20130264
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
NOVEMBER 25, 2013
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota *ex. rel.* Bonnie L. Storbakken, Commissioner of Labor, for the benefit of Patrick Anderson, Adam Barton, Greg Boumont, Jason Richter, Michael Rick, Rick Schake, and Zach Scheeley, Plaintiff and Appellee, vs. Scott's Electric, Inc., Defendant and Appellant.	**SUPREME COURT NO. 20130264** Civil No. 39-2010-CV-00389

ON APPEAL FROM THE JUDGMENT DATED
JUNE 25, 2013
STATE OF NORTH DAKOTA
SOUTHEAST JUDICIAL DISTRICT

BRIEF OF APPELLANT SCOTT'S ELECTRIC, INC.

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

I. UNDER NORTH DAKOTA ADMINISTRATIVE CODE SECTION 46-02-07-02(7), DOES A TRIAL COURT ERR IN FINDING AN EMPLOYER LIABLE TO ITS EMPLOYEES FOR UNPAID WAGES, STATUTORY PENALTIES, AND STATUTORY INTEREST WHEN

A. the activities for which the employees sought payment were non-compensable under North Dakota law and the employer had no constructive knowledge of the unrecorded, unpaid time claimed by the employees because the employees did not write the time down on their timesheets; and

B. the employees did not meet their burden to produce sufficient evidence showing that they worked the number of hours claimed as a matter of just and reasonable inference?

STATEMENT OF THE CASE

I. NATURE OF THE CASE

[¶1] This is an employer/employee dispute in which the State of North Dakota, on behalf of wage claimants Patrick Anderson, Adam Barton, Greg Boumont, Jason Richter, Michael Rick, Rick Schake, and Zach Scheeley, sued Scott's Electric, Inc. for unpaid wages for commuting time. (A ("Appendix") at 6) The case was styled *State of North Dakota ex. rel Tony J. Weiler, Commissioner of Labor, for the benefit of Patrick Anderson, Adam Barton, Greg Boumont, Jason Richter, Michael Rick, Rick Schake, and Zach Scheeley v. Scott's Electric, Inc*., No. 2010-CV-0389. (Id.)

II. TRIAL COURT

[¶2] The Honorable Daniel D. Narum, District Court, Southeast Judicial District.

III. COURSE OF PROCEEDINGS

[¶3] The case was tried to the bench on December 3 and 4, 2012. (Tr.1 ("Transcript Day 1") at 1; Tr.2 ("Transcript Day 2") at 1). The trial court issued its *Findings of Fact, Conclusions of Law, and Order for Judgment* in favor of the wage claimants for $149,551.03 on June 25, 2013. (A at 157).

IV. TRIAL COURT'S DISPOSITION

[¶4] The trial court entered its *Judgment* on June 25, 2013. (A at 163). Service of the *Notice of Entry of Judgment* occurred on June 26, 2013. (A at 165).

V. THE APPEAL

[¶5] Scott's Electric, Inc. timely filed its notice of appeal on August 26, 2013. (A at 168).

STATEMENT OF THE FACTS

[¶6] Scott's Electric, Inc. ("Scott's") is an electrical contracting company based in Wahpeton, North Dakota. Scott's provides electrical contracting services in commercial, residential, industrial, farm, and utility settings within a 200-to-250 mile radius of Wahpeton. (Scott Meyer: Tr.1 at 8:25-9:4). At any given time, the company runs between three and five large commercial jobs, two or three small commercial projects, and one or two underground utility jobs. (Meyer: Tr.2 at 163:11-20).

[¶7] The seven wage claimants ("claimants") worked for Scott's as laborers, apprentice electricians or journeymen electricians. (A at 7-11). During all times relevant, the claimants lived in Wahpeton, North Dakota or Breckenridge, Minnesota – at most a few miles from the company shop in Wahpeton.

I. THE NATURE OF THE CLAIMANTS' DAILY COMMUTE

[¶8] Scott's provided company vehicles—extended cab, crew cab, and regular cab pickup trucks outfitted with gang boxes and ladder racks - that employees could use to "carpool" from Scott's Wahpeton, ND "shop" to Scott's worksites. (Meyer: Tr.1 at 11:24-25; 13:12-21). Employees choosing to carpool to the worksite met at the Wahpeton shop each morning. On a day-to-day basis, the company trucks transported employees and their personal tools and lunch to the worksite; minimal amounts of various miscellaneous items for the work site might also be transported on the truck. Miscellaneous items loaded before the morning commute took "two minutes" and were "not a big deal." (Michael Rick: Tr.1 at 64:6-11).

[¶9] The majority of the time, the company trucks carried passengers. (Meyer: Tr.1 at 36:8; Rick: Tr.1 at 48:13-49:4). "Carpooling" to the worksite in a company vehicle was not compensable time. Occasionally, however, these trucks hauled a flatbed trailer to the

worksite, carrying a piece of equipment or conduit. (Meyer: Tr. 1 at 15:18-22). When the "carpool" truck hauled a piece of equipment on a trailer, the travel time to the worksite was compensable.

[¶10] At the beginning of every project, the majority of materials, supplies, etc. are loaded on to semi tractor-trailers and transported from the shop to the jobsite. (Meyer Tr.1 at 15:4-9). The job materials, supplies, etc. are stored on-site in a locked trailer. As the job progresses, new supplies and materials are delivered by the supplier or by semi-load from the shop. (Vance Wagner: Tr.2 at 168:9-22; 169:2-4). Minor items might be transported in the "carpooling" truck.

[¶11] From time to time, every claimant assisted with loading of supplies for transport to the worksite. This work was done at the Wahpeton shop. Every claimant documented loading and travel time on their timesheets. (See Summaries of Work Activities and Time Due and Owing to Claimants: A at 111-18; 119-26; 127-36; 137-39; 140-42; 143-46; 147-51; 152-56). When loading activities were documented on the employee timesheets, it was compensated. (See id.).

II. SCOTT'S VEHICLE USE AGREEMENT

[¶12] Scott's provided vehicles for the convenience of employees for the purpose of commuting to the work sites. (Meyer: Tr.1 at 13:12-21). During all relevant times, Scott's had in effect a policy governing use of company vehicles. (2004 & 2007 Scott's Employee Handbook: A at 21-22; 30-32). It was up to each Scott's employee whether to drive their personal vehicle or catch a ride from in the company truck from the shop. (Meyer: Tr.2 at 188:20-25). The claimants chose to meet at the shop and carpool to the work site. (Rick: Tr.1 at 52:10-25; Meyer: Tr.1 at 29:22-30:14). All claimants have acknowledged the benefits of this practice – it saved them the cost of gas and wear and

tear on their personal vehicles. (See, e.g., Deposition of Greg Boumont: Odyssey Doc. No. ("O.D.") 44).

III. SCOTT'S TRAVEL POLICY

[¶13] Scott's Electric had a policy related to day-to-day travel to work sites, set forth in its Employee Handbook. (A at 21-22; 30-32). The policy in effect for all periods relevant through January 1, 2008 states:

> If the jobsite is less than 100 miles away from the shop (or approximately 1¾ hours) it is the intent of the Company for employees to drive to the jobsite. If the jobsite is more than 100 miles (or approximately 1¾ hours) from the shop, it is the goal of the company to pay the cost of a room and reasonable food expenses. A maximum of four days subsistence will be paid during a normal working week.
>
> You may choose to return to the home base from a job site that is more than 100 miles [sic] travel time will be paid at a maximum of 1½ hours total for that day. All employees on jobsite must agree to either stay or to travel.

