SOL: PSM:vk
14340-14345

UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF NEW YORK

WILLIAM E. BROCK, Secretary of Labor, United States Department of Labor,	:	Civil Action
	:	File No. CV-83-5569
Plaintiff,	:	(LDW)
v.	:	
SUPERIOR CARE, INC.; NATIONAL NURSING SERVICES, INC.; ANN T. MITTASCH, Individually and as President; ROBERT M. RUBIN, Individually and as Treasurer,	:	
Defendants.	:	

PLAINTIFF'S PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW

Based upon the evidence, including the testimony and exhibits presented by the parties, as well as the pleadings and discovery filed herein, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. The plaintiff is the Secretary of Labor, United States Department of Labor, and brought this action under section 17 and 16(c) of the Fair Labor Standards Act of 1938, as amended (U.S.C. Title 29, Sec. 201, et seq.). (Pretrial Order B-1; complaint)

2. The defendant Superior Care, Inc., is a corporation duly organized under the laws of the State of New York, with its place of business at 287 Northern Boulevard, Great Neck, New York, within the jurisdiction of this court. (Pretrial Order B-1)

3. From about 1978 to September, 1981, Ann T. Mittasch was president of Superior Care, Inc. (Pretrial Order B-1)

4. From September 1981 until 1983, Ann T. Mittasch was Chairman of the Board of Superior Care, Inc. (Pretrial Order B-1)

5. Ann T. Mittasch does business in the State of New York. (Answer dated January 12, 1984).

6. From 1978 until September 8, 1981, Robert M. Rubin was Secretary-Treasurer of Superior Care, Inc. (Pretrial Order B-1)

7. In September 1981, Robert M. Rubin became president and Chief Executive Officer of Superior Care, Inc. and continued to be an officer of the corporate defendant through the trial of the case. (Pretrial Order B-1)

8. Robert M. Rubin does business in the State of New York. (Answer dated January 12, 1984).

9. National Nursing Services Inc. was incorporated under the name of Personal Aides, Inc., in the State of Florida on July 23, 1979. (Plaintiff's Exhibit 5- Response to Interrogatory No. 4)

10. On December 31, 1982, National Nursing Service Inc., formally amended its name to Superior Care, Inc. and since that time operates as a subsidiary of Superior Care, Inc. (Plaintiff's Exhibit 5- Response to Interrogatory No. 3)

11. The corporate headquarters of National Nursing Services are located at 287 Northern Boulevard, Great Neck, New York, within the jurisdiction of this court. (Plaintiff's Exhibit 5- Response to Interrogatory No. 5)

12. Superior Care, Inc. provides health care personnel to hospitals, nursing homes and individuals. (Answer dated January 12, 1984; Pretrial Order C-2; LaPorta 246-247) [1]

13. Ann T. Mittasch was responsible for day to day operations and pay practices of Superior Care. (Pretrial Order C-3)

14. Robert M. Rubin is responsible for pay practices of Superior Care and is involved in day to day operations. (Pretrial Order C-3)

15. Defendants' business has an annual dollar volume in excess of $250,000 a year since at least November 1981 to the present. (Pretrial Order C-1)

16. From about November 1981 until about mid 1982, Richard Mormile, Compliance Officer of the Wage and Hour Division of the United States Department of Labor conducted an investigation of defendants. (Mormile 14, 148)

17. Payroll records and other records of defendants' wage and hour practices were reviewed. (Mormile 17, 21-23)

18. The Wage and Hour Division investigator interviewed present and former Registered Nurses and Licensed Practical Nurses engaged by the defendants concerning their duties, hours worked and days worked. (Mormile 59, 61, 128, 342, 375)

19. The investigation disclosed that the defendants maintained two sets of payrolls for Registered Nurses and Licensed Practical Nurses. (Mormile, 149, 395-397)

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[1] References are to witnesses and pages in the trial transcript.

20. Payrolls designated TCU and NCH contained the payroll data for registered nurses and licensed practical nurses from whom no taxes were withheld. (Mormile 17; LaPorta 207)

21. TCU and NCH payrolls contained the total earnings for registered nurses and licensed practical nurses who are not paid overtime wages for hours worked over forty in a week. (McNamee 254, 255, 274; LaPorta 208)

22. Superior Care, Inc. designated persons who appeared on the TCU and NCH payrolls as independent contractors. (Mormile 17; Bridges 500)

23. Superior Care maintained other payrolls, e.g. NXE in which licensed practical nurses and registered nurses had employee payroll taxes deducted. (LaPorta 207-208)

24. Licensed practical nurses and registered nurses appearing on payrolls other than TCU and NCH were considered by defendants to be employees. (Plaintiff's Exhibit 5 - Responses to Interrogatories No. 33 and 34)

