



ANDREW SEYMORE et al., Plaintiffs and Appellants, v. METSON MARINE,
INC., et al., Defendants and Respondents.

A127489

COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVI-
SION THREE

193 Cal. App. 4th 64; 122 Cal. Rptr. 3d 236; 2011 Cal. App. LEXIS 222

February 28, 2011, Filed

NOTICE: NOT CITABLE--SUPERSEDED BY
GRANT OF REHEARING

SUBSEQUENT HISTORY: Rehearing granted, Depub-
lished by *Seymore v. Metson Marine*, 2011 Cal. App.
LEXIS 808 (Cal. App. 1st Dist., Mar. 25, 2011)

Subsequent opinion on rehearing at *Seymore v. Metson
Marine, Inc.*, 194 Cal. App. 4th 361, 2011 Cal. App.
LEXIS 442 (Cal. App. 1st Dist., 2011)

PRIOR HISTORY: [***1]

Superior Court of Contra Costa County, No.
CIVMSC08-02279, Thomas M. Maddock, Judge.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

The trial court granted summary judgment to em-
ployers on a complaint for unpaid overtime wages. The
employees worked consecutive 14-day periods aboard
the employers' ships. They worked 12-hour shifts, were
on call for the remaining 12 hours of each day, and were
required to sleep aboard the ship and to remain within 45
minutes of the ship while off duty. Each two-week peri-
od started on a Tuesday at noon and ended at noon on the
Tuesday 14 days later. Calculating overtime pay on the
premise that the workweek began at 12:00 a.m. on Mon-
day, the employers paid a single seventh day premium at
the end of the second workweek. (Superior Court of
Contra Costa County, No. CIVMSC08-02279, Thomas
M. Maddock, Judge.)

The Court of Appeal reversed and remanded, hold-
ing that the employers were required to pay the seventh
day premium (*Lab. Code, § 510, subd. (a)*) for both the
seventh and 14th day of each work period because the
workweek (*Lab. Code, § 500, subd. (b)*) had to be the
workweek actually observed by the employees. Because
the on-call restrictions subjected the employees to the
employers' control for the full 14-day period, the on-call
hours constituted hours worked (*Cal. Code Regs., tit. 8, §
11090, subd. 2(G)*). The employees were entitled to over-
time pay only for the four off-duty hours when they were
not sleeping because the parties had agreed to exclude
their sleeping hours from compensation. (Opinion by
Pollak, Acting P. J., with Siggins and Jenkins, JJ., con-
curring.) [*65]

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES

**(1) Labor § 7--Regulation of Working Conditions--
Hours--Workweek.**--Under the plain language of *Lab.
Code, § 510*, employees are entitled to premium pay on
the seventh day of work in any one workweek; and ac-
cording to *Lab. Code, § 500*, a workweek is defined to
mean any seven consecutive days, starting with the same
calendar day each week. The clear intent of this statute is
to provide premium pay for employees who are required
to work a seventh consecutive day in a fixed and regular-
ly occurring workweek.

**(2) Labor § 7--Regulation of Working Conditions--
Hours--Workweek.**--An employer cannot require its
employees to work one workweek, such as from Tuesday

noon to Tuesday noon, and designate another workweek, such as Monday to Sunday night, for the purpose of calculating compensation. The employer may designate any workweek it wishes, but the workweek it selects and requires its employees to observe is the workweek it must use for the purpose of calculating employee compensation.

(3) Statutes § 44--Construction--Aids--Contemporaneous Administrative Construction--Of No Weight where Conflict Exists.--An opinion of the Department of Industrial Relations, Division of Labor Standards Enforcement is entitled to no weight to the extent that it conflicts with the plain statutory language and the remedial purpose of California's overtime laws.

(4) Labor § 7--Regulation of Working Conditions--Hours Worked.--IWC wage order No. 9-2001 (*Cal. Code Regs., tit. 8, § 11090*) requires an employer to compensate its employees for all hours worked and, subject to various provisions and conditions, to pay specified overtime rates for hours worked in excess of eight or 12 hours per day.

(5) Labor § 7--Regulation of Working Conditions--Hours Worked--Control over On-call Employees.--The level of an employer's control over its employees, rather than the mere fact that the employer requires the employees' activity, is determinative of whether particular hours constitute hours worked. Factors to consider in evaluating the level of control exerted by the employer include: (1) whether there was an on-premises living requirement; (2) whether there were excessive geographical restrictions on employee's movements; (3) whether the frequency of calls was unduly restrictive; (4) whether a fixed time limit for [*66] response was unduly restrictive; (5) whether the on-call employee could easily trade on-call responsibilities; (6) whether use of a pager could ease restrictions; and (7) whether the employee had actually engaged in personal activities during call-in time. As a practical matter, if an employee is not required to remain on the employer's premises, geographical restrictions are imposed according to the required response time for an employee to return to the employer's premises. In such cases, the employee while on-call may only travel that distance from the employer's premises which can be traveled safely within the required response time.

(6) Labor § 7--Regulation of Working Conditions--Hours Worked--Control over On-call Employees--Sleeping at Worksite.--Except with respect to certain occupations in which the employee resides on the premises, covered by a different wage order, California courts have consistently held that an employee required to sleep at the worksite is subject to the employer's control (*Cal.*

Code Regs., tit. 8, § 11090, subd. 2(G)) during sleeping hours.

(7) Labor § 7--Regulation of Working Conditions--Hours Worked--Control over On-call Employees--Sleeping at Worksite.--The nature of the employment and the reasonableness of the requirement that employees sleep at the worksite are not relevant to the determinative issue of control (*Cal. Code Regs., tit. 8, § 11090, subd. 2(G)*). The nature of the employment as an additional factor to consider is at odds with the control test approved by the California Supreme Court. Thus, assuming that the restrictions imposed by an employer on its employees, including a sleeping requirement, are in fact reasonable in light of the nature of the services the employer provides, hours during which the employees remain under the substantial control of the employer nonetheless constitute hours worked.

