

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 01 August 2018

Case No.: 2016-FLS-3

In the Matter of:

**Petition for Review of Special
Minimum Wage Rate Pursuant to
Section 14(c)(5)(A) of the Fair Labor
Standards Act by:**

**RALPH MAGERS, PAMELA STEWARD
and MARK FELTON,**
Petitioners,

v.

SENECA RE-AD INDUSTRIES, INC.,
Respondent.

Appearances:

For Petitioners:

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For Respondent:

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DECISION AND ORDER ON REMAND¹

Introduction

The Fair Labor Standards Act of 1938² (“Act”) allows employers to pay some disabled employees less than the minimum wage.³ These “special minimum wages” may be paid where the employer has satisfied the requirements established by the Administrator of the Wage and Hour Division of the United States Department of Labor.⁴

This matter arises under Section 14(c)(5)(A) of the Act,⁵ which provides that “any employee receiving a special minimum wage . . . may petition the Secretary [of Labor] to obtain a review of such special minimum wage rate.” Ralph Magers, Pamela Steward and Mark Felton (“Petitioners”) are workers with disabilities.⁶ Petitioners are employed by Seneca Re-Ad Industries, Inc. (“Respondent”), and work in Respondent’s manufacturing facility in Fostoria, Ohio.⁷ Depending on the exact job being performed by them on a given day, Petitioners were often earning wages that were substantially below minimum wage.⁸

¹ The Supreme Court decided *Lucia v. Securities and Exchange Comm’n*, -- U.S. --, 2018 WL 3057893 on June 21, 2018. The *Lucia* case specifically dealt with the constitutionality of the appointment of an Administrative Law Judge appointed by the Securities and Exchange Commission. The challenge was made under Article 2, Section 2, Clause 2 of the Constitution (the “Appointments Clause”). My appointment as an Administrative Law Judge in the Department of Labor was ratified by the Secretary of Labor on December 21, 2017. This case was remanded to me on March 28, 2018 – more than three months after the Secretary’s ratification of my Department of Labor appointment. It is my view that all of the work necessary for me to re-open the record and issue a new damages calculation in these remand proceedings is wholly and exclusively occurring only after the Secretary’s ratification of my Department of Labor appointment. I notified counsel of the Supreme Court’s decision during the hearing in this case held on June 29, 2018. In the weeks following that hearing, counsel have asserted no challenge to my exercise of jurisdiction in this case. To the extent necessary or appropriate, I ratify all actions which I took on this case prior to December 21, 2018.

² 29 U.S.C. § 201 *et seq.*

³ 29 U.S.C. § 214(c).

⁴ *See generally*, 29 C.F.R. § 525.9.

⁵ 29 U.S.C. § 214(c)(5)(A).

⁶ Mr. Magers is legally blind. 2016 Decision and Order at 7. Ms. Steward is blind in her right eye, and has an intellectual disability. *Id.* at 8. Mr. Felton has Asperger’s Disorder. *Id.* at 9.

⁷ The type of work performed by Petitioners is described at pages 10 through 13 of my 2016 Decision and Order.

⁸ On February 2, 2016, I ordered Respondent to begin paying Petitioners minimum wage. Attached Exhibits A, B and C show that before February 2, 2016, Petitioners were sometimes paid less than \$2.00 per hour for their labor.

The 2016 Hearing

On November 25, 2015, Petitioners filed a petition to obtain a review of the sub-minimum wage rates then being paid to them. The case was assigned to me on December 16, 2015. Under the Act⁹ and the applicable regulation,¹⁰ I was required to set a hearing that would begin no more than 30 days after the case was assigned to me. The hearing began on January 4, 2016, and lasted 5 full days. Nine witnesses, including 3 experts, testified at the hearing. The hearing transcript is 1,163 pages in length. During the week of the hearing, I visited the workplace where the Petitioners have been employed by Respondent, and I was able to observe the type of work being performed by Petitioners.

At the conclusion of the 2016 hearing, I admitted 46 exhibits into the record. Among the exhibits admitted were wage and hour records for each of the Petitioners for the period December 28, 2012 through December 25, 2015.¹¹ I awarded unpaid minimum wages and liquidated damages for that period in my 2016 Decision and Order.¹² I did not receive detailed evidence documenting the hours worked by, or wages paid to, the Petitioners for any period other than Period 2 (as defined below in footnote 12).

At the 2016 hearing, and in the post-hearing briefs filed after that hearing, Petitioners and Respondent agreed that the statute of limitations contained in the Portal-to-Portal Act of 1947, 29 U.S.C. § 255(a),¹³ limited my calculation of the damages to be paid to Petitioners to either a 2- or 3- year period.¹⁴ It was for that reason that Petitioners introduced evidence only of their wages and hours in the 3 years before the hearing. However, there was testimony at the hearing that Mr. Magers,¹⁵ Ms. Steward,¹⁶ and Mr. Felton¹⁷ had each worked for Respondent for longer than those three years.¹⁸

⁹ 29 U.S.C § 214(c)(5)(B).

¹⁰ 29 C.F.R. § 525.22.

¹¹ Petitioners' Exhibits 8, 9, 10, 11, 12 and 13.

¹² During these remand proceedings, the parties have presented information about 3 distinct periods in each Petitioner's work history with Respondent: **Period 1** begins with the date on which the Petitioner began working with Respondent and ends on December 27, 2012. **Period 2** is the three-year period for which I have been ordered to re-calculate damages (December 28 2012 through December 26, 2015). **Period 3** is the 38-day period from the beginning of the hearing until February 2, 2016, when Respondent began paying minimum wage to each Petitioner.

¹³ "Any action commenced on or after May 14, 1947, to enforce any cause of action for unpaid minimum wages . . . or liquidated damages, under the Fair Labor Standards Act of 1938 . . . may be commenced within two years after the cause of action accrued . . . except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued."

¹⁴ Petitioners' Final Argument at 15-16; Respondent's Post-Hearing brief at 39.

¹⁵ 2016 Hearing Transcript at 23.

¹⁶ *Id.* at 79

¹⁷ *Id.* at 120.