25. In all respects, the nature of the work performed was identical whether a nurse was reported on the TCU/NCH payrolls or other payrolls. (Cardin 89-91; Mendoza 69-79; McNamee 254-262, 273-281; Court Exhibit 1)

26. Whether on the NCH/TCU payrolls by request or by unilateral action of Superior Care, the nature of the work performed by the nurses was unaffected. (McNamee, 254-262, 273-281; Nwachuku 429; Bridges 507, 512; Court Exhibit 1)

27. The distinction made by defendants between nurses on the TCU/NCH payrolls and nurses on the other payrolls was limited to

questions of tax withholding and overtime pay. (McNamee, 254-268, 288-296)

28. Some nurses appeared on the defendants' independent contractor payroll apparently for no other reason than the fact that they had listed a large amount of exemptions when completing Internal Revenue Service Form W-4. (McNamee, 281)

29. In all respects the gathering of information for the defendants' payrolls and the processing of the payrolls was identical for nurses who were on the TCU/NCH payrolls or other payrolls. (LaPorta, 216-228)

30. LPN's and RN's who asked for or inquired about the payment of time and one half for overtime hours were told Superior Care did not pay time and one-half for hours worked over forty in a week. (Ramsey 173, 188; Mendoza, 82-83)

31. If a nurse having elected to have no taxes taken attempted to claim overtime, the defendants' computer was programmed to reject her claim. (LaPorta, 222-224)

32. While a nurse on the taxable payroll who worked over 40 hours in a week would be paid overtime she would not be permitted by defendants to work over 40 hours in a week. (Thomas, 425-426)

33. LPN's and RN's appearing on the employee payrolls are restricted as to the number of hours they can work so that defendants

35. RN's and LPN's in some cases acquiesced to defendants' placement of them on the nontaxable payroll because they could receive more work on that payroll than they could on the taxable payroll. (Thomas 425-426)

36. Superior Care did not pay the employer share of Federal Insurance Contribution Act taxes (social security) for amounts reported on the TCU and NCH payrolls, thereby saving approximately seven percent of payroll. (LaPorta 208-210)

37. Having nurses on the NCH/TCU payrolls resulted in financial savings to Superior Care. (LaPorta 235-236; McNamee 282-283)

38. Superior Care expresses the right and exercises the right to control the manner in which the nurses perform their work. (McNamee 326; Mendoza 80-81; Ramsey 189; Thomas 407, 417)

39. Superior Care exercised its right to supervise nurses by actually sending supervising nurses to the home (Thomas 418-420; Nwachuku 444-451)

40. Superior Care exercises its right to supervise nurses by having nursing notes delivered to the supervisory nurse's desk. (Thomas 420)

41. Lack of constant supervision is not a controlling factor of an independent contractor status as many employees normally work without constant supervision. (Bridges 519)

control exercised by employers who employ nurses who perform home visits. (Bridges 507)

44. Responding to medical emergencies is the nature of a nurse's work whether the nurse is placed by defendants on the taxable or non-taxable payroll and is considered an employee or an "independent contractor" by Superior Care. (Bridges 516; Pyant 472)

45. Nursing duties performed as an employee in a hospital is identical to the work done in the home, except that in the home there may be a little more independent decision making. (Thomas 403)

46. LPN's and RN's who work for Superior Care have no opportunity for profit or loss. (Plaintiff's Exhibit 5 - Response to Interrogatory No. 27; Cardin 91; LaPorta 244-245)

47. Bargaining between Superior Care and its nurses was very limited. (Mendoza 79-80, 84; Cardin 88-89; Turner 114-115; Nesbitt 158; Ramsey 171)

48. The opportunity to work for other agencies for additional income was rarely exercised by people who were working overtime for Superior Care, because they did not have enough time. (Ramsey 190, 192)

49. Rates of pay for Superior Care nurses were not determined by the nurses themselves, but were determined by defendants. Thomas 409)

52. The investment in equipment or materials for nurses reported on the NCH and TCU payrolls was the common type of investment made by employee nurses in general, (e.g., uniforms). (Thomas 421-423)

53. While in general the care for any particular patient could be of short duration, it was not uncommon for nurses to have long lasting associations with Superior Care, as much as ten years. (Cardin 85-87; Ramsey 170; Mendoza 66, 75-76, 78; Thomas 411-412; Nwachuku 442; Plaintiff's Exhibit 6; Defendants' Exhibit F)

54. The services rendered by the nurses constitute the most integral part of Superior Care's business which is to provide health care personnel on request. (Findings of Fact 12)

55. The process by which nurses are engaged by Superior Care can be labelled as nothing other than a job interview. (Pyant 467-469; Defendants' Exhibit F; Bridges 490-492; McNamee 258-260)

