

**U.S. Department of Labor**

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**Issue Date: 02 February 2016**

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,  
Petitioner,

and

PAMELA STEWARD,  
Petitioner,

and

MARK FELTON,  
Petitioner,

v.

SENECA RE-AD INDUSTRIES, INC.  
Respondent.

## DECISION AND ORDER

### I. INTRODUCTION

This case arises under Section 214(c) of the Fair Labor Standards Act (“Act”), 29 U.S.C. §214(c).<sup>1</sup> Ralph (“Joe”) Magers, Pamela Steward and Mark Felton (“Petitioners”) are employees of Seneca Re-Ad Industries (“Respondent”), which is located in Fostoria, Ohio. Each of the Petitioners has been diagnosed with one or more developmental disabilities<sup>2</sup> and each receives services from the Seneca County (Ohio) Board of Developmental Disabilities (“DD”).<sup>3</sup> Employment at Respondent’s Fostoria manufacturing facility is one of the services provided by DD.<sup>4</sup>

DD provides services to approximately 230 persons in Seneca County.<sup>5</sup> Approximately 37 people are receiving DD services in the form of community (competitive) employment. Approximately 120 persons work in DD’s “sheltered workshops” (now generally referred to as “community rehabilitation programs”). Respondent is a not-for-profit corporation which has a contract with DD to provide employment opportunities to DD’s clients.<sup>6</sup>

At all relevant times, Respondent has held a Certificate issued by the United States Department of Labor (a “Section 214(c) Certificate”) which has authorized Respondent to pay less than the minimum wage<sup>7</sup> to Petitioners for nearly all of the work they perform. In this action, Petitioners seek a review of the special minimum wages paid to them.

Over the past 75 years, implementation and enforcement of the Fair Labor Standards Act has defined the most fundamental relationships between American employers and their employees. The 40-hour workweek, overtime pay, and the near elimination of child labor have been woven into the fabric of the modern workplace. Applicability of the Act to specific workplace conditions continues to cause disagreement, and litigation under the Act (and its state counterparts) remains a staple of federal and state court dockets.

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<sup>1</sup> That section provides:

Notwithstanding any other provision of this subsection, any employee receiving a special minimum wage at a rate specified pursuant to this subsection . . . may petition the Secretary to obtain a review of such special minimum wage rate. . . .

<sup>2</sup> Categories of developmental disabilities fall generally into seven “life activity areas”: Mobility, Receptive and Expressive Language, Self-Care, Self-Direction, Capacity for Independent Living, Learning and Economic Self Sufficiency.

<sup>3</sup> <http://www.senecadd.org/>, last visited January 17, 2016.

<sup>4</sup> Services are available from DD where it can be established: (1) an individual has deficiencies in 3 or more life activities, (2) the individual’s disability or disabilities became manifest before the individual reached the age of 22, and (3) the said disability (or disabilities) are permanent. Each of the Petitioners submitted an application to receive services from DD. An assessment of each Petitioner’s application was reviewed by DD, and a determination of eligibility was made.

<sup>5</sup> Hearing Transcript (“Tr.”) at p. 529.

<sup>6</sup> Id at pp. 538-39.

<sup>7</sup> Referred to in the Act as a “special minimum wage”.

Our collective notions of disability, and in particular our notions of how a disability might affect the ability of an individual to participate in employment, have also changed dramatically over the past few decades. Statutes such as the Americans with Disabilities Act have fundamentally altered the ways in which employees with disabilities are able to find and sustain competitive employment.

The instant case does not involve competitive employment. Nor, based upon my review of the evidence at the hearing, does it really involve what were once called “sheltered workshops.” The Petitioners live independently in the community. They have held competitive employment in the past. Each of them brings valuable employment skills to the Respondent’s modern manufacturing facility every day. When working for Respondent, the Petitioners participate in the production of products having commercial value. Like American workers in competitive employment, Petitioners view themselves partially through a lens of their labor. How and where they work, and what they do in the workplace, and how they are compensated, gives the Petitioners a significant portion of their identity.

The workplace relationship between Petitioners and Respondent is complicated, and is fundamentally different from competitive employment. A few of the differences are: (1) Petitioners have voluntarily chosen to participate in a Seneca County program for those with developmental disabilities instead of pursuing competitive employment in the community. By accepting disability services from Respondent, Petitioners have agreed to accept the special minimum wages – far below minimum wage – which are authorized by Section 214 of the Act and by the Section 214(c) Certificate held by Respondent; (2) The manner in which the Petitioners’ compensation is calculated is neither easily comprehended nor transparent. In the hearing of this case, the calculation of the so-called “commensurate wages” paid to Petitioners was explained by an expert; (3) The Petitioner’s “personnel files” contain medical, social and psychological information which would not be available to employers in the realm of competitive employment; (4) Some of the jobs performed at Respondent’s manufacturing facility are designed to maximize employment opportunities for those with developmental disabilities, rather than to maximize the output of goods in a workday. This choice by Respondent maximizes the number of persons to whom disability services might be provided by Seneca County. This choice by Respondent does not maximize the amount of money any employee will see in her paycheck. As Rodney Biggert, Division Manager of DD, explained:

Q. Okay. So let me circle back to that question of why not pay minimum wage. And you said that, I believe, that you couldn't pay minimum wage because you wanted to increase opportunities for workers with disabilities, is that correct?

A. Correct.

Q. Can you explain what the connection is between -- why subminimum wage is necessary for you to create opportunity?

A. In the case of the Fostoria division, if our costs were to increase to that extent –

JUDGE BELL: To what extent?

THE WITNESS: To the extent where we are paying every individual at least minimum wage, it would be hard to retain that contract [with Roppe Industries] without some large change in the way they do business, which I mean -- which by that, I mean automating a large portion of what we do and eliminating at least half of the workforce.<sup>8</sup>

In Respondent's Fostoria workplace, Petitioner's wages are suppressed by: (1) Section 214(c) of the Act, which authorizes special minimum wages to be paid to those with disabilities; and (2) Petitioners' disabilities, and how those disabilities might actually affect their ability to perform in the workplace, but also how those disabilities are perceived by the Petitioners and by others; and (3) Respondent's choice that the number of employment opportunities which may be offered to the disabled in this specific workplace will be given priority over the amount of compensation paid to any individual disabled employee; and (4) the manner in which higher-paying jobs are assigned to Petitioners; and (5) the manner in which the Petitioner's commensurate wages are calculated; and (6) the health of the labor market in Seneca County.

For the reasons explained below, I find that the special minimum wages actually paid to the Petitioners are not justifiable given the nature and extent of the Petitioner's respective disabilities. Respondent has failed to demonstrate that the Petitioners are "impaired by a physical or mental disability . . . for the work to be performed"<sup>9</sup> by each Petitioner at the Respondent's Fostoria, Ohio manufacturing facility. By failing to pay minimum wage to each of the Petitioners, Respondent has violated §206 of the Act.

For the reasons explained below, I also find the special minimum wages actually paid to the Petitioners have not been appropriately calculated. Respondent has failed to meet its burden to justify "the propriety of [the] wage" paid to the Petitioners.<sup>10</sup> By failing to pay minimum wage to each of the Petitioners, Respondent has violated §206 of the Act.

Each of these findings independently requires that I find in favor of each Petitioner, and that I fashion an appropriate remedy for each of them. For the reasons which follow, I will order that each of the Petitioners be paid at least the Ohio minimum wage going forward, and I will award back pay and liquidated damages to each of them. I will also award attorney fees and reasonable litigation costs to Petitioners if such a remedy is available.

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<sup>8</sup> Tr. at p. 545.

<sup>9</sup> 29 C.F.R. §525.3(d).

<sup>10</sup> 29 C.F.R. §525.22(d).

## II. PROCEDURAL HISTORY

On November 17, 2015, Petitioners submitted a “Petition for Review of Wages” to the Wage and Hour Division of the United States Department of Labor. On November 25, 2015, the Wage and Hour Division referred the matter to the Office of Administrative Law Judges. The case was assigned to me on December 16, 2015. On that date, I conducted a telephone conference with counsel, and thereafter issued an Order: (1) setting the date and location of the formal hearing; (2) establishing a discovery schedule, and (3) requiring Respondent to immediately produce to Petitioners the information described in 29 C.F.R. §525.16.<sup>11</sup>

Pursuant to the Act<sup>12</sup> and Department of Labor regulations,<sup>13</sup> I was required to schedule and conduct a hearing on an expedited basis. The formal hearing was held in a public courtroom at the Seneca County Court of Common Pleas in Tiffin, Ohio, on January 4, 5, 6, 7 and 8, 2016. On the morning of January 6, I was able (along with counsel) to visit the manufacturing facility in Fostoria, Ohio where each of the Petitioners is now employed. While there, I was able to observe production activities at Respondent’s facility.

Petitioners’ Exhibits 1 through 18 and Respondent’s Exhibits 1 through 24 and A1 through D1 were admitted without objection during the hearing. On January 18, 2016, the parties filed post-hearing briefs. I have reviewed a transcript of the hearing in the preparation of this Decision and Order.<sup>14</sup>

## III. THE PETITIONERS

Petitioners work at Respondent’s manufacturing facility for a variety of reasons. Some of these reasons are easily understood – such as the difficulty finding transportation in a largely rural county. Some of the reasons involve the types of available jobs for unskilled laborers. Some reasons are connected to the Petitioners’ disabilities. Petitioners’ expert, Dr. Frederic Schroeder, testified about the relationship of these factors:

JUDGE BELL: What, if anything, do you understand to be the nature of the labor market here in Tiffin or Seneca County, generally?

THE WITNESS: Oh, I know that this is a college town; I know that that stimulates certain kinds of

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<sup>11</sup> The regulations require the employer of persons “employed under special minimum wage certificates” to maintain records: (a) verifying the disabilities of the workers; (b) showing the productivity of each worker with a disability; (c) describing the wages paid to non-disabled workers for similar work in the same industry in the geographic area where the special minimum wage is being paid; and (d) showing the production standards and supporting documentation for non-disabled workers for each job being performed by disabled workers who receive a special minimum wage.

<sup>12</sup> 29 U.S.C. §§214(c)(5)(B) and (E).

<sup>13</sup> 29 C.F.R. §525.22(b).

<sup>14</sup> Due to the expedited nature of my deliberations, the transcript was not available to the parties at the time they filed their post-hearing briefs.

industry, business. But also I'm assuming, and I'm not intricately familiar with this community, but I'm assuming, being fairly rural, there's probably some agriculture. I have not done a labor market survey of this area.

JUDGE BELL: Do you know whether there are other simple assembly positions that are available to those in the community who may wish to have those jobs and who may be able to get transportation to those jobs or is there a shortage of those kinds of jobs? If you know.

THE WITNESS: I haven't done a labor market survey. I know there's some light industry in the area. So I don't know. But really, the individuals, based on the conversations that I've had with them, I probably would not be exploring the same type of work within an integrated setting. I'd be looking, I think, for different types of employment options for them.

JUDGE BELL: Such as?

THE WITNESS: Well, again, it's an exploratory process. You start with the individual's interests, but you have to factor in all sorts of -- like transportation. But also there's a huge social dynamic around disability and that social dynamic means, for some individuals, they can go into an integrated setting and function very well without any particular supports where other individuals, just to put it bluntly, they've been told for a lifetime that they're inferior, that they can't work at a competitive level, that they're slow, they're inaccurate, and they may need a good bit of support.

So it's not -- what you're trying to do in rehabilitation is maximize employment, see how far you can take the individual in finding a job that's a good fit for them, makes -- that they enjoy, that they're good at, that they're comfortable with. So all of the skills parts just kind of help inform you and then you look at the community, you look at the available jobs, you meet with employers, you look at the employment setting, the receptivity of the coworkers, there's just so many tangible and intangibles. But I would describe the process as an exploration, and with each individual it will vary a great deal in how much support they may need.<sup>15</sup>

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<sup>15</sup> Tr. at pp. 522-24.

Ralph (“Joe”) Magers applied for DD services on November 3, 2009. According to the materials in his file,<sup>16</sup> Mr. Magers is legally blind. Mr. Magers’ OEDI<sup>17</sup> score sheet finds substantial functional limitations in the following areas: mobility, self-care, self-direction, capacity for independent living and economic self-sufficiency.<sup>18</sup> He attended the Ohio School for the Blind, where it was determined that his “measured mental ability . . . is within the superior range.”<sup>19</sup> The Ohio School for the Blind noted that “Joe is a very hard, conscientious worker.”<sup>20</sup> Mr. Magers has worked for Respondent for approximately 6 years.<sup>21</sup> Although legally blind, he has sufficient sight to be able to get around in familiar areas.<sup>22</sup> He has some difficulty differentiating between items of similar color, and he needs larger print in order to be able to read.<sup>23</sup> He lives by himself.<sup>24</sup> He does not drive. He pays his bills, shops for his groceries and does his laundry.<sup>25</sup> He has held some competitive employment in the past, most notably a 3-year period of employment with Ticketmaster. He also worked in a call center. In these jobs, Mr. Magers earned more than minimum wage.<sup>26</sup>

As a result of his visual impairment, Mr. Magers has transportation issues. He describes his travel methods:

Q. Okay. And do you drive?

A. No.

Q. How do you get around Tiffin?

A. I mostly walk. I will take SCAT transportation from time to time, and maybe if I had a little more money, I'd take a cab now and then.

Q. And what is SCAT transportation?

A. That's more or less our version of -- Seneca County's version of Paratransit. It probably operates under a bit different rules since there are no fixed routes.

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<sup>16</sup> Respondents’ Exhibit R-2.

<sup>17</sup> Each of the Petitioner’s files contains an Ohio Eligibility Determination Instrument (“OEDI”), which is a tool used by the Ohio Department of Mental Retardation and Developmental Disabilities, and DD, to make assessments whether individuals qualify for DD services.

<sup>18</sup> Id.

<sup>19</sup> Id.

<sup>20</sup> Id.

<sup>21</sup> Tr. at p. 23.

<sup>22</sup> Tr. at p. 24

<sup>23</sup> Id.

<sup>24</sup> Tr. at p.23.

<sup>25</sup> Id at p. 27.

<sup>26</sup> Id.

