SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

IRENE MUTUC, MARIA HUSSER MEJIA, RHONDA MAURER and JANET CARNES on behalf of themselves and all persons similarly situated,

Plaintiffs,

v.

HUNTINGTON MEMORIAL HOSPITAL, an affiliate of SOUTHERN CALIFORNIA HEALTHCARE SYSTEMS, a California corporation and DOES 1 to 100, inclusive,

Defendants.

Case No. BC 288727

ASSIGNED FOR ALL PURPOSES TO JUDGE WILLIAM A. MACLAUGHLIN DEPT. 89

STATEMENT OF DECISION (CODE CIV. PROC., § 632)

Trial Date: February 21, 2007
Time: 9:00 a.m.
Dept. 89

Complaint Filed: January 17, 2003

I.
DECISION IN PHASE ONE OF TRIAL

Without objection from the parties, on February 9, 2007, the Court bifurcated this action into two phases and directed a bench trial on the Plaintiffs' (the "Class" or "Plaintiffs") first cause of action for equitable remedies under California Business and Professions Code Section 17200, et seq. ("Phase One"). This portion of the trial presented three questions: (1) did Huntington Memorial Hospital ("Defendant" or "HMH") properly calculate overtime and pay overtime earned by its non-exempt 12-hour

employees who worked 10 or more hours per shift during the period of January 17, 1999, to January 21, 2004; (2) if not, should restitution be ordered and, if so, in what amount; and (3) is the Class entitled to injunctive relief that would enjoin HMH from continuing any existing pay practices. Following argument on July 23, 2007, Phase One of the trial was submitted to the Court for its decision.

The parties agreed that both Federal and California law permit an employer and its employees, subject to certain limitations not at issue herein, to establish contractually the base rate, as well as other types of compensation, for a given job and agreed that this was done in this instance by agreements between HMH and its employees. They also agree that, in California, overtime must be paid for all hours worked in excess of 8 hours in a shift, or 40 hours in a week, at a rate of one and a half times the regular rate of pay for hours worked in excess of 8 hours and double the regular rate of pay for hours worked in excess of 12 hours. They also agree that any agreement of an employer and its employees is invalid if it purports to establish a regular rate that does not satisfy the legal standards. They disagree as to whether Defendant properly calculated the regular rate of pay for 12-hour employees during the Class period[1] with the Class contending that the short shift premium ("SSP") should have been included and HMH contending that the SSP was properly excluded and that, therefore, it paid overtime on a properly calculated regular rate of pay.

In support of their contentions, Plaintiffs presented evidence of the Defendant's pay structure (which will be discussed in more detail in Section IV herein) as it existed beginning in the early 1980s, and the changes therein, continuing through the Class period. That evidence revealed that a transition occurred in the early '80s from 8-hour

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[1]The Class includes other employees besides nurses. Whenever the Class or nurses are referred to herein it is intended that such reference includes all Class members unless the context indicates otherwise.

work shifts to predominately 12-hour shifts by the beginning of the Class period and that the jobs that were converted to a 12-hour shift received a lower base rate of pay than had formerly been paid for the same job when it was an 8-hour shift and that this discrepancy continued with 8-hour jobs, involving the same work, continuing to receive a higher base rate of pay than a 12-hour job. Subsequently, after the conversion of a high percentage of the jobs to 12-hour shifts, Defendant began paying the SSP (also sometimes referred to as "the 8-hour rate" or "short-shift differential") to nurses working a 12-hour job but who, as a result of several possible reasons, were only able to work fewer than ten hours in the shift. The premium was not paid if the nurse worked 10 or more hours of the scheduled shift with the result being that a nurse working a 12-hour job received more compensation per hour worked if he/she worked less than 10 hours and less compensation per hour if he/she worked 10 or more hours. Because of this use of the SSP, the Class contends that the regular rate of pay should be determined by including the amount of the SSP because it was a payment of compensation for the statutorily established work day.[2]

HMH, in its defense, asserts that the different base hourly rate of pay for 8-hour and 12-hour nurses, and the payment of a short-shift premium, were not part of a scheme or plan to avoid the payment of overtime wages due. Specifically, it contends that the SSP was justified to accomplish several business objectives unrelated to the payment of overtime. It presented evidence that said premium encourages 12-hour nurses to accept shifts and attend classes outside their regular schedule and provides disappointment pay when the actual shift provided was materially shorter than the scheduled shift due to low patient census. As such, Defendant contends that such

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[2]Other pay types may also be paid to a given employee which must be included in determining the regular rate of pay but no claim is made by the Class in Phase One pertaining to other pay types.

remuneration is excludable from the calculation of the regular rate of pay. From Defendant's perspective, the subject pay practice was not designed to evade the overtime pay requirements, was not a subterfuge or artifice and was not an artificial pay structure.