56. RN's and LPN's appearing on Superior Care Inc., payrolls are employees of employer Robert M. Rubin. (Findings of Fact 14)

57. RN's and LPN's appearing on Superior Care Inc., payrolls were employees of employer Ann T. Mittasch. (Findings of Fact 13, Plaintiff's Exhibit 5-Response to Interrogatory No. 9)

58. All LPN's and RN's employed by the defendants were paid by the hour and were not on a salary basis. (LaPorta 277; Pyant 470; Bridges 502; Plaintiff's Exhibit 5 - Response to Interrogatory No. 36)

60. Compliance Officer Mormile, in addition to the investigation that resulted in this litigation, twice before investigated Superior Care as a result of complaints. (Mormile 393)

61. As a result of the two previous investigations in 1980 and 1981, Superior Care paid backwages in overtime compensation found due to LPN's and RN's who had been paid only straight time for hours worked over forty in a week. (Mormile 7-14)

62. Compliance with the overtime provisions of the FLSA was promised by all defendants, herein, after the two prior investigations. (Mormile 138, 140, 362-363)

63. In a June 28, 1980 conference with Robert M. Rubin, Compliance Officer Mormile reviewed the "economic reality" test for employment and advised defendant Rubin that Superior Care nurses were employees under the FLSA. (Mormile 129-137, 348-351)

64. The June 28, 1980 discussion was initiated by a purported hypothetical question by defendant Rubin proposing to pay nurses as independent contractors rather than employees. (Mormile 143, 348)

65. Defendant Rubin at the time of the June 28, 1980 conference with Wage-Hour had already instituted a plan to declare LPN's and RN's independent contractors and did not inform Wage-Hour. (McNamee 285-286; Ramsey 174; Cardin 88-89; Turner 108-111; Mormile 397-398)

66. The independent contractor payrolls were purposely withheld

68. Defendants continued to pay nurses straight time earnings without premium compensation, after the Wage-Hour Division's third investigation findings of overtime violations were specifically called to the defendants' attention and after initiation of this litigation and even to the present time. (McNamee 292, 297, 299; LaPorta 227; Plaintiff's Exhibits 6 and 7; Nwachuku 443)

69. The unpaid backwages is a sum equal to one-half the straight time hourly rate previously paid for each and every hour worked over forty in a week for the period December 1980 to date of compliance. (Plaintiff's Exhibit 6)

70. The affected employees and the amount of unpaid overtime wages due December 1980 to November 1985, are $655,735.57 to 776 employees (Plaintiff's Exhibit 7). (Mormile 29-30)

71. Defendants' violations of the overtime provisions of the FLSA were willful. (Finding of Fact 66, 67)

72. Defendants have failed to demonstrate good faith in establishing their pay practices. (Findings of Fact 60, 61, 62, 63, 64, 65, 66, 67, 68)

73. Defendants have failed to demonstate any good faith as they are continuing to refuse to pay overtime compensation to nurses on the TCU/NCH payrolls. (McNamee 292, 297-299; LaPorta 227)

74. Plaintiff is entitled to access to the defendants' payroll

CONCLUSIONS OF LAW

JURISDICTION

1. The Court has jurisdiction of the subject matter in this action pursuant to section 17 of the Fair Labor Standards Act, as amended, (29 U.S.C. §201 et seq.) in which the Secretary of Labor seeks an injunction against future violations of the Act and against the continued withholding of unpaid overtime compensation.

2. The plaintiff also seeks an equal amount of backwages as liquidated damages. This court has jurisdiction to award liquidated damages pursuant to section 16(c) of the Fair Labor Standards Act, as amended, (29 U.S.C. §201 et seq.).

3. The defendants are subject to the in personam jurisdiction of this court. Findings of Fact 2, 5, 8, 11,

EMPLOYER STATUS

4. Superior Care, Inc. is an employer within the meaning of section 3(d) of the Fair Labor Standards Act. (Findings of Fact 4, 5, 6, 7, 8, 13, 14; Plaintiff's Exhibit 6; Defendants' Exhibit F; Plaintiff's Exhibit 5-Responses to Interrogatories No. 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20; Mormile 10) The individual defendants are the employers, within the meaning of section 3(d) of the Act, of employees covered by this action all defendants are separately and jointly liable under the Judgment to be entered herein. (Findings of Fact 13, 14

(1947); Usery v. Pilgrim Equipment Co., 527 F.2d 1308 cert. den. 429 U.S. 826 (5th Cir. 1976).