Q. Okay. And does it operate during certain hours?

A. Yes. Weekdays, it operates from quite early in the morning until -- I think they want to be over and done by 6:00. So most generally they want -- they try to make it more like it's 5:00. But if you're doing a special thing, you can -- you'll have services a little past 5:00.<sup>27</sup>

Pamela Steward applied for DD services on May 11, 2009.<sup>28</sup> She has worked at Respondent's Fostoria manufacturing facility for nearly 6 years. She is blind in her right eye, but has fairly good vision in her left eye.<sup>29</sup> She does not drive. She lives alone and is responsible for running her household.<sup>30</sup> She has also been diagnosed with an intellectual disability.<sup>31</sup> She has held some competitive employment in the past, but was out of the labor market immediately after graduating from high school and for many years thereafter while raising a family.<sup>32</sup> Her OEDI form finds that she has substantial functional limitations in the areas of self-care, self-direction, capacity for independent living, learning and economic self-sufficiency.<sup>33</sup> A hand-written document in her file states:

Pam can accomplish most daily living skills. She does not need assistance, however, with money/budgeting, laundry medication + transportation. Social skills: Pam appears friendly. She has been in a long term marriage + has contact with her family on a regular basis. Pam has an adult daughter. Physical: Pam has a diagnosis of depression. No limitations per her physical. Vocational: very limited past employment at a tomato farm. She could not keep up with production demands.<sup>34</sup>

Ms. Steward has chosen to work at the Fostoria manufacturing facility mostly because of availability of transportation, but also because she feels more comfortable there than she would in competitive employment:

The only reason I do choose to work there is because of transportation. I'm able to get along with the people better there. They don't act like they're better than me. I mean, the employees that do work there, we're all in competition and we pretty well get along.<sup>35</sup>

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<sup>27</sup> Tr. at p. 25.

<sup>28</sup> Respondents' Exhibit R-3.

<sup>29</sup> Tr. at p. 81.

<sup>30</sup> Tr. at p. 79.

<sup>31</sup> Id.

<sup>32</sup> Tr. at p. 80.

<sup>33</sup> Id.

<sup>34</sup> Id.

<sup>35</sup> Tr. at p. 93.

Mark Felton has worked for Respondent for approximately 4 years.<sup>36</sup> He has been diagnosed with Asperger's disorder. He has held a small amount of competitive employment in the past.<sup>37</sup> He graduated from high school in 2011.<sup>38</sup> He has held an Ohio driver's license since 2014, although he does not have a car. He lives at home with his parents.<sup>39</sup>

#### IV. THE RESPONDENT

The Seneca County Board of Mental Retardation (predecessor of DD) was established in 1967.<sup>40</sup> At some point thereafter, Respondent and Roppe Industries entered into a partnership and established a workshop in Fostoria, Ohio.<sup>41</sup> Roppe Industries is a Fostoria-based company which manufactures rubber flooring and other products.<sup>42</sup> In 1989, Respondent's Fostoria workshop was moved into a factory purchased by Roppe Industries.<sup>43</sup> The Fostoria facility performs many jobs under a contract with Roppe Industries.<sup>44</sup> A representative of Roppe Industries holds a seat on the Board of Respondent.<sup>45</sup>

Respondent's Fostoria facility is in operation between 8:30 am and 3:15 pm on weekdays. All employees are required to spend approximately one hour of the workday in an unpaid educational or social "activity." There is a 30 minute lunch period, and two 15-minute breaks during the workday. It is thus difficult for an employee at Fostoria to perform more than about 5 hours per day of paid work.

#### V. THE WORK PERFORMED BY PETITIONERS

In order to determine whether the payment of a "special minimum wage" is justified, a number of criteria are considered:

- (1) The nature and extent of the disabilities of the individuals employed as these disabilities relate to the individuals' productivity;
- (2) The prevailing wages of experienced employees not disabled for the job who are employed in the vicinity in industry engaged in work comparable to that performed at the special minimum wage rate;

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<sup>36</sup> Id at p. 120.

<sup>37</sup> Id at pp. 120-121.

<sup>38</sup> Id at p. 122.

<sup>39</sup> Id at p. 121.

<sup>40</sup> <http://www.senecadd.org/#!history/c1anq>. Last visited January 17, 2016.

<sup>41</sup> Id.

<sup>42</sup> <http://www.roppe.com/aboutus/index.html#>. Last visited January 17, 2016.

<sup>43</sup> Id.

<sup>44</sup> Tr. at p. 541.

<sup>45</sup> Id.

- (3) The productivity of the workers with disabilities compared to the norm established for nondisabled workers through the use of a verifiable work measurement method (see §525.12(h)) or the productivity of experienced nondisabled workers employed in the vicinity on comparable work; and
- (4) The wage rates to be paid to the workers with disabilities for work comparable to that performed by experienced nondisabled workers.<sup>46</sup>

At Respondent’s Fostoria facility, a significant amount of the work performed is finishing and packaging product from Roppe Industries. By way of example, at Respondent’s Fostoria manufacturing facility, pieces of rubber flooring manufactured by Roppe Industries are cut to appropriate size, the pieces have a hole drilled in them, and the pieces are sent through a printing process where each piece has identifying information printed onto it. Each of these cutting, drilling and printing jobs is paid on a piece-rate basis, and the Respondents each have experience performing these various jobs.

When performing jobs paid on a piece-rate basis, each of the Petitioners occasionally has been able to earn more than minimum wage. For example, Mark Felton was able to earn more than \$14.00 per hour on September 4, 2015, on a press machine that punches out rubber grommets from a blank (the “Click 5 machine”).<sup>47</sup> On October 16, 2015, Joe Magers was able to earn nearly \$9.00 per hour on a piece-rate job called “Affix Screw and Remove.”<sup>48</sup> Pamela Steward was able to earn \$11.84 per hour on a drill press on October 2, 2015.<sup>49</sup> The Ohio minimum wage during this period was \$8.10.

Mr. Biggert described the opportunities for community employment:

Q. Mr. Biggert, you do have folks that do have community employment; is that correct?

A. Yes.

Q. And some of them are community employment at the same time that they’re working at Seneca Re-ad; is that correct?

A. Yes.

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Q. The folks who are working community

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<sup>46</sup> 29 C.F.R. §525.9(a).  
<sup>47</sup> Petitioners’ Exhibit 19.  
<sup>48</sup> Petitioners’ Exhibit 20.  
<sup>49</sup> Petitioners’ Exhibit 21.

employment, they're getting paid above minimum wage when they're in the community; is that right?

A. Correct.

Q. And they're getting paid below minimum wage in your workshop; is that right?

A. Correct.<sup>50</sup>

The most significant job at Respondent's Fostoria manufacturing facility which is paid on an hourly basis is known as "the line" or "the assembly line" or "the Creform line."<sup>51</sup> Photographs of the Creform line are in the record.<sup>52</sup> The end product of the Creform line is a bundle containing many different colored samples (each approximately 4 inches long by 2.5 inches wide) of Roppe Industries' rubber flooring held together by a small metal chain. A photograph showing this completed bundle of samples is in the record.<sup>53</sup> A consumer wishing to purchase Roppe Industries products can presumably take this bundle to a home or office in order to select the appropriate color to purchase.

Anywhere between 30 and 40 employees sit or stand at stations along the Creform line. In blue and red bins in front of each work station are pieces of the Roppe Industries product which, before being delivered to the line, have been cut to size, had the printed legend applied, and has had a hole drilled in them. A photograph of the bins containing the Roppe Industries product is in the record.<sup>54</sup>

A wooden jig, approximately 24 inches tall and 6 inches wide, has a metal post sticking straight up from its base. A long metal chain is placed over the tip of the post so that the chain hangs parallel to the post. A photograph of several jigs with the chains in place is in the record.<sup>55</sup> The jig is slid on a table containing embedded rollers from person to person down the assembly line from each worker's left to right. The employee at each station will typically remove one sample from each of the two bins in front of the employee (each bin contains a different color product), and will then place the hole in the product over the post, thereby threading the chain through the hole that has been drilled in each piece. The jig is then slid along the table to the next person on the line, who repeats the process with different color samples. At the end of the line, the chain is closed and the ring of samples is inspected and then sent off for shipment.

During the period August 14, 2015 to December 15, 2015, approximately 51% of Mark Felton's working hours at the Fostoria manufacturing facility were on the Creform line.<sup>56</sup> He

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<sup>50</sup> Tr. at pp. 979-980.

<sup>51</sup> Creform is apparently the name of the manufacturer of the long table containing a roller system which is used during this assembly process.

<sup>52</sup> Respondent Exhibits 17C and 17F.

<sup>53</sup> Respondent Exhibit 17F.

<sup>54</sup> Respondent Exhibit 17J.

<sup>55</sup> Respondent Exhibit 17I. Many of the jigs in this photograph have been painted/decorated for enjoyment.

<sup>56</sup> Petitioners' Exhibit 11.

was paid \$4.11 per hour for his Creform line work.<sup>57</sup> During the same period, Joe Magers spent about 62% of his work time on the Creform line.<sup>58</sup> Mr. Magers was initially paid \$3.00, and then \$3.15 per hour, for his work on the Creform line.<sup>59</sup> Pamela Steward spent about 52% of her work time during this period on the Creform line, for which she was paid \$3.22 per hour.<sup>60</sup>

When absences, “activity” time, holidays and other unpaid time is deducted, during the period August 14, 2015 to December 31, 2015, Mark Felton was paid for working a total of 328.25 hours at Respondent’s Fostoria facility (approximately 16.5 paid hours per week).<sup>61</sup> His gross compensation during that period was \$2,573.63 (about \$129 gross per week), and that amount includes an unexplained “Misc-Adj” payment of \$571 paid just before this matter went to hearing.<sup>62</sup>

During the same period, Joe Magers had a total of 257 hours for which he was paid wages (about 13 paid hours per week).<sup>63</sup> His gross compensation during the period was \$1,534.32, or about \$77 gross per week, which also includes an unexplained “Misc-Adj” payment of 435.54.

During the same period, Pamela Steward was paid for working 278.25 hours (about 14 paid hours per week). Her gross compensation during the period was \$2,624.41 (about \$131 gross per week), including a “Misc-Adj” payment of \$685.55. Ms. Steward testified about the unexplained “Misc-Adj” payment:

Q. Okay. And do you know how much your average paycheck is?

A. Here recently, I can't even figure this one out, why it would be that high or anything like that there. But here recently, just before Christmas I received a check of \$763.13.

Q. And you can't figure out why it's that –

A. No, I do not have no idea, no, why it's that high and why it would be that high.

Q. And before that, how much were you getting paid, that paycheck –

A. Well, I was probably getting maybe like \$100, \$200 maybe.

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<sup>57</sup>Id.

<sup>58</sup> Petitioners’ Exhibit 12.

<sup>59</sup> Id.

<sup>60</sup> Petitioners’ Exhibit 13.

<sup>61</sup> Petitioners’ Exhibit 11.

<sup>62</sup> No explanation was offered at the hearing for this payment.

<sup>63</sup> Petitioners’ Exhibit 12.

Q. Every two weeks?

A. When I was placed on the good jobs, when I was on those jobs like the saw and that.

Q. And you're paid every two weeks, is that correct?

A. Yeah. I mean, I made a call to Michelle Guest (ph.) this morning, stating how high my check was and why it was that high and she said, well -- she goes, we think you got a letter in with the check. But I don't recall seeing a letter in with that check --

Q. Okay.

A. -- stating why it would be that high. I mean, I don't have a problem with it, that's fine. I mean, if you want to pay that kind of money, go ahead and pay me that kind of money. I mean, I just can't figure out why it would be so darn high.<sup>64</sup>

## VI. THE CALCULATION OF COMMENSURATE HOURLY WAGES

Department of Labor regulations describe the methods by which the special minimum wages paid to the Petitioners and their co-workers are to be calculated. A method for calculating work paid as piece-work,<sup>65</sup> and a method for calculating hourly wages<sup>66</sup> are prescribed by the Department of Labor.

The Section 14(c) Certificate issued to Respondent by the Department of Labor authorizes Respondent to pay special minimum wages to those working in the facility. For the work performed on the Creform line (paid on an hourly basis),<sup>67</sup> the calculation of the hourly wage to be paid requires Respondent to gather the following information:

1. Respondent conducts an annual survey of employers in Seneca County, Ohio to determine the amount of hourly wages being paid to experienced workers in competitive positions thought to be comparable to those occupied by Petitioners (this is known as the "prevailing rate").<sup>68</sup>

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<sup>64</sup> Tr. at pp. 90-91.

<sup>65</sup> 29 C.F.R. §525.12(h).

<sup>66</sup> 29 C.F.R. §525.12(j).

<sup>67</sup> The Creform line is the only hourly wage job at Fostoria paid at less than minimum wage.

<sup>68</sup> Copies of the annual wage surveys conducted during the relevant period are Respondent Exhibits R-7, R-8 and R-9.

2. From time to time,<sup>69</sup> Respondent determines how many jigs can be processed in 1 hour by a non-disabled worker familiar with the Creform line.<sup>70</sup> This number becomes known as the “production standard” or “standard of production.” The persons participating in this timed test are typically supervisors with familiarity with the operation of the Creform line.<sup>71</sup> The most recent results of these timed tests are Respondent Exhibits C-1 and C-2. Over the past few years, the production standard for the Creform line has been established at these levels:

<b>Dates</b>	<b>Production Standard (Jigs per Hour)</b>
2010 to 2013	816
2013 to 2016	1,114
2016 (current)	1,607

3. Approximately once every six months, Respondent individually determines how many jigs of product can be processed in 1 hour by each employee working on the Creform line.<sup>72</sup> A supervisor will time the employee and count the number of jigs processed during that time.<sup>73</sup> Once the information described above is gathered, a calculation is made: the number of jigs per hour completed by the tested employee (Step 3) is divided by production standard (established by the number of pieces completed in one hour by the tested supervisor at Step 2). That product is then multiplied by the prevailing rate (the hourly wage paid to experienced workers in the county) as determined by Step 1. This calculation yields the “commensurate hourly wage” to be paid to the employee for his or her work on the Creform line.<sup>74</sup>

<sup>69</sup> The testimony at the hearing was that a production standard of 816 jigs per hour had been established in 2010 or 2011. On September 30, 2013, a new production standard of 1,114 jigs per hour was established (Respondent Exhibit C-1). After Petitioners commenced this action, a new production standard of 1,607 jigs per hour was set (Respondent Exhibit C-2). No changes were made to the Creform line or to the manner in which work was done on the Creform line between 2010 and the date of the hearing.