(Id.) Scott's paid meal and lodging costs for crews working on sites more than 100 miles from the shop, to avoid daily travel in excess of the normal commuting (Id.). However, if all members of the crew chose to travel back and forth daily, 1.5 hours of travel time was compensated. (Id.). Travel time was also compensated if the carpool truck hauled equipment or supplies to the worksite on a flat bed trailer. (Id.). Travel time was to be documented by the employee on the timesheet under the appropriate code. (Id.; Michelle Nelson: Tr. 2 at 143:16-145:21).

[¶14] Effective January 5, 2008, Scott's Electric changed its travel policy to provide for travel pay for drivers and passengers riding in company vehicles that commute from the shop to a work site more than 15 miles away. (A at 31-32). Under the revised policy, travel time was to be documented on the employee timesheet under the appropriate code.

(Id.). The employee transport vehicle was to be separately identified on the equipment use form. (Id.).

III. SCOTT'S TIMEKEEPING POLICY AND PRACTICE

[¶15] Hours worked are recorded by employees on a daily basis using a timesheet form developed by Scott's. (A at 24-27; 34-36). The form is divided into columns, to allow employees to identify the job number, describe work activity and start/stop times. (Id.). Every employee must account for all hours worked throughout the day. (Id.). At the end of the day, the hours worked are totaled by the employee. (Id.). The site foreman reviews the timesheets for crew members. The employee and the foreman initial the time sheet, verifying it has been reviewed and approved. (Id.; Nelson: Tr. 2 at 143:16-145:21).

[¶16] A "sample" timesheet is included in Scott's Employee Handbook to instruct employees on the proper way to record hours worked. (A at 27; 36). The *first* entry of the day on the sample timesheet is work in the Scott's "shop", "putting materials away", or unloading. (Id.). The *second* entry of the day on the timesheet is "travel to jobsite." (Id.) The handbook is reviewed during employee orientation. (Nelson: Tr.2 at 152:6-153:11; Meyer: Tr.1 at 26:7-25). All claimants have received a copy of the Employee Handbook, and acknowledged receipt in writing. (A at 24-27; 34-36).

IV. SCOTT'S EQUIPMENT USE DOCUMENTATION

[¶17] Employees must also document on-site use of certain equipment to track costs for a particular project. This documentation is not intended or used to calculate payroll. During all periods pertinent, equipment use recording was done on a separate form and printed on the back side of the timesheet. (Nelson: Tr.2 at 158:11-12). This printing format was used for administrative convenience and does not turn the equipment usage document into a payroll record.

V. DEPARTMENT OF LABOR INVESTIGATION AND DETERMINATION OF WAGES AND PENALTIES DUE

[¶18] The seven claimants brought department of labor wage claims against Scott's in 2008, alleging it had unlawfully withheld wages for travel to and from jobsites. (A at 6-13). The claims related to payment for employee travel time from 2006 to 2008. (Id.). Each claimant generally claimed Scott's electric failed to pay wages for travel time to and from Scott's jobsites. (Id.).

[¶19] These claims were handled by Brenda Halvorson, an investigator assigned by the Labor Commissioner. Scott's responded and cooperated fully with the investigation and discovered that "we may have missed a few hours of his travel time on his time cards when he was driving a company vehicle." (A at 104-10). Scott's arrived at this realization based on gaps in time on individual timesheets.

[¶20] The investigator issued the results in Wage Claim Determinations for each claimant. In all cases, the investigator determined Scott's had wrongfully withheld wages from the claimants in amounts ranging from $1,814.26 to $23,380.89 (Wage Claim Determinations: A at 37; 42; 47; 52; 80; 84; 89).

[¶21] The investigator's determinations concluded that each claimant's unrecorded travel time to work sites and back was compensable because the claimant had engaged in the following principal activities prior to and after the commute: (a) "driving a company vehicle to and from the jobsite"; (b) "loading or unloading materials at the shop and/or the jobsite"; (c) "transporting crew members and supplies to and from the jobsite"; and (4) "cleaning and refueling the company vehicle" (See, e.g., A at 40; 45).

[¶22] The investigator identified the equipment use form as the "back of the time sheet". (See, e.g., A at 45). Further, she concluded "on the backside of his timesheets, the

claimant recorded various "travel" times that identified when he was the driver of a company vehicle to and/or from a jobsite." (A. at 45). This conclusion is unsupported. Additionally, it yields absurd, even impossible, results, including calculations that an employee worked 26 hours in a single day.(See, e.g., Adam Barton Timesheets & Equipment Use Sheets: A at 60-61 (4-11-06); 76-77 (4-12-06); 62-63 (4-17-06); 64-65 (8-1-06); 72-73 (5-1-07)).

VI. LITIGATION

[¶23] On May 7, 2010, the Labor Commissioner filed an action in District Court seeking a judicial determination of the matter. (A at 6-11). The case was tried on December 3 and 4, 2012 before the Honorable Daniel Narum in Wahpeton, North Dakota. After the submission of post-trial briefs, the trial court issued its *Findings of Fact, Conclusions of Law, and Order for Judgment*, and *Judgment* on June 25, 2013. (A at 157). The Department of Labor investigator's determinations as to the compensability of the claimants commute time, and as to the *exact* amount of wages and statutory penalties owed each claimant, were "adopted and incorporated as the basis for the Court's Order for Judgment." (A at 161, ¶ 8). The trial court entered its *Judgment* against Scott's Electric in the amount of $149,551.03, representing $78,253.01 in "wages," $34,080.00 in "statutory penalties/liquidated damages, and $37, 208. 02 in "accrued interest." (A at 163). Scott's timely filed its Notice of Appeal on August 26, 2013. (A at 168).

LAW AND ARGUMENT

I. THE TRIAL COURT ERRED IN FINDING FOR THE WAGE CLAIMANTS BECAUSE THE CLAIMANTS DID NOT ESTABLISH A *PRIMA FACIE* CLAIM FOR UNPAID WAGES UNDER THE FLSA OR NORTH DAKOTA LAW.

[¶24] This is a dispute over alleged unpaid wages for employee commuting time in an employer-provided vehicle. With regard to disputes over unpaid wages, North Dakota's labor and employment laws parallel the federal Fair Labor Standards Act of 1938 ("FLSA"), and require an employer to pay employees a specified minimum wage and overtime for all "hours worked." 29 U.S.C. § 206 et seq.; N.D. Admin. Code §§ 46-02-07-02 and 46-03-01-01.

[¶25] An employee must satisfy a two prong test to establish a claim for unpaid "hours worked" under FLSA and/or North Dakota law. The employee must (1) "prove[] that he has in fact performed work for which he was improperly compensated" and (2) produce either (a) "definite and certain evidence that he worked overtime hours for which he did not receive compensation," or (b) "sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference," depending on the employer's compliance with record-keeping requirements. Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 687 (1946); McGrath v. Cent. Masonry Corp., No. 06-cv-00224-CMA-CBS, 2009 WL 3158131, at *6 (D. Colo. Sept. 29, 2009)).