6. RN's appearing on Superior Care Inc., payrolls are employees within the meaning of the "economic reality" test (Findings of Fact 38, 39, 40, 41, 46, 47, 49, 51, 52, 53, 54, 55)

COVERAGE OF THE ACT

7. Defendants constitute a covered enterprise within the meaning of section 3(s)(1) of the Act. (Findings of Fact 15)

VIOLATIONS

8. The defendants have willfully violated and continue willfully to violate section 7 of the Act by employing a number of their employees in an enterprise engaged in commerce or in the production of goods for commerce within the meaning of the Act for workweeks longer than the statutory maximum without compensating said employees for hours worked over forty in a week at time and one-half the employee's regular rate. (Findings of Fact 56, 57, 58, 60, 67, 68, 72). Donovan v. Carls Drug Co., Inc., 703 F.2d 650, 652 (2nd Cir. 1983).

DEFENDANTS' CLAIM OF EXEMPTIONS

9. The licensed practical nurses and registered nurses are not exempt from the Act's overtime compensation requirements under the professional exemption, 29 U.S.C. 213(a) and 29 CFR §541.3. (Findings of Fact 58, 63)

application of the three year statute of limitations. (Findings of Fact 60, 61, 62, 63, 64, 65, 66, 67, 68). See, EECO v. Home Ins. Co., 672 F.2d 252, 263 (2nd Cir. 1983); Hodgson v. Humphries, 454 F.2d 1279 (10th Cir. 1972); Donovan v. Kaszycki & Sons Contracting, Inc., 599 F.Supp. 560 (S.D.N.Y. 1984).

INJUNCTION

11. The past and continuing violations mandate the issuing of an injunction restraining defendants from violations of sections 7, 11(c), 15(a)(2) and (5) of the Act at all of their locations. (Findings of Fact 60, 61, 62, 63, 64, 65, 66, 67, 71, 72, 73). Walling v. Helmerich and Payne, Inc., 333 U.S. 37 (1944); Wirtz v. Ocala Gas Co., 336 F.2d 236 (5th Cir. 1965); Kaszycki & Sons Contractors, Inc., supra. F.Supp. at 872..

12. The violations mandate the issuing of an injunction requiring defendants to cease withholding all unpaid overtime compensation owed to defendants' employees for the period December 1, 1980 until date of compliance for hours worked over forty per week at less than time and one-half the regular rate of pay. For the period from December 1, 1980 until November 1985, the court finds $655,735.57 in overtime compensation is due to 776 employees (Exhibit 7).

13. Calculations of backwages due shall be made by the plaintiff for the period subsequent to November, 1985 and for all additional

14. The violations mandate the issuing of an injunction requiring defendants to record and maintain accurate records of employees' hours and wages.

LIQUIDATED DAMAGES

15. The violations show a complete lack of good faith and mandate the awarding of liquidated damages equal to the total amount of backwages found to be due. Marshall v. Brunner, 668 F.2d 748, 753 (3rd Cir. 1982), Kaszycki, supra.

C O N C L U S I O N

For all of the foregoing reasons, plaintiff urges this Court to enjoin defendants from violating sections 7, 11(c), 15(a)(2) and 15(a)(5) of the Act including the restraint of withholding of unpaid overtime compensation together with the award of an equal amount of backwages as liquidated damages.

DATED: July 14, 1986
New York, New York

GEORGE R. SALEM
Deputy Solicitor of Labor

PATRICIA M. RODENHAUSEN
Regional Solicitor

BY: Percy S. Miller
PERCY S. MILLER
Attorney

U.S. Department of Labor

and by depositing the same in a post office box regularly maintained by the United States Government at 1515 Broadway, Borough of Manhattan, City of New York.

Deponent further says that the said Ronald M. Green, Esq., attorney(s) for the defendant(s) herein and the address set forth on said envelope is the office and post office address of said attorney(s) upon the last paper served by him/her in the within action.

Anna Salutsky
ANNA SALUTSKY

Sworn to before me this
14th day of July, 1986

Vanessa P. Kenley
NOTARY PUBLIC

VANESSA P. KENLEY
NOTARY PUBLIC, State of New York
No. 41-4783328
Qualified in Queens County
Commission Expires March 30, 1987

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UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF NEW YORK

WILLIAM E. BROCK, Secretary of Labor, United States Department of Labor,	:	Civil Action
	:	File No. CV-83-5569
Plaintiff,	:	(LDW)
v.	:	AFFIDAVIT OF SERVICE
SUPERIOR CARE, INC.; NATIONAL NURSING SERVICES, INC.; ANN T. MITTASCH, Individually and as President; ROBERT M. RUBIN, Individually and as Treasurer,	:	
Defendants.	:	

STATE OF NEW YORK)
:SS:
COUNTY OF NEW YORK)

ANNA SALUTSKY, being duly sworn, deposes and says:

That on the 14th day of July, 1986, she served the within Proposed Findings of Fact and Conclusions of Law, upon Ronald M. Green, and Richard E. Fish, Esqs., attorney(s) for defendant(s), in the above entitled action, by enclosing a true copy of same in a securely sealed United States Government postage-free, franked envelope addressed as follows:

Ronald M. Green, Esq.