<sup>70</sup> As will be discussed below, this testing does not actually last for one hour – it lasts for some fraction of an hour and the results are then extrapolated out to a one hour measurement.

<sup>71</sup> When performing this work, the supervisors are known as “standard setters.” Testimony at the hearing established that during normal production, supervisors often fill a vacancy of the Creform line if an employee needs to take a bathroom break or needs to otherwise temporarily leave the line. The supervisors thus are experienced workers on the Creform line.

<sup>72</sup> Again, this testing lasts less than one hour.

<sup>73</sup> The timed tests of Petitioners are found in Respondent Exhibits D-1 (Felton tests of June 17, 2013, December 11, 2013, June 7, 2014, December 4, 2014 and April 14, 2015), D-2 (Magers tests of June 11, 2013, December 11, 2013, June 9, 2014, November 21, 2014, April 15, 2015 and June 23, 2015), D-3 (Steward tests of June 17, 2013, December 12, 2013, June 9, 2014, November 19, 2014 and March 19, 2015), D-4 & 5 (Felton current test, performed December 15, 2015 & Steward current test, performed December 15, 2015) and D-6 (Magers current test, performed December 16, 2015).

<sup>74</sup> The testimony at the hearing was that Respondent then made some ad hoc upward adjustments to the calculated commensurate wage. The adjustments are called “discretionary increases” on the Petitioners’ Hourly Job Sampling reports. See Petitioners’ Exhibits 14 (Felton), 15 (Magers) and 16 (Steward).

By way of example: If the prevailing rate for light manufacturing in Seneca County is \$9.00 per hour (step 1), and if the standard setter can complete 1,000 jigs on the Creform line in an hour (step 2), and if a disabled employee on the Creform line can complete 750 jigs per hour (step 3), then the commensurate wage to be paid to the worker is \$6.75 per hour (750 divided by 1,000 = 0.75. \$9.00 multiplied by 0.75 = \$6.75). This commensurate wage remains in effect until the next time the employee's performance is tested, or until the information in steps 1 or 2 changes.

The measurement of the hourly rate of production achieved on the Creform line, either by supervisors when acting as "standard setters," or by the Petitioners during their twice-yearly production assessments, plays a critical role in determining the hourly wage paid to each of the Petitioners for their work on the line.

Exhibits D-1 through D-6 are the "Hourly Job Sampling" forms completed for each Petitioner during the relevant period. While all of these forms indicate the Petitioner was tested on the line for precisely "1.000000 hour" or for "100% of an hour," and while each form reports a precise number of jigs produced during that 1-hour test period, the testimony at the hearing was that these tests actually only lasted a few minutes, and the performance results recorded on the Hourly Job Sampling forms were extrapolated from a very short period of actual examination to a 1-hour time period. By way of example, Exhibit D-1 is a June 17, 2013 Hourly Job Sampling report for Mark Felton. This form reports on its face that Mr. Felton produced 251 jigs on the Creform line in 1.000000 hour. Mr. Felton testified about his testing:

Q. So Mark, when -- did Terry do most of the time studies?

A. Yes.

Q. And did he tell you he was doing the time study when he did it?

A. I think so.

\* \* \*

Q. So you were on the Creform line. And do you recall how long the time study lasted or how it was measured, how he did it?

A. It was probably less than a minute, I'm pretty sure.

Q. Do you know if he was measuring it by time or number of jigs?

A. Pretty much pace the jigs, how fast you run the jigs.<sup>75</sup>

Mr. Magers testified as follows:

Q. Okay. Now, during the time that you've been at the workshop, has your productivity ever been tested or timed?

A. Only on the line.

Q. Okay. And when they test you, do you guys have a name for what that's called?

A. Well, they do call it a time study.

Q. Okay. So do you know about how often they normally do time studies?

A. Usually about every six months.

Q. Okay. And is it your testimony that they've only done time studies for you on the line?

A. Yes, I know of no other situations. And I guess there's even been times when they'd study me on the line unbeknownst to me.

Q. Okay. And how do they normally do like, you know, their time studies? Who does it and what do they tell you?

A. It would be done by Terry Stocker. They set you up with about eight jigs and I don't know, they kind of, you know, prod you in there and they don't really encourage much of any kind of real productivity. And, you know, in that time you're kind of hoping that you don't cause a chain to fall off the jig so you're not worried about taking time putting that back on.

Q. So how long does it take you to do about eight jigs?

A. Probably less than a minute.

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<sup>75</sup> Tr. at p. 124.

Q. So they're not -- are they then timing you for like a certain amount of time or just doing it by however many jigs they set up for you?

A. Just however many jigs they set up.<sup>76</sup>

Ms. Steward testified about her testing on the Creform line:

Q. Okay. Now when they normally test you on the Creform line, how does that -- what happens when they're testing you?

A. Terry or Rodney generally come over and tell me, hey, Pam, I'm going to test you today. Are you fine with that? And I'll tell them, yes, I am fine with that. So he'll test me and I'm generally pretty fast at my work.

Q. How long does the test last, generally?

A. I don't even think it lasts more than a minute. It don't seem like it, anyways.

Q. Does he give you a certain number of jigs to work or how does that --

A. Yeah, probably about eight, maybe.<sup>77</sup>

There is no accurate recording of the actual, observed, production of the Petitioners anywhere in the record until after this proceeding had been commenced and Mr. Knuckles was hired by Respondent as a consultant. These tests have a direct and substantial impact on the calculation of the hourly wage to be paid to the Petitioners.

There are accurate recordings of the actual, observed, production of the standard setters. Exhibit C-1 presents the results of a timed test performed by supervisors on September 30, 2013. The face of this document shows that 3 separate tests were performed that day: the first test lasted 52 seconds, during which 17 jigs were completed by the standard setter. The second test lasted 47 seconds, during which 15 jigs were completed. The third test lasted 59 seconds, during which 20 jigs were completed by a supervisor. Arithmetic calculations are then shown on the exhibit, showing how three tests lasting less than one minute were extrapolated to determine a 1-hour production standard.

Exhibit C-2 is a record of tests performed by standard setters on December 16, 2015. Each of the 2 tests performed on December 16, 2015 lasted about 10 minutes. Again, arithmetic

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<sup>76</sup> Tr. at pp. 30-31.

<sup>77</sup> Tr. at p. 85

calculations were made to extrapolate the results of this 10 minute test to a 1-hour production standard.

Of particular note when comparing Exhibits C-1 and C-2 is the dramatic difference in performance by the standard setters. On September 30, 2013 (Exhibit C-1), supervisor Laurie Fretz produced 20 jigs in 59 seconds during the third test reported on that Exhibit. On December 16, 2015 (Exhibit C-2), Ms. Fretz produced 26 jigs per minute during the second reported test. Ms. Fretz was thus measured to be producing about 360 more jigs per hour in 2015 than she had produced in 2013. Nothing on the Creform line had changed during this time, nor had the method of production changed. These tests have a direct and substantial impact on calculation of the hourly wage paid to the Petitioners.

Ms. Fretz testified:

JUDGE BELL: Can you -- does the difference between 1,114 jigs per hour and 1,607 jigs per hour seem to you like a big difference?

THE WITNESS: Not really, being more familiar on the line -- I worked at a steady pace, like I was always taught to do.

JUDGE BELL: Okay.

THE WITNESS: And the pace that I could work at all day.

JUDGE BELL: Do you have an understanding of what the effect is on the rate of pay for the Petitioners when the standard of production moves from 1,114 jigs per hour to 1,607 jigs per hour?

THE WITNESS: Yes, the standard is raised.

JUDGE BELL: And what happens to their pay?

THE WITNESS: It depends on how they do on the line.

JUDGE BELL: Assuming that their pay [rate] remains constant, what's the effect of the production standard going up?

THE WITNESS: It would decrease.

JUDGE BELL: So as the production standard

goes up, assuming the Petitioners' performance remains level, their hourly pay goes down; correct?

THE WITNESS: Yes.<sup>78</sup>

## VII. THE WITNESSES AT THE HEARING

Each of the Petitioners testified at the hearing. I find the testimony of the Petitioners to be substantially supported by the documentary evidence in the record. They were credible, and I accept nearly all of their testimony.

Both parties called Rodney Biggert in their respective cases-in-chief. I believe Mr. Biggert is dedicated to the mission of Respondent. There were areas of Mr. Biggert's testimony that I believe to be lower probative value – such as his observations of the Petitioners as they work on the Creform line<sup>79</sup> -- and which I do not fully accept.

Laurie Fretz and Terry Stocker were called by Respondent. Both are supervisors employed by Respondent. Their testimony was consistent with the record, and both were entirely credible. The record should reflect my thanks to Ms. Fretz for guiding counsel and the Court on our tour of the Fostoria manufacturing facility. This was most helpful.

Three experts appeared at the hearing. Petitioners called Dr. Frederic K. Schroeder in their case-in-chief. Dr. Schroeder has his Ph.D. in Education Administration and Supervision from the University of New Mexico, and since 2014, has been the Executive Director of the National Rehabilitation Association. He is also a Research Professor at San Diego State University. From 1994 to 2001, Dr. Schroeder served as Commissioner of the Rehabilitation Services Administration of the U.S. Department of Education. Dr. Schroeder's complete Curriculum Vitae is in the record as Petitioner's Exhibit 1. Dr. Schroeder's Expert Report (Petitioner's Exhibit 2) concludes that none of the Petitioners "meet the definition of 'worker with a disability' as required by Section 14(c) of the FLSA to be paid under a special wage certificate."<sup>80</sup>

I am concerned that the Petitioners and Dr. Schroeder seem to have markedly different recollections of the length and quality of Dr. Schroeder's interviews of them. Dr. Schroeder described an elaborate interview and information gathering process undertaken in preparation of his expert report:

Q. And the interview itself, when and where did that happen?

A. It took place in -- here in Tiffin. It was over a Friday and Saturday. I'm thinking it was the first weekend

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<sup>78</sup> Tr. at pp. 1026-27.

<sup>79</sup> This testimony is discussed in detail below at pp. 26-33.

<sup>80</sup> Petitioners' Exhibit 2 at page 6.

of June 2015. So it was about a day-and-a-half-long process.

Q. Would the weekend of the 12th and the 13th of June be the appropriate one?

A. Yes, that sounds correct.

Q. And how much time did you spend with these individuals?

A. I would say the interview with each individual took in the neighborhood of 90 minutes, give or take 10 or 15 minutes, but about 90 minutes. It was a little longer than I would normally do in an initial vocational evaluation, but you don't want to go into so much detail that you end up kind of exhausting the individual with whom you're speaking. So I would estimate 90 minutes each and then there was some time when I had a general conversation with them as a group.<sup>81</sup>

Each of the Petitioners has a markedly different recollection of the amount of time they spent with Dr. Schroeder. Ms. Steward's testimony is representative of that offered by the Petitioners on this subject:

Q. Okay. How many times did you talk to [Dr. Schroeder], do you know?

A. Maybe a couple times.

Q. Did you meet him in person or on the phone?

A. In person, I believe.

Q. Okay, a couple times in person?

A. Yeah.

Q. That was in June?

A. Yes.

Q. Was that the only time you've ever met Dr. Schroeder?

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<sup>81</sup> Tr. at p. 167.

A. I don't recall. Maybe. Yeah.

Q. Have you talked to him since June?

A. I don't recall that, either.

Q. Okay. And how long did you talk to him?

A. Probably not too long.

Q. Okay. Can you give me a time frame, 10 minutes, 20 minutes, an hour?

A. Maybe about 10 minutes.

Q. Maybe 10 minutes, okay. Did he ask you questions?

A. Yes, but I don't recall what those questions were.

Q. Okay. Now, you met alone with him for 10 minutes or you only talked to him for 10 minutes in total?

A. I think we were all there.

Q. Okay. Did you ever meet with him alone?

A. Not that I remember.

Q. Okay. And I think you said you can't recall anything you talked about.

A. No, I'm sorry. No.

Q. You didn't tell him about any of your prior jobs?

A. I don't recall that, either.<sup>82</sup>

On this subject, I credit the Petitioners' collective recollections over that of Dr. Schroeder, and I do find Dr. Schroeder's credibility diminished. As a consequence of my doubts whether Dr. Schroeder really gathered sufficient information to support his opinions about whether the Petitioners are impaired for the work they perform at Fostoria, I discount much of his testimony pursuant to Evidence Rule 702(b).

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<sup>82</sup> Tr. at pp. 104-105.

Dr. Schroeder also offered testimony about the impact of disability of the actual performance of work. He also testified about the perceptions of disability, and how those perceptions color our views about the work performed by the disabled. I find these assessments to be largely unaffected by any question I may have as to the quality of his interviews of Petitioners, and I do not discount Dr. Schroeder's opinions in these areas.

Petitioners also called Dr. Robert Cimera. Dr. Cimera has his Ph.D. in Special Education from the University of Illinois, with an emphasis on school-to-work transition. He is a professor at Kent State University, and has published extensively in the areas of the economics of vocational programs and the employment of persons with disabilities. Dr. Cimera did a thorough analysis of the Petitioners' employment and pay records, and raised a number of serious questions about the accuracy and consistency of the calculations made by Respondent which affected the pay received by Petitioners. Dr. Cimera was candid and credible. His testimony was somewhat affected by the fact that additional documents were produced after he had published his expert report, and these additional documents may have affected some of his conclusions.<sup>83</sup> I find Dr. Cimera to be qualified as an expert on the payment of wages to the Petitioners. However, much of Dr. Cimera's "scientific, technical, or other specialized knowledge" was of little help to me in understanding the evidence or determining a fact in issue.<sup>84</sup>

Respondent called Mark Knuckles as an expert. Mr. Knuckles was formerly employed by the Wage and Hour Division of the U.S. Department of Labor, where he was a specialist in compliance issues involving Section 14(c) of the Fair Labor Standards Act. Since 1986, Mr. Knuckles has operated Mark Knuckles Associates in Hickory, North Carolina. Mark Knuckles Associates provides advice and assistance on compliance with the Fair Labor Standards Act, with a particular emphasis on Section 14(c) Certificates. By virtue of his deep experience in the subject area, I find Mr. Knuckles to be qualified as an expert generally on compliance with Section 14(c).

