UNITED STATES DEPARTMENT OF LABOR
Office of the Solicitor
December 31, 1943

Legal Field Letter
No. 90

Attached Opinions

Copies of recent opinions on subjects indicated below are furnished herewith for your information and proper notation in the Index to Legal Field Letters.

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LETTERS

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AIR MAIL

Regs. 598
630
585
631

Dorothy M. Williams
Regional Attorney
San Francisco, California

SOL:JL:FH

Donald M. Murtha
Chief, Wage-Hour Section

September 2, 1943

Western Newspaper Union
Salt Lake City, Utah
File No. 43-50,216
LE:ABS:LIH

This will reply to your memorandum of July 19, 1943 regarding the applicability of various wage orders to the employees of the subject company.

From your memorandum and the inspection report accompanying it, the subject company would appear to be engaged mainly in the following operations:

(1) It maintains a warehouse where large sheets of newspaper, poster paper, and paper suitable for stationery use are cut into smaller sizes and sold to printing companies, newspapers, and paper houses. These concerns then cut the paper to suit their individual requirements and use it to print weekly newspapers, advertising handbills, posters, stationery, school yearbooks, and bulletins. The sale of these paper products constitutes about 70 percent of the subject company's total dollar volume of business.

(2) It cuts and makes scratch pads which are sold at wholesale to Government offices, schools, paper houses, and business concerns, some of which are engaged in interstate commerce.

(3) It maintains a printed syndicate service which is furnished to 112 local weekly newspapers in the Rocky Mountain States. Through this service a partially printed newspaper containing news written by national columnists and advertisements of national interest is sold to these local weekly papers, into which they insert the news pertinent to their own immediate locality. This service constitutes 10 percent of the subject company's dollar volume of business.

(4) It manufactures newspaper plates and stereotype and electrotype plates. The newspaper plates are manufactured according to order of newspapers and printing companies throughout the Intermountain Region. After

(0835)

> the customer has used the plates for printing, they are returned and remade by the subject company, as only the use or service of the plates is sold. The stereotype and electrotype plates are produced for commercial purposes and sold to companies desiring such plates for advertising purposes. The manufacture and sale of these plates constitute about 10 percent of subject concern's dollar volume of business.

With respect to the first class of operations, which constitute the cutting to size of newsprint, poster paper, and other types of paper, it is my opinion that they are covered by the wage order for the Pulp and Primary Paper Industry (Regulations, Part 585). The definition of this industry includes:

> * * * finishing operations normally performed in the paper or board mill, such as * * * cutting to size * * *

I understand it is your opinion that the cutting operations by the subject company in this case would not seem to come within this definition because of the fact that they are not being performed in a paper or board mill. However, the Division has already passed upon the question; the position was taken in August 1942 that the cutting of paper to size for customers by a stock house, which purchases paper at wholesale, is covered by the Pulp and Primary Paper Industry wage order. I do not believe that the operation of the subject company in the instant case is sufficiently different to warrant a different determination.

Of course, you recognize that the definition of the Pulp and Primary Paper Industry excludes "any treating, processing, or refabrication of finished paper or board to produce converted paper or board products." If, therefore, a concern such as the one about which you inquire engages in manufacturing operations, other than merely cutting paper to size, which result in products included in the Converted Paper Products Industry, employees performing such operations and those in occupations necessary to the production of such products would, of course, be entitled to the benefits of the minimum wage rates prescribed in the wage order for that industry.

Classification No. 2 of the subject company's activities, namely, the making of scratch pads, is clearly covered by the wage order for the Converted Paper Products Industry. Since the old wage order of June 30, 1941 (Regulations, Part 598) and the present order, which became effective February 15, 1943 (Regulations, Part 630), both carry a 40-cent rate for this operation, no problem is involved here.

I likewise agree with your opinion that the third category of operations of this company, consisting of the printed syndicate service, is covered by the wage order for the Printing and Publishing and Allied Graphic Arts Industry. Although the company does not print the entire newspaper, I believe that graphic art is the exclusive medium through which this product functions and, therefore, it would seem to be excluded

from the Converted Paper Products wage order by the language of section 630.4(d) of Regulations, Part 630.