¹⁸ Mr. Magers began working for Respondent on January 21, 2010. Ms. Steward's employment with Respondent began on August 12, 2010. Mr. Felton started his work with respondent on December 5, 2011. Counsel stipulated to these dates during the June 29, 2018 hearing in Tiffin, Ohio.

Under the Act¹⁹ and the applicable regulation,²⁰ I was required to issue a decision within 30 days after the end of the hearing. The parties filed their respective post-hearing briefs on January 18, 2016, and I issued my Decision and Order two weeks later.

In my 2016 Decision and Order, I found that Respondent had not proven²¹ that Petitioners were disabled for the work being performed by them.²² I thus found no justification for Petitioners being paid less than minimum wage, and I ordered that Petitioners be paid the minimum wage beginning on February 2, 2016.²³

I also determined that the statute of limitations contained in 29 U.S.C. § 255(a) was not applicable to the administrative proceeding commenced by the Petitioners.²⁴ I awarded damages to each Petitioner²⁵ for their last 3 years of employment “because that is the only period for which I have detailed wage information for each of the Petitioners.”²⁶ After I announced my decision that no statute of limitations was applicable to their claims, Petitioners did not seek to re-open the record to introduce evidence of the hours worked by, and wages paid to, each of them during Period 1.²⁷ No motion for reconsideration was filed by Petitioners which may have allowed me to consider the award of unpaid minimum wages for the entirety of each Petitioner’s employment with Respondent.²⁸

My Decision and Order was appealed to the Administrative Review Board (“ARB”) on February 24, 2016. The ARB’s Decision and Order,²⁹ which affirmed in part, reversed in part, and remanded the case to me, was entered on January 12, 2017. Of importance to my decision-making today is the ARB’s affirmance of my holding that the “Portal-to-Portal Act’s statute of limitations does not apply in this administrative proceeding.”³⁰

On February 6, 2017, Petitioners moved to re-open the administrative record to admit evidence of the hours worked and wages paid from first day of each Petitioner’s employment with Respondent. Soon after receiving Petitioners’ Motion to Re-Open the Record, I conducted a conference call with all counsel in which I informed counsel that I could not rule on the Motion to Re-Open the Record until the ARB returned jurisdiction of the matter to me. That did not happen until March 28, 2018.

¹⁹ 29 U.S.C. § 214(c)(5)(E).

²⁰ 29 C.F.R. § 525.22(e).

²¹ “In these proceedings, the burden of proof on all matters relating to the propriety of a wage at issue shall rest with the employer.” 29 C.F.R. § 525.22(d).

²² 2016 Decision and Order at 36.

²³ Counsel have informed me that Petitioners have been paid minimum wage since February 2, 2016.

²⁴ 2016 Decision and Order at 41-45.

²⁵ In my 2016 Decision and Order, I awarded Ralph Magers \$17,578.30 in unpaid minimum wages and \$17,578.30 in liquidated damages. I awarded Pamela Steward \$18,174.48 in unpaid minimum wages and \$18,174.58 in liquidated damages. I awarded Mark Felton \$9,161.31 in unpaid minimum wages and \$9,161.31 in liquidated damages. The damages total \$54,075.40.

²⁶ *Id.* at 46.

²⁷ See 29 C.F.R. § 18.90.

²⁸ See 29 C.F.R. § 18.93

²⁹ 2017 WL 512658 (ARB January 12, 2017).

³⁰ ARB Decision and Order at 7.

Proceedings on Remand

After the ARB returned the matter to me, I conducted a conference call with all counsel on April 9, 2018. On that same day, I issued an Order which, among other things, allowed Petitioners to submit a Renewed Motion to Re-Open the Record should they choose to do so, and a briefing schedule was established for any such Motion.

Petitioners filed a Renewed Motion to Re-Open the Record on May 11, 2018. Attached to Petitioners' Motion were the Exhibits now identified as Petitioners' Exhibits 19, 20, 21, 22, 23, 24 and 25.³¹ These proffered exhibits provide wage and hour information for each Petitioner for Periods 1, 2 and 3.

On May 25, 2018, Respondent filed a brief opposing Petitioner's request to re-open the record. The exhibits now identified as Respondent's exhibits 25, 26 and 27 were attached. These proffered exhibits provide wage and hour information for each Petitioner for Periods 1, 2 and 3.

All matters related to the requested re-opening of the record and as to the recalculation of damages have been fully briefed by the parties.

On June 29, 2018, I conducted a hearing in the Seneca County Justice Center in Tiffin, Ohio.

Applicable Standards

Twenty-nine C.F.R. § 525.5(a) provides:

An individual whose earning or productive capacity is not impaired for the work being performed cannot be employed under a certificate issued pursuant to this part and must be paid at least the applicable minimum wage.³²

At the 2016 hearing, I heard and considered evidence concerning each of the Petitioners' impairments in Periods 1 and 2.³³ In determining whether Petitioners were "impaired for the work being performed," I looked at production evidence going back to 2010, which is the year that Mr. Magers and Ms. Steward began working for Respondent. After considering evidence of the productivity of Petitioners from the earliest days of their employment through the date of the hearing, I wrote:

I conclude that while each of the Petitioners unquestionably has one or more disabilities, those disabilities should not, and do not, impair any of the Petitioners from performing any of the jobs in

³¹ On May 30, 2018, I issued an Order specifying how proffered exhibits should be identified during these remand proceedings.

³² 29 C.F.R. § 525.5(a).

³³ I made a specific finding that the manner of the work performed by Petitioners had not changed between 2010 and 2015. 2016 Decision and Order at 36.

Petitioner's Fostoria facility. I conclude that Respondent has not had in the past, and does not now have, the legal ability to employ any of the Petitioners under a Section 14(c) Certificate, and that each of the Petitioners has been, and is now, entitled to earn at least minimum wage when working in the Fostoria manufacturing facility. For these reasons, I find Respondent has not paid Petitioners the minimum wage to which Petitioners have been entitled, and that Respondent has thus violated § 206 of the Act.³⁴

At the 2016 hearing, Respondent failed to demonstrate that Petitioners were disabled for the work they performed during Periods 1 and 2. I awarded damages to Petitioners for Period 2 only because I did not have any evidence before me which allowed me to calculate and award damages for Periods 1 or 3.