(8) Labor § 7--Regulation of Working Conditions--Hours Worked--Federal Precedent.--Given the similar purpose behind the Fair Labor Standards Act of 1938 (FLSA) (*29 U.S.C. § 201 et seq.*) and California's wage orders, although the definitions of "hours worked" are not the same, they are parallel, and therefore federal precedent is entitled to some deference. Nevertheless, state law may provide employees greater protection than the FLSA. In light of the remedial nature of the legislative enactments authorizing the regulation of wages, hours and working conditions for the protection and benefit of employees, the [*67] statutory provisions are to be liberally construed with an eye to promoting such protection. To the extent that federal cases apply a more restrictive definition of hours worked or rely on factors not relevant to the control test, those cases have little persuasive value in deciding whether the time periods in question constitute hours worked. Federal decisions are not persuasive authority insofar as the federal courts consider the existence and provisions of an agreement between the parties governing the compensability of on-call work. This factor does not really address the extent of the employer's control over the employee and as such, is not relevant to a determination of compensability under California law.

(9) Labor § 7--Regulation of Working Conditions--Hours Worked--Sleeping at Worksite--Exclusion from Compensation by Agreement.--A maximum of eight hours a 24-hour employee spends sleeping at the employer's premises may be excluded from compensation by prior agreement. It is permissible for an employer and employees to enter into an agreement, which need not be written, to exclude up to eight hours of sleep time from work or compensable time on twenty-four-hour shifts if adequate sleeping facilities are provided by the

employer and the employee has the opportunity to get at least five hours of uninterrupted sleep. Case law has read into the state regulation defining compensable hours worked the provisions of the federal regulation, 29 C.F.R. § 785.22. The federal measure provides that when an employee works 24 hours or more, the employer and the employee may agree to exclude a regularly scheduled sleeping period of not more than 8 hours, provided adequate sleeping facilities are furnished by the employer and the employee can usually enjoy an uninterrupted night's sleep.

(10) Labor § 7--Regulation of Working Conditions--Hours Worked--Sleeping at Worksite--Exclusion from Compensation by Agreement--Burden of Proof.--Since an agreement to exclude sleep time from compensable time is an exception to the requirement that employees be paid for hours worked, it is the burden of the employer to prove that an agreement exists and what the terms of the agreement are.

(11) Labor § 7--Regulation of Working Conditions--Hours Worked--Sleeping at Worksite--Exclusion from Compensation by Agreement.--An employer allocated eight hours of unpaid time a day for its employees, who worked 12-hour shifts, to sleep aboard its ships. The undisputed facts established that sleeping facilities were provided for employees on the ships, and that it was exceptionally rare for their sleep [*68] to be interrupted by an emergency. The undisputed facts also established an implied agreement between the parties that the employees would not be compensated for eight hours of sleep time so long as their sleep was not interrupted. Prior to their employment, they received a handbook that set forth the employer's compensation policies, including that employees would not be compensated for eight hours of off-duty sleep time each day. The employees did not dispute that they were aware of and worked for the employer pursuant to the pay structure set forth in the employee handbook. Thus, the employees were entitled to be compensated for only four, rather than 12, hours of standby time during each 24-hour working day.

[*Wilcox, Cal. Employment Law (2010) ch. 3, § 3.07.*]

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Sheppard Mullin Richter & Hampton, Tracey A. Kennedy and Marlene M. Nicolas for Defendants and Respondents.

JUDGES: Opinion by Pollak, Acting P. J., with Siggins and Jenkins, JJ., concurring.

OPINION BY: Pollak

OPINION

[**237] **POLLAK, Acting P. J.**--Plaintiffs Andrew Seymore and Kenneth Blonden appeal from a judgment entered in favor of their former employers defendants Metson Marine, Inc., and Metson Offshore, Inc. (collectively Metson), on their complaint seeking to recover unpaid overtime wages. The trial court granted summary judgment in favor of Metson on [**238] the ground that Metson's compensation practices comply with the requirements of the Labor Code. When employed by defendants, plaintiffs worked consecutive 14-day "hitches" on Metson's ships providing emergency cleanup of oil spills and other environmentally hazardous discharges off the California coast. They contend the trial court erred in granting Metson's motion for summary judgment because the undisputed facts establish that Metson failed (1) to properly calculate [***2] overtime for [*69] the seventh consecutive day worked in each workweek and (2) to properly compensate them for the 12 hours each day of a hitch that they were on call. We agree with plaintiffs that it is not permissible for Metson to artificially designate the workweek in such a way as to circumvent the statutory requirement to pay overtime rates for the seventh consecutive day worked in a workweek. We also agree that the restrictions placed on plaintiffs during their on-call hours, including the requirement that they sleep aboard the ships and remain within no more than 45 minutes of the ship at all times, subjected plaintiffs to Metson's control for the full 14-day hitch, so that the on-call hours constitute time worked. However, we do not agree that plaintiffs were entitled to compensation for 24 hours a day. California law authorizes employers to enter into an agreement with their 24-hour employees to exclude from compensation eight hours of sleep time in each 24-hour period and the undisputed evidence establishes that plaintiffs and Metson had such an understanding. Accordingly, plaintiffs are entitled to compensation for an additional four, but not 12, hours in each 24-hour period. [***3] Because Metson failed to establish that it had fully and correctly compensated plaintiffs for all hours worked, the trial court erred in granting Metson's motion for summary judgment. We shall, therefore, reverse the judgment and remand the action for further proceedings.

Factual and Procedural Background

Plaintiffs' complaint alleges causes of action for unpaid overtime wages under *Labor Code* ¹ section 1194 and for unfair business practices under *Business and Professions Code* section 17200. The complaint alleges that Metson's "policy, practice, and customs regarding wages violate California overtime laws" and amount to

an unlawful business practice. The parties filed competing motions for summary judgment and summary adjudication. The following undisputed facts were offered in support of the motions:

1 All statutory references are to the Labor Code unless otherwise noted.

Metson provides "crew members and vessel operations for offshore oil spill recovery vessels." Metson's vessels must be prepared to respond to emergency oil spills 24 hours a day. Plaintiffs were employed as crew members on Metson's ships from before 2004 through December 2007.