The last named group of operations, consisting of the manufacture and servicing of newspaper plates and the manufacture and sale of stereotype and electrotype plates, also would appear to be covered by the Printing and Publishing and Allied Graphic Arts Industry wage order by virtue of section 631.4 of Regulations, Part 631, which includes within the definition of this industry "* * * * all other products or services of typesetters and advertising typographers, electrotypers and stereotypers."

The file is returned herewith.

Attachment
(File)

George H. Foley
Regional Attorney
Boston, Massachusetts

SOL:RB:FH

Donald M. Murtha
Chief, Wage-Hour Section

October 9, 1943

Identifying Overtime Hours
Under the Public Contracts Act

Reference is made to your memorandum of September 28, 1943 inquiring as to the overtime compensation due an employee under the Walsh-Healey Act where the daily overtime hours equal the weekly overtime hours but the rate of pay for work during the weekly overtime hours exceeds the rate of pay applicable to work during the daily overtime hours.

You indicate that the employee in question worked 16 hours on Monday, the first day of his workweek, and 8 hours a day on Tuesday, Wednesday, Thursday and Friday, a total of 48 hours for that week. His rate of pay for the first 8 hours on Monday was $1.30 an hour, while for the last 8 hours in that day it was 70 cents an hour. The rate of pay for the other 40 hours in the week, including the 8 hours on Friday, was $1.30 an hour. You ask whether the employee should be paid time and one-half for the 8 hours he worked on Friday at the regular rate of $1.30 an hour or whether he should be paid time and one-half for the 8 daily overtime hours on Monday at the regular rate of 70 cents an hour.

You are advised that the Division has, since the issuance of release R-1913, interpreted section IV, subdivision 9 (b)(1) on page 26 of Rulings and Interpretations, No. 2 to require the payment of overtime compensation due under the Walsh-Healey Act on either a daily or weekly basis, whichever compensation is the greater. In view of this position, it would seem that the employee in question is entitled to time and one-half his basic hourly rate for the 8 hours in excess of 40 in the week since the overtime compensation for these 8 hours appears to be greater than the overtime compensation due for the 8 daily overtime hours on Monday. If the subject company elects to pay overtime on the basis of the employee's average hourly rate for the week rather than on the basis of the hourly rate in effect during the overtime hours, no problem is presented, since the amount of overtime compensation would be the same. On the other hand, if the employer chooses to pay overtime compensation on the basis of the hourly rate in effect during the overtime hours, the weekly overtime compensation (65 cents times 8 or $5.20) is greater than the daily overtime compensation (35 cents times 8 or $2.80).

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Under releases R-1913 and R-1913a the employer does have the right to elect whether he will pay overtime in a particular week on the basis of the employee's average hourly rate for the week or the day or on the basis of the hourly rate in effect during the overtime hours. However, once he has made his election, he must, under the Division's position with respect to daily and weekly overtime compensation under the Public Contracts Act, pay that overtime compensation which is the greater.

SOL:TJK:FH

October 28, 1943

John K. Carroll
Regional Attorney
New York, New York

Donald M. Murtha
Chief, Wage-Hour Section

Gotham Aseptic Laboratory Co., Inc.
40-09 21st Street
Long Island City, New York
SOL:JD:DK

This is in reply to your memorandum of July 8, 1943 wherein you request our opinion as to the coverage of the operations engaged in by the subject company under existing wage orders.

It appears that the subject firm purchases cotton cloth and manufactures adhesive plaster by applying a gummy substance (consisting of a mixture of pitch, rosin, lanolin, rubber, zinc oxide, flour and chalk). The finished product is cut to size (1 inch, 2 inches, 3 inches, etc.) and spooled.

It is our opinion that the manufacture of adhesive tape or plaster, as described above, is included under the term "surgical gauze and bandages" as such term is used in paragraph 619.4(d) of the Textile Industry wage order. Accordingly, employees engaged in the manufacture of this product are entitled to the benefits of such wage order.

(0835)

Charles A. Reynard
Regional Attorney
Cleveland, Ohio

SOL:JL:RHH

November 1, 1943

Donald M. Murtha
Chief, Wage-Hour Section

Shaw-Barton, Inc.
535 Walnut Street
Coshocton, Ohio
File No. 34-2845
SOL:FRD:JTH

This will reply to your memorandum of September 4, 1943 in which you request an opinion as to the minimum wage determination applicable to the operations of the subject company, particularly with respect to work done under contract No. W-535 ac-30763. Since the only violations disclosed by the current inspection report arose from the firm's failure to pay the 42-1/2-cent minimum required by the wage determination for the Leather and Sheep-Lined Jackets Industry, I shall confine my discussion to the application of that wage determination to subject company's operations under this contract.