Re-Opening The Administrative Record

On remand, Petitioners ask me to: (1) re-open the record to receive evidence of the hours worked by, and the wages paid to, each of the Petitioners during Periods 1 and 3; and (2) calculate the amount of unpaid minimum wages owed to Petitioners during Period 1 and 3; and (3) calculate the amount of statutory liquidated damages owed to Petitioners for Periods 1 and 3; and (4) award to Petitioners their unpaid minimum wages and statutory liquidated damages for Periods 1 and 3. In addition, the ARB has ordered me to recalculate Petitioners' unpaid minimum wages and statutory liquidated damages for Period 2, and to award those damages to Petitioners. I do not need to re-open the record in order to recalculate Petitioners' Period 2 damages.

The question whether to re-open the administrative record is committed to my discretion.³⁵ In the exercise of that discretion, I have carefully reviewed the briefs and arguments of counsel submitted to me during these remand proceedings, and I have also weighed the considerations set forth in the paragraphs numbered 1 through 19, below:

1. In my 2016 Decision and Order, I determined that Respondent had failed to demonstrate that it was entitled to pay any Petitioner less than minimum wage at any point during that Petitioner's employment by Respondent.³⁶ That finding established an entitlement to unpaid minimum wages and liquidated damages for each Petitioner during Periods 1, 2 and 3. In my 2016 Decision and Order, I awarded damages only for Period 2 because that was the only period for which I had wage and hour data for the Petitioners. I here reiterate my 2016 finding that each Petitioner is entitled to an award of unpaid minimum wages and liquidated damages for what are now being called Periods 1, 2 and 3.

³⁴ *Id.*

³⁵ "Granting leave to reopen the record is committed to the sound discretion of the ALJ." *Dalton v. Copart, Inc.*, ARB Nos. 04-027, -138; ALJ No. 1999-STA-046, slip op. at 6 (ARB June 30, 2005).

³⁶ 2016 Decision and Order at 36.

2. Respondent argues that I am exceeding the scope of the ARB’s remand if I re-open the record in order to adjudicate Petitioners’ Period 1 and Period 3 damages.³⁷ Respondent argues: “The ALJ has no authority to do anything other than what the ARB remanded for him to do: to recalculate the damages awarded for the 3-year period from December 28, 2012 to December 25, 2015 at the federal minimum wage.”³⁸ Yet I note the following expansive language in the ARB’s Decision and Order:

Seneca Re-Ad failed to pay Magers, Steward, and Felton the federal minimum wage when it was required to do so under the FLSA’s Minimum Wage Provision. Therefore, Seneca Re-Ad must pay Magers, Steward, and Felton ‘in the amount of their unpaid minimum wages . . . and in an additional equal amount as liquidated damages’ – that is, twice the difference between the amount the Employees were paid and the federal minimum wage.³⁹

Nothing in my 2016 Decision and Order, and nothing in the ARB’s decision suggests that Respondent’s violations of the Act occurred only over a limited period of time. Nothing in my 2016 Decision and Order, and nothing in the ARB’s decision suggests that Petitioners should not be paid damages for all of the periods where Respondent paid them less than minimum wage in violation of the Act. Since its earliest days, courts have recognized that “[t]he Fair Labor Standards Act is remedial in its nature and should be liberally construed.”⁴⁰ While Respondent has correctly cited the specific remand language of the ARB’s Decision and Order, the Act clearly states that Respondent “shall be liable to the employee or employees affected in the amount of their unpaid minimum wage . . . and in an additional equal amount as liquidated damages.”⁴¹ I believe the Act requires me to award damages for all of the violations of the Act which I found in my 2016 Decision and Order, especially when those findings have been affirmed unanimously by the ARB. The ARB certainly understood that when it agreed to remove the damages cap imposed by the Portal-to-Portal Act statute of limitations, that these three Petitioners would ask to have their Period 1 damages calculated and paid to them by an ALJ.

3. I do not believe re-opening the record to receive evidence of Petitioners’ Period 1 and Period 3 damages violates any specific direction given to me by the ARB. I believe it is inevitable that a judge in some tribunal is eventually going to need to calculate the Petitioners’ Period 1 and Period 3 damages. I have all the data and all the argument of counsel about performing such a calculation in front of me. I do not believe that re-opening the record violates the intent of what the ARB asked me to accomplish on

³⁷ Respondent “has no issue with the award of damages for the third period – December 26, 2015 to February 2, 2016.” Respondent’s Brief on Damages (May 11, 2018) at p. 5, footnote 4.

³⁸ *Id.* at 5-6.

³⁹ ARB Decision and Order at 23.

⁴⁰ *Fellbaum v. Swift & Co.*, 54 F.Supp. 353 (N.D. Ohio, 1944).

⁴¹ 29 U.S.C. §216(b).

remand. If I am incorrect in that finding, and if I have exceeded the scope of the remand, I have tried to present my damage calculations below in such a manner that will allow the ARB to vacate my award of Period 1 damages without the necessity of again remanding the case to me.

4. I found in my 2016 Decision and Order that Petitioners had established a legal right to be paid the unpaid minimum wages earned by them over the entire course of their respective work histories with Respondent. If I now do not re-open the record to calculate and award these unpaid minimum wages, then I have separated Petitioners' legal right to receive such an award of damages from their actual ability to have those damages calculated and paid to them. I do not believe separating Petitioners' rights from the full remedies available to them is consistent with the text⁴² or the broad remedial intent of the Act.⁴³
5. Until I issued my Decision and Order in 2016, there was no authority holding that the statute of limitations contained in 29 U.S.C. § 255(a) was not applicable in administrative actions for the review of sub-minimum wages brought under 29 U.S.C. § 214(c)(5)(A). The Administrator of the Wage and Hour Division ("Administrator") filed an *amicus* brief before the ARB arguing:

it is reasonable to apply the statute of limitations as set out by the Portal-to-Portal Act because the petition is a challenge to the special minimum wage, i.e., to the employer's payment of less than the requisite minimum wage under section 6 of the FLSA, 29 U.S.C. 206. Therefore the Board should hold that the Portal Act applies and remand the case to the ALJ.⁴⁴

The Administrator has vast experience in the implementation of Section 14 of the Act. If the Administrator was incorrect as to the statute of limitations applicable to a petition for review filed under § 14(c)(5)(A), then it is understandable why Petitioners' counsel came to the same erroneous conclusion.

