.15. Thus, when an employer requires the employee to wait and the employee cannot use the waiting time effectively for his own purposes, such waiting time is generally compensable. See 29 C.F.R. 785.15; see also 29 C.F.R. 790.6(b) ("If an employee is required to report at the actual place of performance of his principal activity at a certain specific time, his 'workday' commences at the time he reports there for work in accordance with the employer's requirement, even though through a cause beyond the employee's control, he is not able to commence performance of his productive activities until a later time."); 29 C.F.R. 790.7(h) (when an employee "is required by his employer to report at a particular hour at his workbench or other place where he performs his principal activity, if the employee is there at that hour ready and willing to work but for some reason beyond his control there is no work for him to perform until some time has elapsed, waiting for work would be an integral part of the employee's principal activities").

The Fifth Circuit's decision in Mireles v. Frio Foods, Inc., 899 F.2d 1407 (5th Cir. 1990), is instructive in this regard. The court there, relying upon the Secretary's definition of "workday" in 29 C.F.R. 790.6(b), held that employees required to arrive at work at a specific time to sign in and then wait until the beginning of productive work should be compensated for their waiting time. As the court stated, "Plaintiffs are not seeking compensation for periods of time spent waiting outside the workday. Rather, plaintiffs contend that they are entitled to pay for the time spent waiting during the workday that they are not able to use effectively for their own purposes." *Id.* at 1414 (footnote omitted); see also Vega v. Gasper, 36 F.3d 417, 426 (5th Cir. 1994) ("[I]f the workers were on duty in the morning so as to get an early start for their employer's benefit (*e.g.*, to assure that work would start promptly at sunrise) or because of Gasper's scheduling, the morning wait time is a compensable principal activity.").

Similarly, the district court below found that necessary waiting time benefited Akron:

> In this case, to th[e] extent that employees had waiting time in the shop in the morning, the waiting time is integral to their principal activities. The waiting time predominantly benefited Akron Insulation. Lombardi required employees to report to the shop at designated times before departing for the job site to receive assignments, assemble crews, load company-owned vehicles, and drive the trucks to the job sites. Furthermore, although employees may have been drinking coffee or

> socializing while waiting, they could not effectively use this time for their own purposes. The waiting time occurred in short intervals in the morning, and Lombardi required full-time employees to report to the shop before going to the job sites. Under the circumstances described, the waiting time is compensable under the FLSA because it is an indispensable part of the employees' principal activities.

(Decision at 17; Apx. 463).[19] Akron's employees, who were required to report to the shop in order to perform integral and indispensable activities to their principal insulation activity, and were essentially confined to that shop, were engaged to wait for the benefit of Akron. This "waiting" time therefore also was compensable.

The regulations also specifically address the effect of the Portal Act on the compensability of travel. They explain that while time spent walking or riding from the plant gate to the place where the employee performs his first principal activity is excluded by the Portal Act from the category of "principal

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[19] Although the evidence does not establish that every employee was required to report to the shop at the same precise time, they all were required to be there in order to perform certain requisite activities before traveling to the job sites. The district court made the following factual finding in this regard: "[A]ny waiting time in the shop is at the employer's request and for its benefit and not for the benefit of the employees. Ample testimony shows that Lombardi required employees to report at specific times and perform several required tasks before departing from the shop for the job site. The time cards show that employees clocked in more than one hour on a single day. The Court finds it incredible that employees would voluntarily clock-in early to socialize and drink coffee for that much time." (Decision at 6; Apx. 452).

activities" and thus is not compensable, see 29 C.F.R. 790.7(f); 790.8(a), travel from the place of performance of one principal activity to the place of performance of another principal activity is not subject to the Portal Act (because it occurs during the workday), and is instead subject to the general rules for determining compensability under the FLSA, see 29 C.F.R. 790.7(c).

Thus, ["t]ime spent by an employee in travel as part of his principal activity, such as travel from job site to job site during the workday, must be counted as hours worked." 29 C.F.R. 785.38. Moreover, the regulations are dispositive of this case because they expressly state that when an employee is required to report to a designated place to receive instructions, perform other work, or pick up tools, and then must travel to another location to perform his work, "the travel from the designated place to the work place is part of the day's work, and must be counted as hours worked." *Id.* See Enduro Plumbing, Inc., 30 WH Cases at 200, 1990 WL 252270, at *5 ("Where, as in this case, an employee is required to report to a designated meeting place (such as the shop in this case) to receive instructions before he proceeds to another work place (such as the jobsites in this case), the start of the workday is triggered at the designated meeting place, and subsequent travel is part of the day's work and must be counted as hours worked for purposes of the FLSA,

regardless of contract, custom, or practice; see 29 C.F.R. 785.38."); see also Rich Kramer Const., Inc., 1998 WL 664622, at *2 (where foremen transported laborers, equipment, and supplies from the employer's shop to a job site, the travel time was compensable not only as a principal activity in and of itself, but "because the work day began when foremen reported to the shop").

Therefore, the travel engaged in by the employees in this case was clearly compensable as being "all in the day's work," 29 C.F.R. 785.38, because the employees were required to report to the shop to receive assignments, assemble crews, and pick up materials to be transported by truck before traveling to the job sites. The travel time after the employees engaged in the first principal activity, both to the job sites and back to the shop (where the last principal activity was performed), was consequently compensable.

6. On appeal, Akron argues that for those employees who were members of unions, existing CBAs as well as custom or practice made the travel time noncompensable. (Brief ("Br.") at 18-22). This argument clearly is without merit. Decades ago, the Supreme Court held that an industry's longstanding practice of not paying for certain time does not establish its validity. See Tennessee Coal, 321 U.S. at 602. The Supreme Court has also stated that its "decisions interpreting the FLSA have frequently

emphasized the nonwaivable nature of an individual employee's right to a minimum wage and to overtime pay under the Act. Thus, [it has] held that FLSA rights cannot be abridged by contract or otherwise waived because this would nullify the purposes of the statute and thwart the legislative policies it was designed to effectuate." Barrentine, 450 U.S. at 740 (internal quotation marks omitted). Therefore, "congressionally granted FLSA rights take precedence over conflicting provisions in a collectively bargained compensation arrangement." *Id.* at 740-41. This Court has issued similar rulings. In Douglas v. Argo-Tech Corp., 113 F.3d 67, 70 (6th Cir. 1997), this Court stated that the "right to overtime pay cannot be waived during the course of collective bargaining." This general principle disposes of Akron's argument (Br. at 25), that Weyrick, Kreitzburg, DiMichele, and Moss testified that they were "paid in full." These employees cannot waive their FLSA rights.[20]

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[20] On appeal, Akron also states that it had a "policy" that the starting time was 7:30 a.m. and quitting time was 4:00 p.m. "per a sign posted above the time clock, and that employees would only be compensated for time before clock-in or after clock-out times if their time card was initialed by defendants. (Br. at 3). For the same reasons discussed supra, this argument fails. As the district court stated, "Defendants cannot cower behind an official start time as an excuse for refusing to pay employees for work that they required." (Decision at 20; Apx. 466). See Barrentine, 450 U.S. at 741 ("The Fair Labor Standards Act was not designed to codify or perpetuate [industry] customs and contracts.") (internal quotation marks omitted); see also Herman v. Fabri-Centers of America, Inc., 308 F.3d 580, 592 (6th Cir. 2002) (same).

The Secretary's regulations cannot be clearer on this precise point as it specifically relates to travel time. They state that "[w]here an employee is required to report at a meeting place to receive instructions or to perform other work there, or to pick up and to carry tools, the travel time from the designated place to the work place is part of the day's work, and must be counted as hours worked regardless of contract, custom, or practice." 29 C.F.R. 785.38 (emphasis added).

C. The District Court Correctly Determined the Back Wages Due to the Employees.

1. The FLSA mandates that an employer maintain adequate and accurate payroll records. See 29 U.S.C. 211(c), 215(a)(5).[21] Because they facilitate enforcement and prevent the concealment of violations, the recordkeeping requirements of the FLSA are the "fundamental underpinnings of the Act." Wirtz v. Mississippi Publishers Corp., 364 F.2d 603, 607 (5th Cir. 1966).

More than half a century ago, the Supreme Court held that an employer's failure to maintain accurate records of hours

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[21] Specifically, section 11(c) requires that an employer "make, keep, and preserve such records of the persons employed . . . of the wages, hours, and other conditions of employment" as prescribed by regulation of the Secretary. The Secretary's recordkeeping regulations require, in part, that an employer maintain accurate records for each employee of the "[h]ours worked each workday and total hours worked each workweek." 29 C.F.R. 516.2(a)(7).

actually worked shifts the burden of proof concerning back wage liability to the employer. See Mt. Clemens, 328 U.S. at 686-88. While acknowledging that under the FLSA, the plaintiff generally carries the burden to demonstrate that the employer is in violation of the Act, the Court in Mt. Clemens, emphasizing "the remedial nature of this statute and the great public policy which it embodies," allocated the burden as follows, where the employer has failed to maintain adequate and accurate wage and hours records:

> [W]here the employer's records are inaccurate or inadequate . . . an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.

328 U.S. at 687-88; see also Herman v. Palo Group Foster Home, Inc., 183 F.3d 468, 472 (6th Cir. 1999); Shultz v. Tarheel Coals, Inc., 417 F.2d 583, 584 (6th Cir. 1969). The Supreme Court stated that the solution for an employer's failure to keep proper records "is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work." Mt. Clemens, 328 U.S. at 687. And, "[t]he employer cannot be heard to complain that the

damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the requirements of § 11 of the Act." *Id.* at 1192-93.