The PC-1 attached to the file states that the contract covered "Cap, Flying Winter" and that the wage determination for the "Leather, Leather-Trimmed, and Sheep-Lined" Industry was made part of the contract. The inspector's Narrative Report, under item 7, states that the contract provided for the manufacture of sheep-lined caps for use by the Army Air Corps, the caps being manufactured from a type of sheep skin known as "shearling." It further appears that the company was advised by the Army Air Corps in a letter dated September 15, 1942 that the wage determination for the Men's Hat and Cap Industry was applicable to its work under the contract. This was followed by a subsequent letter to the company by Captain M. C. Harding of the Air Corps, dated November 17, 1942, advising it to disregard the letter of September 15, 1942, and further stating that since the contract was entered into "with the understanding that the applicable minimum wage was that of the leather, leather trimmed and sheep lined industry, it is assumed that you will proceed with the completion of the contract on the terms and at the unit prices set forth therein." To this letter the company replied on March 24, 1943 stating that it was not their understanding that the contract would be subject to the wage determination referred to but rather that they had been operating under the 40-cent rate for the "Luggage and Leather Goods Industry" and had advised the contracting party to that effect prior to the time the contract was entered into.

It is my opinion that the contract in question is subject to the minimum wage rate of 42-1/2 cents contained in the minimum wage determination for the Leather and Sheep-Lined Jackets Industry. This wage determination, as extended, covers the manufacture of all leather, leather-trimmed and sheep-lined garments for men, women and children. This would appear to be broad enough to include sheep-lined flying caps. With respect to the possible application of the minimum wage determination for the Men's Hat and Cap Industry, the Division has already taken the position that that wage determination does not apply to the manufacturing of sheep-lined flying caps and that such caps are subject to the minimum wage determination for the Leather and Sheep-Lined Jackets Industry. The minimum wage determination for the Luggage and Leather Goods, Belts, and Women's Handbag Industry, which the subject company believes to be applicable, would not apply to the manufacture of these caps. It would seem, therefore, that the wage determination held to be applicable in the notice of award is correct.

I am returning the file herewith.

Attachment
(File)

Ernest N. Votaw
Regional Attorney
Philadelphia, Pennsylvania

Donald M. Murtha
Chief, Wage-Hour Section

SOL:JL:RHH

November 1, 1943

Hartman-Leddon Co., Inc.
Philadelphia, Pennsylvania
ENV: mfm

This will reply to your memorandum of October 11, 1943 in which you request an opinion as to the wage determination applicable to the subject company. You state that the company received a contract from the Army Medical Corps to furnish the following: Biebrich Scarlet, Congo Red, Nigrosin, Water Soluble, and Wright's Stain Powder. These are all chemicals which are used as stains for diagnostic purposes, presumably on a slide for microscopic examination, with the exception of Biebrich Scarlet, which is also used to some extent as an antiseptic for wounds and skin diseases. It appears, therefore, that none of the chemicals is taken internally, and none, with one possible exception, is used externally on the body.

You also state that according to the Notice of Award, the minimum wage determination for the Chemical and Related Products Industry was made part of the contract. However, the company takes the position that these products should be considered as drugs and not chemicals, citing the definition of "drug" under the Federal Food, Drug, and Cosmetic Act of June 25, 1943, and also the fact that the requests for bids and the correspondence concerning the contract with the St. Louis Medical Department Procurement District of the War Department refer to the articles as drugs. You inquire "whether the Chemical and Allied Products Wage Determination was properly made a part of the contract in question or, if not, whether the Drug and Medicine Industry Wage Determination applies, or whether no Wage Determination at all is applicable."