As crew members, plaintiffs "worked on two-week [***4] rotational hitches, i.e., 14-day hitches, alternating with 14-day rest periods." Each two-week period started on a Tuesday at noon and ended at noon on the Tuesday 14 days later. Plaintiffs were paid to work a 12-hour daily shift during this two-week period, except on crew-change days, when they worked only six hours. Plaintiffs were paid an hourly rate for the full 12-hour shift whether or not they actually performed any work during the full 12 hours. Plaintiffs were paid their regular hourly rate for the first eight hours and time and a half for the additional four hours. On the occasions that plaintiffs worked more than [*70] 12 hours in a day while responding to an emergency, they [**239] were paid double time for all hours in excess of the usual 12-hour shift.

The remaining 12 hours in each 24-hour period were designated by Metson as "off-duty." Metson designated eight hours of the "off-duty" time as sleep time, three hours as meal times and one hour as free time. During the "off-duty" time, Metson required employees to be on "stand by." Crew members could leave the boat during their "off-duty" time but were required to "check in and check out" when they left the ship. When employees left the [***5] ship, they were required to carry a cell phone or pager and be able to return to the ship within 30 to 45 minutes of an emergency call. ² Metson provided sleeping quarters for the crew and plaintiffs were required to sleep on board the vessels. If an emergency was reported while the crew members were asleep, crew members were required to respond and return to work. Crew members were prohibited from consuming alcohol at any time during the two-week hitch. Blonden testified that when he was not working he might go for a walk or to the drugstore to pick up a prescription, read, watch television or call his wife. Seymore testified that when he was not working he ate, watched television, went for a walk or to the gym, and ran personal errands.

In their briefs, plaintiffs suggest that the required response time was actually closer to 15 minutes, referring to deposition testimony to that effect. However, the undisputed facts, as set forth in both plaintiffs' and Metson's separate statements, state that the required response time was 30 to 45 minutes. In the context of this case, we deem the difference to be immaterial.

Discussion

1. Metson's Motion for Summary Judgment

The trial court granted [***6] summary judgment in favor of Metson, concluding that the uncontroverted facts establish that Metson calculated plaintiffs' wages correctly. Plaintiffs challenge this conclusion, contending that they were entitled to an additional day of premium pay per hitch for working seven consecutive days in a workweek, and additional compensation for the 12 hours they were on call during their 14-day hitches.

A. Seventh Day Premium Pay

Plaintiffs contend that Metson violated the Labor Code by failing to pay them a seventh day premium on both the seventh and 14th days of each hitch. *Section 510, subdivision (a)* states in pertinent part: "[T]he first eight hours worked on the seventh day of work in any one workweek shall be compensated at the rate of no less than one and one-half times the regular rate of pay for an employee. ... In addition, any work in excess of eight hours on any [*71] seventh day of a workweek shall be compensated at the rate of no less than twice the regular rate of pay of an employee." *Section 500, subdivision (b)* defines a "workweek" as "any seven consecutive days, starting with the same calendar day each week. 'Workweek' is a fixed and regularly recurring period of 168 hours, [***7] seven consecutive 24-hour periods."

Although it is undisputed that Metson's employees, including plaintiffs, worked a regular 14-day schedule beginning at noon on Tuesdays and ending at noon two Tuesdays later, Metson calculated overtime pay on the premise that the workweek began at 12:00 a.m. on Monday and ended at 11:59 p.m. the following Sunday. Under Metson's calculations, plaintiffs worked six days in the first workweek, seven days in the second workweek and two days in the third workweek. On that basis, plaintiffs [**240] were paid a single seventh day premium at the end of the second workweek.

Plaintiffs contend that premium pay must be calculated based on the "fixed and regular" schedule actually worked and that Metson should not be allowed to subvert the employee protections of *section 510* by designating an artificial workweek that does not correspond with the

period actually worked. Asserting that their workweek actually began and ended on Tuesday, plaintiffs argue that Metson was required to pay overtime wages for work performed on the seventh and 14th day of each hitch. We agree.

In *In re Wal-Mart Stores, Inc.* (N.D. Cal. 2007) 505 F.Supp.2d 609, 617-618, the court held that plaintiffs [***8] had properly alleged a claim for failure to pay overtime in violation of sections 500 and 510 where the complaint alleged that " 'when [the plaintiff] worked a graveyard shift, Wal-Mart would count the hours worked before midnight as working one day, and all the hours worked after midnight as hours worked on another day, thereby denying [him] overtime pay.' " (505 F.Supp.2d at p. 616.) The court observed that "[t]he issue of whether an employer may circumvent the overtime pay provisions of the Labor Code by setting the beginning of the 'workday' in the middle of a shift that would otherwise require overtime pay appears to be one of first impression." (*Id.* at p. 617.) The court concluded that the employer's practice was contrary to the plain language of the statute. The court explained, "the first sentence of Labor Code section 510(a) bluntly states: 'Eight hours of labor constitutes a day's work.' In the context of an overtime statute, this sentence clearly conveys the legislature's intent that, other than in the case of specific enumerated exceptions, a shift of more than eight hours of consecutive work qualifies for overtime pay. California's overtime laws are remedial and are to be construed [***9] so as to promote employee protection." (*Ibid.*) [*72]

(1) Metson's attempt to evade the requirements of sections 500 and 510 is no different from the method struck down in the *Wal-Mart* case. Under the plain language of section 510, plaintiffs are entitled to premium pay "on the seventh day of work in any one workweek" and according to section 500, a workweek is defined to mean "any seven consecutive days, starting with the same calendar day each week." The clear intent of this statute is to provide premium pay for employees who are required to work a seventh consecutive day in a "fixed and regularly" occurring workweek. Metson's attempt to circumvent this requirement cannot be condoned. (*Huntington Memorial Hospital v. Superior Court* (2005) 131 Cal.App.4th 893, 910 [32 Cal. Rptr. 3d 373] ["The bottom line is this: An employer may not engage in a subterfuge or artifice designed to evade the overtime laws."].)