After Petitioners filed this matter, Mr. Knuckles was retained by Respondent to review Respondent's compliance with Section 14(c). Mr. Knuckles also performed standard setter testing and testing of the Petitioners on the Creform line. While I find Mr. Knuckles to be knowledgeable about Section 14(c) in general, I have difficulty considering him as an expert when he testified about the Creform line production studies performed at Fostoria. I largely discount Mr. Knuckles' opinions about the Creform production tests for the following three reasons: (1) The production studies themselves involve (a) starting a stopwatch, and (b) counting how many jigs pass a given point in a given amount of time, and (c) performing a few simple calculations to determine how many jigs per hour are being produced by the person being tested. I do not believe this aspect of Mr. Knuckles' testimony should be considered as "expert" under Evidence Rule 702(a) as I do not believe it involves "scientific, technical, or other specialized knowledge"; (2) The wide variances in the results of the Creform line production tests causes me

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<sup>83</sup> The untimely production of these documents by Respondent, and how that production affected Dr. Cimera's opinions, was the subject of a Motion for Sanctions filed by the Petitioners. Shortly after the Motion for Sanctions was filed, counsel reached an agreement to resolve the sanctions issue. I was asked to approve the withdrawal of the Motion for Sanctions. I subsequently issued an order allowing the Motion for Sanctions to be withdrawn.

<sup>84</sup> See Evidence Rule 702(a).

to believe that either the testing is not based upon “reliable principles and methods” in violation of Evidence Rule 702(c), or Mr. Knuckles has not “reliably applied the principles and methods to the facts of the case” in violation of Evidence Rule 702(d). I simply cannot reconcile how Ms. Fretz participated in standard setter tests which produced 1114 jigs/hour in a 2013 test which Respondent considered to be reliable,<sup>85</sup> and was then was inexplicably<sup>86</sup> able to produce 1607 jigs/hour in an 2015 test also considered to be reliable<sup>87</sup>; and (3) there is no data accurately describing how many of the performance tests administered to the Petitioners were actually done. Any testimony about these tests cannot possibly be “based upon sufficient facts or data,” and is thus not admissible under Evidence Rule 702(b).

### VIII. RESPONDENT IS SUBJECT TO THE ACT

In its post-hearing brief, Respondent raises – for the first time – the argument that “[p]etitioners failed to allege or prove that Respondent is engaged in interstate commerce.” I note the coyness with which this argument is posited: Respondent (which would be subject to sanctions under Rule 18.35(b) of the Rules of Practice of the Office of Administrative Law Judges for the knowing assertion of an untrue fact) never says that it is *not* subject to the Act. It only claims that Petitioners “failed to allege or prove” that Respondent is engaged in interstate commerce.

As noted earlier, I had the opportunity to visit the Fostoria manufacturing facility where the Petitioners are employed. While there, I saw product coming into the plant, the kind of work being performed with that product, and the volume of finished product being produced. The Respondents spent much of their time producing product related to the sale of rubber flooring and moldings. These are construction materials. Given the testimony of the Petitioners and the witnesses who supervise the work at the Fostoria manufacturing facility, and given my own observations of the type and volume of work occurring in Fostoria,<sup>88</sup> and given my observations about the lack of new construction in either Tiffin (where the hearing was held) or Fostoria (where the Petitioners work), it strains credulity that all the construction materials being shipped day after day from the Fostoria work site are remaining in this state.

If Respondent truly believes that it is not engaged in interstate commerce, and thus not subject to the Act, and if Respondent truly believes that I had no jurisdiction whatsoever to schedule or conduct a week-long hearing costing the parties tens (or hundreds) of thousands of dollars, then I certainly would have expected Respondent to have mentioned such a claim during our initial case management conference or at the weeklong hearing. Had the issue been raised

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<sup>85</sup> Respondents’ Exhibit C-1.

<sup>86</sup> No evidence of any kind was offered which might explain these dramatically different results, each of which has been used to establish the compensation of each Petitioner. Mr. Knuckles opines that the error lies entirely in the 2013 test (“My work measurements [in 2015] produced an hourly standard higher than that determined and . . . currently used by the Respondent to set the hourly rate of the Petitioners and other workers.” Knuckles Report at page 11). In truth, there is no evidence in the record which allows one to conclude whether any of the performance testing at Fostoria has been objectively accurate.

<sup>87</sup> Respondents’ Exhibit C-2.

<sup>88</sup> Looking at the first page of Petitioners’ Exhibit 8, Mark Felton processed nearly 70,000 pieces on the printing machines in Fostoria just in January and February 2013.

during that prehearing conference,<sup>89</sup> I would have requested full briefing of the matter before the hearing ever commenced. Had I decided to proceed with the hearing, Respondent would then have had a full opportunity to adduce all of the evidence needed for me to make an informed decision on this matter. Instead, I have only the shadow of an argument raised for the first time after the record has been closed. I hold Respondent entirely at fault for depriving me of the opportunity to review a fully developed factual record that would either support or refute the claim (never actually made<sup>90</sup>) that Respondent is not subject to the Act.

There is no “pleading” requirement in this case.<sup>91</sup> The regulations governing petitions seeking review of special minimum wages states explicitly: “[n]o particular form of petition is required, except that a petition must be signed by the individual, or the parent or guardian of the individual, and should contain the name and address of the employee and the name and address of the employee’s employer.”<sup>92</sup> It is thus abundantly clear that Petitioners were not required to “plead” any jurisdictional prerequisites when submitting their petition.

The evidence at the hearing was that Respondent repeatedly applied for Section 14(c) Certificates so that Respondent might pay commensurate wages to the Petitioners and their co-workers, and to thereby comply with the Act. Each of the applications signed by Mr. Biggett contains a “Representation and Written Assurance” that Respondent’s “operations are and will continue to be in compliance with the FLSA.”<sup>93</sup>

The Section 14(c) Certificates issued by the Department of Labor require Respondent to pay special wages only in compliance with the Act.<sup>94</sup>

Soon after the petition in this matter was filed, Respondent retained the consulting services of Mr. Knuckles – who was valued for his expertise in maintaining compliance with the Act. Mr. Knuckles’ expert report states that he was retained “to provide a professional opinion regarding the Respondent’s compliance with the Fair Labor Standards Act.”<sup>95</sup> At the very outset of his analysis, Knuckles assumes:

The workers of the Respondent are engaged in interstate  
commerce and subject to the Fair Labor Standards Act,

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<sup>89</sup> As noted earlier, this matter has proceeded on an expedited basis. I conducted by telephone a case management conference with counsel at the time the case was assigned to me. There is no transcript of this telephone conference, but during that conference, counsel were certainly encouraged to raise any and all issues that might bear on the orderly resolution of this matter. If Respondent believed there was no jurisdictional basis for this matter to proceed, then I believe Respondent was under an unequivocal professional duty to raise that issue during our initial telephone conference and as frequently thereafter as necessary to make sure a well-informed ruling on the matter could be made.

<sup>90</sup> I am conclude that the reason why Respondent never affirmatively states that Respondent is not subject to the Act is because there is no factual or legal basis for making such a claim.

<sup>91</sup> Respondent was under no obligation to file an answer responding to the petition or to otherwise set forth affirmative defenses. However, Rule 18.70(a) of the Rules of Practice before the Office of Administrative Law Judges specifically allows subject matter jurisdiction arguments to be made by way of motion.

<sup>92</sup> 29 C.F.R. §525.22(a).

<sup>93</sup> Petitioner’s Exhibit 4.

<sup>94</sup> Respondent Exhibit R-11.

<sup>95</sup> Knuckles’ Expert Report at p.1.

FLSA, each week, in that they manufacture, process, package, or otherwise handle goods moving in interstate commerce or their work is closely related and directly essential to the movement of those goods and products in interstate commerce.<sup>96</sup>

In the very first sentence of his expert report, Mr. Knuckles states that he was retained by counsel for Respondent, and it thus seems exceedingly improbable that Mr. Knuckles' observations as to the applicability of the Act were not flyspecked by counsel prior to being included in an expert report. I am constrained to conclude that the discussion of the Act in Mr. Knuckles' expert report fairly states the real position of Respondent.

Respondent rested its case without presenting any facts by which I could determine whether Respondent is subject to the Act. In light of the pleading requirements in 29 C.F.R. § 525.22(a), and the "informality" requirements of §522.22(c), I conclude that Respondent had the burden to go forward with any such evidence.

Based upon the state of the record, I conclude that the Act applies to Respondent.

#### IX. PETITIONERS ARE NOT IMPAIRED FOR THE WORK BEING PERFORMED

The regulations implementing Section 214(c) of the Act provide:

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.<sup>97</sup>

I construe the regulation in the following manner: in order to be eligible to be paid a special minimum wage, an individual must have a (1) diagnosed impairment (2) having signs or symptoms (3) which, when supported by a fair assessment of objective evidence, can be said to consistently suppress the wage earning capacity of the individual (4) when the individual is performing a specific job involving a specific set of tasks. By way of example: an individual with a diagnosed impairment causing diminished strength in the hands might be disabled for work involving the assembly of parts by hand, but would likely not be disabled for operating a machine which is operated only by the use of foot controls. I construe the regulation to require proof of a clear nexus between the diagnosed impairment and the impact of that impairment on the actual work tasks being performed in order to justify the payment of a special minimum wage.

Respondent offers two types of evidence in support of its belief that Petitioners are "impaired for the work being performed" on the Creform line: (1) observations of the Petitioners' work habits when they are working on the Creform line, and (2) the number of jigs

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<sup>96</sup> Id. at p. 5.

<sup>97</sup> 29 C.F.R. §525.5(a).

produced by Petitioners per hour when they have been tested as part of setting their individual hourly pay rate.

As to the first category of evidence – observations of the Petitioners at work – several witnesses offered their views. One such observation of Petitioners was made by the Respondent’s witness, Mark Knuckles:

During my observation of the work at Respondent and that performed by the Petitioners, I observed several factors with the Petitioners that would account for below standard productivity, such as going off task when work was waiting for them, watching other workers and staff instead of working, getting up and leaving the work station during production, not following the prescribed work method, and attempting to work too fast and making mistakes.<sup>98</sup>

Later, Mr. Knuckles summarizes his opinion:

[T]he below standard productivity of the Petitioners can only be attributed to the off-task behaviors, lack of focus, not following the prescribed work method, trying to go too fast, and leaving the work station, all common behaviors I observed . . . .<sup>99</sup>

Mr. Biggert also testified as to his observations of the Petitioners’ work habits. As to Ms. Steward:

[S]he has a hard time keeping pace. Sometimes it is learning a new task and the training of a new task that we get in can be difficult. In some instances there’s a bit of retraining that needs to be done. Her ability to follow directions can sometimes be hindered. We’ve had instances where she’s tried to place two or three pieces into a punch or a drill at a time to try to speed up her own pace. But the machine will only take, you know, won’t take three at a time as far as impairing the quality of the product, you know, and needs the reminder from staff to stay on task and do those tasks the way they’re prescribed.

Q. And based on your experience you think that that’s a product of her disability?

A. Yes, I do.<sup>100</sup>

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<sup>98</sup> Knuckles Expert Report at pp. 13-14.

<sup>99</sup> Id. at p. 14.

<sup>100</sup> Tr. at p. 938.

Mr. Biggert testified about Mr. Felton's work:

Q. Okay. Have you observed Mr. Felton at work?

A. Yes, I have.

Q. How often have you been able to observe him at work?

A. Quite often. I mean, I'm over there at least one to two days a week.

Q. Have you noticed anything that you would consider a manifestation of his limitations or diagnosis at work?

A. Yes.

Q. Like what?

A. Sometimes a hard time following directions; sometimes obsessive components, which are commonly associated with Asperger's, where he may obsess on a peer or have an issue with another peer. You see his focus drift from his work to maybe an issue that he had last night or an issue he's having with someone specifically.

Q. And how does that impact his productivity?

A. Sometimes he'll walk away from his work station and completely -- not just from his station but literally walk to the other side of the facility to check up and see on what somebody is doing or try to see what somebody is up to, and it may be focused on a conversation he had last night or any number of other factors.

Q. Have you seen whether the staff attempt to redirect him in those instances?

A. The staff do try to redirect him, yes.

Q. Is this something that happens regularly or infrequently or what?

A. It happens with some regularity.

Q. Okay. Do you -- based on what you know from being an SSA and Adult Services Director, do you make any connection between those behaviors and his diagnosis and limitations?

A. Yes.<sup>101</sup>

Mr. Biggert testified about Mr. Magers' work habits:

I am able and other staff are able to observe some troubles that Joe will have from time to time in being able to discern between types of material, if he gets them reversed, or whether material is in a space or ready to be placed or has already been placed. He has a hard time discerning that a mistake has occurred and needs staff direction to help him with that.

Q. Do you rank that to his disability of optic atrophy or vision impairment?

A. Yes.

JUDGE BELL: Can you describe for me what you mean when you say "difficult for him to tell whether a mistake has occurred"?

THE WITNESS: In the case of maybe placing two of the samples onto a chain in the wrong order, he won't necessarily be able to tell that the pieces are in the wrong order, or in some cases I've witnessed him get confused as to whether he might have a couple of jigs in front of him and become confused as to whether he's put pieces on them yet or not and can't discern whether the job or that job task has been completed without assistance from staff.

JUDGE BELL: Okay, thank you.

BY MR. KESSLER:

Q. Have you noticed -- and I'm sorry, I was only half listening during your answer. Did you talk about whether he has difficulty telling colors apart?

A. He can also have some difficulty with colors.

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<sup>101</sup> Tr. at pp. 932-933.

Q. And if, for example, the chain gets knocked off the post, does that create any problems for him?

A. It can create some problems for him. He can have some issues with getting it back on the post, or in the case that the post or the jig comes to him with the chain already off the post, he can sometimes have an issue noticing that it's off the post to begin with or have an issue with correcting it, and would need staff to assist him with that.<sup>102</sup>

Laurie Fretz is the Division Manager at the Fostoria facility. She has contact with Petitioners on each day when they are working, and is in a good position to observe their work behavior. She testified about Mr. Magers' work:

Q. And for Mr. Magers, have you observed a vision impairment impact his productivity?

A. Yes.

Q. And have you seen him have problems on Creform line?

A. Yes, at times. He has to feel for the pieces, the holes, and then put them on the jig. There was a time when we just did the last time study where he put some pieces on -- I'm not sure why he took them off, but when he took them off, the chain came off, and he dropped a piece and he asked staff for assistance to put it back on, and he asked from time to time.