It is our opinion that the Chemical and Allied Products Industry wage determination was properly made part of the contract in question. The articles called for by the contract appear to be excluded from the wage determination for the Drug and Medicine Industry, since that determination refers to drugs or medicinal preparations "intended for <u>internal</u> or <u>external</u> use in the diagnosis, treatment, or prevention of disease in, or to affect the structure or any function of, the body of man or other animals." It would seem that the word "external," when read in context, has reference to articles which are used on the body, and since the products in question, with one possible exception, are admittedly not used on the body but on a slide for staining purposes, they would not appear to be drugs within the meaning of the determination for the Drug and Medicine Industry. Whether or not these products would be considered as drugs under the Federal Food, Drug, and Cosmetic Act is not, of course, decisive of the question of their coverage under the specific definition contained in the minimum wage determination for the Drug and Medicine Industry. It is significant that the words "internal or external" do not appear in the definition of a drug under the Federal Food, Drug, and Cosmetic Act.

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With reference to Biebric Scarlet, which you state may be used as an antiseptic for wounds and skin diseases, we understand from the Medical Department of the Army here in New York that this product, in the form in which it is purchased and used, is not a drug but requires the addition of oil or other ingredients in order to be used as a drug on the human body. We understand that these products have been purchased by the Army and are used as chemicals in the staining of slides in laboratories and not for use on the human body. It would seem, therefore, that the wage determination held to be applicable in the Notice of Award is correct.

21 AC 101.63
101.3
202.10
414.8

SOL:ERG:RH

October 9, 1943

Mr. J. E. Crouch
c/o W. F. Burch
Charlotte Hall, Maryland

Dear Mr. Crouch:

This will reply to your letter of August 20, 1943 in which you inquire as to the wage rate applicable to the manufacture of ice used to ice railroad refrigerator cars moving in interstate commerce. You also inquire with respect to the wage rate applicable to laborers and truck drivers employed to move ice from the plant to the railroad cars.

The Fair Labor Standards Act provides that employees engaged in interstate commerce or in producing goods for interstate commerce, unless otherwise exempt, must be paid a minimum wage rate of 30 cents and overtime compensation at a rate not less than time and one-half their regular rates of pay for all hours worked in excess of 40 in any workweek. It also provides for increasing the minimum hourly wage rate, but not in excess of 40 cents, through the issuance of wage orders based on recommendations of industry committees.

Employees engaged in producing ice (including laborers and truck drivers) for the icing or re-icing of cars containing refrigerated commodities which move in interstate commerce would be regarded as covered by the Act whether or not such cars leave the State in which the ice is produced. The manufacture of ice is included in the definition of the Bakery, Beverage, and Miscellaneous Food Industries, for which a 40-cent minimum wage rate has been recommended for employees in the industry. After the holding of a public hearing on this recommendation, the Administrator will determine whether to accept or reject the recommendation.

If you have any further questions in this matter, I suggest that you communicate with the Regional Office of the Wage and Hour Division located at 215 Richmond Trust Building, Richmond 19, Virginia.

Very truly yours,

L. Metcalfe Walling
Administrator

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(0835)

Regs. 637

SOL:TJK:FH

October 9, 1943

Mr. Roger Popp
Manager
Sanitary Washed Wiper Co.
19-25 East South Street
Indianapolis, Indiana

Dear Mr. Popp:

This is in reply to your letter of September 22, 1943 wherein you inquire as to the applicability of the Miscellaneous Textile, Leather, Fur, Straw, and Related Products Industries wage order to the operations engaged in by you in the manufacture of wiping cloths.

It appears that you wash and sterilize, cut and trim, pieces of textile fabrics to make wiping cloths.

You will note that section 637.4(b) of the wage order includes within the industry "the manufacture of any products from textile yarn or fabric * * *." This subsection covers the manufacture of industrial wiping cloths, the type of cloth it is assumed you make. Moreover, employees engaged in any occupation in the industry which is necessary to the production of such cloths are entitled to the benefits of the wage order.

With respect to your statement that you "do not manufacture nor process textiles or shop towels," I direct your attention to the fact that subsection (b) of section 637.4 of the wage order is not concerned with the original weaving or processing of textile fabrics as such but covers the manufacturing of any article from a textile fabric (new or used) not previously covered by the definition of an industry for which a wage order has been issued or for which an industry committee has been appointed under the Act. The word "manufacture" is used in its broadest sense and includes any one or all processes, such as sorting, washing, cleaning, sterilizing, cutting and tearing, necessary to the making of the article.