(2) Metson relies on a 1999 memorandum issued by the Department of Industrial Relations, Division of Labor Standards Enforcement (DLSE) ³ regarding the interpretation of the legislation that enacted sections 500 and 510. (DLSE, mem. to All DLSE Professional Staff, Dec. 23, 1999, accessed at <<http://www.dir.ca.gov/dlse/AB60update.htm>> [as of

Feb. [***10] 28, 2011] ["Understanding AB 60: An In Depth Look at the Provisions of the 'Eight Hour Day Restoration and Workplace Flexibility Act of 1999' ".]) In that memorandum, the author writes that "An employer may designate the period of the [*241] ... workweek. Absent pre-designation by the employer, DLSE will treat ... each workweek as starting at midnight on Sunday, so that Sunday is the first day of the workweek and Saturday the last." (*Ibid.*) Contrary to Metson's argument, this language does not suggest that an employer can require its employees to work one workweek, such as from Tuesday noon to Tuesday noon, and designate another workweek, such as Monday to Sunday night, for the purpose of calculating compensation. Metson may designate any workweek it wishes, but the workweek it selects and requires its employees to observe is the workweek it must use for the purpose of calculating employee compensation.

3 The DLSE is the "state agency empowered to enforce California's labor laws." (*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 561-562 [59 Cal. Rptr. 2d 186, 927 P.2d 296].)

(3) Moreover, even if Metson's reading of the DLSE memorandum were correct, the opinion would be entitled to no weight to the extent that it [***11] conflicts with the plain language of the statute and the remedial purpose of California's overtime laws. Much like the case before this court, the employer in *In re Wal-Mart Stores, Inc.* relied on the DLSE's interpretation of section 500 that " '[t]he beginning of an employee's workday need not coincide with the beginning of that employee's shift, and an employer may [*73] establish different workdays for different shifts.' " (*In re Wal-Mart Stores, Inc., supra*, 505 F.Supp.2d at p. 617.) The court rejected the DLSE interpretation, noting that "the California Supreme Court has held that interpretations contained in the DLSE Manual are non-binding and are entitled to no deference. [(*Tidewater Marine Western, Inc. v. Bradshaw, supra*, 14 Cal.4th at p. 568.)] Therefore, to the extent that the DLSE's opinion ... is inconsistent with the Labor Code's goal of promoting employee protection, this opinion should be ignored.? (*In re Wal-Mart Stores, Inc., at p. 617.*)

Thus, the trial court erred in concluding that plaintiffs are not entitled to recover unpaid overtime denied them as a result of Metson's violation of section 510. Incremental overtime compensation is due them for one additional day of every [***12] 14-day hitch they worked and did not receive overtime compensation.

B. "Off-duty, Standby" Hours

(1) *Hours worked*

(4) Plaintiffs also contend that they were entitled to additional compensation for on-call hours worked in the course of their 14-day hitches. The parties agree that Metson's obligation to compensate plaintiffs for 12 hours of "off-duty, stand-by" time each day is governed by wage order No. 9-2001 issued by the Industrial Welfare Commission (IWC), codified in *California Code of Regulations, title 8, section 11090* (hereafter Wage Order No. 9).⁴ This wage order requires an employer to compensate its employees for all "hours worked" and, subject to various other provisions and conditions not here relevant, to pay specified overtime rates for "hours worked" in excess of eight or 12 hours per day. The definition of "hours worked" appears in subdivision 2(G) of Wage Order [**242] No. 9, which provides: "Hours worked" means the time during which an employee is *subject to the control of an employer*, and includes all the time the employee is suffered or permitted to work, whether or not required to do so." (Italics added.) Plaintiffs argue that they are entitled to overtime compensation for the [***13] 12 hours they were on "stand by" each day because the restrictions Metson imposed during that time period subjected them to Metson's continued control.

4 The IWC, which "is the state agency empowered to formulate regulations (known as wage orders) governing employment in the State of California" (*Tidewater Marine Western, Inc. v. Bradshaw, supra, 14 Cal.4th at p. 561*), has promulgated 15 orders covering specific industries and occupations. Wage Order No. 9 applies to the transportation industry. All wage orders contain the same definition of "hours worked" except for two wage orders not applicable here (discussed at pp. ___-___, *post*) which contain additional language. (See *Morillion v. Royal Packing Co. (2000) 22 Cal.4th 575, 581 [94 Cal. Rptr. 2d 3, 995 P.2d 139]*; *Aguilar v. Association for Retarded Citizens (1991) 234 Cal.App.3d 21, 25 [285 Cal. Rptr. 515]*.)

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"Whether and to what extent employees are able to use on-call time for personal activities is a question of fact. [Citations.] However, whether the limitations on the employees' personal activities while on-call are such that on-call waiting time would be considered compensable ... is a question of law which we review *de novo*." (*Berry v. County of Sonoma (9th Cir. 1994) 30 F.3d 1174, 1180*; [***14] see *Ramirez v. Yosemite Water Co. (1999) 20 Cal.4th 785, 794 [85 Cal. Rptr. 2d 844, 978 P.2d 2]*.) Hence, we employ a *de novo* standard of review in determining whether the restrictions on plaintiffs' personal activities, as established by the undisputed facts, are such

that the standby time should be regarded as hours worked within the meaning of Wage Order No. 9.

(5) In *Morillion v. Royal Packing Co., supra, 22 Cal.4th at page 587*, our Supreme Court explained that "[t]he level of the employer's control over its employees, rather than the mere fact that the employer requires the employees' activity, is determinative" of whether particular hours constitute "hours worked." Applying this rule, the court held that time spent in transit by agricultural employees required by their employer to travel to and from the field on employer-provided buses constituted "hours worked." The court rejected the argument that "plaintiffs were not under [the employer's] control during the required bus ride because they could read on the bus, or perform other personal activities." (*Id. at p. 586*.) The court explained, "Permitting plaintiffs to engage in limited activities such as reading or sleeping on the bus does not allow them to use 'the time [***15] effectively for [their] own purposes.' [Citation.] As several amici curiae observe, during the bus ride plaintiffs could not drop off their children at school, stop for breakfast before work, or run other errands requiring the use of a car. Plaintiffs were foreclosed from numerous activities in which they might otherwise engage if they were permitted to travel to the fields by their own transportation. Allowing plaintiffs the circumscribed activities of reading or sleeping does not affect, much less eliminate, the control [the employer] exercises by requiring them to travel on its buses and by prohibiting them from effectively using their travel time for their own purposes." (*Ibid.*)