FACTS TO BE ADDUCED AT TRIAL

At all times pertinent to this action, Superior Care, Inc. was a corporation organized under the laws of the State of New York and had its principal office and place of business at 287 Northern Boulevard, Great Neck, New York 11201. Superior Care, Inc. provides hospitals, nursing homes, and the public with health care personnel, i.e., registered nurses, licensed practical nurses, nurses aides and home health aides. This action concerns only persons engaged as registered nurses and licensed practical nurses.

For licensed practical nurses and registered nurses, deemed by Superior Care, Inc. to be independent contractors, separate payrolls are maintained. These payrolls are labelled NCH and TCU. The NCH and TCU payrolls are maintained apart from payrolls for licensed practical nurses and registered nurses considered to be employees.

Licensed practical nurses and registered nurses, deemed by Superior Care Inc. to be independent contractors and carried on the NCH and TCU payrolls, regularly work over forty hours a week. These LPN's and RN's are employed at hourly wage rates and are paid straight time for all hours worked. It is the contention of Superior Care, Inc. that as "independent contractors" these LPN's and RN's are not entitled to overtime wages.

Payroll records show the variation in the number of hours worked by these LPN's and RN's. The payroll records show conclusively the direct relationship between hours worked and the remuneration paid. Summaries of defendants'

provisions of the Fair Labor Standards Act. It will also be evident that these employees as hourly paid individuals cannot be exempt professionals within the meaning of the Fair Labor Standards Act.

The methods used for computing the overtime compensation due the subject employees in backwages for the period of employment from December 1, 1980 to date will be examined at trial through the testimony of the Compliance Officer of the United States Department of Labor, Wage and Hour Division.

The Court will be shown the willful nature of these overtime violations. The evidence will show the defendants were aware their operations were subject to the Fair Labor Standaards Act provisions. The evidence will show the violations are identical to violations found in several earlier investigations. The evidence will demonstrate that senior management and corporate officials promised and assured the Wage and Hour Division there would be future compliance with the Fair Labor Standards Act overtime provisions. The evidence will show the promises and assurances were not kept.

The evidence will show that Ms. Ann T. Mittasch and Mr. Robert M. Rubin are both employers of the subject employees within the meaning of the Fair Labor Standards Act, section 3(d).

ARGUMENT

POINT I

THE "ECONOMIC REALITY TEST" IS THE PROPER TEST TO APPLY TO DETERMINE WHETHER THE SUBJECT RN'S AND LPN'S ARE INDEPENDENT CONTRACTORS

The Supreme Court of the United States in United States v. Silk, 331 U.S. 704, 67 S.Ct. 1963 (1947); Rutherford Food Corp. v. McComb, 331 U.S. 722, 67 S.Ct. 1473 (1947); NLRB v. Hearst Publications, 322 U.S. 111, 64 S.Ct. 851 (1943) outlined the relevant factors be considered in determining an employer-employee relationship. The Supreme Court set forth five considerations in determining the "economic reality":

(1) Degree of control exercised by the principal over the business;

(2) Opportunity for profit and loss;

(3) Capital investment in facilities and equipment;

(4) Comparative permanancy of relationship between the individuals and the corporation; and

(5) Degree of independent judgment, etc., in open market competition.

The Ninth Circuit in Donovan v. Sureway Cleaners, 656 F.2d 1368 (9th Cir. 1981) referenced the "economic reality test" to a six factor consideration. In the very recent Third Circuit case of Donovan v. Dial America Marketing Inc., 757 F.2d 1376 (3rd Cir. 1985) cert. denied, ____ U.S. ____ 106 S.Ct. 246 (1985) the six factor Sureway Cleaners, Inc., refinement of the "economic reality test" was cited:

(1) The degree of the alleged employer's right to control the manner in which the work is to be performed;

(5) The degree of permanance of the working relationship; and

(6) Whether the service rendered is an integral part of the alleged employer's business.

The evidence that will be produced at trial will establish the subject LPN's and RN's are employees within the meaning of the "economic reality test." The proof will show that these LPN's and RN's perform tasks under circumstances and situations identical to and indistinguishable from the tasks and duties performed by "employees." The proof will further show that in all other respects the "economic reality" of the relationship is that of employer-employee.