Q. And do you know what he asks for from time to time?

A. If he needs help with something. Sometimes he might ask if, you know, if he may have taken a color out and put it in the wrong tub or something like that.<sup>103</sup>

Ms. Fretz testified about Mr. Felton:

Q. Okay. And for Mr. Felton, have you observed whether his disabilities impaired his productivity?

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<sup>102</sup> Tr. at pp. 936-937.

<sup>103</sup> Tr. at pp. 984-985.

A. Yes.

Q. And how would you describe his ability to stay on task?

A. Sometimes it's not good. Sometimes he has a hard time paying attention. He'll walk away from his work station. One of the last ones that I observed was during a -- the time study that we did. He picked the jig up and walked to the other end of the line where Pam was and said something to her, and then walked over and put it on the table, which was holding everybody else up on the line because he had walked away.

Q. Does he often walk away from his work station?

A. It depends on the day. If he's upset, he walks away a lot, goes to the restroom a lot.

Q. You answered part -- what does he do when he walks away?

A. Usually he can -- it's usually -- well, it depends. He might go, you know, talk to somebody or -- which they're allowed to talk, but usually he'll like go to like the other end to talk to somebody or -- I don't know. I don't know, it's hard to explain. When you're on the line, if he's on one end and he leaves to go make conversation with somebody, then that holds up the line. It stops the line. The people beside him can't push jigs down and then nobody can have work that's on the other side.

Q. And the times that you have seen him walk away, I mean, does he walk away to go to the bathroom?

A. Yes.

Q. There's nothing wrong with that?

A. No.

Q. Does he walk away to get a drink of water?

A. Yes. Usually if they go to the restroom or want a drink of water or whatever, they'll tell staff, then staff will cover for them.

Q. And that's normal?

A. Yes.

Q. And that's not an issue, that's not what you're addressing when he walks away from the line?

A. No.

Q. Okay. How would you describe his ability to follow directions?

A. Sometimes he has a hard time accepting direction from staff.

Q. And what happens -- what does he do?

A. Sometimes he can become upset, belligerent, disrespectful to staff, and he's hard to calm down at times.

Q. Have you observed that on any particular job or any -- that's two questions. Have you observed that on any particular job that he's working on?

A. It could be on any job actually. It depends. He could be upset, not because of the job, maybe because of a peer or, you know, a staff asked him to return to his work station if he's over making conversation with somebody.

Q. I think you said he gets upset.

A. Yes.

Q. And when was the last time he got upset?

A. It was the week before Christmas break. Another peer came to me and said that he didn't want to work on the line where Mark was because Mark had left a message on his cell phone and was saying some inappropriate things and using vulgar language about his girlfriend, and he let me listen to it and it was Mark's voice, and I said okay, so I let him work in Building 1. And in the meantime, Anita had -- which is Mark's boss -- had come to me and said that Mark had went off task and he was in the restroom crying and after their break, which was 10:30,

Mark and Pam came to me and asked me to help resolve the situation, which I already knew what was going on, so I asked the peer if he wanted to talk to them, and he said yes. And Mark apologized and they made up, and he lost about two hours of work over the whole situation.<sup>104</sup>

Ms. Fretz testified about Ms. Steward:

Q. Okay. For Ms. Steward, have you observed whether her disabilities impair her productivity?

A. Yes.

Q. Have you seen her have problems with manual pad print?

A. Yes, there's been some times -- she's been trained on the job. Sometimes she'll get going too fast and pass bad pieces, not having in the insta-guide. Then when it stamps, it's crooked. Just not checking the pieces and then they have to be scrapped.

Q. Have you had issues with her on any other jobs?

A. She's not near the standard on some of the other jobs, although the saw, she does very well on. She's one of the best ones that we have to cut the tread.

Q. And do you try to put her on the saw for that reason?

A. Yes, but we don't have -- we don't -- I have to follow what the customers want and I don't always have the tread to saw.

Q. You may not have the job available every day?

A. Correct.

Q. And that wouldn't be limited to Ms. Steward?

A. No.

Q. Nobody else would do the job that day?

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<sup>104</sup> Tr. at pp. 985-987.

A. No. If there's no material, there's nothing to do.

Q. Has Ms. Steward ever refused to do a job?

A. Yes.

Q. And what was that?

A. Actually the sawing job, I asked her to do it -- it was either the week before our break or the week before that -- and it actually kind of shocked me that she said no, but I usually don't ask why, I just ask somebody else to do it.

Q. Is that typical for her?

A. Not usually, no. That's why I was kind of shocked that she refused to do it.<sup>105</sup>

On balance, I find the foregoing observations to be of little to no help when I am deciding whether Petitioners are disabled for the work performed at Fostoria. By the time Mr. Knuckles first observed Petitioners at work, this proceeding was underway, and Mr. Knuckles had been enlisted as a witness for Respondent. That business relationship could not help but color Mr. Knuckles' observations of the Petitioners. Additionally, Mr. Knuckles had only a very limited amount of time in which to observe Petitioners at work. From the testimony he offered at the hearing, he was performing all sorts of tests and measurements during his brief time in Fostoria, and his opportunity to gather anything more than anecdotal information about the job performance of the Petitioners is questionable. Nor does Mr. Knuckles have medical, psychological or other specialized training which would permit him to draw meaningful conclusions about how Mr. Magers' visual impairment actually affects his workplace performance, or how Ms. Steward's intellectual disability actually limits her when she is performing work, or how Mr. Felton's disability allows him to possess a driver's license, but does not permit him to place pieces of flooring on a metal spindle as quickly as someone else. It is not clear whether Mr. Knuckles was able to see Petitioners working anywhere other than the Creform line. Mr. Knuckles' testimony about Petitioners' work performance is not persuasive.

I discount almost entirely Mr. Biggert's observations of Petitioners at work. Mr. Biggert testified that he was only in the Fostoria manufacturing facility one or two times per week.<sup>106</sup> Presumably he was not there to watch the Petitioners perform their jobs. Approximately 80 people work in Fostoria. I do not believe Mr. Biggert was ever in a position before the initiation of this proceeding to make the kind of detailed observations of Petitioners over a long enough period of time that his testimony describes the consistently applicable work characteristics of the Petitioners. As is the case with Mr. Knuckles, I greatly discount any observations of Petitioners after the initiation of this case. I find that the objectivity of observation demanded when

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<sup>105</sup> Tr. at pp. 988-989.

<sup>106</sup> Tr. at p. 1186

applying §214(c) is compromised once high-stakes litigation is underway. Mr. Biggert's testimony about the Petitioners is not persuasive.

Ms. Fretz' observations are generally anecdotal, and do not present a longitudinal explanation of how the Petitioners' acknowledged disabilities have affected their work performance over the lengthy time she has watched the Petitioners at work. She admits that her snapshot observations of Ms. Steward, in part, are "not typical" of Ms. Steward's actual job performance.<sup>107</sup> Her observations of Mr. Felton's holiday meltdown<sup>108</sup> do not inform me of how Mr. Felton's disabilities *consistently* affect his job performance.

For his part, Mr. Felton flatly denies the observations that he "lacks focus" while working on the line:

Q. Okay. Do you remember with any of the time studies that was done whether you got up and walked away from the line while you were being tested?

A. No.

Q. You don't recall or you didn't?

A. I didn't.

Q. Do you recall if you ever lost focus on what you were doing?

A. No.<sup>109</sup>

It is not necessary for me to resolve the specific dispute between Mr. Felton's view of his workplace behavior and that of his supervisors. After observing all of the witnesses as they testified, and after evaluating their credibility, I am not persuaded that the observations of the Petitioners made by Mr. Knuckles, Mr. Biggert and Ms. Fretz establishes that they are disabled for the work performed by them at Fostoria. Instead, it seemed as though a scripted narrative was being played out.

I had the opportunity to visit the Fostoria facility while production on the Creform line was ongoing. I also had the chance to view many of the jobs in Fostoria which are paid on a piece-rate basis. The jobs being performed by Petitioners are simple and straightforward. The jobs have been designed so they might be performed by persons with all different types of disabilities. Watching actual production take place on the Creform line did not help me to understand in the least why Petitioners' respective impairments might slow them. The same can be said for the piece-rate work I was able to observe. There is nothing about the work itself

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<sup>107</sup> Tr. at p. 989.

<sup>108</sup> Tr. at p. 987.

<sup>109</sup> Tr. at p. 126.

which would inherently favor production rates by a non-disabled person over the production rate of an individual with one or more disabilities.

Lastly, I had the unique opportunity to observe each of the Petitioners while each was on the witness stand and to thereby make a credibility determination. Equally important, I was able to carefully observe Petitioners as they sat in the courtroom during more than 30 hours of testimony. I was able to evaluate the Petitioners as they entered and left the courtroom, as they interacted among themselves and with the other people in the courtroom. In the compact downtown of Tiffin, Ohio, I even occasionally saw the Petitioners as they arrived at the courthouse or went to lunch, or as they waited for rides at the end of the day. Mr. Magers' visual impairment did not interfere with his ability to be a full participant in the courtroom activities. Mr. Felton did not have any emotional outburst such as that described by Ms. Fretz. Ms. Steward seemed to have no difficulty seeing what was happening in the courtroom or understanding the sometimes complex testimony.

Respondent next argues that I should consider the Petitioner's individual hourly production rates when determining whether they are "impaired for the work being performed" on the Creform line.<sup>110</sup>

At the outset of this analysis, I note my significant reservations about the quality of the production data maintained by Respondent. These reservations are discussed in detail in Section X of this Decision and Order.

I have carefully reviewed the hourly production on the Creform line of each Petitioner.<sup>111</sup> It is undeniably true that the Petitioners have never produced on the Creform line at the production standard which was in effect at the time the testing took place.<sup>112</sup> However, I have no medical, psychological or other evidence in the record which explains (in a cause-and-effect manner) why this is so. On the record now before me, it would be pure speculation to conclude that the Petitioners don't meet the production standards solely or primarily because of their respective disabilities. It is just as likely they don't meet the production standards because they are bored with a highly repetitive task they have performed on a hundred prior occasions, or because they lack a substantial economic impetus to perform at a higher level,<sup>113</sup> or because they self-identify as individuals whose performance should be lower than their non-disabled supervisors. I find there to be no proof in the record that Petitioners are intrinsically incapable of performing at the level of their non-disabled supervisors because of Petitioner's visual impairments, intellectual disability or Asperger's disorder. No such causal relationship has been persuasively demonstrated.

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<sup>110</sup> It seems to me that this is a circular argument. "The Petitioners are disabled for the work they perform because the rate at which they work shows they are disabled." Despite my thoughts on the logic of the argument, I will nonetheless review and weigh the evidence.

<sup>111</sup> Petitioners' Exhibits 14 (Felton), 15 (Magers) and 16 (Steward)

<sup>112</sup> Although there have been instances where Petitioners have met or exceeded past performance standards.

<sup>113</sup> Using the example of production set forth on page 15, above, if an individual increased her production rate on the Creform line from 750 jigs per hour to 850 jigs per hour, her pay for that work would increase from \$6.75 per hour to \$7.65 per hour. I am not a labor economist, but it is my view that a wage increase of less than one dollar per hour in exchange for a substantial increase in work output would not ordinarily incentivize a worker to consistently perform at her best.

When Mark Knuckles measured the Creform line production rates of Mark Felton and Joe Magers in December, 2015, he obtained the following results: Mr. Felton was able to produce at the rate of 1029 jigs per hour in test number 2.<sup>114</sup> Mr. Magers was able to produce at the rate of 978 jigs per hour in one test, and 816 jigs per hour in a second test.<sup>115</sup> These measured production rates are above (and in some cases well above) the rate of production established by the non-disabled standard setter in 2010, and above the standard units per hour measure that was in place for all Creform line workers between 2010 and 2013.<sup>116</sup> Nothing about the Creform line process changed between 2010 and 2015. The fact that the Petitioners were able to meet – and exceed – what had been the production standard set by a non-disabled supervisor contradicts the inference that Petitioners work performance numbers establishes that they are disabled for the work performed.

The same is true for piece-rate work. When performing jobs paid on a piece-rate basis, each of the Petitioners occasionally has been able to earn more than minimum wage. I believe this fact directly refutes the conclusion that the Petitioners are disabled for the work they perform in Fostoria. As noted above, Mark Felton was able to earn more than \$14.00 per hour on the Click 5 machine.<sup>117</sup> Joe Magers was able to earn nearly \$9.00 per hour on a piece-rate job called “Affix Screw and Remove.”<sup>118</sup> Pamela Steward was able to earn \$11.84 per hour on a drill press.<sup>119</sup> Based upon my observation of these jobs during the visit to the Fostoria facility, these other jobs seem comparable to the Creform line in terms of skill level. The fact that Petitioners have been able to exceed minimum wage in piece-work jobs of similar complexity to the Creform line effectively rebuts the notion that Petitioners are disabled for the work performed by them.

After making my own observations of the production processes in the Fostoria manufacturing facility, and after making my own observations about the practical impact of the Petitioners’ disabilities on their public lives, 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 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.

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<sup>114</sup> Respondent Exhibit D-4 & -5.

<sup>115</sup> Respondent Exhibit D-6.

<sup>116</sup> The production standard during that time was 816 jigs per hour. *See* Respondent Exhibit D-1.

<sup>117</sup> Petitioners’ Exhibit 19.

<sup>118</sup> Petitioners’ Exhibit 20.

<sup>119</sup> Petitioners’ Exhibit 21.

X. RESPONDENT HAS FAILED TO PROVE THE PROPRIETY OF THE WAGES PAID

The Regulations implementing Section 214(c) of the Act provide:

In determining whether any special minimum wage rate is justified, the ALJ shall consider, to the extent evidence is available, the productivity of the employee or employees identified in the petition and the conditions under which such productivity was measured, and the productivity of other employees performing work of essentially the same type and quality for other employers in the same vicinity and the conditions under which such productivity was measured. In these proceedings, the burden of proof on all matters related to the propriety of a wage at issue shall rest with the employer.<sup>120</sup>

I conclude Respondent has failed to demonstrate by a preponderance of the evidence that the wages actually paid to Petitioners during the relevant period have been properly calculated. The following are examples of the significant shortcomings of the Respondent's calculations:

(1) Over the past 4 years, the hourly production standard set by non-disabled supervisors acting as "standard setters" on the Creform line has increased from 816 to 1607 jigs per hour. No explanation for this 100% increase in performance was offered at the hearing. No changes to the method of production on the Creform line occurred during the time when this increase occurred. Mr. Knuckles testified that the rate of production of non-disabled workers should remain relatively constant over time:

Q. So all three, Pam, Mark and Joe, who have very different disabilities, all consistently performed higher at piece rate jobs than on the hourly jobs, is that right?