Factors to consider in evaluating the level of control exerted by the employer include: "(1) whether there was an on-premises living requirement; (2) whether there were excessive geographical restrictions on employee's movements; (3) whether the frequency of calls was unduly restrictive; (4) whether a fixed time limit for response was unduly restrictive; (5) whether the on-call employee could easily trade on-call responsibilities; (6) whether use of a pager could ease restrictions; and (7) whether the employee [***16] had [*75] actually engaged in personal activities during call-in time." (*Gomez v. Lincare, Inc. (2009) 173 Cal.App.4th 508, 523 [93 Cal. Rptr. 3d 388]* (*Gomez*), quoting *Owens v. Local No. 169 (9th Cir. 1992) 971 F.2d 347, 351*; see also *Berry v. County of Sonoma, supra, 30 [**243] F.3d 1174, 1183*.)⁵

5 A similar multifactor analysis has been applied in a number of advice letters issued by the DLSE. (*Ghazaryan v. Diva Limousine, Ltd. (2008) 169 Cal.App.4th 1524, 1535 [87 Cal. Rptr. 3d 518]*; see DLSE Opn. Letter No. 1998.12.28 (Dec. 28, 1998) ["Compensability of Resident Apartment Managers' 'On-call Time'"]

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accessed at
<<http://www.dir.ca.gov/dlse/opinions/1998-12-28.pdf>> [as of Feb. 28, 2011]; DLSE Opn. Letter No. 1993.03.31 (Mar. 31, 1993) [" 'On-Call Time--Beeper's' "] accessed at
<<http://www.dir.ca.gov/dlse/opinions/1993-03-31.pdf>> [as of Feb. 28, 2011].) "Advisory opinions of this sort, ' "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." ' " (*Bell v. Farmers Ins. Exchange (2001) 87 Cal.App.4th 805, 815 [105 Cal. Rptr. 2d 59]*; see also *Morillion v. Royal Packing Co., supra, 22 Cal.4th at p. 583.*)

It is undisputed that Metson allocated eight hours of the 12 hours of off-duty, standby [***17] time for sleeping and required plaintiffs to sleep aboard ship during their 14-day hitches. With respect to the remaining four hours of the 12 off-duty standby hours, plaintiffs were subject to a response time requirement that effectively placed a geographic restriction on their activities during that period. "As a practical matter, if an employee is not required to remain on the employer's premises, geographical restrictions are imposed according to the required response time for an employee to return to the employer's premises. [Citations.] In such cases, the employee while on-call may only travel that distance from the employer's premises which can be traveled safely within the required response time." (*Berry v. County of Sonoma, supra, 30 F.3d at p. 1185.*) The undisputed evidence here establishes that if plaintiffs left their ship during their standby time, they needed to be able to return to the ship within at most 45 minutes.

Considering only the four hours not designated as a period for sleep, some of the factors articulated in the federal *Owens* decision and embraced in *Gomez* point to employer control, while other factors militate in favor of the opposite conclusion. During [***18] those four hours plaintiffs were free to pursue whatever activities they chose, so long as they did not consume alcohol and could safely return to the ship within the prescribed time. The required response time (and perhaps the alcohol ban) precluded plaintiffs from going places and pursuing activities in which they might otherwise have engaged. (Cf. *Madera Police Officers Assn. v. City of Madera (1984) 36 Cal.3d 403 [204 Cal. Rptr. 422, 682 P.2d 1087]* [constraints placed on activities and conduct of police officers during mealtimes converted that time into hours worked].) Nonetheless, plaintiffs were free to pursue recreational activities of their choice aboard ship, such as reading, watching television or using the Internet, and they could and did leave the ship to exercise and run personal [*76] errands. Moreover, the undisputed evi-

dence is that emergencies were rare and that plaintiffs were seldom called back to the ship during their off-duty standby hours.

Metson cites a number of cases in which courts have concluded that on-call employees able to engage in such personal activities and subject to even shorter response time requirements were not entitled to compensation. (See *Gomez, supra, 173 Cal.App.4th 508* [30-minute [***19] telephone response time]; *Dinges v. Sacred Heart St. Mary's Hospitals (7th Cir. 1999) 164 F.3d 1056* [seven-minute response time]; *Bright v. Houston Northwest Medical Center Survivor, Inc. (5th Cir. 1991) 934 F.2d 671* [20-minute response time].) However, there is one critical difference between each of those cases and the present situation?in none of those [**244] cases was the employee required to sleep at the employer's premises. In *Bright*, the court observed that the situation there was "wholly different" from cases in which employees were required to serve their on-call time at the employer's premises because "Bright did not have to remain on or about his employer's place of business, or some location designated by his employer, but was free to be at his home or at any place or places he chose, without advising his employer, subject only to the restrictions that he be reachable by beeper, not be intoxicated, and be able to arrive at the hospital in 'approximately' twenty minutes." (*934 F.2d at p. 676.*)

(6) Except with respect to certain occupations in which the employee resides on the premises, covered by a different wage order, California courts have consistently held that an employee required to [***20] sleep at the worksite is subject to the employer's control during sleeping hours. (*Aguilar v. Association for Retarded Citizens, supra, 234 Cal.App.3d at p. 30* ["broad definition [of 'hours worked'] clearly includes time when an employee is required to be at the employer's premises and subject to the employer's control even though the employee was allowed to sleep"]; *Monzon v. Schaefer Ambulance Service, Inc. (1990) 224 Cal.App.3d 16, 50 [273 Cal. Rptr. 615]* (conc. & dis. opn. of Johnson, J.) ["An ambulance driver who is sleeping in a designated sleeping area ... is definitely 'subject to the control of the employer' [so that] in the absence of some specific exception ... his or her sleep and mealtime counts as 'hours worked' under the California rules."]; cf. *Bono Enterprises, Inc. v. Bradshaw (1995) 32 Cal.App.4th 968, 974-975 [38 Cal. Rptr. 2d 549]*, disapproved on other grounds in *Tidewater Marine Western, Inc. v. Bradshaw, supra, 14 Cal.4th at p. 574* [upholding DLSE enforcement policy treating as hours worked meal periods during which employee is required to remain at the worksite].)

