Volume 51 | Issue 3 Article 5

March 1949

Computation of "Overtime" Pay Under the Bay Ridge Case

C. H. H. Jr.
West Virginia University College of Law

West Virginia Law Quarterly *and* The Bar

Published by the College of Law of West Virginia University. Official publication of The West Virginia Bar Association.

STUDENT NOTE

COMPUTATION OF "OVERTIME" PAY UNDER THE *Bay Ridge* CASE.—Since the enactment in 1938 of the Fair Labor Standards Act, employers engaged in business affecting interstate commerce have, with varying degrees of success,[1] sought to apply correctly section 7 (a) of the act which states:

"No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or the production of goods for commerce . . . (3) for a workweek longer than forty hours after 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."[2]

Confronting the employer was the perplexing problem of what constitutes the regular rate which the act makes the basis for computation of wage payments for work in excess of forty hours. The statute contains neither a definition of regular rate nor a rule

[1] See Notes, 140 A. L. R. 1263 (1942), 152 A. L. R. 1030 (1944), 169 A. L. R. 1307 (1947).

[2] 52 STAT. 1060, 29 U. S. C. A. § 207 (a) (1940).

for its determination. On June 7, 1948 the Supreme Court of the United States handed down its clearest interpretation to date of the above quoted section in *Bay Ridge Operating Co. v. Aaron.* The *Bay Ridge* case dealt with determination of a regular rate under longshoremen employment contracts where the hours of work were highly irregular and where the wage rates varied dependent on the particular hours of the day worked. A brief discussion of the regular rate in the ordinary employment contract will aid analysis of the *Bay Ridge* case.

In the case of an employee hired at a standard and constant hourly rate, no computation is necessary to determine his regular rate of pay for it is established by his contract of employment.[4] In such a case the employee is entitled under the act to receive for all hours worked in any week in excess of forty, compensation at the rate of one and one-half times his contract hourly wage. In the case of an employee hired on a weekly basis for a definite weekly compensation, a computation is necessary in order to determine his regular rate of pay. If by his contract of employment he is hired at a fixed weekly salary for a workweek of a fixed number of hours, his regular rate of pay is determined by dividing the agreed weekly compensation by the agreed number of hours to be worked in the week for which compensation is paid. If his employment is for a fixed weekly compensation for a week of varying or fluctuating hours, the regular rate must be determined by dividing his fixed weekly compensation by the number of hours actually worked in any workweek.[5] In the case of piecework wages, the regular rate coincides with the hourly rate actually received for all hours worked during the particular workweek and, as in other cases, the rate is the quotient of the amount received during the week divided by the number of hours worked.[6]

However, where, as in the *Bay Ridge* case, the hourly wages are not constant a more difficult problem arises. For determination of the regular rate the Court set forth the following formula:

". . . Congress intended the regular rate of pay to be found by dividing the weekly compensation by the hours worked unless the compensation paid to the employee contains some amount that

---

3 334 U. S. 446, 68 Sup. Ct. 1186 (1948).
4 Landreth v. Ford, Bacon & Davis, Inc., 147 F. 2d 446 (C. C. A. 8th 1945).
5 Anderson et al. v. Federal Cartridge Corp., 156 F. 2d 681 (C. C. A. 7th 1946).
6 Walling v. Youngerman-Reynolds Hardwood Co., 325 U. S. 419 (1945).

represents an overtime premium. If such overtime premium is included in the weekly pay check that must be deducted before the division."[7]

By this determinative standard a working knowledge of what constitutes "overtime premium" is absolutely essential not only to prevent overpayments, but also to determine whether the payment plan in operation satisfies overtime provisions of the act. Heretofore several tests have been used in deciding whether or not certain premium payments constitute true overtime. The district court[8] which first entertained the *Bay Ridge* case and the dissent in the Supreme Court[9] accepted as a test the ratio of the premium wage to the normal wage, a modest premium being only a shift differential while a substantial premium amounting to approximately fifty percent or more is true overtime. The majority of the Court negatives any such test and holds that true overtime payment is limited to a premium payment made because an employee has previously worked a specified number of hours in any workday or workweek for the opinion states:

"We therefore hold that overtime premium, deductible from extra pay to find the regular rate of pay, is any additional sum received by an employee for work because of previous work for a specified number of hours in the workweek or workday whether the hours are specified by contract or statute."[10]

Recognizing that the above definitions attain importance only where the hourly rate paid an employee varies, what, by these standards may we regard as overtime within the meaning of the act and the *Bay Ridge* case? The following catagories are to be so considered:[11]

1. Any premium payment for hours beyond a bona fide standard fixed by contract in a workweek may be deducted from the total wages paid before dividing this figure by the number of hours worked to determine the regular rate. The standard agreed to by the parties must be bona fide and not an arrangement, the sole purpose of which is to avoid payment of overtime. The standard must represent the actual normal workweek in order to be bona fide.[12]

---

7 68 Sup. Ct. at 1196 (1948).
8 Aaron v. Bay Ridge Operating Co., 69 F. Supp. 956 (1948).
9 68 Sup. Ct. at 1209 (1948).
10 68 Sup. Ct. at 1200 (1948).
11 *Cf.* Farmer, *Overtime on Overtime*, 34 VA. L. REV. 1 (1948).
12 Walling v. Helmerich & Payne, 323 U. S. 37 (1944).

2. Any premium for hours beyond a bona fide standard fixed by contract in a workday is true overtime and therefore deductible.

3. Any premium payment for the sixth and seventh consecutive day of work in any workweek is deductible as within the definition.

It is important to note that these payments are premiums paid to an employee only because a specified number of hours have been previously worked in a workday or workweek and therefore encompassed by the Court's overtime definition and as such may be deducted from wages in determining the regular rate.

Of far more reaching effect, is the determination of what the *Bay Ridge* case excludes as not constituting overtime payments. There are excluded:

1. Shift differentials which the Court classifies as higher wages because of the character of the work done or the time at which he is required to labor. The size of the shift differential has already been shown to have no effect on its treatment as overtime for in no way does this payment depend on the number of hours previously worked. More specific examples of differentials follow.

2. Premium pay for work on Saturdays and Sundays, because it is less desirable to work on weekends, without regard to the number of hours previously worked, is not true overtime and therefore part of the regular rate.

3. Premium pay for work on holidays without regard to the prior work pattern is for like reasons part of the regular rate.

4. Premium pay for extra-hazardous work is perhaps the clearest example of a premium for the type of work done and not for excess hours worked and consequently not true overtime.

5. Premium pay for work outside normal working hours, either before or after, without regard to hours previously worked is to be distinguished from premium payments for work after completion of prescribed workday which, as stated above, is a true overtime payment. The former being paid without regard to hours worked is not to be deducted from wages paid in determining the regular rate. As the above premium payments prior to the *Bay Ridge* case were in many instances treated as overtime payments by employment contracts, their exclusion now from true overtime classification and consesquent inclusion in the regular rate basis for time and a half payments gives rise to opinion that such payments are "overtime on overtime".

Unfortunately the Court did not set forth the exact method of computing the credit due for true overtime already paid. It left the precise method for the final determination by the lower court on rehearing in accordance with the Court's opinion. It did, however, recommend as reasonable the Administrator's interpretation that an employer may credit himself with an amount equal to the number of hours worked in excess of forty multiplied by the average rate of pay for these excess hours.[13]

In conclusion, one may deduce the following general principles in computing overtime pay so as to satisfy the Fair Labor Standards Act. For all hours in excess of forty worked in any workweek an employee is entitled to a premium equal to one and one-half times the regular rate. Where the employee receives an hourly rate of pay which varies, the regular rate is to be found by dividing the wages received for the week by the number of hours worked providing the wages do not include any true overtime payments. If there are any such payments, as defined above, they must be deducted from the wages received before dividing such figure by the hours worked. It would seem that legislation would be proper in order to prevent any claims for the nonpayment of true overtime where both parties had attempted in good faith to comply with the overtime provisions of the Fair Labor Standards Act.

C. H. H., JR.

---

[13] Interpretative Bulletin No. 4 § 14, 1948 W. H. 1343 (1948).