2. Akron did not keep proper payroll records of hours worked each workday and workweek, as required by the applicable regulations, specifically of the compensable pre-shift and post-shift hours of work. See 29 C.F.R. 516.2. The district court, therefore, correctly accepted the Wage-Hour investigator's computations based on clock-in and clock-out times. (Decision at 23-24; Apx. 469-70). The Wage and Hour investigator reviewed all of the employers' time cards for the investigation period of September 1, 2001 to August 31, 2003. (*Id.* at 2; Apx. 448). Those time cards contain the clock-in and clock-out times, which represent the time the employees arrived at the shop in the morning and the time they left the shop after returning there from the job sites. (*Id.* at 7-9; Apx. 453-55). The time cards also contain handwritten times, which represent the times spent by the employees on the particular job site for that day; the district court did not find credible Akron's witnesses's (Lombardi, Weyrick, Kreitzburg, and DiMichele) testimony that the hand-written times represented the times the employees left and returned to the shop. (*Id.* at 8-9; Apx. 454-55).[22] As the

[22] The district court noted that "[t]ypically, Defendants paid employees for the hand-written times, although sometimes they

district court found, the Wage-Hour investigator "correctly measured the [uncompensated] shop and travel time as the difference between the clock-in times and the hand-written times, while giving credit for the hours that Defendants paid" (*Id.* at 7; Apx. 453). Thus, the court aptly concluded that, because Akron failed to keep proper records or offer evidence of the specific hours actually worked, "it is reasonable for Plaintiff to infer that the clock-in times reflect the amount of hours worked because it includes shop time and travel time." (*Id.* at 23; Apx. 469).[23]

3. Akron's argument on the computation of back wages essentially restates its contention that the employees voluntarily clocked in early, and then did not perform any work. (Br. at 25). But the district court, "[a]fter observing the demeanor of the witnesses and considering the evidence and parties' arguments" (Decision at 1; Apx. 447), found otherwise,

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paid for hours in excess of the hand-written times (whether of not Lombardi initialed the time card)." (Decision at 7; Apx. 453).

[23] As argued supra, the Secretary recognizes that the time recorded on time clocks is not necessarily dispositive as to the number of hours worked. See 29 C.F.R. 785.48(a). But, as the district court stated in this case, "the clock-in time most accurately represented the hours worked." (Decision at 24 n.5; Apx. 470).

and did not commit clear error in doing so.[24] As this Court has stated in this regard, "When the findings rest on credibility determinations, Rule 52 [of the Federal Rules of Civil Procedure] requires even greater deference [under the clearly erroneous standard]." Cole Enterprises, Inc., 62 F.3d at 778.

Specifically, the district court found "it incredible that employees would voluntarily clock-in early to socialize and drink coffee for that much time [more than one hour in a single day]" (Decision at 6; Apx. 452). The court noted that while Akron's three witnesses -- Weyrick, Kreitzburg, and DiMichele -- testified that they clocked in voluntarily and drank coffee at the shop (Tr. 161; 173; 189; Apx. 170; 182; 198), Weyrick testified that he received his job assignment and picked up his job ticket at the shop, from which he drove co-workers to the job site (Decision at 5; Apx. 451; Tr. 166, 170; Apx. 175, 179); Kreitzburg testified that he received job assignments and loaded trucks at the shop (Decision at 6; Apx. 452; Tr. 179-80; Apx. 188-89); and DiMichele testified that he waited for crew members

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[24] While challenging the district court's credibility findings among the witnesses who testified, Akron did not challenge the representative nature of the testimony. "The testimony of fairly representative employees may be the basis for an award of back wages to nontestifying employees." United States Dep't of Labor v. Cole Enterprises, Inc., 62 F.3d 775, 781 (6th Cir. 1995). In addition to the Secretary calling two former employees to testify at trial, the Wage-Hour investigator obtained interview statements from 18 employees.

to arrive and helped load trucks at the shop, and would arrive even earlier to the shop when there was a big job (Decision at 6, 10; Apx. 452, 456; Tr. 191, 197; Apx. 200, 206). Moreover, Moss and Westfall testified that Lombardi expected employees to report to the shop at approximately 6:00 a.m. in the morning to perform necessary duties; and Moss testified that if he were to have arrived at the shop at 7:30 a.m., everyone would already have been gone (Decision at 10; Apx. 456; Tr. 20, 24, 27-28, 37; 61-62, 70; Apx. 29, 33, 36-37, 46; 70-71, 79).[25] Therefore, the district court's finding that the employees did not voluntarily come to the shops in order to socialize, which forms the very crux of the employers' case, was not clearly erroneous.

Thus, contrary to Akron's argument, the employees could not arrive at the shop whenever they chose. When they were not directed to come in at a specific time, the employees were nevertheless expected to come into the shop to perform certain duties prior to 7:30 a.m. (Akron's "official" start time). Because the evidence clearly established the existence of uncompensated time, in the absence of precise records or other

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[25] Akron argues (Br. at 19 n.3) that Zimmerman, in his computations, failed to factor in that some workers drove straight home from the job and did not return to the office in the company trucks. However, Zimmerman testified that if there was no clock-out entry on a timecard for a certain day, then the handwritten time would prevail (indicating when the employee left the job site), and thus no return travel hours would be computed for that particular worker. (Tr. 122; Apx. 131).

countervailing evidence, the district court reasonably determined under Mt. Clemens that the clock-in and clock-out times were the best measure of back wages due. Employers, of course, can structure their operations in such a way that the employees' pre- and post-shift work is captured exactly. Akron did not do so here.

4. In a final attempt to attack the back wage award, Akron challenges the accuracy of the computations as mathematically flawed, because Akron's bookkeeper found some calculation errors in a sample. (Br. at 22-24). However, Akron's specific objections to the calculations were considered by the Wage-Hour investigator, who submitted a revised back wage calculation based on the bookkeeper's corrections.

CONCLUSION

For the foregoing reasons, the Secretary respectfully requests that this Court affirm the decision of the district court granting the Secretary both restitutionary and prospective injunctive relief.

Respectfully submitted,

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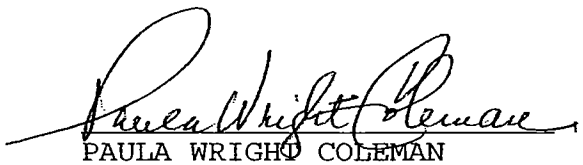
CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. 32(a)(5) and (7). This document is monospaced, has 10.5 or fewer characters per inch, and contains less than 14,000 words.



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STATEMENT OF RELATED CASES

There are no related cases pending in this Court.

CERTIFICATE OF SERVICE

I certify that on this 16th day of December, 2005, copies of the Secretary of Labor's Final Brief were served by Federal Express Overnight Delivery on counsel for Defendants/Appellants:

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ADDENDUM A

ADDENDUM A

APPELLEE'S DESIGNATION OF JOINT APPENDIX CONTENTS

DESCRIPTION OF ENTRY	RECORD ENTRY NO.	DATE FILED
Plaintiff's Exhibit 1	32	11/29/04
Plaintiff's Exhibit 3 pp. 11-12; 27-28; 41-42	32	11/29/04
Exhibit "A" attached to Affidavit of Dale Zimmerman	35	12/17/04

ADDENDUM B

29 U.S.C.A. § 206

United States Code Annotated Currentness
Title 29. Labor
Chapter 8. Fair Labor Standards (Refs & Annos)
§ 206. Minimum wage

(a) Employees engaged in commerce; home workers in Puerto Rico and Virgin Islands; employees in American Samoa; seamen on American vessels; agricultural employees

Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:

(1) except as otherwise provided in this section, not less than $4.25 an hour during the period ending on September 30, 1996, not less than $4.75 an hour during the year beginning on October 1, 1996, and not less than $5.15 an hour beginning September 1, 1997;
(2) if such employee is a home worker in Puerto Rico or the Virgin Islands, not less than the minimum piece rate prescribed by regulation or order; or, if no such minimum piece rate is in effect, any piece rate adopted by such employer which shall yield, to the proportion or class of employees prescribed by regulation or order, not less than the applicable minimum hourly wage rate. Such minimum piece rates or employer piece rates shall be commensurate with, and shall be paid in lieu of, the minimum hourly wage rate applicable under the provisions of this section. The Administrator, or his authorized representative, shall have power to make such regulations or orders as are necessary or appropriate to carry out any of the provisions of this paragraph, including the power without limiting the generality of the foregoing, to define any operation or occupation which is performed by such home work employees in Puerto Rico or the Virgin Islands; to establish minimum piece rates for any operation or occupation so defined; to prescribe the method and procedure for ascertaining and promulgating minimum piece rates; to prescribe standards for employer piece rates, including the proportion or class of employees who shall receive not less than the minimum hourly wage rate; to define the term "home worker"; and to prescribe the conditions under which employers, agents, contractors, and subcontractors shall cause goods to be produced by home workers;
(3) if such employee is employed in American Samoa, in lieu of the rate or rates provided by this subsection or subsection (b) of this section, not less than the applicable rate established by the Secretary of Labor in accordance with recommendations of a special industry committee or committees which he shall appoint pursuant to sections 205 and 208 of this title. The minimum wage rate thus established shall not exceed the rate prescribed in paragraph (1) of this subsection;
(4) if such employee is employed as a seaman on an American vessel, not less than the rate which will provide to the employee, for the period covered by the wage payment, wages equal to compensation at the hourly rate prescribed by paragraph (1) of this subsection for all hours during such period when he was actually on duty (including periods aboard ship when the employee was on watch or was, at the direction of a superior officer, performing work or standing by, but not including off-duty periods which are provided pursuant to the employment agreement); or
(5) if such employee is employed in agriculture, not less than the minimum wage rate in effect under paragraph (1) after December 31, 1977.

(b) Additional applicability to employees pursuant to subsequent amendatory provisions

Every employer shall pay to each of his employees (other than an employee to whom subsection (a)(5) of this section applies) who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this section by the amendments made to this chapter by the Fair Labor Standards Amendments of 1966, title IX of the Education Amendments of 1972 [20 U.S.C.A. § 1681 et seq.], or the Fair Labor Standards Amendments of 1974, wages at the following rate: Effective after December 31, 1977, not less than the minimum wage rate in effect under subsection (a)(1) of this section.