[¶26] The trial court erred in finding that Scott's Electric was liable to the claimants as a matter of law. Specifically, the trial erred in finding that the claimants established a *prima facie* claim for unpaid wages because:

> [¶27] (1) The claimants did not show that the activities for which they sought compensation fall into the category of compensable "hours

worked" and Scott's Electric had no constructive knowledge of the unrecorded, unpaid time claimed by the employees because the employees did not document the time on their timesheets; and

[¶28] (2) The wage claimants did not produce legally or factually sufficient evidence to show they worked the number of unpaid hours awarded in the judgment as a matter of just and reasonable inference.

A. The Court should conduct a *de novo* review of this FLSA "principal activity" dispute.

[¶29] The Court should conduct a *de novo* review of the issues raised by Scott's Electric in this appeal because they are properly classified as either questions of law or mixed questions of fact and law. The trial court found Scott's liable because it determined that each Scott's employee's travel time was compensable as "part of [his] principal activity," and not "merely incidental use of an employer-provided vehicle." According to courts in other jurisdictions, the question of whether a given activity constitutes a "principal activity" and is compensable under FLSA is either a question of law or a mixed question of fact and law. See Dooley v. Liberty Mut. Ins. Co., 307 F. Supp. 2d 234, 241 (D. Mass. 2004) (deciding whether a given activity constitutes a "principal activity" within the meaning of the FLSA is something a court may do in the manner and by procedures appropriate to deciding matters of law); IBP, Inc. v. Alvarez, 546 U.S. 21, 31-32 (2005) (referring to the trial court's determination that employees' donning and doffing of protective gear was a compensable "principal activity" under FLSA as a "legal conclusion"); Ballou v. General Elec. Co., 433 F.2d 109, 111 (1970), cert. denied 401 U.S. 1009 (1971) ("Though it may be complex, the issue whether or not the classroom program was an 'integral and indispensable part of appellants' principal activity is not…a

factual one. It is a question of law."). Cf. Barrentine v. Arkansas-Best Freight Sys., 450 U.S. 728, 743 (1981) ("FLSA claims typically involve complex mixed questions of fact and law-*e.g.*, what constitutes…'principal' rather than 'preliminary or postliminary activities.'"); Holzapfel v. Town of Newburgh, N.Y., 145 F.3d 516, 521 (2d Cir. 1998) (deciding what constitutes compensable work under the FLSA "is a mixed question of law and fact").

[¶30] The North Dakota Supreme Court reviews matters of law *de novo*. See Johnson v. Taliaferro, 2011 ND 34, ¶ 9, 793 N.W.2d 804 ("The question of how to interpret and apply [a statute] is a question of law; therefore, the standard of review is de novo."). The North Dakota Supreme Court reviews mixed questions of law and fact under the same *de novo* standard as it does pure questions of law. Estate of Wenzel-Mosset by Gaukler v. Nickels, 1998 ND 16, ¶ 28, 575 N.W.2d 425. Accordingly, the Court should review the trial court's FLSA interpretation and determination in this lawsuit as it would review a question of law or a mixed question of fact and law: *de novo*. See id.

B. Legal framework in unpaid wages disputes concerning employee drive time in employer-provided vehicles

[¶31] To establish a *prima facie* claim for unpaid wages under the FLSA, or North Dakota law, the employee must (1) "prove[] that he has in fact performed work for which he was improperly compensated" and (2) produce either (a) "definite and certain evidence that he worked overtime hours for which he did not receive compensation," or (b) "sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference," depending on the employer's compliance with record-keeping requirements. Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 687 (1946); McGrath

v. Cent. Masonry Corp., No. 06-cv-00224-CMA-CBS, 2009 WL 3158131, at *6 (D. Colo. Sept. 29, 2009)).).

[¶32] An employee has the preliminary burden of showing that the activities for which compensation is sought fall into the category of compensable "hours worked." See Adams v. United States, 471 F.3d 1321, 1326 (Fed. Cir. 2006). Further, it is well-established that the employer must have had constructive knowledge that it was not compensating the employee for time worked to be found liable. See White v. Baptist Memorial Health Care Corp., 699 F.3d 869, 873-77 (6th Cir. 2012).

1. North Dakota Admin. Code Section 46-02-07-02(7) parallels federal law on the non-compensability of employee travel time in employer-provided vehicles.

[¶33] The time an employee spends commuting from home to work in an employer-provided vehicle are not compensable "hours worked." N.D. Admin. Code § 46-02-07-02(7); 29 U.S.C. § 254(a); Employee Commuting Flexibility Act of 1996, § 2102 of Pub.L. 104-188, 110 Stat. 1755, 1928 (1996); Bernal v. Trueblue, Inc., 730 F. Supp. 2d 736, 745 (W.D. Mich. 2010). North Dakota Administrative Code Section 46-02-07(7) states:

> **Ordinary travel from home to work need not be counted as work time.** Special and unusual one-day assignments performed for the employer's benefit and at the employer's request is work time for the employee regardless of driver or passenger status. Travel away from home is work time when performed during the employee's regular working hours. Time spent traveling on nonworking days during regular working hours is work time. The time spent as a passenger on an airplane, train, bus, or automobile after normal working hours is not work time. The driver of a vehicle is working anytime when required to travel by the employer. Travel from jobsite to jobsite, or from office to jobsite, is work time to be compensated. **Activities which are merely incidental use of an employer-provided vehicle for commuting home to work are not considered part of the employee's principal activity and therefore need not be counted as work time.**

[¶34] N.D. Admin. Code § 46-02-07-02(7) (emphasis added). North Dakota Administrative Code Section 46-02-07(7)'s standards for compensable travel time reiterate, in general terms, Section 254(a) of the Fair Labor Standards Act ("FLSA"), as amended by the Portal-to-Portal Act and the Employee Commuting Flexibility Act ("ECFA"), and the regulations and interpretive guiding principles thereunder.

2. The FLSA governs unpaid wages disputes.

[¶35] The purpose of the FLSA is to ensure that employees are paid for all hours worked in a given workweek. 29 U.S.C. §§ 206; 207. The FLSA requires employers to pay minimum wage for all hours worked; nonexempt employees must be paid a rate of at least one and one half times the regular rate of pay for all hours worked in excess of 40 hours in a work week. 29 U.S.C. § 206; 207. The FLSA also requires employers to make, keep, and preserve such records of all persons employed, including a record of wages, hours, and other conditions and practices of employment. See 29 U.S.C.A. § 211(c); Hertz v. Woodbury County, Iowa, 566 F.3d 775, 779 (8th Cir. 2009).

3. The Portal-to-Portal Act amendment makes time spent commuting between home and the workplace non-compensable.

[¶36] The Portal-to-Portal Act, 29 U.S.C. § 254(a), is a 1947 amendment to the FLSA. It narrowed the coverage of the FLSA by making time spent commuting between an employee's home and the workplace non-compensable:

> An employee who travels from home before his regular workday and returns to his home at the end of the workday is engaged in ordinary home to work travel which is a normal incident of employment. This is true whether he works at a fixed location or at different job sites. Normal travel from home to work is not worktime.

29 U.S.C. § 254(a). Reich v. New York Transit Authority, 45 F.3d 646, 650 ("Commuting and similar activities are generally not compensable."). "Generally, the

Portal-to-Portal Act, 29 U.S.C. § 254(a), requires employers to pay employees only when they are engaged in 'principal activities of employment,' and not those activities that are considered 'preliminary or postliminary' to the principal activities." Bernal v. Trueblue Inc., 730 F. Supp. 2d 736, 745 (W.D. Mich. 2010). "Travel time is generally not considered a principal activity of employment." Id.