I trust this fully answers your inquiry. If, however, you have any further question, may I suggest you contact our regional office located at 1200 Merchandise Mart, 222 West Bank Drive, Chicago 54, Illinois.

Very truly yours,

L. Metcalfe Walling
Administrator

472392

(0835)

SOL:HCN:YS

October 27, 1943

Mr. J. Peyton Moore
Probation and Parole Officer
Commonwealth of Virginia
Post Office Box 332
Lynchburg, Virginia

Dear Mr. Moore:

I regret that it has not been possible to give you an earlier answer to the question submitted to the Superintendent of Documents, Washington, D. C., in your letter of August 31, 1943, which was referred to this office for reply.

You state that you understand from an employer that he is being instructed not to employ parolees or people who have served any time in prison on defense production. You indicate that if the Walsh-Healey Public Contracts Act is being thus applied, it does not seem to be in keeping with the idea of rehabilitation of prisoners or consistent with the idea of paroling men from prison and taking them from parole into the Army.

It is true that the Walsh-Healey Act provides that no convict labor may be employed by the contractor in the manufacture or furnishing of any of the materials, supplies, articles or equipment included in a contract subject to that Act. This provision was included in the law in order to prevent the use of low-paid labor of men and women actually serving prison sentences in competition with the labor of free persons in the manufacture of articles to be supplied to the Government. There is, however, nothing in the law nor in any regulation issued by this Department which in any way restricts the employment on Government contracts of persons who have been discharged from prison.

Moreover, while a prisoner at liberty on parole under the jurisdiction of the parole authorities may be constructively a prisoner, it is nevertheless clear, as pointed out by the Kentucky Court of Appeals in Com. v. Minor, 195 Ky. 103, 241 S.W. 856, that he is free, subject to the conditions of his parole, to select and engage in any lawful remunerative employment and to receive and dispose of the fruits thereof as he chooses. It is not believed that the prohibition of convict labor by the Walsh-Healey Act was intended to apply to the employment of such a parolee. In my opinion, parolees may be lawfully employed on work subject to this Act.

In accordance with your request, I am enclosing a copy of the Walsh-Healey Act, together with the Rulings and Interpretations.

I trust that this is the information you desire. If you should have further questions, I suggest that you communicate with the Division's regional office located at 215 Richmond Trust Building, Richmond 19, Virginia.

Very truly yours,

L. Metcalfe Walling
Administrator

Enclosure
451963

(0835)

23 CD 302.2
401

SOL:HK:HC

October 30, 1943

Deep Rock Oil Corporation
Atlas Life Building
Tulsa, Oklahoma

Attention: R. K. Huey

Gentlemen:

This is in reply to your letter of September 18, 1943, addressed to Mr. Villard Martin, which was left by Mr. Martin with Mr. Mealy of this office, together with four questions concerning which Mr. Martin has requested an expression of our views relative thereto.

It appears from the communications that Mr. Mealy left at our office that an agreement was entered into between your company and certain employees who are members of the International Union. It provides for the employment of drillers, tool dressers and fleet truck drivers for 36 hours in each workweek and a limit of 1872 hours was placed upon the total number of hours that any man could work under this clause during a one-year period. It is now proposed to extend the working hours to an average of 44 hours per week which will be equivalent to 2288 hours per year.

You state you have some men who have already put in a total of 1872 hours and who have been laid off and who, under the proposed plan, will not be able to go to work for a month or six weeks without causing the company to lose the benefit of the section 7(b)(2) exemption contained in the Fair Labor Standards Act. For example, you state that employee A has been employed as a truck driver under the provisions of section 7(b)(2). His year under the agreement will expire on November 1 but he has already put in his total of 1872 hours and has been laid off to November 1. You then go on to state that if you adopt a 44-hour workweek on October 1 and this employee is not permitted to return to work until November 1, that he will be penalized thereby and not get in as many hours per year as his fellow-workers. Both the union and the company would like this man to be able to work and get in enough time so that his total hours will be increased in proportion to the new basic annual hours totaling 2288. You inquire whether this objective can be reached without placing the company in a position where it will be required to go back over the man's year and recalculate his overtime pursuant to section 7(a) of the Fair Labor Standards Act.

In the light of the data contained in your letter of September 18, 1943, to Mr. Villard Martin, I will discuss the four written questions left with this office by Mr. Martin in their respective order.