29 U.S.C.A. § 207

United States Code Annotated Currentness
Title 29. Labor
Chapter 8. Fair Labor Standards (Refs & Annos)
§ 207. Maximum hours

(a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions

(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(2) No employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this subsection by the amendments made to this chapter by the Fair Labor Standards Amendments of 1966--

(A) for a workweek longer than forty-four hours during the first year from the effective date of the Fair Labor Standards Amendments of 1966,
(B) for a workweek longer than forty-two hours during the second year from such date, or
(C) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(b) Employment pursuant to collective bargaining agreement; employment by independently owned and controlled local enterprise engaged in distribution of petroleum products

No employer shall be deemed to have violated subsection (a) of this section by employing any employee for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed--

(1) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that no employee shall be employed more than one thousand and forty hours during any period of twenty-six consecutive weeks; or
(2) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that during a specified period of fifty-two consecutive weeks the employee shall be employed not more than two thousand two hundred and forty hours and shall be guaranteed not less than one thousand eight hundred and forty-hours (or not less than forty-six weeks at the normal number of hours worked per week, but not less than thirty hours per week) and not more than two thousand and eighty hours of employment for which he shall receive compensation for all hours guaranteed or worked at rates not less than those applicable under the agreement to the work performed and for all hours in excess of the guaranty which are also in excess of the maximum workweek applicable to such employee under subsection (a) of this section or two thousand and eighty in such period at rates not less than one and one-half times the regular rate at which he is employed; or
(3) by an independently owned and controlled local enterprise (including an enterprise with more

29 U.S.C.A. § 211

United States Code Annotated Currentness
Title 29. Labor
Chapter 8. Fair Labor Standards (Refs & Annos)
§ 211. Collection of data

(a) Investigations and inspections

The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this chapter, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this chapter, or which may aid in the enforcement of the provisions of this chapter. Except as provided in section 212 of this title and in subsection (b) of this section, the Administrator shall utilize the bureaus and divisions of the Department of Labor for all the investigations and inspections necessary under this section. Except as provided in section 212 of this title, the Administrator shall bring all actions under section 217 of this title to restrain violations of this chapter.

(b) State and local agencies and employees

With the consent and cooperation of State agencies charged with the administration of State labor laws, the Administrator and the Secretary of Labor may, for the purpose of carrying out their respective functions and duties under this chapter, utilize the services of State and local agencies and their employees and, notwithstanding any other provision of law, may reimburse such State and local agencies and their employees for services rendered for such purposes.

(c) Records

Every employer subject to any provision of this chapter or of any order issued under this chapter shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this chapter or the regulations or orders thereunder. The employer of an employee who performs substitute work described in section 207(p)(3) of this title may not be required under this subsection to keep a record of the hours of the substitute work.

(d) Homework regulations

The Administrator is authorized to make such regulations and orders regulating, restricting, or prohibiting industrial homework as are necessary or appropriate to prevent the circumvention or evasion of and to safeguard the minimum wage rate prescribed in this chapter, and all existing regulations or orders of the Administrator relating to industrial homework are continued in full force and effect.

29 U.S.C.A. § 215

United States Code Annotated Currentness
Title 29. Labor
Chapter 8. Fair Labor Standards (Refs & Annos)
§ 215. Prohibited acts; prima facie evidence

(a) After the expiration of one hundred and twenty days from June 25, 1938, it shall be unlawful for any person--

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 206 or section 207 of this title, or in violation of any regulation or order of the Secretary issued under section 214 of this title; except that no provision of this chapter shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this chapter shall excuse any common carrier from its obligation to accept any goods for transportation; and except that any such transportation, offer, shipment, delivery, or sale of such goods by a purchaser who acquired them in good faith in reliance on written assurance from the producer that the goods were produced in compliance with the requirements of this chapter, and who acquired such goods for value without notice of any such violation, shall not be deemed unlawful;
(2) to violate any of the provisions of section 206 or section 207 of this title, or any of the provisions of any regulation or order of the Secretary issued under section 214 of this title;
(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee;
(4) to violate any of the provisions of section 212 of this title;
(5) to violate any of the provisions of section 211(c) of this title, or any regulation or order made or continued in effect under the provisions of section 211(d) of this title, or to make any statement, report, or record filed or kept pursuant to the provisions of such section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.

(b) For the purposes of subsection (a)(1) of this section proof that any employee was employed in any place of employment where goods shipped or sold in commerce were produced, within ninety days prior to the removal of the goods from such place of employment, shall be prima facie evidence that such employee was engaged in the production of such goods.

29 U.S.C.A. § 217

United States Code Annotated Currentness
Title 29. Labor
Chapter 8. Fair Labor Standards (Refs & Annos)
§ 217. Injunction proceedings

The district courts, together with the United States District Court for the District of the Canal Zone, the District Court of the Virgin Islands, and the District Court of Guam shall have jurisdiction, for cause shown, to restrain violations of section 215 of this title, including in the case of violations of section 215(a)(2) of this title the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this chapter (except sums which employees are barred from recovering, at the time of the commencement of the action to restrain the violations, by virtue of the provisions of section 255 of this title).

Amendments

1961 Amendments. Pub.L. 87-30 substituted ", including in the case of violations of section 215(a)(2) of this title the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this chapter (except sums which employees are barred from recovering, at the time of the commencement of the action to restrain the violations, by virtue of the provisions of section 255 of this title" for ": Provided, That no court shall have jurisdiction, in any action brought by the Secretary of Labor to restrain such violations, to order the payment to employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages in such action".

1960 Amendments. Pub.L. 86-624 eliminated reference to the District Court for the Territory of Alaska.

1957 Amendments. Pub.L. 85-231 included the District Court of Guam within the enumeration of courts having jurisdiction of injunction proceedings.

1949 Amendments. Act Oct. 26, 1949 included a more precise description of United States courts having jurisdiction to restrain violations and added proviso denying jurisdiction to order payment of unpaid minimum wages, overtime, and liquidated damages in injunction proceedings.

Effective and Applicability Provisions

1961 Acts. Amendment by Pub.L. 87-30 effective upon expiration of one hundred and twenty days after May 5, 1961, except as otherwise provided, see section 14 of Pub.L. 87-30, set out as a note under section 203 of this title.

1957 Acts. Amendment by Pub.L. 85-231 effective upon expiration of ninety days from Aug. 30, 1957, see section 2 of Pub.L. 85-231, set out as a note under section 213 of this title.

1949 Acts. Amendment by Act Oct. 26, 1949 effective ninety days after Oct. 26, 1949, see section 16 (a) of Act Oct. 26, 1949, set out as a note under section 202 of this title.

Transfer of Functions

All functions relating to enforcement and administration of equal pay provisions vested by this section in the Secretary of Labor were transferred to the Equal Employment Opportunity Commission by Reorg. Plan No. 1 of 1978, § 1, 43 F.R. 19807, 92 Stat. 3781, set out in Appendix 1 to Title 5, Government Organization and Employees, effective Jan. 1, 1979, as provided by section 1- 101 of Ex. Ord. No. 12106, Dec. 28, 1978, 44 F.R. 1053.

Termination of United States District Court for the District of the Canal Zone

For termination of the United States District Court for the District of the Canal Zone at the end of the "transition period", being the 30-month period beginning Oct. 1, 1979, and ending midnight Mar. 31, 1982, see Paragraph 5 of Article XI of the Panama Canal Treaty of 1977 and notes under former sections 3831 and 3841 to 3843 of Title 22, Foreign Relations and Intercourse.

CODE OF FEDERAL REGULATIONS
TITLE 29--LABOR
SUBTITLE B--REGULATIONS RELATING TO LABOR
CHAPTER V--WAGE AND HOUR DIVISION, DEPARTMENT OF LABOR
SUBCHAPTER A--REGULATIONS
PART 516--RECORDS TO BE KEPT BY EMPLOYERS
SUBPART A--GENERAL REQUIREMENTS
Current through October 20, 2005; 70 FR 61206

§ 516.2 Employees subject to minimum wage or minimum wage and overtime provisions pursuant to section 6 or sections 6 and 7(a) of the Act.

(a) Items required. Every employer shall maintain and preserve payroll or other records containing the following information and data with respect to each employee to whom section 6 or both sections 6 and 7(a) of the Act apply:

(1) Name in full, as used for Social Security recordkeeping purposes, and on the same record, the employee's identifying symbol or number if such is used in place of name on any time, work, or payroll records,

(2) Home address, including zip code,

(3) Date of birth, if under 19,

(4) Sex and occupation in which employed (sex may be indicated by use of the prefixes Mr., Mrs., Miss., or Ms.) (Employee's sex identification is related to the equal pay provisions of the Act which are administered by the Equal Employment Opportunity Commission. Other equal pay recordkeeping requirements are contained in 29 CFR Part 1620.)

(5) Time of day and day of week on which the employee's workweek begins (or for employees employed under section 7(k) of the Act, the starting time and length of each employee's work period). If the employee is part of a workforce or employed in or by an establishment all of whose workers have a workweek beginning at the same time on the same day, a single notation of the time of the day and beginning day of the workweek for the whole workforce or establishment will suffice,

(6)(i) Regular hourly rate of pay for any workweek in which overtime compensation is due under section 7(a) of the Act, (ii) explain basis of pay by indicating the monetary amount paid on a per hour, per day, per week, per piece, commission on sales, or other basis, and (iii) the amount and nature of each payment which, pursuant to section 7(e) of the Act, is excluded from the "regular rate" (these records may be in the form of vouchers or other payment data),

(7) Hours worked each workday and total hours worked each workweek (for purposes of this section, a "workday" is any fixed period of 24 consecutive hours and a "workweek" is any fixed and regularly recurring period of 7 consecutive workdays),

(8) Total daily or weekly straight-time earnings or wages due for hours worked during the workday or workweek, exclusive of premium overtime compensation,

(9) Total premium pay for overtime hours. This amount excludes the straight-time earnings for overtime hours recorded under paragraph (a)(8) of this section,

(10) Total additions to or deductions from wages paid each pay period including employee purchase orders or wage assignments. Also, in individual employee records, the dates, amounts, and nature of the items which make up the total additions and deductions,

(11) Total wages paid each pay period,

(12) Date of payment and the pay period covered by payment.