[¶37] There are two exceptions. "First, travel time may be a principal activity of employment [and compensable] if it is 'an indispensable part of performing one's job' rather than 'ordinary home to work travel which is a normal incident of employment.'' Id. "Second, even if the travel itself is not an indispensable part of performing one's job, travel time is compensable if it 'occur[s] after the employee commences to perform the first principal activity on a particular workday.'" Id. (quoting 29 C.F.R. § 790.6(a)).

[¶38] This second exception is based on a regulation issued by the Secretary of Labor shortly after enactment of the Portal-to-Portal Act, which concluded that the statute had no effect on the computation of hours worked "within" the workday. 29 C.F.R. § 790.6(a). This principle has become what is now known as the "continuous workday rule," under which the compensable workday is defined as "the period between the commencement and completion on the same workday of an employee's principal activity or activities." 29 C.F.R. § 790.6(b); IBP, Inc. v. Alvarez, 546 U.S. 21 (2005).

4. Under the "continuous workday rule," time spent working before or after a commute does not make the commute compensable if the preliminary or postliminary time is *de minimis.*

[¶39] The "continuous workday rule"—that travel time is compensable if it occurs after the employee performs "the first principal activity on a particular workday"—is subject to the *de minimis* rule. Under the *de minimis* rule, compensation is necessary "only when

an employee is required to give up a substantial measure of his time." Id. "The *de minimis* rule provides that an employer, in recording working time, may disregard 'insubstantial or insignificant periods of time beyond scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes.'" Mireles v. Frio Foods, Inc., 899 F.2d 1407, 1414 (5th Cir. 1990) (quoting 29 C.F.R. § 785.47). In applying the *de minimis* rule, most courts "have found daily periods of approximately ten minutes *de minimis* even though otherwise compensable." Chambers v. Sears Roebuck and Co., 428 Fed. Appx. 400, 415 (5th Cir. 2011) (quoting Lindow v. United States, 738 F.2d 1057, 1062 (9th Cir. 1984) (the administrative difficulty in deciphering the amount of time spent on compensable rather than social activities, seven to eight minutes per day spent by employees reading a log book and exchanging information, was *de minimis*)).

5. The ECFA amendment to FLSA makes use of an employer's vehicle for travel and activities performed by an employee which are incidental to the use of such vehicle for commuting non-compensable.

[¶40] In response to claims based on time commuting in employer-provided vehicles, Congress amended the Portal-to-Portal Act in 1996 with the Employee Commuting Flexibility Act ("ECFA"). The ECFA added the following language to the Portal-to-Portal Act:

> For purposes of this subsection, 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.

29 U.S.C. § 254(a); Employee Commuting Flexibility Act of 1996 ("ECFA"), § 2102 of Pub.L. 104-188, 110 Stat. 1755, 1928 (1996).

[¶41] Travel time is presumed to be non-compensable under the EFCA and N.D. Admin. Code § 46-02-07-02(7), if the use of the employer's vehicle is (a) "for travel that is within the normal commuting area for the employer's business or establishment"; and (b) "subject to an agreement on the part of the employer and the employee or representative of such employee." 29 U.S.C. § 254(a); Rutti v. Lojack Corp., Inc., 596 F.3d 1046, 1051-52 (9th Cir. 2010); Buzek v. Pepsi Bottling Group, Inc., 501 F. Supp. 2d 876, 879-80 (S.D. Tex. 2007).

[¶42] Further, the ECFA expressly provides that activities "incidental" to use of a company vehicle for commuting are not principal activities and therefore do not count as compensable "hours worked." See, e.g., Buzek., 501 F.Supp.2d at 886 ("end-of-day reports and transportation of tools are activities incidental to his use of a company vehicle for commuting" and, thus, "[t]ime spent on these activities … is … not compensable under the FLSA"). Therefore, commuting in a company vehicle within the normal commuting area, subject to an agreement between the employer and employee, is not compensable work time unless employees are required to "perform additional legally cognizable work during the commute. Adams v. United States, 471 F.3d 1321, 1325 (Fed. Cir. 2006).

C. The Scott's employees did not show that the activities for which compensation is sought fall into the category of compensable "hours worked."

[¶43] The claimants' use of a Scott's vehicle was "for travel that is within the normal commuting area for the employer's business or establishment," and was "subject to an agreement on the part of the employer and the employee or representative of such

employee." See 29 U.S.C. § 254(a). Further, any undocumented activities alleged by claimants must be viewed as "incidental" to the use of the Scott's truck for commuting. See Buzek, 501 F.Supp.2d at 886.

[¶44] The claimants' drive time was not compensable via the "continuous workday rule" because Scott's (a) did not have constructive knowledge of principal activities performed before or after the commute. Alternatively, Scott's employees' drive time was not compensable via the "continuous workday rule" because (b) the undocumented, alleged pre/post trip loading activities were *de minimis.*

1. Scott's employees' travel time was not independently compensable as the drives were within the normal range for Scott's business and were subject to a vehicle usage agreement.

[¶45] In order for travel time to be considered non-compensable under the ECFA, the use of the employer's vehicle must be for travel that is within the normal commuting area for the employer's business and subject to an agreement. 29 U.S.C. § 254(a). Both requirements were met in this case. The company has a standard related to day-to-day commuting to work sites and a policy governing use of employer's vehicle set forth in its Employee Handbook. (A at 21-22; 30-32). All seven wage claims involve travel within a two hundred fifty mile radius of its Wahpeton shop. (Meyer: Tr.1 at 8:25-9:4).

[¶46] By custom and policy until January 5, 2008, Scott's Electric identified a "normal" commute area within 100 miles from its shop in Wahpeton. The company travel policy was in effect for all periods relevant to this matter through January 1, 2008. It states:

> If the jobsite is less than 100 miles away from the shop (or approximately 1¾ hours) it is the intent of the Company for employees to drive to the jobsite. If the jobsite is more than 100 miles (or approximately 1¾ hours) from the shop, it is the goal of the company to pay the cost of a room and reasonable food expenses. A maximum of four days subsistence will be paid during a normal working week.

> You may choose to return to the home base from a job site that is more than 100 miles [sic] travel time will be paid at a maximum of 1½ hours total for that day. All employees on jobsite must agree to either stay or to travel.

(A at 22; 31).

[¶47] Effective January 5, 2008, Scott's Electric changed its travel policy to provide travel pay for drivers and passengers riding in company vehicles from the shop to a work site more than 15 miles away. (A at 31-32).[1] Travel time was time was compensable at the prevailing minimum wage rate and itemized on the timesheet. (Id. at 32). The company vehicle had to be identified on the equipment use form. (Id.).

[¶48] Claimants' commutes in the company vehicle was subject to a vehicle usage agreement. (A at 21-22; 30-32). The ECFA has no specific requirements for the agreement under §254(a), although legislative history indicates the agreement may be informal or formal. Rutti v. Lojack Corp., Inc., 596 F.3d 1046, 1052 (9th Cir. 2010) (citing H.R. Rep. No. 104-585, Use of Employer Vehicles, at 4 (1996)). Scott's President, Scott Meyer, testified about the company policy providing vehicles for the convenience of employees commuting to work sites. (Tr.1 at 13:12-21). The company travel policy, set forth above, governed the use of the Scott's pickup trucks. (A at 21-22; 30-32). The "agreement" requirement under § 254(a) is satisfied.