1

It is my opinion that if you work any employee who is covered by a collective bargaining agreement, which meets the requirements of section 7(b)(2) in excess of 2080 hours during a period of 52 consecutive weeks you would become liable for overtime to such employee for all hours which he worked in excess of 40 hours in a workweek during the annual period specified in the agreement . In this connection I direct your attention to paragraphs 21, 24, 27 and 29 of

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Interpretative Bulletin No. 8, a copy of which is enclosed herewith. Likewise, if any employee is employed pursuant to the provisions of an agreement which complies with section 7(b)(1) of the act, if you work any such employee in excess of 1000 hours during any period of 26 consecutive weeks you will become liable for overtime to such employee for any workweek in which he worked over 40 hours during the period and will be subject to the penalties set forth in the act.

2.

(a) There is no provision in any of the laws administered by this Division which would require approval of any agreement of the parties changing their basic workweek from 36 hours to 44 hours with provision for time and one-half to be paid for all hours in excess of 40. However, in the event such overtime compensation is not required by law, approval from the National War Labor Board would probably be required in that such a change in overtime practice might be deemed to constitute a wage increase.

(b) An employer, in the event the 7(b)(1) or (2) exemption is not strictly adhered to, thereby loses the benefit of the exemption by the employment of his employees in excess of the maximum number of hours specified therein, in which event the employee would have a right of action for back overtime for the period under the terms of section 16(b) of the act. As aforementioned, if the collective bargaining agreement which meets the terms of the exemption is not complied with and the employee works in excess of the maximum hours specified in the exemption, the hours worked during the period under the old contract, which are in excess of 40 a week, would have to be compensated for at not less than time and one-half the employee's regular hourly rate of pay.

3

The maximum hour limitations set forth in section 7(b)(1) and (2) are absolute and if the employees are employed in excess of the hours specified therein, an employer thereby subjects himself to liability for hours worked in excess of 40 in any workweek during the period embraced by an agreement purporting to comply with the terms of these exemptions.

4

The employee has the right to maintain an action under section 16(b) of the act for all overtime due for the period and in addition to recover an amount equal to such unpaid overtime as liquidated damages and also to attorney's fees.

Your letter states that the employees covered thereby are not permitted to be employed in excess of 1872 hours annually. In this connection, I wish to call your attention to paragraph 24 of the enclosed bulletin. You will note therein the requirements necessary for an employee to be employed on an annual basis pursuant to section 7(b)(2). If your employees are not guaranteed either a fixed annual wage or continuous employment for 52 weeks or employment for 2080 hours in a year, such employees would not be exempt under section 7(b)(2) of the act.

Very truly yours,

L. Metcalfe Walling
Administrator

Enclosure

(0835)

23 CD 401

SOL:EG:RHH

November 2, 1943

Mr. Jay C. Hormel
Geo. A. Hormel & Co.
Austin, Minnesota

Dear Mr. Hormel:

This is in reply to your letter of September 11, 1943 regarding the computation of the regular rate of pay for employees employed pursuant to a section 7(b)(2) employment contract under the Fair Labor Standards Act. Although your letter describes in some detail the Hormel method of paying employees employed under an annual wage agreement, I do not fully understand the payment plan you contract with the payment plan outlined to you by Regional Director Hill. As I understand the Hormel method of pay, it consists of guaranteeing employees a weekly wage plus a production bonus, referred to in your letter as an "hourly gain rate."

As you know, when an employee working under a section 7(b)(2) collective bargaining agreement works for more than 2,080 hours, the agreement is voided from the beginning.

It has been the consistent position of the Division, and this position has been upheld by the courts, that the Act is operative on a workweek basis. Overtime must be compensated at a rate not less than one and one-half times the regular rate of pay at which the employee is actually employed. Where an employee has been guaranteed an annual wage payable in weekly instalments plus a production bonus under a section 7(b)(2) agreement which has been voided, his regular rate of pay, in order to satisfy the requirements of the Act, must be computed by dividing the weekly compensation received by the number of hours actually worked during the workweek. Such an employee would be entitled to an additional one-half time per hour for each of the overtime hours in a week up to 56 and time and one-half for hours in excess of 56. Thus, in weeks in which the employee worked in excess of 40 but not more than 56 hours, his regular rate of pay would be determined by dividing the weekly salary and production bonus earned in that week by the hours worked. If the employee worked over 56 hours in a week, the regular rate would be computed by dividing by 56.