(b) Records of retroactive payment of wages. Every employer who makes retroactive payment of wages or compensation under the supervision of the Administrator of the Wage and Hour Division pursuant to section 16(c) and/or section 17 of the Act, shall:

(1) Record and preserve, as an entry on the pay records, the amount of such payment to each employee, the period covered by such payment, and the date of payment.

(2) Prepare a report of each such payment on a receipt form provided by or authorized by the Wage and Hour Division, and (i) preserve a copy as part of the records, (ii) deliver a copy to the employee, and (iii) file the original, as evidence of payment by the employer and receipt by the employee, with the Administrator or an authorized representative within 10 days after payment is made.

(c) Employees working on fixed schedules. With respect to employees working on fixed schedules, an employer may maintain records showing instead of the hours worked each day and each workweek as required by paragraph (a)(7) of this section, the schedule of daily and weekly hours the employee normally works. Also,

(1) In weeks in which an employee adheres to this schedule, indicates by check mark, statement or other method that such hours were in fact actually worked by him, and

(2) In weeks in which more or less than the scheduled hours are worked, shows that exact number of hours worked each day and each week.

END OF DOCUMENT

CODE OF FEDERAL REGULATIONS
TITLE 29--LABOR
SUBTITLE B--REGULATIONS RELATING TO LABOR
CHAPTER V--WAGE AND HOUR DIVISION, DEPARTMENT OF LABOR
SUBCHAPTER B--STATEMENTS OF GENERAL POLICY OR INTERPRETATION NOT DIRECTLY RELATED TO REGULATIONS
PART 778--OVERTIME COMPENSATION
SUBPART B--THE OVERTIME PAY REQUIREMENTS
PRINCIPLES FOR COMPUTING OVERTIME PAY BASED ON THE "REGULAR RATE"
Current through October 20, 2005; 70 FR 61206

§ 778.115 Employees working at two or more rates.

Where an employee in a single workweek works at two or more different types of work for which different nonovertime rates of pay (of not less than the applicable minimum wage) have been established, his regular rate for that week is the weighted average of such rates. That is, his total earnings (except statutory exclusions) are computed to include his compensation during the workweek from all such rates, and are then divided by the total number of hours worked at all jobs. Certain statutory exceptions permitting alternative methods of computing overtime pay in such cases are discussed in §§ 778.400 and 778.415 through 778.421.

END OF DOCUMENT

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SUBCHAPTER B--STATEMENTS OF GENERAL POLICY OR INTERPRETATION NOT DIRECTLY RELATED TO REGULATIONS
PART 785--HOURS WORKED
SUBPART B--PRINCIPLES FOR DETERMINATION OF HOURS WORKED
Current through October 20, 2005; 70 FR 61206

§ 785.7 Judicial construction.

The United States Supreme Court originally stated that employees subject to the act must be paid for all time spent in "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer of his business." (Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123, 321 U. S. 590 (1944)) Subsequently, the Court ruled that there need be no exertion at all and that all hours are hours worked which the employee is required to give his employer, that "an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen. Refraining from other activity often is a factor of instant readiness to serve, and idleness plays a part in all employments in a stand-by capacity. Readiness to serve may be hired, quite as much as service itself, and time spent lying in wait for threats to the safety of the employer's property may be treated by the parties as a benefit to the employer." (Armour & Co. v. Wantock, 323 U.S. 126 (1944); Skidmore v. Swift, 323 U.S. 134 (1944)) The workweek ordinarily includes "all the time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed work place". (Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946)) The Portal-to-Portal Act did not change the rule except to provide an exception for preliminary and postliminary activities. See § 785.34.

END OF DOCUMENT

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SUBPART C--APPLICATION OF PRINCIPLES
WAITING TIME
Current through October 20, 2005; 70 FR 61206

§ 785.14 General.

Whether waiting time is time worked under the Act depends upon particular circumstances. The determination involves "scrutiny and construction of the agreements between particular parties, appraisal of their practical construction of the working agreement by conduct, consideration of the nature of the service, and its relation to the waiting time, and all of the circumstances. Facts may show that the employee was engaged to wait or they may show that he waited to be engaged." (Skidmore v. Swift, 323 U.S. 134 (1944)) Such questions "must be determined in accordance with common sense and the general concept of work or employment." (Central Mo. Tel. Co. v. Conwell, 170 F. 2d 641 (C.A. 8, 1948))

END OF DOCUMENT

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WAITING TIME
Current through October 20, 2005; 70 FR 61206

§ 785.15 On duty.

A stenographer who reads a book while waiting for dictation, a messenger who works a crossword puzzle while awaiting assignments, fireman who plays checkers while waiting for alarms and a factory worker who talks to his fellow employees while waiting for machinery to be repaired are all working during their periods of inactivity. The rule also applies to employees who work away from the plant. For example, a repair man is working while he waits for his employer's customer to get the premises in readiness. The time is worktime even though the employee is allowed to leave the premises or the job site during such periods of inactivity. The periods during which these occur are unpredictable. They are usually of short duration. In either event the employee is unable to use the time effectively for his own purposes. It belongs to and is controlled by the employer. In all of these cases waiting is an integral part of the job. The employee is engaged to wait. (See: Skidmore v. Swift, 323 U.S. 134, 137 (1944); Wright v. Carrigg, 275 F. 2d 448, 14 W.H. Cases (C.A. 4, 1960); Mitchell v. Wigger, 39 Labor Cases, para. 66,278, 14 W.H. Cases 534 (D.N.M. 1960); Mitchell v. Nicholson, 179 F. Supp, 292,14 W.H. Cases 487 (W.D.N.C. 1959))

END OF DOCUMENT

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§ 785.16 Off duty.

(a) General. Periods during which an employee is completely relieved from duty and which are long enough to enable him to use the time effectively for his own purposes are not hours worked. He is not completely relieved from duty and cannot use the time effectively for his own purposes unless he is definitely told in advance that he may leave the job and that he will not have to commence work until a definitely specified hour has arrived. Whether the time is long enough to enable him to use the time effectively for his own purposes depends upon all of the facts and circumstances of the case.

(b) Truck drivers; specific examples. A truck driver who has to wait at or near the job site for goods to be loaded is working during the loading period. If the driver reaches his destination and while awaiting the return trip is required to take care of his employer's property, he is also working while waiting. In both cases the employee is engaged to wait. Waiting is an integral part of the job. On the other hand, for example, if the truck driver is sent from Washington, D.C. to New York City, leaving at 6 a.m. and arriving at 12 noon, and is completely and specifically relieved from all duty until 6 p.m. when he again goes on duty for the return trip the idle time is not working time. He is waiting to be engaged. (Skidmore v. Swift, 323 U.S. 134, 137 (1944); Walling v. Dunbar Transfer & Storage, 3 W.H. Cases 284; 7 Labor Cases para. 61,565 (W.D. Tenn. 1943); Gifford v. Chapman, 6 W.H. Cases 806; 12 Labor Cases para. 63,661 (W.D. Okla., 1947); Thompson v. Daugherty, 40 Supp. 279 (D. Md. 1941))

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§ 785.17 On-call time.

An employee who is required to remain on call on the employer's premises or so close thereto that he cannot use the time effectively for his own purposes is working while "on call". An employee who is not required to remain on the employer's premises but is merely required to leave word at his home or with company officials where he may be reached is not working while on call. (Armour & Co. v. Wantock, 323 U.S. 126 (1944); Handler v. Thrasher, 191 F. 2d 120 (C.A. 10, 1951); Walling v. Bank of Waynesboro, Georgia, 61 F. Supp. 384 (S.D. Ga. 1945))

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§ 785.18 Rest.

Rest periods of short duration, running from 5 minutes to about 20 minutes, are common in industry. They promote the efficiency of the employee and are customarily paid for as working time. They must be counted as hours worked. Compensable time of rest periods may not be offset against other working time such as compensable waiting time or on-call time. (Mitchell v. Greinetz, 235 F. 2d 621, 13 W.H. Cases 3 (C.A. 10, 1956); Ballard v. Consolidated Steel Corp., Ltd., 61 F. Supp. 996 (S.D. Cal. 1945))

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§ 785.19 Meal.

(a) Bona fide meal periods. Bona fide meal periods are not worktime. Bona fide meal periods do not include coffee breaks or time for snacks. These are rest periods. The employee must be completely relieved from duty for the purposes of eating regular meals. Ordinarily 30 minutes or more is long enough for a bona fide meal period. A shorter period may be long enough under special conditions. The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating. For example, an office employee who is required to eat at his desk or a factory worker who is required to be at his machine is working while eating. (Culkin v. Glenn L. Martin, Nebraska Co., 97 F. Supp. 661 (D. Neb. 1951), aff'd 197 F. 2d 981 (C.A. 8, 1952), cert. denied 344 U.S. 888 (1952); Thompson v. Stock & Sons, Inc., 93 F. Supp. 213 (E.D. Mich 1950), aff'd 194 F. 2d 493 (C.A. 6, 1952); Biggs v. Joshua Hendy Corp., 183 F. 2d 515 (C.A. 9, 1950), 187 F. 2d 447 (C.A. 9, 1951); Walling v. Dunbar Transfer & Storage Co., 3 W.H. Cases 284; 7 Labor Cases para. 61.565 (W.D. Tenn. 1943); Lofton v. Seneca Coal and Coke Co., 2 W.H. Cases 669; 6 Labor Cases para. 61,271 (N.D. Okla. 1942); aff'd 136 F. 2d 359 (C.A. 10, 1943); cert. denied 320 U.S. 772 (1943); Mitchell v. Tampa Cigar Co., 36 Labor Cases para. 65,198, 14 W.H. Cases 38 (S.D. Fla. 1959); Douglass v. Hurwitz Co., 145 F. Supp. 29, 13 W.H. Cases (E.D. Pa. 1956))

(b) Where no permission to leave premises. It is not necessary that an employee be permitted to leave the premises if he is otherwise completely freed from duties during the meal period.

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§ 785.38 Travel that is all in the day's work.