The evidence will show that the LPN's and RN's have no opportunity to make a profit or loss and as such are indistinguishable from other employees of the defendants in particular or employees in general. The only opportunity "independent contractors" or "employees" have to make more money is to work more hours. The evidence will show that the services of the "independent contractors" which are identical to the services of the "employees" is at the very essence of the Superior Care Inc. business, and, but for these services there would be no business. The evidence will show that the nature of the contractual arrangment between Superior Care Inc. and the patient is to provide services and when and if the service is not performed the patient looks to Superior Care Inc. to perform. Whether the performance be by a person on the NCH/TCU payroll or some other payroll is of no concern to the patient, his family or his doctor.

POINT II

THE DEFENDANTS' WERE REQUIRED TO PAY THE EMPLOYEES OVERTIME COMPENSATION AND KEEP PROPER RECORDS OF HOURS WORKED

Section 7(a)(1) of the Fair Labor Standards Act, 29 U.S.C. Section 207(a)(1) provides in pertinent part as follows:

> "... no employer shall employ any of his employees ... 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."

A violation of the Act's overtime provisions occurred with respect to the employees because Superior Care Inc. failed to compensate LPN's and RN's on the TCU and NCH payrolls at time and one-half for all hours worked over 40 per week. The payroll records show these persons regularly worked over 40 hours in a week. It was the defendants' intention not to compensate persons on the TCU and NCH payrolls at time and one half. Consequently, when the employee is named, the hours of overtime worked during a week is ascertained, the period of employment is shown and the rate of pay set forth, the plaintiff's prima facie case is established. Marshall v. R & M Erectors, Inc., 429 F.Supp. 771, 776 (D. Del. 1977); Marshall v. National Freight Inc., 87 CCH Labor Cases ¶ 48,915 (D.N.J.) 1979).

Section 11(c) of the FLSA, 29 U.S.C. §211(c), requires as follows:

> 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 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

The regulations set forth in 29 C.F.R. §516.2(a) require these records to contain information with respect to, inter alia, name and address of each employee, occupation in which the individual is employed, rate of pay, hours worked each work day and total hours for each workweek, and both total wages due and total wages paid for regular time and overtime. Payroll records are to be preserved by the employer for three years. 29 C.F.R. §516.5. Employment, earnings, and wage rate records are to be preserved for two years. Id. at §516.6(a).

These records are to be maintained by the employer at the place of employment or central recordkeeping office, and are to be available for Department inspection on seventy-two hours notice. Id. at §516.7.

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UNITED STATES DISTRICT COURT FOR
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WILLIAM E. BROCK, Secretary of Labor, United States Department of Labor,	:	Civil Action File
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Defendant.	:	

PLAINTIFF'S TRIAL MEMORANDUM

GEORGE R. SALEM
Deputy Solicitor of Labor

PATRICIA M. RODENHAUSEN
Regional Solicitor

PERCY S. MILLER
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Defendant.	:	

PLAINTIFF'S TRIAL MEMORANDUM

GEORGE R. SALEM
Deputy Solicitor of Labor

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UNITED STATES DISTRICT COURT FOR
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	:	
Defendant.	:	

PLAINTIFF'S TRIAL MEMORANDUM

PRELIMINARY STATEMENT

The instant action was filed on December 28, 1983 and alleged that the defendants willfully violated sections 7 and 15(a)(2) of the Fair Labor Standards Act by employing many of their employees in commerce or in an enterprise engaged in commerce for work weeks longer than 40 hours at rates less than one and one-half times the regular rate of pay at which they were employed in defendants' positions of Licensed Practical Nurse and Registered Nurse. 29 USC §§201-19. The action also alleged that the defendants violated sections 11(c) and 15(a)(5) of the Act by failing to make, keep and preserve accurate records of the persons employed by them and the wages, hours as provided by regulations. Plaintiff seeks an injunction restraining future violations of the Act, restraining the withholding of unpaid overtime compensation and liquidated damages for the period of wage violations from December 1, 1980 to the present, and continuing until such time as compliance with the Act is secured.

For Publication

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM E. BROCK, Secretary of Labor, UNITED STATES DEPARTMENT OF LABOR, Plaintiff-Appellant, vs. SOME SETO, individually and doing business as TONY OF CALIFORNIA, Defendant-Appellee.	No. 85-5826 DC# CV 80-954 RMT O P I N I O N

Appeal from the United States District Court
for the Central District of California
District Judge Robert M. Takasugi, Presiding

[Argued and Submitted April 11, 1986 - Pasadena]

Before: WRIGHT and NELSON, Circuit Judges, and MARQUEZ,* District Judge.

WRIGHT, Circuit Judge.