[1] The policy defining the "normal" commuting distance per day of 100 miles each way was not changed under the 2008 amendments. The amendments addressed travel pay only.

2. Claimants' activities during the commute were "incidental" to the use of the company trucks; neither driving nor riding in a pickup truck outfitted with toolboxes and a ladder rack, nor washing and fueling vehicles, renders the commute significantly more onerous than traveling in a car.

[¶49] Under N.D. Admin. Code § 46-02-07-02(7), and the Portal-to-Portal Act, as amended by ECFA, when an activity is "incidental" to the use of the company vehicle used for commuting, it is not compensable. As a matter of law, the trial court erred in concluding the claimants' travel time was compensable:

> the company-owned vehicles were necessary to transport tools, equipment, and supplies to and from the jobsites that were essential for the performance of their jobs on a nearly daily basis and that the quantity of such items, whether by collective volume or by individual size and weight, was sufficiently burdensome to justify compensation for their transportation.

(A at 5 ¶ 5).

[¶50] The House Report for the ECFA states: "merely transporting tools or supplies should not change the noncompensable nature of the travel." H.R. Rep. No. 104-585, Use of Employer Vehicles, at 5 (1996). The legislative history of the ECFA indicates Congress's intent that employer vehicles subject to the Act not impose "substantially greater difficulties to operate than the type of vehicle which would normally be used for commuting." U.S. Department of Labor, Wage and Hour Opinion Letter, "Travel time in company owned vehicles," April 18, 2001 (citing id.).

[¶51] Scott's company pickup trucks provided for employee use are recognized by the U.S. Department of Labor as a type of vehicle normally used for commuting under the ECFA. See id. Examples provided by the U.S. Department of Labor state that an automobile, *pick-up,* van or mini-van *would normally not present substantially greater difficulties to operate, even if modified to carry tools or equipment.* Id. (emphasis added).

Moreover, no one has offered evidence that the Scott's pickup trucks are difficult to operate because they are equipped with ladder racks or gang boxes. The additions to the company trucks do not transform the commute into a legally compensable activity.

[¶52] Further, transporting "necessary" equipment does not render compensable what is otherwise a non-compensable commute. See Dooley v. Liberty Mutual Insurance Co., 307 F.Supp.2d 234, 247-48 (D. Mass. 2004). In Dooley, the federal district court considered the compensability of commuting time when the employee transported equipment for the benefit of the employer. The Dooley court found that "the transportation of light equipment from employees' homes to work, and back from work to home, does not constitute a principal activity." Id. at 247 (D. Mass. 2004). Plaintiffs argued without success for compensability of travel time involving the transport of necessary equipment. The Court explained:

> [i]ndeed, this approach would lead to surprising results. For example, under the reasoning the plaintiffs propose, a police officer who is required to carry a gun must be compensated for his or her commute, since the officer is also transporting necessary equipment. This is not consistent with the intent manifested by Congress.

Id. The Court further recognized that, while the transport of ordinary hand tools or small pieces of equipment was not compensable, the transport of heavier equipment *might* be. Id.

[¶53] Indeed, as alluded to in Dooley, "an employee is entitled to relief under the FLSA for his commuting time to the extent that he is required to carry equipment that is significantly more burdensome than that typically carried in an ordinary commute." Clarke v. City of New York, 2008 WL 3398474 at *7, No. 06 Civ. 11397, (S.D.N.Y. June 16, 2008). When employees are required to transport equipment that is extremely heavy and difficult to transport, their commuting time has sometimes been held to be

compensable. See, e.g., Baker v. Barnard Const. Co., Inc., 146 F.3d 1214, 1218 (10th Cir. 1998) (transport of "welding rigs" for use in oil and gas pipeline repair compensable because it amounts to something more than "ordinary home-to-work travel"). By contrast, where employees have been required to carry items that are lightweight or typical of a worker's commute, their commuting times have been held to be non-compensable. See, e.g., Turn v. Barber Foods, Inc., 331 F.3d 1, 7 (1st Cir. 2003) (transport of "ordinary safety gear" not compensable). Put differently, whether commuting time "is spent predominantly for the employer's benefit or the employee's" depends on the degree to which the materials transported are a "burden on the employee's use of time." Id. (quoting Singh v. City of New York, 524 F.3d 361, 371 (2d Cir. 2008)).

[¶54] Crucially, when required items are transported to the jobsite and the only effort an employee must undertake is to set the items in the vehicle pre-commute and remove them at the end, the mere presence of the items does not render the commute significantly more onerous and the items are not extremely heavy. See Clarke, 2008 WL 3398474 at *5-7. Commuting with "necessary" items that require little effort of the commuting employee is non-compensable under the FLSA as amended by the Portal-to-Portal Act and ECFA. See id. In Clarke v. City of New York, present and former New York City Health and Mental Hygiene inspectors filed an FLSA claim for time they spent carrying job-related materials between their homes and their places of work. Id. at *1. The Clarke inspectors spent a significant amount of time commuting with a laptop, printer, telephone, specialized inspection equipment, among other things needed to perform inspections. Id. The weight of this equipment estimated by various inspectors ranged from thirteen to

forty pounds. Id. One group of inspectors transported the equipment to the worksite in a vehicle; a second group traveled on public transportation. Id.

[¶55] The Clarke court granted the City's motion for summary judgment on the claims of those inspectors who commuted by car or truck and denied the claims of those inspectors who commuted using public transportation. The court found:

> nothing to suggest that plaintiffs who drive to work are burdened substantially by the presence of the bags of equipment, as they do not need to carry their bags of equipment at all. For these plaintiffs, the only effort they must undertake is to set the bags on a car seat or place them in the trunk. Plaintiffs offer no evidence that the presence of this equipment makes their commute significantly more onerous than a typical car commute…

Id. at *7. Accordingly, the vehicle-driving inspectors could not show the equipment transported rendered their commute significantly more burdensome than an ordinary commute. Id.

[¶56] Similarly, the only effort required of the Scott's claimants was to place their personal tools and lunch into the company vehicle before the daily commute and take them out at the work site. There is no evidence in this record that the presence of tools and equipment in the company's pickup trucks made the claimants' daily commute "significantly more onerous than a typical car commute." See Clarke, 2008 WL 3398474 at *7.

[¶57] The record reflects that, on a day-to-day basis, the company pickup trucks were used to transport employees to and from the jobsite. (Rick: Tr.1 at 48:13-49:4). Before the company vehicle left the shop, an employee might throw a few minimal items into the truck toolboxes, cabs, or beds. (Rick: Tr.1 at 41:16-42:13).

> Q: …And then there were times where you might have loaded equipment at the beginning of the day or unloaded at the end of the day?
> A: Yes.

> Q: Did you record that?
> A: No.
> Q: Why didn't you record that travel time – or that time?
> A: Well, most of the time it was throwing such minimal stuff on. I mean, if I get there in the morning or at night -- I mean, we'd call in ahead what we were gonna need for the next day if we needed stuff, and there was a bin back there designated for us, we'd -- I'd just grab it and throw it in there. It might take 5 minutes.

(Id. at 41:16-42:4). If the truck took any supplies or material to the work site, loading took "two minutes" and was "not a big deal." (Id. at 64:6-11). There is nothing to suggest that the claimants were burdened substantially by one or two boxes of supplies or a tool and transporting small amounts of supplies did not render their commute significantly more onerous than a typical commute. As a matter of law, these claimants cannot meet their burden to be entitled to relief under the FLSA for commuting time. Id.