Time spent by an employee in travel as part of his principal activity, such as travel from job site to job site during the workday, must be counted as hours worked. Where an employee is required to report at a meeting place to receive instructions or to perform other work there, or to pick up and to carry tools, the travel from the designated place to the work place is part of the day's work, and must be counted as hours worked regardless of contract, custom, or practice. If an employee normally finishes his work on the premises at 5 p.m. and is sent to another job which he finishes at 8 p.m. and is required to return to his employer's premises arriving at 9 p.m., all of the time is working time. However, if the employee goes home instead of returning to his employer's premises, the travel after 8 p.m. is home-to-work travel and is not hours worked. (Walling v. Mid-Continent Pipe Line Co., 143 F. 2d 308 (C.A. 10, 1944))

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§ 785.48 Use of time clocks.

(a) Differences between clock records and actual hours worked. Time clocks are not required. In those cases where time clocks are used, employees who voluntarily come in before their regular starting time or remain after their closing time, do not have to be paid for such periods provided, of course, that they do not engage in any work. Their early or late clock punching may be disregarded. Minor differences between the clock records and actual hours worked cannot ordinarily be avoided, but major discrepancies should be discouraged since they raise a doubt as to the accuracy of the records of the hours actually worked.

(b) "Rounding" practices. It has been found that in some industries, particularly where time clocks are used, there has been the practice for many years of recording the employees' starting time and stopping time to the nearest 5 minutes, or to the nearest one-tenth or quarter of an hour. Presumably, this arrangement averages out so that the employees are fully compensated for all the time they actually work. For enforcement purposes this practice of computing working time will be accepted, provided that it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked.

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§ 790.6 Periods within the "workday" unaffected.

(a) Section 4 of the Portal Act does not affect the computation of hours worked within the "workday" proper, roughly described as the period "from whistle to whistle," and its provisions have nothing to do with the compensability under the Fair Labor Standards Act of any activities engaged in by an employee during that period. [FN34] Under the provisions of section 4, one of the conditions that must be present before "preliminary" or "postliminary" activities are excluded from hours worked is that they 'occur either prior to the time on any particular workday at which the employee commences, or subsequent to the time on any particular workday at which he ceases' the principal activity or activities which he is employed to perform. Accordingly, to the extent that activities engaged in by an employee occur after the employee commences to perform the first principal activity on a particular workday and before he ceases the performance of the last principal activity on a particular workday, the provisions of that section have no application. Periods of time between the commencement of the employee's first principal activity and the completion of his last principal activity on any workday must be included in the computation of hours worked to the same extent as would be required if the Portal Act had not been enacted. [FN35] The principles for determining hours worked within the "workday" proper will continue to be those established under the Fair Labor Standards Act without reference to the Portal Act, [FN36] which is concerned with this question only as it relates to time spent outside the "workday" in activities of the kind described in section 4. [FN37]

[FN34] The report of the Senate Judiciary Committee states (p. 47), "Activities of an employee which take place during the workday are * * * not affected by this section (section 4 of the Portal-to-Portal Act, as finally enacted) and such activities will continue to be compensable or not without regard to the provisions of this section."

[FN35] See Senate Report, pp. 47, 48; Conference Report, p. 12; statement of Senator Wiley, explaining the conference agreement to the Senate, 93 Cong. Rec. 4269 (also 2084, 2085); statement of Representative Gwynne, explaining the conference agreement to the House of Representatives, 93 Cong. Rec. 4388; statements of Senator Cooper, 93 Cong. Rec. 2293-2294, 2296-2300; statements of Senator Donnell, 93 Cong. Rec. 2181, 2182, 2362.

[FN36] The determinations of hours worked under the Fair Labor Standards Act, as amended is discussed in Part 785 of this chapter.

[FN37] See statement of Senator Wiley explaining the conference agreement to the Senate, 93 Cong. Rec. 3269. See also the discussion in §§ 790.7 and 790.8.

(b) "Workday" as used in the Portal Act means, in general, the period between the commencement and completion on the same workday of an employee's principal activity or activities. It includes all

time within that period whether or not the employee engages in work throughout all of that period. For example, a rest period or a lunch period is part of the "workday", and section 4 of the Portal Act therefore plays no part in determining whether such a period, under the particular circumstances presented, is or is not compensable, or whether it should be included in the computation of hours worked. [FN38] If an employee is required to report at the actual place of performance of his principal activity at a certain specific time, his "workday" commences at the time he reports there for work in accordance with the employer's requirement, even though through a cause beyond the employee's control, he is not able to commence performance of his productive activities until a later time. In such a situation the time spent waiting for work would be part of the workday, [FN39] and section 4 of the Portal Act would not affect its inclusion in hours worked for purposes of the Fair Labor Standards Act.

[FN38] Senate Report, pp. 47, 48. Cf. statement of Senator Wiley explaining the conference agreement to the Senate, 93 Cong. Rec. 4269; statement of Senator Donnell, 93 Cong. Rec. 2362; statements of Senator Cooper, 93 Cong. Rec. 2297, 2298.

[FN39] Colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2297, 2298.

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§ 790.7 "Preliminary" and "postliminary" activities.

(a) Since section 4 of the Portal Act applies only to situations where employees engage in "preliminary" or "postliminary" activities outside the workday proper, it is necessary to consider what activities fall within this description. The fact that an employee devotes some of his time to an activity of this type is, however, not a sufficient reason for disregarding the time devoted to such activity in computing hours worked. If such time would otherwise be counted as time worked under the Fair Labor Standards Act, section 4 may not change the situation. Whether such time must be counted or may be disregarded, and whether the relief from liability or punishment afforded by section 4 of the Portal Act is available to the employer in such a situation will depend on the compensability of the activity under contract, custom, or practice within the meaning of that section. [FN40] On the other hand, the criteria described in the Portal Act have no bearing on the compensability or the status as worktime under the Fair Labor Standards Act of activities that are not "preliminary" or "postliminary" activities outside the workday. [FN41] And even where there is a contract, custom, or practice to pay for time spent in such a "preliminary" or "postliminary" activity, section 4(d) of the Portal Act does not make such time hours worked under the Fair Labor Standards Act, if it would not be so counted under the latter act alone. [FN42]

[FN40] See Conference Report. pp. 10, 12, 13; statements of Senator Donnell, 93 Cong. Rec. 2178-2179, 2181, 2182; statements of Senator Cooper, 93 Cong. Rec. 2297, 2298. See also §§ 790.4 and 790.5.

[FN41] See Conference Report, p. 12; Senate Report, pp. 47, 48; statement of Senator Wiley, explaining the conference agreement to the Senate, 93 Cong. Rec. 4269; statement of Representative Gwynne, explaining the conference agreement to the House of Representatives, 93 Cong. Rec. 4388. See also § 790.6.

[FN42] See § 790.5(a).

(b) The words "preliminary activity" mean an activity engaged in by an employee before the commencement of his "principal" activity or activities, and the words "postliminary activity" means an activity engaged in by an employee after the completion of his "principal" activity or activities. No categorical list of "preliminary" and "postliminary" activities except those named in the act can be made, since activities which under one set of circumstances may be "preliminary" or "postliminary" activities, may under other conditions be "principal" activities. The following "preliminary" or "postliminary" activities are expressly mentioned in the act: "Walking, riding, or traveling to or from the actual place of performance of the principal activity or activities which (the) employee is employed to perform." [FN43]

[FN43] Portal Act, subsections 4(a), 4(d). See also Conference Report, p. 13; statement of Senator Donnell, 93 Cong. Rec. 2181, 2362.

(c) The statutory language and the legislative history indicate that the "walking, riding or traveling" to which Section 4(a) refers is that which occurs, whether on or off the employer's premises, in the course of an employee's ordinary daily trips between his home or lodging and the actual place where he does what he is employed to do. It does not, however, include travel from the place of performance of one principal activity to the place of performance of another, nor does it include travel during the employee's regular working hours. [FN44] For example, travel by a repairman from one place where he performs repair work to another such place, or travel by a messenger delivering messages, is not the kind of "walking, riding or traveling" described in section 4(a). Also, where an employee travels outside his regular working hours at the direction and on the business of his employer, the travel would not ordinarily be "walking, riding, or traveling" of the type referred to in section 4(a). One example would be a traveling employee whose duties require him to travel from town to town outside his regular working hours; another would be an employee who has gone home after completing his day's work but is subsequently called out at night to travel a substantial distance and perform an emergency job for one of his employer's customers. [FN45] In situations such as these, where an employee's travel is not of the kind to which section 4(a) of the Portal Act refers, the question whether the travel time is to be counted as worktime under the Fair Labor Standards Act will continue to be determined by principles established under this act, without reference to the Portal Act. [FN46]

[FN44] These conclusions are supported by the limitation, "to and from the actual place of performance of the principal activity or activities which (the) employee is employed to perform," which follows the term "walking, riding or traveling" in section 4(a), and by the additional limitation applicable to all "preliminary" and "postliminary" activities to the effect that the act may affect them only if they occur "prior to" or "subsequent to" the workday. See, in this connection the statements of Senator Donnell, 93 Cong. Rec. 2121, 2181, 2182, 2363; statement of Senator Cooper, 93 Cong. Rec. 2297. See also Senate Report, pp. 47, 48.

[FN45] The report of the Senate Judiciary Committee (p. 48) emphasized that this section of the act "does not attempt to cover by specific language that many thousands of situations that do not readily fall within the pattern of the ordinary workday."

[FN46] These principles are discussed in Part 785 of this chapter.

(d) An employee who walks, rides or otherwise travels while performing active duties is not engaged in the activities described in section 4(a). An illustration of such travel would be the carrying by a logger of a portable power saw or other heavy equipment (as distinguished from ordinary hand tools) on his trip into the woods to the cutting area. In such a situation, the walking, riding, or traveling is not segregable from the simultaneous performance of his assigned work (the carrying of the equipment, etc.) and it does not constitute travel "to and from the actual place of performance" of the principal activities he is employed to perform. [FN47]

[FN47] Senator Cooper, after explaining that the "principal" activities referred to include activities which are an integral part of a "principal" activity (Senate Report, pp. 47, 48), that is, those which "are indispensable to the performance of the productive work," summarized this provision as it appeared in the Senate Bill by stating: "We have clearly eliminated from compensation walking, traveling, riding, and other activities which are not an integral part of the employment for which the worker is employer." 93 Cong. Rec. 2299.