6. Until the ARB concluded that the statute of limitations in the Portal-to-Portal Act does not apply to § 14(c)(5)(A) administrative actions, there was no authoritative

⁴² "Any employer who violates the provisions of section 206 . . . of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages . . . and in an additional equal amount as liquidated damages."

⁴³ See *Powell v. U.S. Cartridge Co.*, 339 U.S. 497, 509–11, (1950) ("[T]he primary purpose of Congress ... was to eliminate, as rapidly as practicable, substandard labor conditions throughout the nation."). The Act was intended to "protect all covered workers from substandard wages and oppressive working hours." *Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981). "Congress passed the FLSA with broad remedial intent" to address "unfair method[s] of competition in commerce" that cause "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." *Keller v. Miri Microsystems LLC*, 781 F.3d 799, 806 (6th Cir. 2015).

⁴⁴ See Brief of the Wage and Hour Administrator as *Amicus Curiae*, submitted to the ARB on May 13, 2016, at 39-40. The Wage and Hour Division did not participate in the proceedings before me, despite the invitation in 29 C.F.R. §525.22(c) that it may do so ("the Administrator shall be permitted to participate by counsel in the proceeding"). Given the novelty and importance of the issues before me, I doubtless would have benefitted from the Administrator's participation.

decision from any tribunal about the statute of limitations applicable in the rare administrative proceedings brought under § 14(c) of the Act.⁴⁵ Given the state of the law on the statute of limitations issue at the time the 2016 hearing commenced,⁴⁶ I find the intentional failure of Petitioners' counsel to introduce the Period 1 wage data into the record at the time of the 2016 hearing created the type of "extraordinary circumstance" that would warrant relief under Rule 60(b)(6) of the Federal Rules of Civil Procedure.⁴⁷ In concluding that Petitioners' counsel acted in good faith when they chose in 2016 not to submit Period 1 data for my review, I find it highly probative that even the Administrator of the Wage and Hour Division incorrectly believed that a 2- or 3-year statute of limitations governed the claims of Petitioners. Petitioners should not bear the adverse consequence of a reasonable, understandable, yet improvident, litigation decision made by their counsel, particularly if a method of error correction is easily at hand.

7. Under the Act⁴⁸ and the regulations,⁴⁹ I was required to issue a decision within 30 days after the end of the hearing. This 30-day deadline, when combined with the lack of precedent available to guide my deliberations, and when further combined with the decision of Petitioners' counsel not to admit evidence concerning Petitioners' Period 1 wages and hours, set in place a decision-making process that resulted in error, and which also did not permit me to fully adjudicate the damage claims of Petitioners.⁵⁰ In my 2016 Decision and Order, I awarded unpaid minimum wage and liquidated damages only for Phase 2 "because that is the only period for which I have detailed wage information for each of the Petitioners."⁵¹ In making my 2016 damage calculations, I incorrectly used Ohio minimum wage rates instead of the significantly lower federal minimum wage rate. I now know that my failure to address Petitioners'

⁴⁵ Petitioners have cited the decision of the Secretary of Labor in *In re Depp*, ALJ Case No. 91-FLS-1, 1992 WL 752725 (Office of Administrative Appeals, July 10, 1992). The Secretary's remand order in that case might be read to suggest that the statute of limitations of the Portal to Portal Act is applicable in that §14(c)(5) case, but there is no discussion of the issue and there is no explicit finding to that effect.

⁴⁶ At the time I began writing my decision in January 2016, there was almost no authority on any point of law which would need to be resolved before I could issue my decision. Under these circumstances, and given the fact that both parties were equally incorrect about the application of the statute of limitations, I do not fault Petitioners' counsel for not seeking to admit the Period 1 wage and hour data at the time of the January 2016 hearing.

⁴⁷ There is no corollary to Rule 60(b)(6) in the ALJ Rules. Rule 18.10(a) of the ALJ Rules provides: "The Federal Rules of Civil Procedure (FRCP) apply in any situation not provided for or controlled by these rules, or a governing statute, regulation, or executive order." I am not looking to Rule 60(b)(6) to provide a rule of decision in this matter. However, given the very limited circumstances under which the record may be reopened under ALJ Rule 18.90(b), I look to Rule 60(b) for a description of other circumstances in civil litigation where a final judgment might be reopened in order to serve the needs of justice. *See, e.g., Fuller v. Quire*, 916 F.2d 358 (6th Cir. 1990) (Rule 60(b)(6) properly applied to prevent "penalizing plaintiff" for error committed by plaintiff's counsel.)

⁴⁸ 29 U.S.C. § 214(c)(5)(E).

⁴⁹ 29 C.F.R. § 525.22(e).

⁵⁰ Toward the end of the 2016 hearing, I made the following comments to counsel about the content of their post-hearing briefs: "there is a relative shortage of decisions in this area and my number one obligation to all of you is to get this right, so to the extent that there's not a large body of case law out there establishing what kind of remedies may or may not be available, you and I are all going to be involved in the common adventure of considering lots of issues in this case, perhaps including remedies, and I want to make sure I have the benefit of all of your thinking on the subject . . ." Transcript of 2016 hearing at 926.

⁵¹ 2016 Decision and Order at 46.