As explained more fully hereafter, the Court finds that Defendant's pay system did not properly calculate the overtime pay for 12-hour employees and therefore it failed to pay the full amount of earnings due the class members when they worked 10 or more hours in a shift during the class period. The pay policies that led to this result were an artifice that resulted in the failure to pay the full overtime due and, as a consequence, the Class has established a violation of Labor Code section 510(a) and, therefore, a violation of Business and Professions Code section 17200, and is entitled to restitution and injunctive relief. However, the amount of restitution is not determined at this time as the Court intends to partially reopen the evidence on that subject as discussed hereafter.

II.
PROCEDURAL HISTORY

On January 17, 2003, Plaintiffs Irene Mutuc, Maria Husser Mejia, Rhonda Maurer, and Janet Carnes filed a complaint styled as a class action against the Defendant, alleging various causes of action stemming from its pay practices, and sought injunctive relief, declaratory relief and restitution. *See Mutuc v. Huntington Memorial Hospital* Complaint, filed on January 17, 2003. Less than a month later, on February 13, 2003, Plaintiffs filed a first amended complaint. *See Mutuc v. Huntington Memorial Hospital* First Amended Complaint, filed February 13, 2003. The First-Amended Complaint alleged causes of action for violation of Business and Professions Code section 17200, et seq. (hereafter "Section 17200"), recovery of unpaid wages and

penalties, violation of Labor Code section 200, conversion, breach of contract, fraud and common counts for work, labor, services provided and money had and received.[3]

The legal claims asserted in the causes of action for breach of contract, conversion, and violations of the California Labor Code form the basis of the Class's Section 17200 claim. The only legal claims not subsumed by the equitable Section 17200 claim are the claims for attorneys fees (which are not available under Section 17200) and claims for waiting time penalties under Labor Code section 203.[4]

On January 20, 2004, Judge Willhite granted the Class's motion for class certification. The Court defined the "General Class" as "all employees of Huntington Memorial Hospital since January 17, 1999 who worked at least ten (10) hours out of a scheduled twelve (12) hour day and were paid on an hourly basis." *See Mutuc v. Huntington Memorial Hospital* Order Granting Plaintiffs' Motion for Class Certification, dated January 20, 2004; and Court Ruling Re Class Certification, filed December 23, 2003. In addition to the General Class, the Court certified six subclasses, only the following four of which remain part of the case:

- Subclass 1: Pay Stub Subclass A: All persons employed by Huntington Memorial Hospital as hourly, non-exempt employees, who received pay stubs at any time since January 17, 1999;
- Subclass 2: Pay Stub Subclass B Re Itemized Deductions: All persons employed by Huntington Memorial Hospital as hourly, non-exempt employees, who received pay stubs containing an aggregate of any deductions not made pursuant to written

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[3]Two years earlier, on July 6, 2001, Barry Phillips, the spouse of a class member in this action, filed suit against HMH in Los Angeles Superior Court, Case No. BC253767, in his capacity as a private attorney general. Like *Mutuc*, *Phillips v. Huntington Memorial Hospital* ("Phillips") challenged the pay practices pertaining to 12-hour nurses and also challenged the legality of pay stubs issued by HMH to his wife and other nurses who worked 12 hour shifts.

[4]The Class dismissed with prejudice the sixth, seventh and eighth causes of action prior to trial.

authorization at any time between January 17, 1999 and March 31, 2001;

- Subclass 3: SDI Over-Withholding Subclass: All persons identified in Joint Trial Exhibit 3 in *Phillips v. Huntington Memorial Hospital*, BC253767, whose employment terminated between January 17, 1999 and December 21, 2002, and whose refund checks (issued by the Hospital in June 2003) were returned to the Hospital undelivered;

- Subclass 6: Waiting Time Penalty Class: All persons employed as hourly, non-exempt employees by Huntington Memorial Hospital since January 17, 1999, who left employment with the Hospital and did not receive all wages due on termination, either as a result of SDI over-withholding or underpayment of overtime pay.

See Mutuc v. Huntington Memorial Hospital, Order Granting Plaintiffs' Motion for Class Certification, dated January 20, 2004.

On January 7, 2005, the Defendant's motion for summary judgment or, in the alternative, for summary adjudication, was denied and the Court of Appeal thereafter accepted the Defendant's Writ of Mandate to consider the denial of said motion concurrently with review of the Judgment in favor of Defendant in *Phillips*. Thereafter, in the published *Mutuc* opinion, the Court of Appeal affirmed the denial of HMH's motion for summary adjudication on the overtime pay issue and remanded the case. *Huntington Memorial Hospital v. Sup. Ct. (Mutuc)*, 131 Cal.App.4th 893, 911 (2005) (hereinafter "*Mutuc*"). In doing so, the Court of Appeal held that the hospital's motion for summary adjudication did not establish as a matter of law that the SSP is not a subterfuge or artifice. *Mutuc*, 131 Cal.App.4th at 911. The Court of Appeal confirmed that although this case is governed by California law, federal law could provide "useful guidance" in applying California law. *Id.*, at 903. This Statement of Decision, *inter alia*, draws upon the authorities cited in the *Mutuc* decision as well as authorities brought to the attention of the Court by the parties.