[¶58] Any unrecorded fueling and washing time was "incidental" to the use of the pickup truck for commuting. See Baker v. GTE North, Inc., 110 F.3d 28, 29 (7th Cir. 1997) (finding that buying fuel and conducting standard vehicle inspections were "incidental" to the use of plaintiffs' vehicles). Accordingly, such activities are excluded from the employee's principal activities under the Portal-to-Portal Act, as amended by ECFA, and they are not compensable. See Buzek v. Pepsi Bottling Group, Inc., 501 F.Supp.2d 876, 886 (S.D. Tex. 2007) ("end-of-day reports and transportation of tools are activities incidental to his use of a company vehicle for commuting" and, thus, "[t]ime spent on these activities … is … not compensable under the FLSA").

3. The Scott's employees' drive time was not compensable via the "continuous workday rule" because Scott's did not have constructive knowledge of any pre/post trip loading or unloading of equipment that the employees did not write down on their timesheets.

[¶59] In a claim for unpaid wages, the employer is liable if it had constructive knowledge that it was not compensating employees for "hours worked". See White v. Baptist Memorial Health Care Corp., 699 F.3d 869, 873-77 (6th Cir. 2012). If an employer establishes a reasonable process for an employee to report uncompensated work time, the employer is not liable for non-payment if the employee fails to follow the established process. Id. at 876. "When the employee fails to follow reasonable time reporting procedures []he prevents the employer from knowing its obligation to compensate the employee and thwarts the employer's ability to comply with the FLSA." Id.

[¶60] The issue is not whether the employer "could have known that [the employee] was working overtime hours," but "whether [it] should have known." Newton v. City of Henderson, 47 F.3d 746, 749 (5th Cir. 1995)). Accordingly, "where the acts of an employee prevent an employer from acquiring knowledge…of alleged uncompensated overtime hours, the employer cannot be said to have suffered or permitted the employee to work in violation of [the FLSA]." Forrester v. Roth's I.G.A. Foodliner, Inc., 646 F.2d 413, 414 (9th Cir. 1981). The constructive knowledge analysis presumes "the employee bears some responsibility for the proper implementation of the FLSA's overtime provisions." White., 699 F.3d 869, 876 (6th Cir. 2012) (quoting Wood v. Mid-America Mgmt. Corp., 192 Fed. Appx. 378, 381 (6th Cir. 2006) (unpublished)).

[¶61] In Hertz v. Woodbury County, Iowa, 566 F.3d 775, 783 (8th Cir. 2009), police officers sued the County under the FLSA for unpaid overtime compensation for among

other things, work during meal breaks. 566 F.3d at 777–78. The County used a sign-in sheet system to track the hours worked for officers on a day to day basis. Overtime was requested in writing; requests were "rarely denied." Id. at 779.

[¶62] The unpaid overtime claims alleged the County had constructive knowledge of the hours worked through the Computer Aided Dispatch system and "knew or should have known that they were working overtime." Id. at 781. The CAD system monitored officer availability and duty status using a series of codes. It was not a time-keeping system. Id. at 779.

[¶63] The Hertz Court found: "[a]ccess to records indicating that employees were working overtime, however, is not necessarily sufficient to establish constructive knowledge." Id. at 781–82 (citing Newton, 47 F.3d at 749). The Court concluded: "[t]he FLSA's standard for constructive knowledge in the overtime context is whether the County 'should have known,' not whether it could have known." Id. at 782 (citation omitted); "[i]t would not be reasonable to require that the County weed through non-payroll CAD records to determine whether or not its employees were working beyond their scheduled hours. This is particularly true given the fact that the County has an established procedure for overtime claims that Plaintiffs regularly used." Id. (citing Newton, 47 F.3d at 749).

[¶64] The Court noted the officers were in the best position to prove their hours of work; "[t]o require ... the County [to] prove a negative—that an employee was not performing 'work' during a time reserved for meals—would perversely incentivize employers to keep closer tabs on employees...." Id. at 784. Finally, the court confirmed that "under the FLSA, the employee bears the burden" to prove unpaid wage claims. Id.

[¶65] In this matter, the evidence does not support that Scott's "should have known that the hours reported" on its employees' timesheets were not correct. As in Hertz, the fact that Scott's had access to the equipment use forms is not sufficient to establish that it had constructive knowledge that claimants were working time for which they were not being compensated. See Hertz, 566 F.3d at 783. It would be unreasonable to require Scott's to weed through non-payroll equipment use forms to determine whether an employee had forgotten to record hours worked. "This is particularly true given the fact that [Scott's] has an established procedure for [recording travel time] claims that Plaintiffs regularly used." See id.

[¶66] All seven claimants regularly wrote down travel and loading time on their timesheets pursuant to the travel policy. (See **Boumont:** loading & travel activities on **100** time sheets (A at 127;7); **Rick: 103** (A at 128;8); **Barton: 211** (A at 129;10); **Schake: 67** (A at 130;3); **Richter: 39** (A at 131;4); **Anderson: 73** (A at 132; 4); **Scheeley: 78** (A at 133;5)). When loading and unloading time was recorded on claimants' timesheets, they were compensated. (See id.).

[¶67] Scott's handbook contained its timekeeping, travel and vehicle use policies. (A at 21-22; 30-32). Scott's also had a policy for employee reporting of uncompensated time. (**ERROR(S) IN PAY**: A at 29). If an employee believed he was owed time, he was to notify the payroll clerk, and Scott's was to attempt to investigate and/or correct the error no later than the next pay period. (Id.). The claimants each received copies of the employee handbook. They bore the responsibility to write down time for which they could be expected to be paid and to report errors in pay.

[¶68] It simply cannot be said that, in those instances when claimants did not write down their travel or loading time, Scott's had constructive knowledge it was not compensating the claimants for hours owed. See Hertz, 566 F.3d at 783; White, 699 F.3d at 873-77. Therefore, Scott's "cannot be said to have suffered or permitted the employee to work in violation of [the FLSA or North Dakota law]." Forrester, 646 F.2d at 414.

4. Alternatively, any unrecorded, unpaid time spent loading or unloading was de minimis, and therefore did not render the entire commute compensable via the "continuous workday rule."

[¶69] The North Dakota Department of Labor investigator determined that travel time for the claimants was compensable if it was preceded by the principal activity of loading. (See, e.g., A at 40; 45). The investigator's determination as to employee loading, and her other determinations as to compensability, were "adopted and incorporated as the basis for the Court's Order for Judgment." (A at 161, ¶ 8).

[¶70] The trial court's adoption and incorporation of this Determination in its *Findings of Fact, Conclusions of Law and Order for Judgment* was in error; the evidence supports a finding that any unrecorded time loading or unloading was *de minimis.* If the time an employee spends engaged in a principal activity prior to or following an ordinary commute is *de minimis*, neither that preliminary or postliminary time, nor the commute itself, is compensable. See Lindow v. United States, 738 F.2d 1057, 1062 (9th Cir. 1984).

[¶71] The "continuous workday rule"—which says travel time is compensable if it occurs after the employee performs "the first principal activity on a particular workday"—is subject the *de minimis* rule. Under the *de minimis* rule, compensation is necessary "only when an employee is required to give up a substantial measure of his time." Id. "The de minimis rule provides that an employer, in recording working time,

may disregard 'insubstantial or insignificant periods of time beyond scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes.'" Mireles v. Frio Foods, Inc., 899 F.2d 1407, 1414 (5th Cir. 1990) (quoting 29 C.F.R. § 785.47).