Period 1 damages in my 2016 Decision and Order has caused Petitioners (in the aggregate) not to be awarded \$21,569.75 in unpaid minimum wages to which they are legally entitled, and an additional \$21,569.75 in statutory liquidated damages to which they are also legally entitled. If I had been adjudicating a case where there was no statutory deadline for the issuance of a decision, I hope that I would not have issued a final decision in such a hypothetical case while a \$43,000 damage question was not developed on the record and not briefed by the parties. I appreciate the importance of resolving the important questions presented by Petitioners' action in an expeditious manner. However, I am not certain it was ever contemplated that a week-long trial with experts and more than 1,100 pages of trial transcript would precede the 30 day decision-making process. There are errors and omissions in my 2016 Decision and Order.⁵² On remand, I believe I should correct all of the errors and omissions contained in my 2016 Decision and Order. By this Order, I have recalculated Period 2 damages using the lower federal minimum wage rate. I believe the Act now also requires me to award each Petitioner the unpaid Period 1 and Period 3 minimum wages and liquidated damages to which they are entitled as a consequence of my 2016 finding that Respondent violated the Act.

8. I do not believe Respondent is prejudiced by the admission of the exhibits identified above. The underlying wage and hour data was created and maintained by Respondent. No question is raised as to the accuracy or authenticity of the wage and hour data. No hearsay objection to its admission has been made. The only objections made to the admission of Petitioners' Exhibits 20 through 25 is that I am exceeding the scope of the ARB's remand order by admitting these exhibits, and that Rule 18.90(b) of the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges ("ALJ Rules")⁵³ does not allow the record to be re-opened in the situation now before me.
9. ALJ Rule 18.90(b) discusses the circumstances when a Department of Labor ALJ may re-open the administrative record because newly-discovered evidence is located after the record is closed. That is not the factual situation now before me. The Period 1 wage and hour information contained in the exhibits which I have now admitted was available to all parties at the time of the 2016 hearing, and is thus not "newly discovered."⁵⁴ Petitioners deliberately elected not to admit the Period 1 evidence into the record because counsel for both sides (and, later, the Administrator of the Wage and Hour Division) incorrectly believed that the two- or three-year statute of limitations in 29 U.S.C. § 255(a) limited Petitioners' damages only to Period 2, and Petitioners' counsel thus believed that Period 1 wage and hour data was irrelevant. I

⁵² In terms of the damages payable to Petitioners, the most consequential mistake in my 2016 Decision and Order was my failure to pay Period 1 damages to Petitioners. But that was not the only significant damages miscalculation: in my 2016 Decision and Order, I awarded \$54,075.40 in Period 2 damages to Petitioners at hourly rates of pay above the federal minimum wage. Today I award them \$43,565.24 in Period 2 damages using the lower federal minimum wage. My award today is based upon a substantially better understanding of these damage issues than I had when I issued my 2016 Decision and Order.

⁵³ 29 C.F.R. Part 18, Subpart B.

⁵⁴ Petitioners were in the midst of Period 3 when the hearing commenced in January 2016, and the administrative record was closed before Period 3 ended.

conclude that ALJ Rule 18.90(b) was not intended to address a factual circumstance such as that now before me.

10. The regulations governing this proceeding contain the following provision: “[t]here shall be a minimum of formality in the proceeding consistent with orderly procedure.”⁵⁵ I view enforcement of 29 C.F.R. § 18.90(b) in a manner that would prevent me from considering and awarding unpaid minimum wage damages to Petitioners during Periods 1 and 3 to represent the kind of “formality” which the regulations give me the discretion to relax. I believe all parties have been given ample opportunities to present lay witness testimony, expert testimony, exhibits and legal argument to me. I have nearly 100 pages of spreadsheets containing the parties’ competing damage calculations. I have done everything possible to conduct this case in a manner that is “consistent with orderly procedure.” I have no concern whether the due process rights of all parties have been respected during these remand proceedings.
11. The statute of limitations contained in the Portal-to-Portal Act may affect the outcome of any civil action filed by Petitioners against Respondent seeking to recover unpaid minimum wages and liquidated damages. Petitioners initiated such an action in 2017. *Steward v. Seneca Re-Ad Industries, Inc.*, Case No. 3:17-CV-2119 (United States District Court, Northern District of Ohio). Respondent has filed a motion to dismiss that case, arguing, among other things, that the Portal-to-Portal Act’s 2 or 3 year statute of limitations bars much of the relief being sought by Petitioners in that forum.⁵⁶ The District Court has not yet addressed the statute of limitations issue in that case.⁵⁷ If the District Court applies either a 2-year or a 3-year statute of limitations, that would seem to preclude Petitioners’ efforts to recover in that District Court action any of the unpaid minimum wages owed to them for Period 1.⁵⁸
12. It seems there is no jurisdictional barrier to Petitioners commencing a new action under 29 U.S.C. §214(c)(5) to recover their Period 1 and Period 3 wages. However, that case would not likely be assigned to me, and it is possible the ALJ assigned to any such new case could determine that Petitioners have the burden to go forward with evidence establishing they are entitled to an award of damages for Periods 1 and

⁵⁵ 29 C.F.R. § 525.22(c).

⁵⁶ “Plaintiffs have no minimum wage case to make here. Using the FLSA’s longest available statute of limitations, 3 years, minimum wages in this case could only be awarded back to October 2014. Yet, this 3-year period is already encompassed within the final order from the administrative proceeding. Because Plaintiffs cannot again be awarded minimum wage *for the same period of time*, they cannot again be awarded . . . damages.” Respondent’s December 12, 2017 Motion to Dismiss (ECF #19) in *Steward v. Seneca Re-Ad Industries, Inc.*, Case No. 3:17-CV-2119 (United States District Court, Northern District of Ohio) at 12 (emphasis in original).

⁵⁷ A Motion to Dismiss filed in the District Court addresses the statute of limitations issue. I last checked the docket in the District Court case at 6:58 a.m. on August 1, 2018. As of that time, no decision on the Motion to Dismiss had been entered by the District Court.

⁵⁸ Petitioner’s District Court action was commenced on October 6, 2017, and Respondent argues that Petitioners cannot recover unpaid minimum wage damages for any date prior to October 6, 2014. I awarded unpaid minimum wages to each Petitioner during Period 2 – which runs from December 28, 2012 to December 25, 2015. Respondent’s statute of limitations argument would not seem to apply to Petitioners’ damage claims for Period 3.

3.⁵⁹ In other words, the ALJ assigned to that case may want to begin those proceedings at the beginning.