(e) The report of the Senate Committee on the Judiciary (p. 47) describes the travel affected by the statute as "Walking, riding, or traveling to and from the actual place of performance of the principal activity or activities within the employer's plant, mine, building, or other place of employment, irrespective of whether such walking, riding, or traveling occur on or off the premises of the employer or before or after the employee has checked in or out." The phrase, actual place of performance," as used in section 4(a), thus emphasizes that the ordinary travel at the beginning and end of the workday to which this section relates includes the employee's travel on the employer's premises until

he reaches his workbench or other place where he commences the performance of the principal activity or activities, and the return travel from that place at the end of the workday. However where an employee performs his principal activity at various places (common examples would be a telephone lineman, a "trouble-shooter" in a manufacturing plant, a meter reader, or an exterminator) the travel between those places is not travel of the nature described in this section, and the Portal Act has not significance in determining whether the travel time should be counted as time worked.

(f) Examples of walking, riding, or traveling which may be performed outside the workday and would normally be considered "preliminary" or "postliminary" activities are (1) walking or riding by an employee between the plant gate and the employee's lathe, workbench or other actual place of performance of his principal activity or activities; (2) riding on buses between a town and an outlying mine or factory where the employee is employed; and (3) riding on buses or trains from a logging camp to a particular site at which the logging operations are actually being conducted. [FN48]

[FN48] See Senate Report, p. 47; statements of Senator Donnell, 93 Cong. Rec. 2121, 2182, 3263.

(g) Other types of activities which may be performed outside the workday and, when performed under the conditions normally present, would be considered "preliminary" or "postliminary" activities, include checking in and out and waiting in line to do so, changing clothes, washing up or showering, and waiting in line to receive pay checks. [FN49]

[FN49] See Senate Report p. 47. Washing up after work, like the changing of clothes, may in certain situations be so directly related to the specific work the employee is employed to perform that it would be regarded as an integral part of the employee's "principal activity". See colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2297-2298. See also paragraph (h) of this section and § 790.8(c). This does not necessarily mean, however, that travel between the washroom or clothes-changing place and the actual place of performance of the specific work the employee is employed to perform, would be excluded from the type of travel to which section 4(a) refers.

(h) As indicated above, an activity which is a "preliminary" or "postliminary" activity under one set of circumstances may be a principal activity under other conditions. [FN50] This may be illustrated by the following example: Waiting before the time established for the commencement of work would be regarded as a preliminary activity when the employee voluntarily arrives at his place of employment earlier than he is either required or expected to arrive. Where, however, an employee is required by his employer to report at a particular hour at his workbench or other place where he performs his principal activity, if the employee is there at that hour ready and willing to work but for some reason beyond his control there is no work for him to perform until some time has elapsed, waiting for work would be an integral part of the employee's principal activities. [FN51] The difference in the two situations is that in the second the employee was engaged to wait while in the first the employee waited to be engaged. [FN52]

[FN50] See paragraph (b) of this section. See also footnote 49.

[FN51] Colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2298.

[FN52] See Skidmore v. Swift & Co., 323 U.S. 134, 7 WHR 1165.

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§ 790.8 "Principal" activities.

(a) An employer's liabilities and obligations under the Fair Labor Standards Act with respect to the "principal" activities his employees are employed to perform are not changed in any way by section 4 of the Portal Act, and time devoted to such activities must be taken into account in computing hours worked to the same extent as it would if the Portal Act had not been enacted. [FN53] But before it can be determined whether an activity is "preliminary or postliminary to (the) principal activity or activities" which the employee is employed to perform, it is generally necessary to determine what are such "principal" activities. [FN54]

[FN53] See §§ 790.4 through 790.6 of this bulletin and Part 785 of this chapter, which discusses the principles for determining hours worked under the Fair Labor Standards Act, as amended.

[FN54] Although certain "preliminary" and "postliminary" activities are expressly mentioned in the statute (see § 790.7(b)), they are described with reference to the place where principal activities are performed. Even as to these activities, therefore, identification of certain other activities as "principal" activities is necessary.

The use by Congress of the plural form "activities" in the statute makes it clear that in order for an activity to be a "principal" activity, it need not be predominant in some way over all other activities engaged in by the employee in performing his job; [FN55] rather, an employee may, for purposes of the Portal-to-Portal Act be engaged in several "principal" activities during the workday. The "principal" activities referred to in the statute are activities which the employee is "employed to perform"; [FN56] they do not include noncompensable "walking, riding, or traveling" of the type referred to in section 4 of the act. [FN57] Several guides to determine what constitute "principal activities" was suggested in the legislative debates. One of the members of the conference committee stated to the House of Representatives that "the realities of industrial life," rather than arbitrary standards, "are intended to be applied in defining the term 'principal activity or activities'," and that these words should "be interpreted with due regard to generally established compensation practices in the particular industry and trade." [FN58] The legislative history further indicates that Congress intended the words "principal activities" to be construed liberally in the light of the foregoing principles to include any work of consequence performed for an employer, no matter when the work is performed. [FN59] A majority member of the committee which introduced this language into the bill explained to the Senate that it was considered "sufficiently broad to embrace within its terms such activities as are indispensable to the performance of productive work." [FN60]

[FN55] Cf. Edward F. Allison Co., Inc. v. Commissioner of Internal Revenue, 63 F. (2d) 553 (C.C.A. 8, 1933).

[FN56] Cf. Armour & Co. v. Wantock, 323 U.S. 126, 132-134; Skidmore v. Swift & Co., 323 U.S.

134, 136-137.

[FN57] See statement of Senator Cooper, 93 Cong. Rec. 2297.

[FN58] Remarks of Representative Walter, 93 Cong. Rec. 4389. See also statements of Senator Cooper, 93 Cong. Rec. 2297, 2299.

[FN59] See statements of Senator Cooper, 93 Cong. Rec. 2296-2300. See also Senate Report, p. 48, and the President's message to Congress on approval of the Portal Act, May 14, 1947 (93 Cong. Rec. 5281).

[FN60] See statement of Senator Cooper, 93 Cong. Rec. 2299.

(b) The term "principal activities" includes all activities which are an integral part of a principal activity. [FN61] Two examples of what is meant by an integral part of a principal activity are found in the Report of the Judiciary Committee of the Senate on the Portal-to-Portal Bill. [FN62] They are the following:

[FN61] Senate Report, p. 48; statements of Senator Cooper, 93 Cong. Rec. 2297-2299.

[FN62] As stated in the Conference Report (p. 12), by Representative Gwynne in the House of Representatives (93 Cong. Rec. 4388) and by Senator Wiley in the Senate (93 Cong. Rec. 4371), the language of the provision here involved follows that of the Senate bill.

(1) In connection with the operation of a lathe an employee will frequently at the commencement of his workday oil, grease or clean his machine, or install a new cutting tool. Such activities are an integral part of the principal activity, and are included within such term.
(2) In the case of a garment worker in a textile mill, who is required to report 30 minutes before other employees report to commence their principal activities, and who during such 30 minutes distributes clothing or parts of clothing at the work-benches of other employees and gets machines in readiness for operation by other employees, such activities are among the principal activities of such employee.

Such preparatory activities, which the Administrator has always regarded as work and as compensable under the Fair Labor Standards Act, remain so under the Portal Act, regardless of contrary custom or contract. [FN63]

[FN63] Statement of Senator Cooper, 93 Cong. Rec. 2297; colloquy between Senators Barkley and Cooper, 93 Cong. Rec. 2350. The fact that a period of 30 minutes was mentioned in the second example given by the committee does not mean that a different rule would apply where such preparatory activities take less time to perform. In a colloquy between Senators McGrath and Cooper, 93 Cong. Rec. 2298, Senator Cooper stated that "There was no definite purpose in using the words '30 minutes' instead of 15 or 10 minutes or 5 minutes or any other number of minutes." In reply to questions, he indicated that any amount of time spent in preparatory activities of the types referred to in the examples would be regarded as a part of the employee's principal activity and within the compensable workday. Cf. Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 693.

(c) Among the activities included as an integral part of a principal activity are those closely related activities which are indispensable to its performance. [FN64] If an employee in a chemical plant, for example, cannot perform his principal activities without putting on certain clothes, [FN65] changing clothes on the employer's premises at the beginning and end of the workday would be an integral part of the employee's principal activity. [FN66] On the other hand, if changing clothes is merely a

convenience to the employee and not directly related to his principal activities, it would be considered as a "preliminary" or "postliminary" activity rather than a principal part of the activity. [FN67] However, activities such as checking in and out and waiting in line to do so would not ordinarily be regarded as integral parts of the principal activity or activities. [FN67]

[FN64] See statements of Senator Cooper, 93 Cong. Rec. 2297-2299, 2377; colloquy between Senators Barkley and Cooper, 93 Cong. Rec. 2350.

[FN65] Such a situation may exist where the changing of clothes on the employer's premises is required by law, by rules of the employer, or by the nature of the work. See footnote 49.

[FN66] See colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2297-2298.

[FN67] See Senate Report, p. 47; statements of Senator Donnell, 93 Cong. Rec. 2305-2306, 2362; statements of Senator Cooper, 93 Cong. Rec. 2296-2297, 2298.

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52 Stat. 1068.
29 U. S. C. § 215.
Ante, p. 919.
Restriction.

have jurisdiction, for cause shown, to restrain violations of section 15: *Provided*, That no court shall have jurisdiction, in any action brought by the Administrator to restrain such violations, to order the payment to employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages in such action."

MISCELLANEOUS AND EFFECTIVE DATE

SEC. 16. (a) The amendments made by this Act shall take effect upon the expiration of ninety days from the date of its enactment; except that the amendment made by section 4 shall take effect on the date of its enactment.

Ante, p. 911.

(b) Except as provided in section 3 (o) and in the last sentence of section 16 (c) of the Fair Labor Standards Act of 1938, as amended, no amendment made by this Act shall be construed as amending, modifying, or repealing any provision of the Portal-to-Portal Act of 1947.