[¶72] This rule strikes a balance between work activities and the need to avoid the "split second absurdities" that are not supported by the reality of working conditions. Lindow, 738 F.2d at 1062. In applying the *de minimis* rule, most courts "have found daily periods of approximately ten minutes de minimis even though otherwise compensable." Chambers v. Sears Roebuck and Co., 428 F.App'x 400, 415 (5th Cir. 2011) (quoting Lindow, 738 F.2d at 106). The record demonstrates that any unrecorded loading or unloading of equipment was *de minimis* and non-compensable. Employees were not expected to load or unload trucks at the shop, or carry heavy equipment to the worksite, on a regular basis. The record reflects that, on a day-to-day basis, the company pickup trucks were used to transport personnel to and from the jobsite. (Rick: Tr.1 48:13-49:4). "[F]our out of five days," the Scott's trucks carried nothing but passengers. (Meyer: Tr. 1 at 36:10-12).

[¶73] Employee record-keeping history and testimony demonstrate that any unrecorded pre-trip loading activity was *de minimis*. (See A at 119; Rick: Tr.1 at 41:16-42:13). Before most commutes, the Scott's employees might throw a few minimal items into the truck toolboxes, cabs, or beds. (Rick: Tr.1 at 41:16-42:13).

> Q: …And then there were times where you might have loaded equipment at the beginning of the day or unloaded at the end of the day?
> A: Yes.
> Q: Did you record that?
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(Id. 41:16-42:4). Most of the time, any loading in the morning before the commute took "two minutes" and was "not a big deal." (Id. at 64:6-11). This day-to-day loading was *de minimis* and not a principal activity as required under the Portal-to-Portal Act. Lindow, 738 F.2d at 1062.

D. The claimants did not produce (a) *definite and certain* or (b) *sufficient evidence to show as a matter of just and reasonable inference* they worked the amount of unpaid hours awarded.

[¶74] The trial court erred in determining the claimants met their evidentiary burden to establish a wage claim against Scott's Electric for the amount of unpaid hours awarded in the Judgment. In this regard, "[a]n employer's compliance, or lack thereof" with the FLSA's timekeeping requirements determines the burden of proof a plaintiff must carry in establishing the number of overtime hours worked. McGrath v. Cent. Masonry Corp., No. 06-cv-00224-CMA-CBS, 2009 WL 3158131, at *6 (D. Colo. Sept. 29, 2009). The Fair Labor Standards Act requires all employers to make, keep, and preserve such records of all persons employed, including a record of wages, hours, and other conditions and practices of employment. See 29 U.S.C.A. § 211(c).

[¶75] "If an employer complies with these requirements, a plaintiff must prove with definite and certain evidence that he worked overtime hours for which he did not receive compensation." McGrath, 2009 WL 3158131, at *6. While an employee need not prove the precise extent of any uncompensated work in every case, at the very least, he *is* required to produce sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. A burden shifts to the employer only once an

employee has met its burden to produce either (a) definite and certain evidence of the amount of unpaid hours worked or (b) sufficient evidence of the amount and extent of unpaid hours worked as a matter of just and reasonable inference. The claimants did not meet this burden.

1. The claimants failed to meet their burden to prove the amount of hours worked by "definite and certain evidence" because Scott's Timekeeping system complies with the requirements of FSLA § 211(c).

[¶76] Scott's Electric maintains, keeps and preserves records for each of its employees as required under the FLSA. Hours worked are recorded by employees on a daily basis using a timesheet form developed by Scott's. (A at 27; 36; 58; 60). Every employee is asked to account for all hours worked. (Id.). The foreman reviews timesheets for accuracy; the employee and foreman initial the timesheet to verify that it has been reviewed and approved. (Id.).

[¶77] Hours worked must be documented on the employee timesheet. Claimants' timesheets were received as exhibits by the trial court. (O.D. 61; 67; 73; 77; 84; 89; 105). Without fail, every claimant properly documented and was paid for loading and travel time with sufficient regularity. This documentation evidences claimants' understanding of how, when and where to record loading and travel time. (See id.; Summaries of Work Activities and Time Due and Owing to Claimants: A at 111-18; 119-26; 127-36; 137-39; 140-42; 143-46; 147-51; 152-56). Claimants have not met their burdens to produce definite and certain evidence of unpaid wages.

2. The claimants did not meet the minimal burden to show they worked the number of unpaid hours awarded as a matter of just and reasonable inference.

[¶78] Regardless of Scott's compliance with FLSA timekeeping requirements, at the very least, every wage claimant is required to produce sufficient evidence to show the amount and extent of any alleged unpaid work as a matter of just and reasonable inference. Allen v. Bd. of Pub. Educ., 495 F.3d 1306, 1316 (11th Cir. 2007). The claimants did not meet this minimum burden to establish their claims for unpaid wages in the amount awarded.

[¶79] When employees' claims are based on an unreliable estimate of the amount of work performed, they do not satisfy their burden to produce sufficient evidence to show the amount and extent of the unpaid work hours they seek to recover as a matter of just and reasonable inference. In Gilbert v. Old Ben Coal Corporation, the court found that plaintiffs had not satisfied their burden of proof, in spite of the fact the employer failed to produce all required records. 407 N.E. 2d 170, 175-76 (5th Dist. 1980). Plaintiffs, who were employed by defendant as mine engineers, filed a complaint alleging violations of the maximum hour and overtime pay provisions of the FLSA. Id. at 171. The trial court found for defendant.

[¶80] Neither the Gilbert defendant nor Gilbert plaintiffs kept any records pertaining to the hours worked by plaintiffs. Id. The only evidence offered in support of plaintiffs' case was their testimony. One plaintiff testified he had worked a "weekly average of 50 hours." Another estimated he had worked a weekly average of 48-50 hours. Id. at 173-74. Another testified he worked the equivalent of six days a week during the period in question. The superintendent of defendant testified that "they [the plaintiffs] averaged 5 1/2 days a week." Id.

[¶81] The Gilbert court found an employee who fails to provide information "'such as the reasonable and creditable estimates of the employees themselves'" does not satisfy his burden of proof, and the burden will not switch to the employer. Id. at 175 (quoting Brennan v. Parnham, 366 F. Supp. 1014, 1025, (W.D. Pa. 1973). "Mere estimates of work performed, without more, are not, one may infer, 'sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference....'" Id. (quoting Anderson, 328 U.S. 680, 687 (1946)).

[¶82] The amount of unpaid hours awarded to the Scott's claimants is based on a wholly unreliable estimate of the amount of work performed. See Gilbert, 407 N.E. 2d at 175-76. The Wage Claim Determinations issued by the Department investigator, which were "adopted and incorporated as the basis for the Court's Order for Judgment," are based on myriad faulty and unsupported presumptions and are wholly unreliable. (A at 161, ¶ 8). See also id.). In her reports, the investigator concluded that claimants consistently recorded "travel time" on the back of their time sheets on those days they were driving one of the employer's vehicles to the job site. (See, e.g., A at 40). Her calculations presume the hours of equipment use listed by an employee on the "back" of the time sheet correspond directly to the travel time owed. This determination cannot be reconciled with the actual entries on timesheets completed by each Claimant. (See Summaries of Work Activities and Time Due and Owing to Claimants: A at 111-18; 119-26; 127-36; 137-39; 140-42; 143-46; 147-51; 152-56).