A. That's correct.

Q. Different disabilities?

A. Correct. It's not unusual; very common.

Q. Yeah. Among people with disabilities there's huge variations in ability, how they're going to do all of these different types of jobs, right? Is there, in your experience, variation in the abilities of folks without disabilities to perform these types of jobs?

A. To perform these types of jobs?

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<sup>120</sup> 29 C.F.R. §525.22(d).

Q. Yes.

A. I wouldn't think that they -- without disabilities there would be -- I haven't done any studies of people doing these types of jobs. These are different jobs than you would find out in industry, typically. But would we find differences? There would be some differences, yes, but generally not as much.<sup>121</sup>

The variability in the performance results of the same non-disabled person (Laurie Fretz) performing the same test over a 2-year span is quite large. The establishment of this production standard was of critical importance to the calculation of the Petitioner's weekly wages. The unexplained 100% variance in the production rate of the standard setters convinces me that the numbers have not been properly derived from any defined professional methodology, and are, in fact, arbitrary.

(2) Respondent presented no evidence about how the 816 jigs per hour standard was set in 2011. The hourly rate of the Petitioners was dependent upon that standard until October, 2013. Without evidence which allows me to evaluate the methodology used to set the 816 jigs per hour standard, and in light of my serious concerns about how all other standards have been set and documented, I do not presume the 2011 test was properly done and/or properly documented. I cannot find Respondent has met its burden to prove the propriety of the wages paid prior to the 2013 performance standard test.

(3) The establishment of the performance standard in 2013 was based upon a flawed methodology. As described in detail above, the 2013 performance standard<sup>122</sup> was extrapolated from the results of testing which lasted less than 1 minute. The individual who performed this test acknowledged at the hearing that these intervals were too short to generate a valid study:

Q. Okay. So when you made the decision -- and I assume it was your decision, tell me if it wasn't -- to run the first test here for 52 seconds, did you believe that was an appropriately long period in order to be able to make a fair assessment of the standard setter's performance?

THE WITNESS: In looking back, no.

JUDGE BELL: Okay. So I assume you would say the same thing for 47 seconds?

THE WITNESS: Correct.

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<sup>121</sup> Tr. at p. 1107-8.

<sup>122</sup> Respondent's Exhibit C-1.

JUDGE BELL: And the same thing for 59 seconds?

THE WITNESS: Yes.<sup>123</sup>

This flawed production standard played a pivotal role in calculating the amount of money paid to the Petitioners from October 2013 to January 2016. In light of the admission that these test results are flawed, the “propriety” of the wages paid to the Petitioners based upon that testing has not been established.

(4) As noted above, when comparing Exhibits C-1 and C-2, there is a dramatic difference in performance by the standard setters. On September 30, 2013 (Exhibit C-1), supervisor Laurie Fretz produced 20 jigs in 59 seconds during the third test reported on that Exhibit. On December 16, 2015 (Exhibit C-2), Ms. Fretz produced an average of 26 jigs per minute during the second reported test. Ms. Fretz was thus measured to be producing about 360 more jigs per hour in 2015 than she had produced in 2013. Nothing on the Creform line had changed during this time, nor had the method of production changed. These tests have a direct and substantial impact on calculation of the hourly wage to be paid to the Petitioners. The unexplained variance in the production rate of Ms. Fretz when acting as a standard setter convinces me that the production numbers have not been properly derived from any defined professional methodology, and are, in fact, largely arbitrary.

(5) Respondent has a tolerance for wide variance in performance test results that I do not share, and which I do not believe generates information that should be admissible as evidence. Mr. Knuckles was asked about his tolerance for variability:

JUDGE BELL: I'm sorry, did you run two different samples?

THE WITNESS: Yes.

JUDGE BELL: So the first sample he produced 717 units per hour and the second 1,028 units per hour?

THE WITNESS: Yes.

JUDGE BELL: And are those thought by you to be consistent?

THE WITNESS: Consistent, yeah. Yes, they're good. Yes, these are good samples.

JUDGE BELL: But they are 20-some percent –

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<sup>123</sup>Tr. at pp. 1407-08.

THE WITNESS: Yes. Well, while I was observing Mark, there's other factors in there. Mark would get up and move around, lose focus on the work. So that could explain the difference here.<sup>124</sup>

Respondent seeks to admit the results of these performance tests through Mr. Knuckles to support Mr. Knuckles' opinion that the Petitioners are disabled for the work performed in the Fostoria manufacturing facility. Under the standard set forth in *Daubert v. Merrell Dow Pharmaceuticals*, I am constrained to take notice of the error rate when evaluating the admissibility of expert opinion:

Additionally, in the case of a particular scientific technique, the court ordinarily should consider the known or potential rate of error, and the existence and maintenance of standards controlling the technique's operation.<sup>125</sup>

Here, I believe the variances between the performance tests prevents them from being offered by Mr. Knuckles as evidence the Petitioners are disabled for the work performed by them.

(6) The documentation of the Petitioner's performance tests on the Creform line contains inaccuracies. The majority of these forms incorrectly state the Petitioners were timed for a full 1 hour, when it is now clear that was not the case. Respondent cannot sustain its burden to prove the propriety of the wages paid without clear, accurate, contemporaneous records of what was done during these crucial performance tests.<sup>126</sup>

(7) The fact that the Petitioners have occasionally been able to perform at minimum-wage levels when performing piece-rate work leads me to believe that the job testing on the Creform line systematically suppresses the volume of production of which each Petitioner is capable. No explanation has been offered as to why Petitioners allegedly perform so much better on some piece-rate work than they do on the Creform line. In the absence of an explanation, and for all the reasons stated above, Respondent has failed to demonstrate the "propriety" of the wages paid to Petitioners.

For the reasons stated above, Respondent has failed to sustain its burden to prove the propriety of the wages paid to the Petitioners. Where, as here, the Respondent has failed to prove the propriety of the wages paid, the consequent failure of Respondent to pay minimum wage to the Petitioners constitutes a violation of §206 of the Act.<sup>127</sup>

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<sup>124</sup> Tr. at p. 633.

<sup>125</sup> *Daubert*, 509 U.S. 579, 595 (1993).

<sup>126</sup> The failure to maintain such records is a violation of the Section 14(c) Certificate itself. *See, e.g.* Respondent Exhibit R-11 at paragraph 4(b).

<sup>127</sup> Section 206 provides: "Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates . . . ."

## XI. DAMAGES

Under 29 U.S.C. §216(b), employers who fail to pay minimum wage to their employees are liable to the affected employees for the amount of their unpaid minimum wages plus “an additional equal amount as liquidated damages.”<sup>128</sup> I have been supplied with approximately 3 years of detailed wage information for each Petitioner, and I have been asked to award each Petitioner the difference between minimum wage and what the Petitioner was actually paid by Respondent for that period.<sup>129</sup> Petitioners have not asked me to award them liquidated damages, interest or attorney fees.

### A. The Statute of Limitations in §255 of the Act does not Apply

Petitioners and Respondent are in agreement that §255 of the Act establishes a two-year statute of limitations for back pay claims absent willful violations of the Act, and they agree that statute of limitations is applicable to this case.<sup>130</sup>

I disagree with the parties, and I find that the statute of limitations contained in 29 U.S.C. §255 is not applicable to this proceeding. The statute states:

Any action commenced on or after May 14, 1947, to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938 . . . may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless 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;

I find the matter before me is not an “action commenced . . . to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages” under the Act. I find instead that this is a petition directed to the Secretary of Labor seeking to “obtain a review of such special minimum wage rate”<sup>131</sup> being paid to the Petitioners. “Petitions” brought pursuant to §214(c)(5)(A) are clearly distinguishable from an “action commenced . . . to enforce any cause of action for unpaid minimum wages” in at least the following respects: (1) the §214(c)(5)(A) proceedings are conducted by Administrative Law Judges, not by the Article III judges who preside over the “actions” to which §255 applies; (2) the parties to the “actions” referenced in §255 seek to obtain conclusive judgments, while the object of “petitions” under §214(c)(5)(A) is to obtain the “final agency action” referenced in §214(c)(5)(E) and (F). I conclude that Section 255 refers and is applicable to lawsuits brought in an Article III court, and

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<sup>128</sup> 29 U.S.C. §216(b).

<sup>129</sup> Petitioners’ Final Argument at pp. 15-16.

<sup>130</sup> Id. at p. 15; Resp. Post Hearing Brief at p. 39.

<sup>131</sup> 29 U.S.C. §214(c)(5)(A).

I further conclude that the statute of limitations contained in §214(c)(5)(E) does not apply to this administrative proceeding before the Secretary of Labor and his delegees.

I further find that application of the statute of limitations in §255 of the Act to the facts of this case would create an irreconcilable conflict with the regulations governing my calculation of damages:

If the ALJ finds that the special minimum wage being paid or which has been paid is not justified, the order shall specify the lawful rate *and the period of employment to which the rate is applicable*. In the absence of evidence sufficient to support the conclusion that the proper wage should be less than the minimum wage, the ALJ shall order that the minimum wage be paid.<sup>132</sup>

The plain reading of 29 C.F.R. §525.22(e) instructs me to determine the “period of employment” over which unpaid minimum wages are to be paid to the Petitioners. There is no reference in 29 C.F.R. §525.22(e) to the statute of limitations contained in §255 or the Act, or to any other temporal limitation on the calculation and award of back pay. I am thus constrained to calculate the “period of employment” without regard to the §255 statute of limitations.

I further decline to import the statute of limitations contained in §255 of the Act because of significant problems which would arise if one attempted to apply the “willfulness” standard to matters brought under §214(c)(5)(A). The problems which would inevitably arise when attempting to apply the statute of limitations of §255 of the Act to petition actions commenced under §214 of the Act lead me to conclude that the authors of the Act did not intend the §255 statute of limitations to apply to §214 petition matters.

In *McLaughlin v. Richland Shoe Co.*,<sup>133</sup> the word “willful” was given the following meaning:

In 1965, the Secretary proposed a number of amendments to expand the coverage of the FLSA, including a proposal to replace the 2-year statute of limitations with a 3-year statute. The proposal was not adopted, but in 1966, for reasons that are not explained in the legislative history, Congress enacted the 3-year exception for willful violations.

The fact that Congress did not simply extend the limitations period to three years, but instead adopted a two-tiered statute of limitations, makes it obvious that Congress intended to draw a significant distinction between ordinary violations and willful violations.

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<sup>132</sup> 29 C.F.R. §525.22(e)(emphasis added).

<sup>133</sup> 468 U.S. 128 (1988).

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In common usage the word "willful" is considered synonymous with such words as "voluntary," "deliberate," and "intentional." *See* Roget's International Thesaurus § 622.7, p. 479; § 653.9, p. 501 (4th ed.1977). The word "willful" is widely used in the law, and, although it has not by any means been given a perfectly consistent interpretation, it is generally understood to refer to conduct that is not merely negligent. The standard of willfulness that was adopted in *Thurston* -- that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute -- is surely a fair reading of the plain language of the Act.<sup>134</sup>

There is no question here that Respondent willfully did not pay minimum wage to the Petitioners. Instead, Respondent sought and obtained from the Department of Labor a series of Section 14(c) Certificates prior to paying Petitioners less than minimum wage for their labor. I find the notion of "willfulness" set forth §255 of the Act (and as defined in *McLaughlin v. Richland Shoe*) overlooks the explicit authorization in the Act for an employer to willfully pay employees less than minimum wage under certain circumstances. Importation of a willfulness standard to §214(c)(5)(A) proceedings is highly problematic, and it does not seem to me that Congress intended to apply the willfulness standard of §255 to petitions brought under §214(c)(5)(A).

A willfulness standard is inconsistent with the special relationship between Petitioners and Respondent. Petitioners are not involved in competitive employment. While they are "employees" in the sense that they exchange their labor for compensation, they are simultaneously "clients" of the Seneca County Board of Developmental Disabilities when at work. While the immediate objective of the Petitioners may be to maximize their wages, the objectives of Respondent are not limited to the labor-for-compensation exchange. The overarching responsibility of Respondent is to provide rehabilitation services to each Petitioner. In the discharge of its overarching responsibility to provide services, Respondent willfully makes many workplace choices which dramatically suppress the ability of the Petitioners to earn wages. An example of such a choice -- and of the tension between being an "employee" and a "client" -- was discussed during Dr. Schroeder's testimony:

JUDGE BELL: Each of the Petitioners testified yesterday that some portion of their workday, and I'm just going to say approximately an hour of each workday, is spent in nonproductive work, a social activity of some kind, an educational activity of some kind. Did you discuss that or are you aware of the fact that that's part of their daily schedule?

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<sup>134</sup>Id. at pp. 132-133.

THE WITNESS: Yes. And that's -- yes, certainly.

JUDGE BELL: And is that a hallmark of sheltered work?

THE WITNESS: It's not uncommon. It's -- in other words, it's not something that's necessarily designed in, that a shop must make allowance or would be expected to make allowance for social or recreational activities, but it's very common. And I mentioned earlier the idea of no sense of urgency. I think that's part of that whole mosaic in sheltered facilities.

JUDGE BELL: I don't want to put words in your mouth. Can you extrapolate what you just said for me, please?

THE WITNESS: Oh, all right. I'll do my best. In other words, in an ordinary work environment you don't have social activities as part of the workday. And where I'm going with this is one of the concerns about facilities is the mindset that the individuals who work there are not employees but clients, that they're recipients of services. And that's -- that creates a very different set of expectations and a very different work environment. If you listen to self-advocates who have worked in segregated facilities, they talk about being treated like children, having their decisions managed.

And I'm not -- I don't -- I'm not making any assertion about this particular facility and I'm not trying to disparage it, but I'm saying that the work environment is very often one of low expectations and not intentionally, not deliberately, but when you hear about extended break times, social activities, going on walks, these are not things that you would ordinarily have in the competitive work environment and it -- so it sets a different climate, a different tone to the workday.<sup>135</sup>

Respondent makes rehabilitation decisions which may have an adverse impact on the wages earned by Petitioners and their co-workers. These decisions by Respondent are clearly willful (as defined by the Court in *McLaughlin*). Application of the statute of limitations from

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<sup>135</sup> Tr. at pp. 272-273.