Ante, pp. 911, 919.

61 Stat. 84.
29 U. S. C., Supp. II, §§ 251–262.
Existing orders.

(c) Any order, regulation, or interpretation of the Administrator of the Wage and Hour Division or of the Secretary of Labor, and any agreement entered into by the Administrator or the Secretary, in effect under the provisions of the Fair Labor Standards Act of 1938, as amended, on the effective date of this Act, shall remain in effect as an order, regulation, interpretation, or agreement of the Administrator or the Secretary, as the case may be, pursuant to this Act, except to the extent that any such order, regulation, interpretation, or agreement may be inconsistent with the provisions of this Act, or may from time to time be amended, modified, or rescinded by the Administrator or the Secretary, as the case may be, in accordance with the provisions of this Act.

52 Stat. 1060.
29 U. S. C. § 201; Supp. II, § 216.

(d) No amendment made by this Act shall affect any penalty or liability with respect to any act or omission occurring prior to the effective date of this Act; but, after the expiration of two years from such effective date, no action shall be instituted under section 16 (b) of the Fair Labor Standards Act of 1938, as amended, with respect to any liability accruing thereunder for any act or omission occurring prior to the effective date of this Act.

52 Stat. 1069.
29 U. S. C., Supp. II, § 216 (b).

(e) No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended (in any action or proceeding commenced prior to or on or after the effective date of this Act), on account of the failure of said employer to pay an employee compensation for any period of overtime work performed prior to July 20, 1949, if the compensation paid prior to July 20, 1949, for such work was at least equal to the compensation which would have been payable for such work had section 7 (d) (6) and (7) and section 7 (g) of the Fair Labor Standards Act of 1938, as amended, been in effect at the time of such payment.

52 Stat. 1060.
29 U. S. C. §§ 201–219; Supp. II, § 216.

Ante, pp. 914, 915.

(f) Public Law 177, Eighty-first Congress, approved July 20, 1949, is hereby repealed as of the effective date of this Act.

Repeal.
Ante, p. 446.

Approved October 26, 1949.

[CHAPTER 737]

October 26, 1949
[H. J. Res. 340]
[Public Law 394]

JOINT RESOLUTION

To clarify the status of the Architect of the Capitol under the Federal Property and Administrative Services Act of 1949.

Architect of the Capitol.
"The Senate and the House of Representatives."
Ante, p. 377.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the term "the Senate and the House of Representatives", as used in the Federal Property and Administrative Services Act of 1949, shall be construed to include the Architect of the Capitol and any activities under his direction,

Calendar No. 44

80TH CONGRESS, 1st Session | SENATE | REPORT No. 48

EXEMPTING EMPLOYERS FROM LIABILITY FOR PORTAL-TO-PORTAL WAGES IN CERTAIN CASES

MARCH 10 (legislative day, FEBRUARY 19), 1947.—Ordered to be printed

Mr. WILEY, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H. R. 2157]

The Committee on the Judiciary, to whom was referred the bill (H. R. 2157) entitled "An act to define and limit the jurisdiction of the courts, to regulate actions arising under certain laws of the United States, and for other purposes," having considered the same, now report the said bill with an amendment in the nature of a substitute for the text thereof, and an amendment to the title, and recommend that said bill, as so amended, do pass.

STATEMENT

THE PUBLIC INTEREST REQUIRES CORRECTION OF THE CONDITION NOW PRESENTED BY THE PORTAL-TO-PORTAL CLAIMS, INCLUDING THOSE IN PENDING SUITS, AND SAFEGUARDS AGAINST FUTURE REPETITION OF SUCH A CONDITION.

I

INTRODUCTION

In the recent past a great many lawsuits have been filed in courts throughout the Nation by employees against their respective employers, seeking compensation under the Fair Labor Standards Act of 1938, based upon the so-called portal-to-portal principle.

Official information as to the number of such actions which have been filed, the aggregate amounts which have been claimed, and related data in those actions has been made available to the committee by Henry P. Chandler, Director, Administrative Office of the United States Courts. A letter dated February 14, 1947, from Mr. Chandler, reads as follows:

(*b*) No court shall require the defendant to pay the whole or any part of the attorneys' fee of the plaintiff in any action on any such claim.

(*c*) The claimant is required to bear the burden of proof in any action on any such claim, which shall include proving the extent of such claim, without the benefit of inference. In this connection it will be recalled that in the Mount Clemens case the court says:

> When the employer has kept proper and accurate records the employee may easily discharge his burden by securing the production of those records. But where the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes a more difficult problem arises. The solution, however, is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the Fair Labor Standards Act. In such a situation we hold that an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate. (See note, 43 Col. L. Rev. 355.)

It is also prescribed in this subsection that the burden of going forward with the evidence of the amount of activities claimed by the employee to have been engaged in is, under no circumstances, to be shifted to the employer. This provision is necessary because in our opinion in the great majority of the pending portal-to-portal claims, the employer did not realize until the decision of the Supreme Court in the Mount Clemens case that portal-to-portal time of the kind in issue in that case was working time, and therefore, in the great majority of cases he did not keep records of such time. It is also prescribed in this subsection that if the employee fails to carry such burden of proof, the court shall award judgment to the employer. Nothing in this subsection prevents or limits any right of the plaintiff in any action on any such claim to subpena the books and records of the employer.

(*d*) Settlement, compromise, release, or satisfaction of any such claim before this bill becomes law shall be a defense thereto and any other appropriate legal or equitable defense may be pleaded in defense of such claim.

(*e*) All such accrued claims may be settled, compromised, released, or satisfied, after the date the bill becomes law. Such settlement, compromise, release, or satisfaction to be valid must contain a provision that the amount of money, if any, resulting therefrom be distributed equitably among the real parties in interest to such claim.

DEFINITION

Section 5 contains the definition of the term "portal-to-portal activities." It means those activities which section 2 of the bill provides shall not be a basis of liability or punishment under the Fair Labor Standards Act, the Walsh-Healey Act, or the Bacon-Davis Act.

FUTURE PORTAL-TO-PORTAL CLAIMS

Section 6 relates to claims, based on portal-to-portal activities, accruing on or after the date of enactment of the bill. For purposes

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of clarity, this report uses the term "workday" to mean that period of the workday between the commencement by the employee, and the termination by the employee, of the principal activity or activities which such employee was employed to perform. This section relieves an employer from liability or punishment under the Fair Labor Standards Act on account of the failure of such employer to pay an employee minimum wages or overtime compensation, for activities of an employee engaged on or after such date, if such activities take place outside of the hours of the employee's workday: *Provided, however,* That activities which take place outside of the workday which are compensable pursuant to the terms of a written or nonwritten contract or by a practice or custom not inconsistent with the contract of employment of the employee are not affected and such activities will continue to be compensable without regard to the provisions of this section. Activities of an employee which take place during the workday are also not affected by this section and such activities will continue to be compensable or not without regard to the provisions of this section.

This section does not attempt to define what constitutes work but provides that activities performed outside of the workday, are not to be compensable except by contract or by a practice or custom not inconsistent therewith. The rule laid down is that activities which take place either prior to the time at the beginning of his workday, when such employee commences, or subsequent to the time at the end of his workday, when such employee terminates his principal activity or activities, are activities (called portal-to-portal activities) which are not compensable except by contract or by a practice or custom not inconsistent therewith. The following activities outside the workday are among those not to be considered compensable under the Fair Labor Standards Act unless made so by contract or by a practice or custom not inconsistent therewith:

(1) Walking, riding, or traveling to and from the actual place of performance of the principal activity or activities within the employer's plant, mine, building, or other place of employment, irrespective of whether such walking, riding, or traveling occur on or off the premises of the employer or before or after the employee has checked in or out. Examples of this are (*a*) walking or riding from the plant gate to the employee's lathe, workbench, or other actual place of performance of his principal activity or activities; (*b*) riding on busses from a town to an outlying mine; (*c*) riding on busses or trains from an assembly point to a particular site at which a logging operation is being conducted.

(2) Checking in or out and waiting in line to do so, changing clothes, washing up or showering, waiting in line to receive pay checks, and the performance of other activities occurring prior and subsequent to the workday, such as the preliminary activities which were involved in the Mt. Clemens case (U. S. No. 342, June 10, 1946).

The foregoing list of noncompensable activities is not intended to be exhaustive but merely to indicate some types of activities outside the employee's workday which are not to be compensable under the Fair Labor Standards Act. Obviously, it would have been an impossible

task for the committee to prepare an exhaustive list of all activities which under the bill are not to be considered compensable.

It will be observed that the particular time at which the employee commences his principal activity or activities and ceases his principal activity or activities marked the beginning and the end of his workday. The term "principal activity or activities" includes all activities which are an integral part thereof as illustrated by the following examples:

(1) In connection with the operation of a lathe an employee will frequently at the commencement of his workday oil, grease, or clean his machine, or install a new cutting tool. Such activities are an integral part of the principal activity, and are included within such term.

(2) In the case of a garment worker in a textile mill, who is required to report 30 minutes before other employees report to commence their principal activities, and who during such 30 minutes distributes clothing or parts of clothing at the workbenches of other employees and gets machines in readiness for operation by other employees, such activities are among the principal activities of such employee.

This section also relieves an employer from liability for travel time from the portal of a mine to its face unless such time is compensable by contract or by a practice or custom not inconsistent therewith. Since the present collective-bargaining contract of the United Mine Workers provides for compensation for such travel time, liability of the employer, who is a party to any such contract, to pay for such time is not affected by this section.

Any activity occurring during a workday will continue to be compensable or not compensable in accordance with the existing provisions of the Fair Labor Standards Act. For example, if a rest period during that time is now considered a compensable activity under the act, it will remain so. If a timber worker who is employed to chop down trees finds it necessary during the workday to clear away underbrush in order to get at the trees to be felled the time spent in clearing away such underbrush will continue to be compensable or not compensable in accordance with the existing provisions of the Fair Labor Standards Act. If a lunch period during the workday is compensable or not compensable under the existing provisions of the Fair Labor Standards Act, it will continue to be compensable or not compensable in accordance with that act; and the same will be true as to waiting periods during a production break-down and to other waiting periods during the workday.