Metson disputes this conclusion, arguing that under *Isner v. Falkenberg/Gilliam & Associates, Inc. (2008)*

160 Cal.App.4th 1393 [73 [*77] Cal.Rptr.3d 433] and *Brewer v. Patel* (1993) 20 Cal.App.4th 1017 [25 Cal. Rptr. 2d 65], [***21] when the nature of the job requires the employee to sleep at the worksite and the employee must merely remain available for emergencies without performing any other services during off-duty hours, the off-duty standby hours do not constitute hours worked for compensation purposes. However, both of those cases involve employees who reside on the premises--an apartment manager and a hotel clerk--whose compensation is governed by wage order No. 5-2001, governing the public housekeeping industry. (*Cal. Code Regs., tit. 8, § 11050.*) The definition of "hours worked" in that wage order begins, as does Wage Order No. 9, "the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so." But unlike the definition in Wage Order No. 9, wage order No. 5-2001 continues, "and in the case of an employee who is required to reside on the employment premises, that time spent carrying out assigned duties shall be counted as hours worked." (*Cal. Code Regs., tit. 8, § 11050, subd. 2(K).*) Metson acknowledges the difference in the definition of "hours worked" under the two wage orders, noting that it "is not [***22] asking this court to abandon the 'control test' in favor of the narrow definition of 'hours worked,' as set forth in Wage Order 5." Instead, Metson "offers these legal authorities as guidance in analyzing the 'nature of employment' factor of the control test." "[G]iven the emergent nature of [plaintiffs'] employment, which rendered residing aboard ship [**245] reasonable," Metson argues, "the limited control Metson maintained over crewmembers during the 12-hour off-duty standby period was also reasonable" and requiring it to compensate the employee for such an off-duty period would have "a serious negative impact" on its business.

(7) However, the nature of the employment and the reasonableness of the requirement that employees sleep at the worksite are not relevant to the determinative issue of control. In asserting that these issues are relevant, Metson relies on the 1993 DLSE advisory opinion letter, cited *ante*, footnote 5. (DLSE Opn. Letter No. 1993.03.31.) This advisory letter does include "the nature of the employment" as an additional factor to consider. ⁶ However, the letter does not cite any statutory or other authority for considering this factor, which is at odds with the control [***23] test approved by the California Supreme Court in *Morillion v. Royal Packing Co.*, *supra*, 22 Cal.4th 575. Moreover, the factor is not included in the later 1998 advisory letter in which the DLSE [*78] approved the factors applied in *Gomez*, *supra*, 173 Cal.App.4th 508. (DLSE Opn. Letter No. 1998.12.28.) Thus, assuming that the restrictions imposed by Metson on its employees, including the on-board sleeping re-

quirement, are in fact reasonable in light of the nature of the services Metson provides, hours during which the employees remain under the substantial control of Metson nonetheless constitute hours worked. Such control unquestionably exists during hours that employees are required to sleep aboard ship. ⁷

6 The letter states, "A reasonable and long-standing industry practice which clearly indicates that workers in the affected classifications are expected to be on-call and that depriving the employer of the right to require uncompensated on-call status of the workers in this category will have a serious negative impact on the employer's business will be considered in [determining whether on-call time qualifies as hours worked]." (DLSE Opn. Letter No. 1993.03.31, *supra*, at p. 5.)

7 While [***24] Metson may not insist that its employees in fact sleep eight hours each night, that is the number of hours assigned to sleep time and no party questions considering eight hours as the number of hours during which plaintiffs were required to sleep aboard ship during their 14-day hitches.

Metson also relies on two federal cases involving similar residency requirements in which the court found sleep time not compensable working hours. In *Allen v. Atlantic Richfield Co.* (5th Cir. 1984) 724 F.2d 1131, guards at a plant under strike from early January to the end of March were required to remain at the plant 24 hours a day, during 12 of which they were on duty, and during the other 12 they "were free to sleep, eat at no expense, watch movies, play pool or cards, exercise, read, or listen to music." (*Id.* at p. 1137.) The employees were not compensated for this off-duty time except on the infrequent occasions that their off-duty time was interrupted. (*Id.* at p. 1134.) The court upheld a judgment in favor of the employer on the ground that the evidence supported the jury's findings that "time spent on off-shift status inside the refinery was not work time ... [and] that there was an agreement [***25] between Arco and the guards that the off-shift time of the guards during the strike would not be work or compensable time." (*Ibid.*)

In *Rousseau v. Teledyne Movable Offshore, Inc.* (5th Cir. 1986) 805 F.2d 1245, 1247, the employees worked "on a 'hitch' basis, spending seven full days working and living on the barges and then seven full days not working or living on the barges." They were paid for 12 hours [**246] each day. During the other 12 hours they were required to remain on the barges but " 'were free to sleep, eat, watch television, watch VCR movies, play pingpong or cards, read, listen to music, etc.' " (*Id.* at p. 1248.) The evidence admitted at trial established that while "each

derrick barge employee was in fact subject to being called to work, if circumstances required ... , the experiences of individual plaintiffs demonstrate that they were either never, seldom, or infrequently called upon to perform job duties after they had been released from the day's work and before their next day's work began, particularly when the barges were docked and are not working." (*Rousseau v. Teledyne Movable Offshore, Inc.* (W.D.La. 1985) 619 F.Supp. 1513, 1516.) The evidence also established [***26] that "[t]he reasons for the [no-leave] policy at dockside were several, including liability and safety concerns, a desire to avoid having to take disciplinary action due to employees drinking and related rule [*79] violations, and the desire and need to remain in a 'movable' status with a full crew aboard." (*Id.* at pp. 1516-1517.) On appeal, the court upheld the trial court's finding that the time the employee spent on the barges not actively working was not time spent primarily for the benefit of the employer. (*Rousseau, supra*, 805 F.2d at p. 1248.) The court explained, "the record indicates that the employees actually benefited from the no leave policy, at least potentially. By remaining on the barges during the off duty times, the employees could take advantage of any jobs that might come up on short notice, with the accompanying possibility of overtime work. In short, any benefits derived by Teledyne from the no leave policy do not, on these facts, create a claim for compensable time." (*Id.* at pp. 1248-1249.)