§255 of the Act to such decisions by the employer does not seem to be what Congress intended in drafting the Act.

Finally, I reject application of the willfulness standard of §255 because I find it would impermissibly shift an important aspect of proving the “propriety of the wage” from the Respondent to the Petitioners in violation of 29 C.F.R. §525.22(d). In any case where a disabled employee brings her concerns about the propriety of wages paid to the Secretary, the regulations make it clear that “the burden of proof on all matters relating to the propriety of a wage at issue shall rest with the employer.”<sup>136</sup>

If the employee is asserting (as Petitioners do here) that wages going back more than 2 years were not properly paid, then requiring such employees to prove willfulness in order to evade the §255 statute of limitations would shift to the employee a burden of proof related to “the propriety of a wage at issue” in order to recover wages not properly paid beyond the second year. Requiring the employee to assume this burden of proof would not only violate the plain language of the regulation, but would add an additional burden to a disabled employee seeking only to vindicate his right to be paid a minimum wage. Many of those being paid special minimum wages under a Section 14(c) Certificate would be expected to have difficulty understanding how the wages paid to them for their labor have been calculated,<sup>137</sup> and I conclude that it would be inconsistent with 29 C.F.R. §522(d) to require a petitioner to have the burden to prove willfulness simply in order to obtain a full recovery of the wages to which they are entitled. I believe the burden always remains on the employer to show the propriety of the wages paid in all years.

For all of the reasons above, I conclude that the statute of limitations in §255 of the Act does not apply to this case. Therefore, I will provide Petitioners with an award of underpaid wages for the period December 28, 2012 to December 25, 2015 without requiring them to demonstrate willfulness.

#### B. The Award of Back Pay to Petitioners is Appropriate

The controlling regulation states:

If the ALJ finds that the special minimum wage being paid or which has been paid is not justified, the order shall specify the lawful rate and the period of employment to which the rate is applicable. In the absence of evidence sufficient to support the conclusion that the proper wage should be less than the minimum wage, the ALJ shall order that the minimum wage be paid.<sup>138</sup>

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<sup>136</sup> 29 C.F.R. §522(d).

<sup>137</sup> For example, Ms. Steward’s file notes that she needs assistance with “money/budgeting” matters. Respondent Exhibit R-3.

<sup>138</sup> 29 C.F.R. §525.22(e).

The plain language of the regulation requires me to make three findings in order to calculate the damages to be awarded to each of the Petitioners: (1) determine the amount of the hourly wage to be paid; and (2) determine the period of time over which the hourly wage determined in step (1) is to be paid, and (3) determine the applicable minimum wage for all periods in question.

Consistent with the plain language of the regulation, I find each Petitioner should have been paid the then-applicable minimum wage for each hour of work performed at Respondent's Fostoria manufacturing facility during the period December 28, 2012 to December 25, 2015. I have chosen to award damages during this period because: (1) that is the only period for which I have detailed wage information for each of the Petitioners, and (2) I find Respondent failed to appropriately calculate the commensurate wage paid to each Petitioner during that entire period.

I have determined that the minimum wage is to be paid during this period because I do not have sufficient credible evidence by which I can accurately calculate the proper wage to be paid. In order to make such a calculation, I would, at a minimum, need credible evidence establishing the rates of production for the Petitioners and the non-disabled standard setters. For the reasons discussed in detail above, I do not believe I can rely on the information in the record to establish an appropriate commensurate wage for each of the Petitioners. The regulation instructs that under such circumstances I am to determine that the minimum wage applies.

I find that the Ohio minimum wage for the period December 28 to December 31, 2012 was \$7.70 per hour. The Ohio minimum wage throughout 2013 was \$7.85 per hour. The Ohio minimum wage throughout 2014 was \$7.95 per hour. The Ohio minimum wage throughout 2015 was \$8.10 per hour.

I find that the Petitioners are entitled to the minimum wage for every hour of covered employment. The minimum wage rate will therefore be applied to the three years of wage data supplied by the Petitioners to calculate their entitlement to remedial back pay.

The following table outlines the Petitioners' hourly damages by year.<sup>139</sup>

PETITIONER	YEAR	TOTAL HOURS WORKED	COMMENSURATE WAGE PAID	MINIMUM WAGE	TOTAL BACK PAY OWED <sup>140</sup>
RALPH "JOE" MAGERS	2012	4.5	\$2.02	\$7.70	\$25.56
	2013	290	\$2.52	\$7.85	\$1,545.72
	2014	406.04	\$4.77 \$2.77 \$2.79	\$7.95	\$2,110.45
	2015	564	\$2.94 \$3.00 \$3.15	\$8.10	\$2,881.61
<b>TOTAL</b>					<b>\$6,537.78</b>
PAMELA STEWARD	2012	2.5	\$2.00	\$7.70	\$14.25
	2013	478	\$2.00 \$2.05	\$7.85	\$2,773.76
	2014	303.5	\$3.20 \$3.22	\$7.95	\$1,438.22
	2015	268.75	\$3.22	\$8.10	\$1,311.50
<b>TOTAL</b>					<b>\$5,537.73</b>
MARK FELTON	2013	173.75	\$2.49 \$2.55	\$7.85	\$921.01
	2014	397.25	\$3.89 \$3.93	\$7.95	\$1,603.32
	2015	421.5	\$3.93 \$4.11	\$8.10	\$1,682.84
<b>TOTAL</b>					<b>\$4,207.17</b>

I find the Respondent owes Petitioner Magers \$6,537.78 in hourly back wages. Additionally, Exhibit A to Petitioners' Post-Hearing Brief establishes that Petitioner Magers was paid less than minimum wages for 633.75 hours of piece work in 2013, resulting in an underpayment of \$1,445.29; 210.25 hours of piece work in 2014, resulting in an underpayment of \$655.94; and 54.25 hours of piece work in 2015, resulting in an underpayment of \$150.14. I find these piece work numbers to have been correctly calculated, and I adopt them as part of my Decision. Accordingly, in sum, Petitioner Magers is entitled to a total of \$8,789.15 in back pay.

<sup>139</sup> Because each Petitioners was paid a varying hourly rate for piece work tasks, the resulting calculation of back pay does not lend itself to explanation by table.

<sup>140</sup> This figure has been calculated by: (1) multiplying the number of hours worked in a year times the commensurate wage actually paid to the Petitioner; (2) multiplying the number of hours worked in a year times the minimum wage paid in that year, and then (3) subtracting the number derived in calculation (1) from the number calculated at step (2).

I find Respondent owes Petitioner Steward \$5,537.73 in hourly back wages. Additionally, Exhibit B to Petitioners' Post-Hearing Brief establishes that Petitioner Steward was paid less than minimum wage for 11.5 hours of piece work in 2012, resulting in an underpayment of \$30.10; 567.25 hours of piece work in 2013, resulting in an underpayment of \$1,661.39; 457 hours of piece work in 2014, resulting in an underpayment of \$1,445.56; and 251.75 hours of piece work in 2015, resulting in an underpayment of \$412.46. I find these piece work numbers to have been correctly calculated, and I adopt them as part of my Decision. Accordingly, in sum, Petitioner Steward is entitled to a total of \$9,087.24 in back pay.

I find Respondent owes Petitioner Felton \$4,207.17 in hourly back wages. Additionally, Exhibit C to Petitioners' Post-Hearing Brief establishes that Petitioner Felton was paid less than minimum wage for 9.5 hours of piece work in 2012, resulting in an underpayment of \$16.98; 810.5 hours of piece work in 2013, resulting in an underpayment of \$3,022.04; 279 hours of piece work in 2014, resulting in an underpayment of \$1,302.11; and 156.75 hours of piece work in 2015, resulting in an underpayment of \$613.01. I find these piece work numbers to have been correctly calculated, and I adopt them as part of my Decision. Accordingly, in sum, Petitioner Felton is entitled to a total of \$9,161.31 in back pay.

### C. An Award of Liquidated Damages to Petitioners is Appropriate

Employers who violate the minimum wage provisions of the Act are liable for not only the unpaid back wages, but also “an additional equal amount as liquidated damages.”<sup>141</sup> These damages are considered compensatory, not punitive.<sup>142</sup> Double damages are the norm, single damages are the exception.<sup>143</sup>

Petitioners do not request an award of liquidated damages.<sup>144</sup> Respondent argues that the Petitioners “would not be entitled to liquidated damages or attorney fees” because “this proceeding is brought pursuant to 29 U.S.C. §214(c), and 29 C.F.R. Part 525, not sections [29 U.S.C. 20]6 or [20]7.”<sup>145</sup> I disagree with Respondent. I find that liquidated damages under §216 are available for violations of §214 of the Act.<sup>146</sup>

An award of liquidated damages is not automatic.<sup>147</sup> An Employer may avoid liability for liquidated damages by establishing it acted subjectively and objectively in good faith in its violation of the Act.<sup>148</sup> In such cases, the Employer's burden is to establish that it had “an honest

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<sup>141</sup> 29 U.S.C. §216(b).

<sup>142</sup> *Local 246 Util. Workers Union v. Southern Cal. Edison Co.* 83 F.3d 292, 297 (9<sup>th</sup> Cir. 1996)(citing *Brooklyn Sav. Bank v. O'Neil*, 324 U.S.. 697 (1945)).

<sup>143</sup> *Local 246, supra*, at 297 (citing *Walton v. Consumers Club, Inc.*, 786 F.2d 303, 310 (7<sup>th</sup> Cir. 1986)).

<sup>144</sup> See Petitioners' Post-Hg. Bf. at 16.

<sup>145</sup> Respondent's Post-Hg. Bf. at 41.

<sup>146</sup> See *Douglas v. Hurwitz Co.*, 145 F. Supp. 29 (E. D. Pa. 1956); see also *Marshall v. Lovett*, 1977 WL 1834 (M.D. Tenn.)(November 2, 1977).

<sup>147</sup> See 29 U.S.C. §260.

<sup>148</sup> *Id.*

intention to ascertain and follow the dictates of the Act” and that it had “reasonable grounds for believing that [its] conduct complied with the Act.”<sup>149</sup>

In analyzing Respondent’s conduct, I note that while the commensurate wages paid to Petitioners were authorized by a series of §214(c) Certificates, that fact alone is not dispositive. Each Certificate states clearly: “The enclosed certificate does not constitute a statement of compliance by the Department of Labor nor does it convey a good faith defense to the employer should violations of the Fair Labor Standards Act . . . occur.”<sup>150</sup> To the contrary, I find Respondent’s repeated requests to the Department of Labor for permission to pay Petitioners far less than minimum wage imposes on Respondent a particularly high duty (approaching a fiduciary duty) to make certain every aspect of the Petitioners’ wages have been accurately and fairly calculated.

I reach my conclusion about the existence of this high duty from the following undisputed facts: (1) The regulations<sup>151</sup> require the employer possessing a Section 14(c) Certificate to make a series of “written assurances” regarding how the employer will evaluate the compensation paid to employees; (2) Petitioners have disabilities, including intellectual disability. The ability of Petitioners to understand the calculation of the “commensurate wages” being paid to them is very limited, and Petitioners doubtless rely on Respondent to perform the wage calculations accurately; (3) There is an extremely high potential for disabled workers to be exploited in sheltered workshops. This potential becomes more concrete where, as here, Petitioners are engaged in the manufacture of goods being sold by a large corporation such as Roppe Industries.<sup>152</sup> Roppe could hire its own employees to replace the labor of Petitioners. If it chose to do so, it would pay those non-disabled workers at least minimum wage. Petitioners have been paid one-half or one-third of minimum wage for their work on the Creform line. A representative of Roppe occupies a seat on the Board of Directors of Respondent. Roppe Industries is the landlord of Respondent. I find the potential for Petitioners’ exploitation to be high, and thus a high duty of care should be imposed on Respondent to properly calculate their commensurate wages.

One form of potential workplace exploitation comes from the assignment of work in the Fostoria manufacturing facility. Mr. Biggert testified:

Q. Okay. Do you have a sense or knowledge about how wages break down for workers there on the line versus the –

A. It varies depending on the job, it varies depending on the worker. There are some jobs that some

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<sup>149</sup> *Local 246, supra*, at 298 (citing *Marshall v. Brunner*, 668 F.2d 748 (3<sup>rd</sup> Cir. 1982)). “Good faith is an honest intention to ascertain what the [FLSA] requires and to act in accordance with it.” *EEOC v. First Citizens Bank*, 758 F.2d 397, 403 (9<sup>th</sup> Cir. 1985).

<sup>150</sup> Exhibit R-11.

<sup>151</sup> 29 C.F.R. §525.9(b).

<sup>152</sup> Many sheltered workshops produce goods having little to no commercial value.

workers really hit out of the park and there are other jobs where workers tend to struggle a little bit more.

Q. So if you had a job where somebody's really hitting it out of the park, as you say, say they're producing at a rate of \$14 an hour or \$18 an hour as compared to the measure of productivity of the standard setter, would you want to place that person on that job more often?

A. Yes.

Q. Is there any reason you wouldn't place that person on the job more often?

A. No. I mean, job availability sometimes is a bit of an issue. I mean, we don't always need every job running at the same time. Obviously, the assembly task at the end is the largest task we have.

Q. Um-hum.

A. But the only reason I can think that we wouldn't put somebody who was performing well on a specific job would be job availability and perhaps multiple people doing well on a job and wanting to make sure that we're spreading that opportunity around as much as possible.

Q. So some folks might be doing very well on jobs and those same folks might be doing very poorly on other jobs, is that correct?

A. That is possible, yes.

Q. Is there any consistency in some jobs, just everybody seems to be getting particularly low wages or everybody seems to be getting higher wages?

A. Not that I know of.

Q. Are you familiar with the productivity and wages that Mr. Magers, Ms. Steward, and Mr. Felton have received?

A. Yes, to some degree.

Q. Okay. And they're -- would you agree that all three of them at times, for instance, on the auto pad print machine are earning well above minimum wage, is that correct?

A. Yes.

Q. Is that unusual or is that consistent with other folks that also operate that machine?

A. I don't know the answer to that question. While I do know the productivity of the three Petitioners, part of that has been in prep for what we've been doing right now. I'm sure we have many people who do well on that machine and I'm sure we have others who probably do not.