13. In 2016, I issued an order awarding \$266,000 in attorney fees to counsel for Petitioners in connection with the 2016 hearing.⁶⁰ In addition, Petitioners incurred more than \$83,000 in expert witness fees and \$10,000 in out of pocket costs in the proceedings held before me in 2016. I do not know the amount of attorney fees and expert witness expenses incurred by Respondent, but Respondent had two experienced lawyers in the courtroom for 5 days. Mr. Knuckles, Respondent's expert, performed a study, prepared a report, presented testimony, and observed the proceedings in the courtroom. It seems likely that the total cost of the first hearing approached or exceeded half a million dollars.
14. To the best of my knowledge, counsel currently representing Petitioners has not pledged to perpetually provide legal services to them. If Petitioners were forced to find an attorney to represent them in a new administrative proceeding under § 214(c)(5) of the Act, Petitioners may face insurmountable challenges securing new counsel. I take official notice⁶¹ that Seneca County, Ohio (the county in which Petitioners reside) has a population of about 55,000, and has only about 60 persons holding active licenses to practice law in Ohio. That list of 60 includes all the county's judges and prosecuting attorneys, who presumably could not represent the Petitioners. That list of 60 likely contains in-house corporate counsel and real estate lawyers and others who do not undertake civil litigation matters. That list of 60 likely contains lawyers who would doubtless wonder how they would ever get paid for representing claimants who earn minimum wage in a complex administrative proceeding seeking to recover about \$40,000⁶² where fee-shifting is not available.⁶³ That list of 60 likely includes lawyers who would have little interest learning an entirely new area of the law.

⁵⁹ Respondent ultimately bears the burden of proving the propriety of the wages paid to Petitioners.

⁶⁰ The ARB vacated my award of attorney fees.

⁶¹ During the June 29, 2018 hearing, the parties expressed no objection to me taking official notice of the facts listed in this paragraph. *See* ALJ Rule 18.84.

⁶² Mr. Magers' Period 1 unpaid minimum wages are about \$9,000. Ms. Steward's unpaid minimum wages for Period 1 are about \$10,800. Mr. Felton's unpaid minimum wages for Period 1 are about \$1,700. Their aggregate Period 3 unpaid minimum wages are about \$150.00. The total unpaid minimum wages for Petitioners in Periods 1 and 3 is thus about \$21,650. If an equivalent amount of liquidated damages are added, the maximum damages that could be sought in a proceeding to vindicate Petitioners' claims for Period 1 and Period 3 is about \$43,300.

⁶³ Assume a lawyer takes Petitioners' \$43,300 claim on a contingent fee basis. A one-third contingent fee would pay a fully-successful lawyer \$14,433, presumably payable only after he or she successfully defends the ALJ's Order before the ARB, the District Court and wherever else the case may go from there. And, of course, payment of that fee to a lawyer would reduce by a corresponding amount the monies to be received by the aggrieved Petitioners. While I fully understand the ARB's decision to vacate my award of attorney fees, I do not see how it would ordinarily be feasible for those earning less (and sometimes far less) than minimum wage to vindicate their rights in a proceeding brought under § 14(c)(5)(A) of the Act if they must either pay counsel an hourly fee or sign a contingent fee agreement. In the ordinary case, there simply is not enough money at issue for the clients to find a lawyer willing to get involved in complicated case that may go on (as has this case) for years.

15. Petitioners' disabilities, which were extensively discussed in my 2016 Order, likely would hinder their ability to maintain a working relationship with counsel who is located very far outside Seneca County.
16. For the reasons set forth in my 2016 Decision and Order, I have already determined that each Petitioner is entitled to receive unpaid minimum wages and liquidated damages in Periods 1, 2 and 3. There are questions whether Petitioners can recover their Period 1 damages in the suit they filed in District Court in 2017. There is a question whether requiring Petitioners to initiate a new §214(c)(5) proceeding may be stymied because no counsel will take the case. Even if willing counsel is located, there are questions how much a new §214(c)(5) case might cost. By contrast, I believe I am now able to decide the damage questions regarding Periods 1 and 3 with no further testimony, hearings or briefs.
17. ALJ Rule 18.10 instructs that "[t]hese [ALJ] rules . . . should be construed and administered to secure the just, speedy and inexpensive determination of every proceeding." This same language appears in Rule 1 of the Federal Rules of Civil Procedure. A 1993 Advisory Committee note to FED. R. CIV. P. 1 emphasizes "the affirmative duty of the court to exercise the authority conferred by these rules to ensure that civil litigation is resolved not only fairly, but also without undue cost or delay." A 2015 Advisory Committee note to FED. R. CIV. P. 1 contains the following guidance:

Rule 1 is amended to emphasize that just as the court should construe and administer these rules to secure the just, speedy and inexpensive determination of every action, so the parties share the responsibility to employ the rules in the same way. Most lawyers and parties cooperate to achieve these ends. But discussions of ways to improve the administration of civil justice regularly include pleas to discourage over-use, misuse, and abuse of procedural tools that increase cost and result in delay. Effective advocacy is consistent with – and indeed depends upon – cooperative and proportional use of procedure.

I believe admitting Petitioners' Period 1 and Period 3 wage and hour data into the record, and allowing all parties the opportunity for full briefing and oral argument as to the proper methodology of computing Petitioners' damages, represents a superior means to provide all parties with a "just, speedy and inexpensive" resolution of the damages issues.

18. This dispute has been pending for more than two and one half years. It that time, it has generated this administrative proceeding (now being considered for the second time), an ARB appeal (now closed), and two other cases which are now pending in the United States District Court for the Northern District of Ohio. One of those

District Court cases is the appeal of the ARB's Decision and Order.⁶⁴ Currently pending in that case is a Motion to Dismiss filed by the Secretary of Labor,⁶⁵ and a Motion for Stay filed by Seneca Re-Ad.⁶⁶ Both of those pending motions suggest that the Decision and Order which I am now issuing is of importance to the ability of that case to move forward.⁶⁷ In the interest of judicial economy, it seems to serve the interests of all of the parties for me to fully and finally adjudicate this matter now that I have developed a complete evidentiary record, and now that I have had the benefit of complete briefing and argument from all parties on the damage issues.