In this appeal we must decide the sufficiency of evidence regarding uncompensated overtime where the employer failed to keep records required by the Fair Labor Standards Act. We conclude that the district court did not fulfill its duty to approximate an award of back wages based on the employees' testimony. We reverse and remand for a determination of back wages.

FACTS AND PROCEEDINGS BELOW

* Of the District of Arizona.

The Secretary of Labor filed this action on behalf of sixteen employees of Seto, alleging minimum wage, overtime and record keeping violations under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-219. The Secretary sought a permanent injunction to restrain Seto from violating the Act and a restitutionary injunction for unpaid overtime compensation (back wages).

At trial, four employees testified that they had worked over 40 hours a week without overtime pay. A Compliance Officer (CO) from the Wage and Hour Division of the Department of Labor testified about her investigation of Seto's business for compliance with federal wage and hour requirements. However, she was not permitted to testify about her computations of back wages The court sustained Seto's objection that the CO's computations were based on employees' statements and that testimony based on such hearsay was inadmissible.

After the Secretary's case in chief, Seto moved to dismiss the Secretary's claim for back wages. The court granted the motion, finding that the evidence was "too speculative and unspecific" to support an award. Trial proceeded on the prospective injunction issue.[1/] Seto presented seven employee

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[1] After dismissing the back wages claim, the court made this observation about the Secretary's claim for injunctive relief:

> There is no question of the fact that based on th present state of the evidence that there is substantial evidence that the defendant had violated the laws as contended by the Department Labor. And so for that reason, a permanent injunction is certainly a viable request.

witnesses who testified that they were paid overtime wages. Finally, Seto was called by the Secretary as a rebuttal witness. He testified that overtime hours were not recorded in the payroll earnings statements for one year of the two-year period in question. All other employment records for the relevant period were apparently destroyed.

The district court found "by a preponderance of the evidence . . . that there [had] been violations of the applicable [FLSA] statutes." It granted a permanent injunction prohibiting Seto from violating Section 6 (minimum wages), Section 7 (overtime), Section 11(c) (record keeping), and Section 15(a)(1) (shipment of goods manufactured in violation of FLSA).

The Secretary timely appealed the denial of back wages and presents us with two issues:

(1) Did the district court err in refusing to award back wages based on a finding that the evidence of uncompensated overtime was too speculative?

(2) Did it err in refusing to allow the compliance officer's testimony about the computation of back wages?

STANDARD OF REVIEW

Findings of fact are reviewed for clear error. United States v. McConney, 728 F.2d 1195, 1200 (9th Cir.) (en banc), cert. denied, 105 S. Ct. 101 (1984). The selection and application of the correct legal standard for reviewing a claim for unpaid overtime under the FLSA is a question of law, reviewable de novo. See id. at 1201. Evidentiary rulings are reviewed for abuse of discretion. See United States v.

McClintock, 748 F.2d 1278, 1291 (9th Cir.), cert. denied, 106 S. Ct. 75 (1985).

ANALYSIS

I. Refusal to Award Back Wages

An employee seeking to recover unpaid minimum wages or overtime under the FLSA "has the burden of proving that he performed work for which he was not properly compensated." Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 687 (1946). In view of the remedial purpose of the FLSA and the employer's statutory obligation "to keep proper records of wages, hours and other conditions and practices of employment," this burden is not to be "an impossible hurdle for the employee." Id.

> [W]here the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes, . . . the solution . . . 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 . . . ; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the [FLSA].

Id.

Here, it is undisputed that overtime hours and wages were not recorded by Seto as required by the FLSA. In such a situation, "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 a just and reasonable inference." Id. (emphasis added).

The burden then shifts to the employer to show the precise number of hours worked or to present evidence sufficient to negate "the reasonableness of the inference to be drawn from the employee's evidence." Id. at 688. If the employer fails to make such a showing, the court "may then award damages to the employee, even though the result be only approximate." Id. (emphasis added).

We find that the district court erred as a matter of law in concluding that the Secretary's proof of uncompensated overtime was "too speculative." Mt. Clemens Pottery leaves no doubt that an award of back wages will not be barred for imprecision where it arises from the employer's failure to keep records as required by the FLSA.

> The 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 [FLSA]. . . . Nor is [an award] to be condemned by the rule that precludes the recovery of uncertain and speculative damages.

Id. at 688 (emphasis added).

Seto argues that the Secretary failed to show the amount of overtime as a just and reasonable inference. In the alternative, he argues that his witnesses' testimony negated the reasonableness of the inference to be drawn from the Secretary's evidence.

These arguments are unavailing here. The district court found that Seto failed to pay overtime and minimum wages and failed to maintain records as required by the FLSA. These

violations were the basis for the injunctive relief granted below. Seto does not challenge these findings or the injunction.