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All payments made to such employees represent straight-time compensation for all hours worked up to 56 in any workweek. The weekly salary in a short week, that is, a week under 40 hours is compensation only for the hours worked in that week, since it is contemplated by the parties that in future weeks the employee will work in excess of 40 hours without receiving additional overtime compensation. Inasmuch as the compensation paid for a short week is paid for the hours worked, no part of it may be credited against overtime due for other weeks. Overtime compensation paid for hours worked in excess of 12 a day or 35 a week may, of course, be credited against the overtime due under the Act.

You will appreciate, I am sure, that the above-described method of computing the regular rate of pay for an employee who has worked more than 2,080 hours complies with the Act's requirements that overtime be computed on a workweek basis. The compromise you suggest cannot be viewed as establishing compliance with the requirements of the Act, as it appears that compensation paid for short weeks is offset against that paid for long weeks, and it disregards the requirement that overtime compensation be computed on a workweek basis.

Very truly yours,

L. Metcalfe Walling
Administrator

(0835)

SOL:HK:DMH

November 10, 1943

Lt. Col. Wm. J. Brennan, Jr.
Chief, Labor Section
Office of the Chief of Ordnance
War Department
Washington, D. C.

Dear Colonel Brennan:

This is in reply to your recent letter with reference to the Sherwin Williams Defense Plant. You refer to a letter received by you from Mr. Walling, dated March 25, 1943, and inquire as to the applicability of the interpretation expressed in it to a case involving the Walsh-Healey Act where the daily and weekly overtime for the first workweek are equal. The example presented by you, however, does not illustrate this question. It may be graphically viewed as follows:

Example 1 (Your Example)

First Week							:	Second Week						
S	M	T	W	T	F	S	:	S	M	T	W	T	F	S
		9	9	9	9	9	:	8*						

Example 2 (Variation)

							:							
S	M	T	W	T	F	S	:	S	M	T	W	T	F	S
	8	8	8	8	8	8	:	8*	8	8	8	8	8	8

*These hours worked fall within the 24-hour period commencing the previous calendar day.

Under the Walsh-Healey Act, overtime is computed on the basis of daily or weekly overtime hours, whichever is the greater. Where the daily and weekly overtime hours are equal, overtime under the act should be computed and paid on either a daily or weekly basis, depending upon which yields the greater compensation. This principle is applicable to the example you present. Thus, in example 1, set forth in your letter, the 8 hours worked on Sunday of the second week falling within the 24-hour period, commencing on Saturday, the end of the preceding week, are deemed daily overtime hours attributable to the preceding week for the purpose of comparing the weekly and daily overtime hours in the first workweek in order to determine the choice of method for overtime compensation. Thus, there would be 13 hours of daily overtime attributable to the first workweek against five hours of weekly overtime. Accordingly, overtime must be paid on a daily basis for the first workweek including the 8 hours on Sunday of the second week.

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In example 2, it is also assumed the 8 hours worked on Sunday fall within the 24-hour period commencing the previous Saturday, the weekly and daily overtime hours for the first week are equal in that both total 8 (the 8 hours daily overtime on Sunday of the second workweek being attributable to the first week for purposes of comparing weekly and daily overtime). If the hourly rates are uniform, and overtime attributable to the first week is paid for on a weekly basis, the overtime requirements of the act are satisfied by the payment of 8 hours of overtime for the 16 hours worked within the 24-hour period in question. If, however, overtime is paid upon a daily basis because the rates for such work are higher or for some other reason, the payment of 8 hours of daily overtime satisfies the weekly overtime due for the first workweek. The same 8 hours paid for on a daily basis, however, are hours worked in the second workweek, during which week 56 hours would have been worked. Since the amount paid for work on Sunday at time and one-half in effect offsets the amount due for overtime in the first week upon a weekly basis, such payment would not affect the amount due for overtime upon a weekly basis in the second workweek. In example 2, consequently, there would be 8 hours of overtime due the first week and 16 for the second or a total of 24 hours covering both weeks.

Very truly yours,

WM. R. McCOMB
Deputy Administrator

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