19. I do not believe Petitioners have actually received any of the damages which were awarded to them in my 2016 Decision and Order. Petitioners were paid less than minimum wage in violation of the Act as far back as 2010. I have found Respondent liable to pay Petitioners unpaid minimum wages and liquidated damages. The ARB unanimously affirmed that decision. In the name of judicial economy, I believe I should take reasonable and appropriate steps to expedite the actual payment of these awarded damages to each of the Petitioners. I believe re-opening the record and calculating Petitioners' Period 1 and Period 3 damages is now reasonable and appropriate.

After considering the arguments of counsel, and after carefully weighing the considerations described in paragraphs numbered 1 through 19, and over the objection of Respondent,⁶⁸ I hereby **GRANT** Petitioners' Motion to Re-Open the Record, and I hereby **ADMIT** into the record the following Petitioners' Exhibits:

Petitioners' Exhibit	Description
19	Affidavit of Scott Winzig ⁶⁹
20	Spreadsheet calculating Periods 1, 2 and 3 damages for Ralph Magers
21	Spreadsheet calculating Periods 1, 2 and 3 damages for Pamela Steward
22	Spreadsheet calculating Periods 1, 2 and 3 damages for Mark Felton
23	Raw wage and hour data for Ralph Magers for all pay periods ending between January 29, 2010 and April 1, 2016
24	Raw wage and hour data for Pamela Steward for pay periods ending between April 23, 2010 and April 1, 2016
25	Raw wage and hour data for Mark Felton for the pay periods ending between December 16, 2011 to April 1, 2016

⁶⁴ *Seneca Re-Ad Industries, Inc. v. Acosta*, Case No. 3:17-CV-281 (United States District Court, Northern District of Ohio).

⁶⁵ ECF #6, filed February 27, 2017.

⁶⁶ ECF #12, filed May 7, 2018.

⁶⁷ I last checked the docket in this District Court case at 6:56 a.m. on August 1, 2018. As of that time, no decisions on the Motion to Dismiss or the Motion for Stay had been entered by the District Court.

⁶⁸ I do not believe Respondent is objecting to the admission into the record of those portions of Petitioners' Exhibits 23, 24 and 25 which show raw wage and hour data for each Petitioner during Period 2. The Period 2 information in Petitioners' Exhibits 23, 24 and 25 contain the same wage and hour data which is in Petitioners' Exhibits 8, 9, 10, 11, 12 and 13. Petitioners' Exhibits 8 through 13 were admitted into the record at the 2016 hearing.

⁶⁹ Mr. Winzig is the paralegal who prepared Petitioners' Exhibits 20, 21 and 22.

Without objection from Petitioners, I hereby also **ADMIT** into the record the following Respondent's Exhibits:

Respondent' Exhibit	Description ⁷⁰
25	Spreadsheet calculating Periods 1, 2 and 3 damages for Mark Felton
26	Spreadsheet calculating Periods 1, 2 and 3 damages for Ralph Magers
27	Spreadsheet calculating Periods 1, 2 and 3 damages for Pamela Steward

Calculation of Damages

Following the remand of this case to me, I asked the parties to provide me with descriptions of the methodology they believe should be used to calculate Petitioners' damages. I have also asked them to provide me with Excel spreadsheets showing me exactly how their damage computations have been performed. I have carefully reviewed the competing methods proposed by the parties. I conducted a hearing on June 29, 2018 so counsel could sharpen for me the differences in their computational methods.

I award unpaid minimum wages to each of the Petitioners in Periods 1, 2, and 3. I award liquidated damages to each of the Petitioners in Periods 1, 2 and 3. I have generally followed the methodology of damages calculation proposed by Petitioners⁷¹ because I find it provides a means to produce the most accurate estimation of the unpaid minimum wages owed by Respondent to each of the Petitioners. Specifically, I find Petitioners' proposed damages calculations deal appropriately with the question of those occasions where, prior to February 2, 2016, Petitioners may have earned more than minimum wage while doing piecework.

All of the wage and hour data provided to me during this case has been presented by bi-weekly pay periods. I have no data presented by way of weekly pay periods. Respondent has been required to maintain payroll records for each "workday"⁷² and for each "workweek."⁷³ I do not believe it is appropriate to give a "credit" in week 2 of a biweekly pay period for wages in excess of minimum wage that may have been earned in the first week of that pay period. As a result of the manner in which Respondent has maintained its payroll records, it is not possible to know exactly in which week of a biweekly pay period the piecework wage was paid. I have

⁷⁰ I represented to Respondent's counsel that Respondent's submission of these spreadsheets would not be treated by me as an admission by Respondent that any damages are due to any Petitioner for Periods 1 or 3.

⁷¹ The Excel spreadsheets provided to me by Petitioners serve as the base model for attached Appendices A, B and C.

⁷² Defined as "any fixed period of 24 consecutive hours." 29 C.F.R. Section 516.2(a)(7).

⁷³ Defined as "any fixed and regularly recurring period of 7 consecutive workdays." *Id.* See *Douglas v. Xerox Business Services, LLC.*, 875 F.3d 884 (9th Cir. 2017) ("the workweek as the measuring rod for compliance" with FLSA).

generally adopted Petitioner's approach to estimating the amount of unpaid minimum wage when these above-minimum wage events occur. I have generally rejected the approach to this matter proposed by Respondent. Had Respondent maintained payroll records on a weekly basis, I would have been able to perform a better calculation of the unpaid minimum wages owed to Petitioners.