This section does not attempt to cover by specific language the many thousands of situations that do not readily fall within the pattern of the ordinary workday. To do this would be an almost impossible task and one that your committee believes to be unnecessary to attempt. The problem which has arisen from the portal-to-portal suits, will, in large measure, be met by the proposed bill.

The proviso contained in this section provides that the exemption from liability or punishment contained therein is not to apply to any portal-to-portal activities of an employee if such activities are compensable by either an express provision of a written or nonwritten contract or by a custom or practice not inconsistent with such contract. In determining whether an activity is compensable under a written

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This section also provides that no judicial or administrative interpretation of the Fair Labor Standards Act shall have the effect of changing any written or nonwritten contract between the employer and employee so as to make compensable any portal-to-portal activities. It also provides that if any such contract incorporates by reference as a part of the contract such judicial or administrative interpretations, such incorporation shall not have the effect of making compensable any such portal-to-portal activities.

Section 7 of the bill lays down the same rule with respect to portal-to-portal claims arising on or after the bill becomes law under the Walsh-Healey Act or the Bacon-Davis Act, as is laid down in section 6 of the bill with respect to portal-to-portal claims accruing in the future under the Fair Labor Standards Act. In general, time spent in the future by an employee before the commencement, on any particular workday, and after the termination, on any particular workday, of his principal activity or activities will not be compensable working time under such acts unless compensable by reason of a contract or by a practice or custom not inconsistent therewith.

FUTURE REPRESENTATIVE ACTIONS BANNED

Section 8 of the bill amends section 16 (b) of the Fair Labor Standards Act by repealing the authority now contained therein permitting an employee or employees to designate an agent or representative to maintain an action for and in behalf of all employees similarly situated. Collective actions brought by an employee or employees (a real party in interest) for and in behalf of himself or themselves and other employees similarly situated may continue to be brought in accordance with the existing provisions of the act. However, as to any individual claimant named in any such collective action, the action is deemed to be commenced as to him when he is named a party thereto. In other words, the commencement of the collective action does not stop the running of the statute of limitations for those who later become parties to the action. No employee is to be made a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The amendment made by this section is to be applicable only with respect to claims which accrue on or after the date the bill becomes law. Representative actions which are pending on such date are not affected.

STATUTE OF LIMITATIONS

Subsection (a) of section 9 of the bill amends the Fair Labor Standards Act by adding a new subsection to section 16 of that Act,

163 F.3d 602 (Table), 1998 WL 664622 (8th Cir.(Mo.))
Unpublished Disposition

(Cite as: 163 F.3d 602, 1998 WL 664622 (8th Cir.(Mo.)))

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA8 Rule 28A, FI CTA8 IOP and FI CTA8 APP. I for rules regarding the citation of unpublished opinions.)

United States Court of Appeals, Eighth Circuit.
Alexis M. HERMAN, Secretary of Labor, Appellee,
v.
RICH KRAMER CONSTRUCTION, INC., Appellant.
No. 97-4308WMS.

Submitted: June 10, 1998.
Filed: Sept. 21, 1998.

Appeal from the United States District Court For the Western District of Missouri, Southern Division.

Before RICHARD S. ARNOLD and MORRIS SHEPPARD ARNOLD, Circuit Judges, and PANNER [FN1], District Judge.

FN1. The Honorable Owen M. Panner, United States District Judge for the District of Oregon, sitting by designation.

PER CURIAM

**1 The Secretary of Labor brings this action against Rich Kramer Construction, Inc. (Kramer), claiming that Kramer failed to pay overtime to six employees, violating the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-219. After a bench trial, the District Court [FN2] ruled that Kramer should have paid employees for traveling to and from job sites.

FN2. The Honorable Russell G. Clark, United States District Judge for the Western District of Missouri.

Kramer appeals. We affirm.

BACKGROUND

Kramer constructed metal buildings, usually within sixty miles of its shop in Springfield, Missouri. Kramer employed five foremen, who drove company-owned trucks carrying laborers, equipment, and supplies from Kramer's shop to job sites. Early in the morning before driving to a job site, the foremen loaded trucks, received crew assignments, and studied blueprints. When the foremen returned to Kramer's headquarters after a day's work, they filled out time-sheets, unloaded and locked the trucks, and secured equipment. Kramer did not pay foremen for travel time to and from job sites or for time spent in the shop before and after their regular shifts.

Kramer employed a bookkeeper, Joyce King. Kramer did not pay King overtime wages unless she worked more than forty-five hours in a week.

After a bench trial, the District Court ruled that Kramer should have paid foremen for shop time and travel time. Based on its finding that Kramer failed to pay foremen for one hour per weekday and two hours per alternate Saturdays, the District Court awarded a total of $32,940 in back wages, plus prejudgment interest.

The District Court granted the Secretary's motion to alter the judgment. The District Court concluded that Kramer had failed to prove that its bookkeeper fell under an exemption for administrative employees, 29 C.F.R. § 541.2, and awarded the bookkeeper $660 in back wages. The District Court

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denied Kramer's post-judgment motion, ruling that Kramer was on notice that the Secretary sought back wages from September 1993 to September 1995.

DISCUSSION

I. Appeal from Summary Judgment Order

Kramer appeals the District Court's partial denial of its motion for summary judgment. An order denying summary judgment, however, is "not appealable after a full trial on the merits." *Johnson Int'l Co. v. Jackson Nat'l Life Ins. Co.*, 19 F.3d 431, 434 (8th Cir.1994); *Metropolitan Life Ins. Co. v. Golden Triangle*, 121 F.3d 351, 356 (8th Cir.1997).

II. Appeal from Final Judgment

A. Standard of Review

In an FLSA action, we review for clear error the district court's findings on the number of hours worked and the duties performed by an employee. *See Reich v. Stewart*, 121 F.3d 400, 404 (8th Cir.1997). We review de novo whether activities before or after an employee's official work shift are compensable. *See Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 738-39 n. 13, 101 S.Ct. 1437, 67 L.Ed.2d 641 (1981).

B. Travel Time

**2 Kramer contends that the Portal to Portal Act, 29 U.S.C. §§ 251-262, exempts the foremen's travel time. We agree, however, with the District Court that driving to job sites was compensable as a principal activity because Kramer could not have constructed buildings without the tools, supplies, and employees transported by foremen. *See Secretary v. E.R. Field, Inc.*, 495 F.2d 749, 751 (1st Cir.1974). Although providing trucks may have been convenient for the foremen, it also benefited Kramer. *See id.* (activity compensable if done partially for employer's benefit, even if employee also benefits).

Alternatively, travel time was compensable because the work day began when foremen reported to the shop. 29 C.F.R. § 785.38 (if employer requires employees to report at meeting place to receive instructions or to pick up and carry tools, "travel from the designated place to the work place is part of the day's work, and must be counted as hours worked regardless of contract, custom, or practice"); *Dole v. Enduro Plumbing, Inc.*, No. 88-7041-RMT (KX), 1990 WL 252270, at *5 (C.D.Cal. Oct.16, 1990).

Kramer argues that the travel time is excluded from FLSA coverage by the Employee Commuting Flexibility Act of 1996 (ECFA), which amended the Portal to Portal Act, 29 U.S.C. § 254. Section 254 now provides that

> the use of an employer's vehicle for travel by an employee and activities performed by an employee which are incidental to the use of such vehicle for commuting shall not be considered part of the employee's principal activities if the use of such vehicle for travel is within the normal commuting area for the employer's business or establishment and the use of the employer's vehicle is subject to an agreement on the part of the employer and the employee or representative of such employee.

The District Court correctly held that the ECFA did not apply because Kramer's foremen were not using the company trucks to commute between home and work, but to drive between work and job sites. *Cf. Baker v. GTE North Inc.*, 110 F.3d 28, 30-31 (7th Cir.1997) (ECFA applied to employee who parked company vehicle two miles from home and drove own car rest of the way; employee was entitled to drive company vehicle home). The foremen were not merely commuting but were also transporting other employees, equipment, and supplies.

C. Shop Time

Kramer contends that its foremen's shop time is not compensable either because it was preliminary or "postliminary" to regular work, or because the amount of shop time was de minimis. *See* 29 U.S.C. § 254(a)(2) (exempting from FLSA coverage

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"activities which are preliminary to or postliminary to ... principal activity or activities"); *Bobo v. United States,* 136 F.3d 1465, 1468 (Fed.Cir.1998) (applying test for determining whether work was so brief or sporadic as to be de minimis). The District Court did not err in concluding that the foremen's shop time benefited Kramer, and that the shop time, though brief, should be aggregated with travel time to determine total uncompensated time.

D. Calculation of Damages

**3 Kramer challenges the District Court's calculation of damages. Because Kramer did not keep records on travel time or most shop time, the District Court properly drew reasonable inferences from the evidence at trial. *See Martin v. Tony & Susan Alamo Foundation,* 952 F.2d 1050, 1052 (8th Cir.1992) ("[W]hen an employer has failed to keep proper records, courts should not hesitate to award damages based on the 'just and reasonable inference' from the evidence presented.") (quoting *Anderson v. Mt. Clemens Pottery Co.,* 328 U.S. 680, 687, 66 S.Ct. 1187, 90 L.Ed. 1515 (1946)). The District Court's calculation of damages is not clearly erroneous.

III. Post-Judgment Issues

The District Court did not abuse its discretion in ruling that Kramer should have known that the Secretary's claims encompassed FLSA violations from September 1993 to September 1995, when the complaint was filed. *See Twin City Constr. Co. v. Turtle Mountain Band of Chippewa Indians,* 911 F.2d 137, 139 (8th Cir.1990) (rulings on post-judgment motions under Fed.R.Civ.P. 59 reviewed for abuse of discretion). The complaint and other documents put Kramer on notice of the relevant period.

We also see no abuse of discretion in the District Court's post-judgment ruling that Kramer failed to establish that the bookkeeper was an administrative employee.

Affirmed.

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