(8) Both *Allen* and *Rousseau* were decided under the provisions of the federal Fair Labor Standards Act of 1938 (29 U.S.C. β 201 et seq.). "California's wage orders are closely modeled after (although they do not [***27] duplicate), section 7(a)(1) of the Fair Labor Standards Act of 1938 (FLSA) [29 U.S.C. β 207(a)(1)]." (*Monzon v. Schaefer Ambulance Service, Inc.*, *supra*, 22 Cal.App.3d at p. 38.) "Given the similar purpose behind FLSA and the wage orders, ... although the definitions of 'hours worked' are not the same, they are parallel, and therefore federal precedent is entitled to some deference." (*Id.* at p. 46; see also *Huntington Memorial Hospital v. Superior Court*, *supra*, 131 Cal.App.4th at p. 910.) Nevertheless, the California Supreme Court has repeatedly stressed the "recognized principle that state law may provide employees greater protection than the FLSA." (*Morillion v. Royal Packing Co.*, *supra*, 22 Cal.4th at p. 592; see also *Ramirez v. Yosemite Water Co.*, *supra*, 20 Cal.4th at p. 795 ["IWC's wage orders, although at times patterned after federal regulations, also sometimes provide greater protection than is provided under federal law in the Fair Labor Standards Act"].) The court has "recognized that 'past decisions additionally teach that in light of the remedial nature of the legislative enactments authorizing the regulation of wages, hours and working conditions for the protection and [***28] benefit of employees, the statutory provisions

are to be liberally construed with an eye to promoting such protection.' " (*Morillion, supra*, at p. 592.) To the extent that the federal cases apply a more restrictive definition of hours worked or rely on factors not relevant to the control test, those cases have little persuasive value in deciding whether the time periods in question here constitute hours worked.

[**247] DLSE advisory opinions emphasize that federal decisions are not persuasive authority insofar as the federal courts "consider the existence and provisions of any agreement between the parties governing the compensability of on-call work." (DLSE Opn. Letter No. 1998.12.28, *supra*, at p. 4, fn. 3; see DLSE Opn. Letter No. 1993.03.31, *supra*, at p. 3.) The December 1998 opinion letter explains that "this factor does not really address the extent of the employer's control over the employee and as such, is not relevant to a [*80] determination of compensability under California law." (DLSE Opn. Letter No. 1998.12.28, *supra*, at p. 4, fn. 3; see also *Ghazaryan v. Diva Limousine, Ltd.*, *supra*, 169 Cal.App.4th at p. 1535, fn. 10 [noting DLSE's refusal to defer to federal authority with respect to analysis of [***29] whether on-call time constitutes "hours worked" "because, under California law 'the existence of an "agreement" regarding the understanding of the parties (as to the compensation policy) is of no importance. The ultimate consideration in applying the California law is determining the extent of the "control" exercised.' "].)

The decision in *Allen* is thus distinguishable based largely on the fact that the employees there had negotiated an agreement with their employer in advance of the strike under which they were paid at a higher hourly rate for hours worked during the strike in exchange for the 24-hour residency requirement. (*Allen v. Atlantic Richfield Co.*, *supra*, 724 F.2d at p. 1134.) The employees thus did receive additional compensation for the extra hours spent on the premises. Moreover, no such agreement exists here and, as just noted, the existence of such an agreement would not in any event be relevant to a determination of hours worked under California law. ⁸ *Rousseau* too is of little persuasive value based on findings that cannot be made in this case and on a criterion that does not apply under California's standard. While the court in *Rousseau* found that the [***30] on-board sleeping requirement was not primarily for the benefit of the employer, in the present case the undisputed evidence establishes that the residential and standby requirements were imposed solely because of the nature of Metson's business, which was to provide emergency cleanup of oil spills and other environmentally hazardous discharges. As Metson recognizes, the nature of its business requires its employees to be ready to respond to an emergency on short notice. There is no suggestion that the standby requirement was designed in any way for the benefit of the

employees. Moreover, insofar as the reasoning in *Rousseau* conflicts with the well-established California law that an employee required to sleep at his employer's premises is under the control of his employer, it is of little persuasive value.

8 While an agreement between the parties is not relevant to whether on-call time should be considered "hours worked," under limited circumstances an employer and employee may agree to exclude from compensable hours sleep time that otherwise qualifies as "hours worked." (See discussion, *post*.)

Thus, the degree of control exercised by requiring the employees to sleep aboard ship, which [***31] is not their residence, renders the eight sleep time hours "hours worked" under California law. The fact that plaintiffs were required to spend their sleeping hours aboard ship also bears on the appropriate characterization of the additional four hours per day of standby time. While the balance of factors specified in *Gomez* might otherwise lead to the conclusion that those four hours are not under the employer's control, the fact that the [*81] employees must under all circumstances return to the [*248] ship to sleep tips the balance in the other direction. The on-board sleep requirement significantly affects and limits what the employee can and cannot do during the four nonsleeping hours. (*Bright v. Houston Northwest Medical Center Survivor, Inc.*, *supra*, 934 F.2d at p. 676.) Viewing the entire 12-hour off-duty standby period as a whole, the restrictions placed on plaintiffs' whereabouts significantly restricted their ability to pursue activities of their choice. (See *Madera Police Officers Assn. v. City of Madera*, *supra*, 36 Cal.3d at p. 411 ["The courts, in evaluating the employee's claims, must examine the restrictions cumulatively to assess their overall effect on the worker's noncompensatory [***32] time."])

Moreover, there is an additional factor to consider. The failure to analyze the 12 hours as a whole would produce an absurd result. As discussed more fully *post*, an employer may agree with a 24-hour employee to exclude eight hours of sleep time per day from compensable hours. Such an agreement is not permissible if the employee works less than 24 hours a day. (*Aguilar v. Association for Retarded Citizens*, *supra*, 234 Cal.App.3d at pp. 31, 33 [exemption for sleep time applies only to 24-hour employees].) Thus, considering the entire 12 hours as hours worked leads to the ultimate conclusion that the employees are entitled to compensation for the four nonsleeping hours of the 12 off-duty standby hours. If, on the other hand, the four hours of nonsleep time were not considered as hours worked, the employees would be entitled to be compensated for eight of the off-duty standby hours, the eight sleeping hours.