Award of Damages⁷⁴

My award of unpaid minimum wages and liquidated damages is as follows:

- A. I calculate and award unpaid minimum wages to Ralph Magers during Period 1 in the amount of \$9,035.69. Appendix A (attached to this Decision and Order on Remand) details my calculation of Mr. Magers' Period 1 unpaid minimum wage damages.**
- B. I award Ralph Magers liquidated damages in the amount of \$9,035.69 for Period 1.**
- C. I re-calculate and award unpaid minimum wages to Ralph Magers during Period 2 in the amount of \$6,820.73. Appendix A (attached to this Decision and Order on Remand) details my calculation of Mr. Magers' Period 2 unpaid minimum wage damages.
- D. I award Ralph Magers liquidated damages in the amount of \$6,820.73 for Period 2.
- E. I calculate and award unpaid minimum wages to Ralph Magers during Period 3 in the amount of \$70.90. Appendix A (attached to this Decision and Order on Remand) details my calculation of Mr. Magers' Period 3 unpaid minimum wage damages.**
- F. I award Ralph Magers liquidated damages in the amount of \$70.90 for Period 3.**
- G. I calculate and award unpaid minimum wages to Pamela Steward during Period 1 in the amount of \$10,778.75. Appendix B (attached to this Decision and Order on Remand) details my calculation of Ms. Steward's Period 1 unpaid minimum wage damages.**
- H. I award Pamela Steward liquidated damages in the amount of \$10,778.75 for Period 1.**
- I. I re-calculate and award unpaid minimum wages to Pamela Steward during Period 2 in the amount of \$7,365.28. Appendix B (attached to this Decision and Order on Remand) details my calculation of Ms. Steward's Period 2 unpaid minimum wage damages.

⁷⁴ For the future convenience of the ARB or anyone else reviewing my decision, I have put in boldface font the awards of unpaid minimum wage and liquidated damages for Periods 1 and 3 contained in paragraphs A, B, E, F, G, H, K, L, M, N, Q and R immediately below. These paragraphs in boldface represent my awards of damages claimed by Respondent to be outside the scope of the ARB remand.

- J. I award Pamela Steward liquidated damages in the amount of \$7,365.28 for Period 2.
- K. I calculate and award unpaid minimum wages to Pamela Steward during Period 3 in the amount of \$54.41. Appendix B (attached to this Decision and Order on Remand) details my calculation of Ms. Steward’s Period 3 unpaid minimum wage damages.**
- L. I award Pamela liquidated damages in the amount of \$54.41 for Period 3.
- M. I calculate and award unpaid minimum wages to Mark Felton during Period 1 in the amount of \$1,755.31. Appendix C (attached to this Decision and Order on Remand) details my calculation of Mr. Felton’s Period 1 unpaid minimum wage damages.
- N. I award Mark Felton liquidated damages in the amount of \$1,755.31 for Period 1.
- O. I re-calculate and award unpaid minimum wages to Mark Felton during Period 2 in the amount of \$7,596.61. Appendix C (attached to this Decision and Order on Remand) details my calculation of Mr. Felton’s Period 2 unpaid minimum wage damages.
- P. I award Mark Felton liquidated damages in the amount of \$7,596.61 for Period 2.
- Q. I calculate and award unpaid minimum wages to Mark Felton during Period 3 in the amount of \$35.64. Appendix C (attached to this Decision and Order on Remand) details my calculation of Mr. Felton’s Period 3 unpaid minimum wage damages.**
- R. I award Mark Felton liquidated damages in the amount of \$35.64 for Period 3.**

Respondent is **ORDERED** to pay the amounts of the awards listed in paragraphs A through R, above. The following is a summary of my damage awards:

<i>Ralph Magers</i>	<i>Pamela Steward</i>	<i>Mark Felton</i>
9,035.69 Period 1 Unpaid MW ⁷⁵	10,778.75 Period 1 Unpaid MW	1,755.31 Period 1 Unpaid MW
6,820.73 Period 2 Unpaid MW	7,365.28 Period 2 Unpaid MW	7,596.61 Period 2 Unpaid MW
70.90 Period 3 Unpaid MW	54.41 Period 3 Unpaid MW	35.64 Period 3 Unpaid MW
15,927.32 Total Unpaid MW	18,198.44 Total Unpaid MW	9,387.56 Total Unpaid Wages
15,927.32 Liquidated Damages	18,198.44 Liquidated Damages	9,387.56 Liquidated Damages
\$31,854.64 Total Damages	\$36,396.88 Total Damages	\$18,775.12 Total Damages

I hereby **ORDER** that the awards of unpaid minimum wage and liquidated damages contained in the paragraphs NOT in boldface font (paragraphs C, D, I, J, O and P) shall be paid to Petitioners pursuant to a schedule to be established by all counsel within 21 days after the issuance of this Order. The purpose of the payment schedule is to make certain that the payment

⁷⁵ Minimum Wage.

of monies by Respondent to Petitioners does not interfere with the receipt of disability and/or other government benefits now being paid to Petitioners. I ask counsel for Petitioners to propose a schedule to counsel for Respondent for the payment of these awards within the next 10 days. If counsel are unable to agree on a payment schedule, please contact me.

I further **ORDER** that the payment of the awards unpaid minimum wage and liquidated damages contained in boldface font (paragraphs A, B, E, F, G, H, K, L, M, N, Q and R) is hereby **STAYED** for a period of 15 days after the issuance of this Order. This stay will remain in place if, within 15 days after the issuance of this Order, Respondent seeks review of this Order by the ARB. If timely review is sought, the stay will remain in place until the ARB has issued any decision or exceptions concerning this Order. If no timely request for review is sought by Respondent, the stay discussed in this paragraph will dissolve 16 days after the issuance of this decision without any further order by me, and the unpaid wages and damages described in those paragraphs shall then become due. I ask counsel for the parties to meet and confer at the time the wages and damages awarded in the boldfaced paragraphs are to be paid to develop a schedule which will avoid interference with Petitioners' receipt of disability or other government benefits. If counsel are unable to agree on a payment schedule, please contact me.

SO ORDERED.

Steven D. Bell
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within **fifteen (15) days** of the date of issuance of the administrative law judge's decision.⁷⁶ The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would

⁷⁶ 29 C.F.R. § 525.22(f).

be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1980.110(a). Your Petition should identify the legal conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. *See* 29 C.F.R. § 1980.110(a).

When you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor. *See* 29 C.F.R. § 1980.110(a).

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

Any response in opposition to a petition for review must be filed with the Board within **five (5) working days** from the date of filing of the petitioning party's petition for review.⁷⁷ The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1980.109(e) and 1980.110(b). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the

⁷⁷ *Id.*

Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 1980.110(b).