[¶83] For example, based upon the investigator's findings, it should follow that documentation of equipment usage hours (the "back" of the timesheet) for a Scott's crew cab pickup should result in travel time due and owing. (See, e.g., A at 40-41; 45-46

("Although the employer asserts that "equipment usage, not travel time," was recorded on the back of the claimant's timesheets, the evidence shows that the recorded "equipment usage" by the claimant includes and identifies the time he spent driving the company vehicle (e.g., a crew cab pickup) to and from a jobsite."). However, an examination of the employees' equipment usage sheets shows they are a wholly unreliable indicator of travel time to and from a jobsite.

[¶84] Claimants Barton and Rick's timesheets are instructive in this regard. Claimant Barton's timesheets regularly identify usage of a crew cab pickup on the equipment usage documentation sheet on the "back," with no corresponding travel time noted on his timesheet. (See Barton Timesheets: A at 60-61). Mr. Barton's April 11, 2006 time sheet shows 13 hours worked; travel time is not reported. (Id. at 60). His equipment usage documentation shows use of Equipment # 114, a crew cab pickup, for a period of 13 hours. (Id. at 61). Because Mr. Barton has no travel time listed on his timesheet, and based upon the investigator's belief that equipment usage time on the "back" of employee time sheets corresponded directly to unrecorded travel time, Mr. Barton should be due an additional 13 hours of travel time for April 11. Of course Mr. Barton didn't work a 26-hour work day on April 11, 2006. There are numerous other instances of Mr. Barton working days in excess of 24 hours under the investigator's method. (See, e.g., A at 76-77 (4-12-06); 62-63 (4-17-06); 64-65 (8-1-06).

[¶85] Another example. Claimant Michael Rick regularly reported use of a pickup truck on the equipment usage documentation sheet. (See, e.g., A at 95 (identifying usage of Equipment # 106, a 2001 extended cab pickup); 97 (identifying usage of Equipment # 105, a 1999 crew cab pickup)). He did not, however, always identify the hours the

vehicle was used and at times failed to note the location. (See id.). Although there is no record of the "time he spent driving the company vehicle", the investigator computed wages due and owing to Michael Rick. (See Rick Wage Claim Determination: A at 37-41).

[¶86] There are myriad other inconsistencies that call into question the Department's conclusions as to wages due. For example, during the wage investigation, Claimant Patrick Anderson informed the investigator that he loaded material at the shop on a daily basis. (Anderson Wage Claim Determination: A at 85). At his deposition, testifying under oath, Anderson admitted his interview statements to Ms. Halvorson were incorrect. At trial, Anderson testified that loading activities did not occur daily and in fact occurred once a week. (Anderson: Tr.2 at 19:18-21). The sole fact that the investigator's computation of the amount of unpaid travel time, was based on an assumption the employees loaded five days per week, rather than the correct one day per week, shows that the claimants did not meet their minimum burden to establish their claim for unpaid wages in the amount awarded. (A at 161, ¶ 8). See also Gilbert, 407 N.E. 2d at 175-76.

[¶87] The investigator was present at the trial of this matter on December 3 and 4, 2012. She testified on December 4, after listening to the testimony of six of the seven claimants.[2] With respect to principal activities of loading activities and travel, Patrick Anderson and other claimants contradicted information provided to the investigator during her investigations. (See, e.g., Anderson: Tr.2 at 19:18-21). On cross examination by counsel for Scott's Electric, the investigator was asked about these inconsistencies.

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[2] Claimant Zach Scheeley did not appear on his own behalf.

Q: And did you -- have you been sitting here during the testimony of all the claimants?
A: Yes.
Q: And did you hear claimants testify that they did not load every single day?
A: Yes.
Q: And does that change your determination?
A: Which days, you know, that's something that I can't answer because how do I know how many days that was? How does anybody know? We look at the records. That's all we have to go by.
Q: Well, I understand, but you have extrapolated a great deal of information based on, on information that's not on the timesheets.
A: Mm-hmm.
Q: And some of the claimants have testified that, both in their depositions and here during this proceeding, that they, they *maybe* loaded once a week. And yet, if they've got travel time on the back of their timesheet then they're getting credit for time that's owed as part of the work day. And I'm trying to understand what principal activity they were engaged in that made that drive time compensable.
A: The, you know, the only thing -- I don't know how to answer that. What, you know, again, how many days was that? You know, was it two days a week? Was it one day a week? I had no way of knowing that.
Q: Well exactly. But isn't the burden of proof here on the claimants?
A: Yes.

(Brenda Halvorson: Tr. 2 at 42:6-43:9).

[¶88] The investigator issued seven wage determinations for these claimants that impose significant liability upon Scott's Electric. The methods she used to arrive at her estimates of hours worked and wages owed in the Determination are rife with inconsistency and wholly unreliable. Accordingly, the claimants did not meet their burden of proof to establish their wage claim against Scott's. See Gilbert, 407 N.E. 2d at 175-76.

CONCLUSION

[¶89] The trial court's *Findings of Fact, Conclusions of Law and Order for Judgment* is wrong on the law concerning the compensability of the Scott's employees' travel time in employer-provided vehicles and is based on an unreliable non-payroll record. More particularly, the trial court erred in finding that Scott's Electric was liable to the claimants

as a matter of law. The claimants did not establish a *prima facie* claim for unpaid wages because (1) they did not show the activities for which they sought compensation fall into the category of compensable "hours worked"; and (2) they did not produce legally or factually sufficient evidence to show they worked the number of unpaid hours awarded as a matter of just and reasonable inference. Accordingly, this Court should reverse the trial court's *Findings of Fact, Conclusions of Law and Order for Judgment* and render a take-nothing judgment in favor of Scott's.

[¶90] Respectfully submitted this 25th day of November.

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota *ex. rel.* Bonnie L. Storbakken, Commissioner of Labor, for the benefit of Patrick Anderson, Adam Barton, Greg Boumont, Jason Richter, Michael Rick, Rick Schake, and Zach Scheeley, Plaintiff and Appellee, vs. Scott's Electric, Inc., Defendant and Appellant.	**SUPREME COURT NO. 20130264** Civil No. 39-2010-CV-00389

ON APPEAL FROM THE JUDGMENT DATED
JUNE 25, 2013
STATE OF NORTH DAKOTA
SOUTHEAST JUDICIAL DISTRICT

AFFIDAVIT OF SERVICE BY ELECTRONIC MAIL

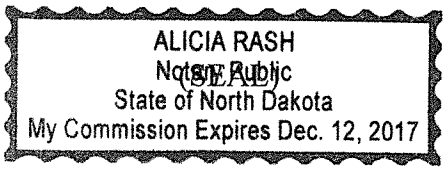
STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

[¶1] Donna R. Hanson, being first duly sworn, does depose and state that she is of legal age and not a party to the above-entitled matter. Affiant states that on November 25, 2013, the Brief of Appellant Scott's Electric, Inc. and the Appellant's Appendix were filed electronically with the Clerk of Court of the North Dakota Supreme Court through email, and that the same documents were electronically served through email upon:

[¶2] Douglas B. Anderson
dbanders@nd.gov
Attorney for Plaintiff and Appellee

Donna R. Hanson

[¶3] Subscribed and sworn to before me this 25 day of November, 2013.



Alicia Rash

Notary Public
Burleigh County, North Dakota

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