Q. Do you have anybody who's been sort of reviewing the productivity of -- I mean, it sounds like you've got a lot of managers. Let me back up. Is there anybody who is trying to select appropriate people for appropriate tasks?

A. I think the staff do that on a day-to-day basis. You know, if Laurie [Fretz] knows somebody's good at a particular task and that's a task we need to get a lot of done that day, that person will go on that task.<sup>153</sup>

I do not see any corroboration in the Petitioner's pay records that they are frequently assigned jobs where they "knock it out of the park" in terms of making minimum wage or more. Although an employer may possess a Section 14(c) Certificate, I nonetheless conclude that, to the extent such work is available, the employer is required to allocate work in such a manner that as many employees may earn minimum wage as frequently as possible. It does not appear to me that such an allocation of higher-paying work has been made to the Petitioners here, and I find the failure of Respondent to make work assignments so as to maximize wages subjects Respondent to liquidated damages.

Respondent argues in its Post-Hearing Brief that its administration of "timely wage surveys and hourly job samplings" evinces an effort to comply with the mandates of the Act.<sup>154</sup> However, as noted above, the artificiality of those evaluations undermines their probative value as evidence of attempted compliance. Similarly, I reject Respondent's argument that its provision of "a discretionary increase on top of the commensurate wage . . . provide[s] extra compensation to workers with disabilities . . . to which they are not otherwise entitled" as evidence of good-faith dealing with Petitioners. The record supports that the Petitioners were not impaired for the work performed, a fact which would have been discovered by the Respondent had it engaged in

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<sup>153</sup> Tr. at pp. 548-550.

<sup>154</sup> Resp. Post-Hg. Bf. at 40.

an honest and meaningful evaluation of their production. Therefore, its provision of a “discretionary increase,” which still amounts to less than the minimum wage, does not establish an honest attempt to ascertain and follow the dictates of the Act. Notably, although not categorized as such by the Petitioners, the Respondent’s discretionary payments could be equivocally interpreted as an attempt to disincentivize administrative review of the special minimum wage.<sup>155</sup>

Respondent was required by the regulations to review the special minimum wages being paid to Petitioners “at a minimum of once every six months.”<sup>156</sup> Where, as here, there is such extraordinary variance in the production rates of the standard setters, I conclude Respondent should not have continued to rely on the same standard setter production data year after year. I believe Respondent violated 29 C.F.R. §525.9(b)(1) in that Respondent did not conduct an appropriate review of *all* of the data that goes into the formula by which Petitioners’ wages are established. On the facts of this case – where the standard setter production data is so inconsistent – Respondent’s failure to review that data at least at 6-month intervals subjects Respondent to liquidated damages.

I have set forth earlier in this decision the various ways in which Petitioners wages were not appropriately calculated. I have set forth numerous examples of the documentation of how Petitioners’ wages were calculated is inaccurate or missing. These acts and omissions violate the heightened duty of care I have found applicable, and the repeated nature of these acts and omissions subjects Respondent to liquidated damages.

Petitioners’ wage data reveals other unexplained variances in the wages paid by the Respondent. For example, Petitioner Felton was employed as a “Production Helper” for a total of 6 hours during the pay period ending March 7, 2014.<sup>157</sup> It was agreed by Respondent and Petitioners that Production Helpers earn minimum wage as a matter of course. However, Mr. Felton earned minimum wage for only 4 of the 6 hours he worked as a Production Helper during the period. Without explanation, the Respondent paid Mr. Felton 0.03 per hour for a fifth hour of the same work as and 0.25 per hour for a sixth hour of the same work.<sup>158</sup> Similarly, Mr. Magers was paid \$15.48 per hour for 1.75 hours of work on the Creform line during the September 6, 2013, pay period, and \$2.52 per hour for 23.75 hours of work on the Creform line during the September 20, 2013, pay period.<sup>159</sup> These unexplained events lead me to conclude that good faith has not been demonstrated by Respondent.

I also conclude Respondent has attempted to interfere with the fair adjudication of this matter by making large, unexplained, payments to each of the Petitioners on the very eve of this

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<sup>155</sup> To be clear, I interpret the amount and timing of the “MISC ADJ” payments of between \$433 and \$685, made shortly before the formal hearing in this case, and the fact that their purpose has yet to be explained to the Petitioners or the court, as evidence that the Respondent made them in a last-ditch attempt to mitigate its compensatory damage liability. Such evidence does not establish that the Respondent’s violation of the Act was made in good faith.

<sup>156</sup> 29 C.F.R. §525.9(b)(1).

<sup>157</sup> Petitioners’ Post-Hg. Bf. at Ex. C, p. 5.

<sup>158</sup> See Petitioners’ Post-Hg. Bf. at Ex. C, p. 5.

<sup>159</sup> See Petitioners’ Post-Hg. Bf. at Ex. A, p 2.

matter going to hearing. The “MISC ADJ” payments made by Respondent to Petitioners in late December 2015 of between \$435 and \$685 represent a substantial portion of the income made by Petitioners during the 2015 calendar year. Questions about these payments were raised in the very first hours of a 5-day hearing, yet Respondent never offered any explanation for these payments. If one does not carefully study the line-items on Petitioners’ wage documents, these “MISC ADJ” payments paint a much more benign picture of how Petitioners have been compensated. In the absence of any explanation, I conclude these payments were made immediately before the hearing to paint a misleadingly rosy picture of Petitioners’ 2015 wages.

Respondent has failed to establish that it had reasonable grounds for believing that its conduct complied with the Act. I find that Respondent is liable for liquidated damages in an amount equal to the amount of unpaid wages due to the Petitioners. Accordingly, Respondent owes each petitioner an additional amount equal to the total back pay outlined above.

#### D. An Award of Interest is Not Appropriate

Federal Circuit Courts of Appeal are in disagreement about whether prevailing plaintiffs in actions under the Act are entitled to pre-judgment and post-judgment interest. The Second, Third, Ninth, and Eleventh Circuit Courts of Appeal have held that while not mandatory, if pre-judgment interest is not awarded, a court must explain why the usual equities in favor of such interest are not applicable.<sup>160</sup>

The majority of Federal Circuits, however, have held that if a petitioner is awarded liquidated damages under §216(b), then pre-judgment interest is unavailable. In *Herman v. Harmelech*,<sup>161</sup> the court held that because liquidated damages were awarded, it was unnecessary to address the Secretary's request for pre-judgment interest. Citing to *Uphoff v. Elegant Bath, Ltd.*<sup>162</sup> the court held that recovery of liquidated damages and prejudgment interest would amount to double recovery.<sup>163</sup>

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<sup>160</sup>See *Brock v. Richardson*, 812 F.2d 121, 125-127 (3<sup>rd</sup> Cir. 1987)(“[W]e will apply the same presumption in favor of pre-judgment interest on a back pay award under the FLSA as we have just held applicable to post-judgment interest.”); see also *Starceski v. Westinghouse Elec. Corp.*, 54 F.3d 1089 (3<sup>rd</sup> Cir. 1995); *Lindsey v. American Cast Iron Pipe Co.*, 810 F.2d 1094 (11<sup>th</sup> Cir. 1987); *Criswell v. Western Airlines, Inc.*, 709 F.2d 544 (9<sup>th</sup> Cir. 1983)(liquidated damages and pre-judgment interest serve different functions in making ADEA plaintiffs whole); *Donovan v. Sovereign Security Ltd.*, 726 F.2d 55, 58 (2<sup>nd</sup> Cir. 1984)(“it is ordinarily an abuse of discretion not to include pre-judgment interest in a back-pay award under the FLSA”).

<sup>161</sup> 2000 WL 420839 (N.D. Ill., Apr. 14, 2000) (unpub.).

<sup>162</sup> 176 F.3d 399 (7<sup>th</sup> Cir. 1999).

<sup>163</sup> Slip op. at 10, n. 4. See also *Powers v. Grinnell Corp.*, 915 F.2d 34 (1<sup>st</sup> Cir. 1990) (an award of liquidated damages precludes recovery of pre-judgment interest as that would constitute double recovery); *Hamilton v. 1<sup>st</sup> Source Bank*, 895 F.2d 159 165 (4<sup>th</sup> Cir. 1990); *Burns v. Texas City Refining, Inc.*, 890 F.2d 747 (5<sup>th</sup> Cir. 1989); *Coston v. Plitt Theatres, Inc.*, 831 F.2d 1321 (7<sup>th</sup> Cir. 1987); *Rose v. National Cash Register Corp.*, 703 F.2d 225 (6<sup>th</sup> Cir. 1983)(vacating District Court’s award of pre-judgment interest due to concurrent award of liquidated damages); *Gibson v. Mohawk Rubber Co.*, 695 F.2d 1093 (8<sup>th</sup> Cir. 1982); *Blim v. Western Elec. Co., Inc.*, 731 F.3d 1473 (10<sup>th</sup> Cir. 1984)(vacated on other grounds).

The weight of authority supportive of this proposition relies on U.S. Supreme Court precedent from 1945. In *Brooklyn Sav. Bank v. O'Neil*,<sup>164</sup> the Court established:

Interest is not recoverable in judgments obtained under §16(b). As we indicated in our decision in *Overnight Motor Co. v. Missel*, [316 U.S. 572 (1942)], §16(b) authorizes the recovery of liquidated damages as compensation for delay in payment of sums due under the Act. Since Congress has seen fit to fix the sums recoverable for delay, it is inconsistent with Congressional intent to grant recovery of interest on such sums in view of the fact that interest is customarily allowed as compensation for delay in payment. To allow an employee to recover the basic statutory wage and liquidated damages, with interest, would have the effect of giving an employee double compensation for damages arising from delay in the payment of basic minimum wages. Allowance of interest on minimum wages and liquidated damages recoverable under §16(b) tends to produce the undesirable result of allowing interest on interest. Congress by enumerating the sums recoverable in an action under §16(b) meant to preclude recovery of interest on minimum wages and liquidated damages.<sup>165</sup>

I find that an award of pre-judgment interest on the back pay owed the Petitioners would constitute double recovery since liquidated damages have been awarded.

However, case law suggests that the Petitioners may also be entitled to post-judgment interest.<sup>166</sup> Under 28 U.S.C. §1961, post-judgment interest may be compounded on civil monetary damages received in district court, and in other express circumstances. However, §1961(c)(4) specifically disclaims that “[t]his section shall not be construed to affect the interest on any judgment of any court not specified in this section.” Still, that statute has been interpreted, albeit infrequently, to allow post-judgment interest on monetary damages awarded in an administrative adjudication. *See PGB International LLC Co. v. Bayche Companies, Inc.*<sup>167</sup>

I find that the imposition of post-judgment interest is not warranted in this matter. As outlined below, in making its curative back pay and liquidated damages payments to Petitioners, the Respondent will be required to consider the extent to which lump sum payment might affect Petitioners’ eligibility to receive certain benefits and services crucial to the quality of their lives. To the extent possible, Respondent is being directed to work cooperatively with Petitioners to spread the payment of damages over a sufficient number of months to ensure Petitioners retain eligibility to necessary support programs. Because Respondent is being ordered to potentially delay payment of the total sum due to Petitioners, subjecting that sum to post-judgment interest

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<sup>164</sup> 324 U.S. 697 (1945).

<sup>165</sup> 324 U.S. at 715-716. (internal citations omitted).

<sup>166</sup> *See Ford v. Alfaro*, 785 F.2d 835 (9<sup>th</sup> Cir. 1986); *Brock, supra* (“FLSA back pay awards should be presumed to carry post-judgment interest, unless the equities in a particular case require otherwise”).

<sup>167</sup> 2006 USDA LEXIS 201 (it is appropriate for the Secretary to follow 28 U.S.C. §1961 in assessing money judgments because the reparation claim could have been brought in federal court and the administrative decision is appealable to federal district court).

would disincentivize meaningful compliance with that directive. Accordingly, I find that the unique equities of this case do not support an award of post-judgment interest.

E. An Award of Attorneys' Fees and Costs May be Appropriate

The Act authorizes the reviewing court to award the petitioner “a reasonable attorney’s fee” and “costs of the action.”<sup>168</sup> On January 21, 2016, the parties submitted a Stipulated Withdrawal of the Petitioners’ Motion for Sanctions, which states that each party has agreed to pay its own costs and attorney’s fees. If that Stipulation was intended only as a waiver of attorney fees related to the Motion for Sanctions itself, then counsel for Petitioners may submit an application for attorney fees and costs within 14 days of the issuance of this Decision and Order. Respondent shall have 10 days to oppose any request for the award of attorney fees.

XII. ORDER

1. Effective immediately, Petitioners Ralph (“Joe”) Magers, Pamela Steward and Mark Felton shall each be paid minimum wage for each hour worked at Respondent’s Fostoria manufacturing facility;
2. Respondent shall pay Petitioner Ralph (“Joe”) Magers the sum of \$17,578.30 (\$8,789.15 in unpaid wages and \$8,789.15 in liquidated damages);
3. Respondent shall pay Petitioner Pamela Steward the sum of \$18,174.48 (\$9,087.24 in unpaid wages and \$9,087.24 in liquidated damages);
4. Respondent shall pay Petitioner Mark Felton the sum of \$18,322.62 (\$9,161.31 in unpaid wages and \$9,161.31 in liquidated damages); and
5. Upon receipt of this Decision and Order, and before making any payments of back wages and liquidated damages to the Petitioners, Respondent shall contact counsel for Petitioners. Counsel shall discuss whether the payment of the back wages and liquidated damages over a period of time will allow the Petitioners to retain eligibility for benefits Petitioners currently receive. Respondent shall pay the back wages and liquidated damages over time if counsel for Petitioners so requests. Otherwise those sums shall be payable within 30 days after the issuance of this Decision and Order;

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<sup>168</sup>29 U.S.C. §216(b). See also *Loughner v. The University of Pittsburgh*, 260 F.3d 173 (3<sup>rd</sup> Cir. 2001).

6. As outlined above, Petitioners may seek the award of attorney fees and costs.

**SO ORDERED.**

Steven D. Bell  
Administrative Law Judge

**NOTICE OF APPEAL RIGHTS:** If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Administrative Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days of the date of issuance of the administrative law judge's decision. See 29 C.F.R. § 580.13. 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 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](mailto:Boards-EFSR-Help@dol.gov)

At the time you file the appeal 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 20001-8001. See 29 C.F.R. § 580.13.

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 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. 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 appeal is timely filed, then the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 580.12(e).