Such a result would be entirely nonsensical and provides another reason for considering the entire 12-hour period to constitute hours worked.

(2) *Compensability*

(9) Although the 12 off-duty hours of each day during plaintiffs' 14-day hitch constitute hours worked within the meaning [***33] of the wage order, it does not necessarily follow that plaintiffs were entitled to be compensated for each of those hours. In *Monzon v. Schaefer Ambulance Service, Inc.*, *supra*, 224 Cal.App.3d at page 46, the court recognized that a maximum of eight hours a 24-hour employee spends sleeping at the employer's premises may be excluded from compensation by prior agreement. The court held that "it is permissible for an employer and [employees] to enter into an agreement, which need not be written, to exclude up to eight hours of sleep time from work or compensable time on twenty-four-hour shifts if adequate sleeping facilities are provided by the employer and the employee has the opportunity to get at least five hours of uninterrupted sleep." (*Ibid*.)

(10) Plaintiffs argue unpersuasively that an agreement such as recognized in *Monzon* is effective only with respect to ambulance drivers and attendants. [*82] Plaintiffs are correct that Wage Order No. 9 provides an exemption for ambulance drivers and attendants who have agreed in writing to exclude from compensation eight hours of sleep in a 24-hour period. (*Cal. Code Regs.*, tit. 8, § 11090, subd. 3(K).) Nonetheless, the court held that this exemption was not applicable [***34] in that case because there was no written agreement. (*Monzon v. Schaefer Ambulance Service, Inc.*, *supra*, 224 Cal.App.3d at pp. 40-41.) Instead, recognizing that the DLSE's "enforcement policy for sleep time closely resembles the federal policy," the court read into the state regulation defining compensable hours worked the provisions of the federal regulation, 29 *Code of Federal Regulations part 785.22*. The federal measure provides that when an employee works 24 hours or more, the employer and [***249] the employee may agree to exclude a "regularly scheduled sleeping period of not more than 8 hours ... provided adequate sleeping facilities are furnished by the employer and the employee can usually enjoy an uninterrupted night's sleep." (*Monzon*, at pp. 41-42, italics omitted.) The court explained that the explicit exemption in the regulation for a sleep time exclusion that applies only to ambulance drivers and attendants and requires a written agreement provides an exclusion only from the daily overtime requirement in the wage order. That explicit exemption is not the source of the more general sleep time exclusion; the exclusion of sleep time from compensable hours worked by 24-hour employees is implied from the terms of the federal regu-

lation. [***35] (*Id. at p. 46.*) The court held that "since an agreement to exclude sleep time from compensable time is an exception to the requirement that employees be paid for 'hours worked,' it is the burden of the employer to prove that an agreement exists and what the terms of the agreement are." (*Ibid.*) In the 20 years since *Monzon* was decided, no judicial decision brought to our attention has disagreed with its ruling and neither the statute nor the regulations have been amended to modify the ruling. (See *Aguilar v. Association for Retarded Citizens, supra*, 234 Cal.App.3d at pp. 31, 33.)

(11) As noted above, Metson allocated eight hours of unpaid time a day for sleep. The undisputed facts establish that sleeping facilities were provided for employees on the ships, and that it was exceptionally rare for their sleep to be interrupted by an emergency. The undisputed facts also establish an implied agreement between the parties that plaintiffs would not be compensated for eight hours of sleep time so long as their sleep was not interrupted. Prior to their employment, plaintiffs received a handbook that set forth Metson's compensation policies, including that employees would not be compensated for eight [***36] hours of "off-duty" sleep time each day. Plaintiffs did not dispute that they were "aware of and worked for [Metson] pursuant to the pay structure set forth in [Metson's] employee handbook."

Thus, while plaintiffs were entitled to be compensated for only four, rather than 12, hours of standby time during each 24-hour working day, the [*83] summary judgment in favor of Metson must be reversed also because plaintiffs are entitled to be compensated for those four-hour periods.

In reaching this conclusion, we neither agree nor disagree with Metson's contention that the exclusion of the entire 12 off-duty standby hours from "hours worked" would be reasonable in light of the nature of its business, and that requiring it to compensate employees for any of these hours (at overtime rates, no less) will negatively impact its business and may adversely affect employees by leading to the reduction of the number of crewmembers or hourly rates of compensation. Our task is to interpret and enforce the applicable wage order that has been properly adopted by the IWC. The several wage orders that have been promulgated by the IWC are tailored to the conditions of the different industries to which each applies, [***37] and within the wage orders

themselves are numerous qualifications and exceptions to reflect more unique situations within the scope of the order that make different treatment appropriate. If the nature of providing emergency maritime cleanup services is such as to justify an exception from the normal control standard governing the determination of "hours worked," that is a matter to be evaluated by the IWC. The existing wage order contains no such exception. It is not for the court to determine whether such an exception [**250] would be appropriate, but Metson's contentions may well deserve the careful consideration of the IWC.

2. Plaintiffs' Motion for Summary Adjudication

Plaintiffs' motion sought summary adjudication of the following issues: "1. That California wage and hour laws apply; 2. That plaintiffs were under the control of the defendants for the entire two-week 'hitch'; 3. That the defendants failed to provide duty free meal periods; and 4. That the defendants failed to properly calculate overtime for the seventh consecutive day worked pursuant to California wage and hour laws." In the trial court, Metson objected to plaintiffs' motion on procedural as well as substantive grounds [***38] and the trial court agreed that the motion should be denied on both grounds. On appeal, Metson renews its contention that the motion is not proper because plaintiffs do not seek to summarily adjudicate "one or more causes of action within an action, one or more affirmative defenses, one or more claims for damages, or one or more issues of duty" as authorized by *Code of Civil Procedure section 437c, subdivision (f)(1)*. Plaintiffs have not responded to this procedural deficiency nor do they challenge the court's ruling denying the motion on this procedural ground. We agree that the motion was properly denied on this ground. We shall therefore affirm the denial of the summary adjudication motion on this procedural ground, without implying any qualification of the substantive rulings expressed above. [*84]

Disposition

The judgment is reversed and remanded to the trial court with directions to proceed in accordance with the views expressed in this opinion. Plaintiffs are to recover their costs on appeal.

Siggins, J., and Jenkins, J., concurred.