Once the employee "has proved that he has performed work and has not been paid in accordance with the [FLSA]," the fact of damage is certain. Mt. Clemens Pottery, 328 U.S. at 688. The only uncertainty is the amount of damage. "In such a case 'it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts.'" Id. (quoting Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563 (1931)).

The district court's determination that the damages were too speculative ignored the legal standard established in Mt. Clemens Pottery: "Unless the employer can provide accurate estimates [of hours worked], it is the duty of the trier of facts to draw whatever reasonable inferences can be drawn from the employees' evidence . . .." Id. at 693. The district court failed to fulfill its duty in ascertaining back wages.

The Secretary's claim for back wages is remanded to permit the district court to approximate an award based on reasonable inferences from the employees' testimony. See Houser v. Matson, 447 F.2d 860, 863 (9th Cir. 1971) (remand where ample evidence in record from which amount of back wages can be reasonably inferred); Wirtz v. Dix Box Co., 322 F.2d 499, 501 (9th Cir. 1963) (remand for new trial where proffered testimony permitted determination of award of back wages with reasonable

accuracy).

II. Refusal to Allow Compliance Officer Testimony

The Secretary contends that the district court erred in excluding the CO's testimony about her back wage computations tha were based in part on employees' statements as to overtime. That testimony was offered not for the truth of the employee statements, but to describe the methodology in preparing the wage transcription and computation sheets.

We find that such testimony was erroneously excluded. See Avery v. Commissioner, 574 F.2d 467, 468 (9th Cir. 1978) (IRS agent testimony about deficiency computations based on third part statements not excludable as hearsay where admitted only to support the reasonableness of the agent's actions in computing th deficiency). See also DiMauro v. United States, 706 F.2d 882, 88 (8th Cir. 1983) (affidavit, inadmissible to prove the assertions contained therein, was admissible for the limited purpose of determining whether the agent's reconstruction of wages rested on a reasonable basis).

We have not decided this precise issue in the context o alleged FLSA violations. However, at least two other circuits have ruled that not only the CO's testimony but the actual computations are admissible as evidence in support of an award of back wages.

In Hodgson v. Humphries, 454 F.2d 1279 (10th Cir. 1972) the court upheld the admission of the CO's computation sheets "no as direct evidence of [wages and hours] as to which employees had testified, but only as a 'helpful summary or chart.'" Id. at

1282. Even though "primarily based upon information obtained through interviews with the employees," the computation sheets were properly "receive[d] . . . in evidence for the limited purpose they were intended to serve." Id. at 1282-83. The Tenth Circuit emphasized that the back wages claim "[did] not rest solely upon the computation sheets." Id. at 1283. Here, we find, as did the court in Humphries, that "[t]he testimony of the former employees, standing alone, made out the Secretary's prima facie case." Id. In such circumstances both the CO's testimony and the computations are admissible.

Similarly, the Sixth Circuit in Hodgson v. American Concrete Construction Co., Inc., 471 F.2d 1183 (6th Cir.), cert. denied, 412 U.S. 949 (1973), held that where, as here, the CO's computations of overtime pay were based in part on employer records, those computations were improperly excluded. It concluded that the computations were "relevant and competent evidence and should be admitted and considered on retrial . . .." Id. at 1186.

We find that the district court abused its discretion in excluding the CO's testimony about the overtime computations where it was limited to showing the methodology of the computations and not the veracity of the employees' statements.

CONCLUSION

The district court failed to apply correctly the standard established in Mt. Clemens Pottery for awarding back wages. The testimonial evidence from employees was sufficient to impose upon the district court a duty to estimate back wages.

Excluding the CO's testimony was an abuse of discretion since it was offered only to show the methodology used in the computation of back wages.

The judgment of the district court as to back wages is reversed and the cause is remanded for determination of the amoun of back wages owing, "such determination to be based either upon the present record or as supplemented by such additional evidence as the District Court may afford the parties an opportunity to offer . . . ." Donovan v. Tony and Susan Alamo Foundation, 722 F.2d 397, 405 (8th Cir. 1984).

REVERSED AND REMANDED.

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UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF NEW YORK

WILLIAM E. BROCK, Secretary of Labor, United States Department of Labor,	:	Civil Action File
Plaintiff,	:	No. CV-83-5569 (LDW)
v.	:	
SUPERIOR CARE, INC.; NATIONAL NURSING SERVICES, INC.; ANN T. MITTASCH, Individually and as President; ROBERT M. RUBIN, Individually and as Treasurer,	:	
Defendant.	:	

PLAINTIFF'S POST-TRIAL MEMORANDUM OF LAW

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	:	File No. CV-83-5569
	:	(LDW)
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PLAINTIFF'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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