In an unpublished part of its decision, the Court of Appeal found violations of Labor Code section 226 (relating to pay stubs) but did not decide whether HMH knowingly and intentionally violated said provision of law and that issue, therefore, remained for determination upon remand. Thereafter, HMH's motion for summary adjudication was granted with respect to such claim of Subclasses 1 and 2, finding that the evidence established that the violation of Section 226 was not knowing and intentional and, on that basis, an award of any penalties was denied. The Court also found that there was no continuing violation and denied injunctive relief. The judgment to be entered in this case will include these rulings.

III.
REMEDY SELECTED BY CLASS FOR ENFORCEMENT OF ITS CLAIMED RIGHTS

The California Labor Code and supporting regulatory structure closely regulate the wage rights of employees within the State including the means by which an employee may seek enforcement of those rights. In addition to administrative remedies, the Legislature has also provided California workers a private right of action (see Labor Code Sections 218 and 1194) and the courts have, in turn, recognized that an action may be brought under Section 17200 to obtain restitution of unlawfully withheld wages as well as injunctive relief against further violations of the wage law. [*Cortez v. Purolator Air Filtration Products Co.* (2000) 23 C4th 163.] In this instance, the Class' first cause of action is a 17200 claim and it is that claim which was the subject of Phase One of the trial. As recited previously, the Class also has alleged other causes of action on different theories of recovery.

IV.
LIABILITY

A. An Employer and Its Employees Have Great Freedom in Determining the Pay Scale for Any Given Job With Only a Few Limitations.

While there is no disagreement between the two sides, preliminarily it should be stated that the applicable law gives employers and employees freedom to agree on the pay for a given job except that, in doing so, they may not violate the minimum wage laws and may not create a structure or scale that is artificial in the sense that it negates the statutory purposes. This principle of law was referred to in *Mutuc* (at p. 904). In addition, it should also be noted that the parties to an employment relationship are not able to establish a regular rate of pay in contravention of the applicable regulations. [See *Walling v. Hardwood Co.* (1945) 325 U.S. 419, 424-425 and 29 C.F.R. Sec. 778.104 (2004).

B. Some Years Ago, Defendant and Its Employees Altered the Then Existing Hour and Wage Structure and Did So in Compliance With the Legal Requirements.

More than 20 years ago, HMH began a process of change from a standard 8-hour work shift to a standard 12-hour work shift. Up until some time in the early 1980s, the nursing staff at HMH worked standard 8-hour shifts. While the exact date of the beginning of a transition to 12-hour shifts was not established, the evidence presented indicated that it probably occurred at least by 1982 (see Exh. 57 indicating the transfer of a nurse to 12-hour shifts) and certainly by early 1983. (See Exh. 836.) This documentary evidence is consistent with the testimony of Payroll Manager Lisa Kay Reese who recalled the change began in the early 1980s [Reporter's Transcript (hereafter "R.T.") 88:9-10]. The nurses who agreed to 12-hour shifts signed written agreements and the early such agreements provided that the base rate of pay then being paid to the nurse would be reduced by 4.76%, thus establishing a different base

rate of pay for the 8-hour and 12-hour nurses (see Exh. 836) and this rate of reduction continued for some years thereafter (see Exh. 1, agreement dated December 20, 1988, and Exhs. 73 and 847) but was subsequently changed to a reduction of 14.29% of the base rate then being paid to 8-hour nurses. (See, for example, Exhs. 1, 85 and 842.) These agreements, regardless of the rate of reduction from the then current base rate of pay, provided for payment of overtime based on the reduced rate.

When the transition was essentially completed, more than 80% of the non-exempt nursing staff was working 12-hour shifts. In a typical 14-day pay period, the 12-hour nurses are scheduled for six 12-hour shifts for a total of 72 hours per pay period, plus any additional shifts they choose to work, while the remaining 8-hour nurses work ten 8-hour shifts for a total of 80 hours per pay period. At this point in time, before the introduction of the SSP, the Class agrees that the contracting for a higher base rate of pay for 8-hour shifts and a lower base rate for 12-hour shifts was within the permissible discretion of the parties as the rate of pay did not violate the minimum wage laws and the agreed upon rates were in fact used in determining the straight time and overtime wages owed to the employees.

C. A Short Shift Premium was Subsequently Provided Which Changed the Pay Structure of the Nursing Staff and is the Basis for the Claim Being Made Herein.

HMH has emphasized, both in the evidence it presented and the arguments made, that the transition to 12-hour shifts was made by employee choice as such shifts are preferred by most employees because they work fewer shifts in a pay period (6 shifts compared to the 10 shifts worked by 8-hour employees) and thus have greater latitude in the use of their remaining time. There are also operational advantages to HMH as scheduling is easier and it is felt that patient care is improved because of fewer nurses involved in the care of a given patient and saving of time because of fewer shift

changes.

These advantages are undoubtedly true but the advent of the 12-hour shift was not without any problem. As the process of explaining and implementing the change began, it was very quickly realized that persons working six 12-hour shifts, a total of 72 hours, would earn essentially the same as persons working ten 8-hour shifts, a total of 80 hours, because of the overtime and that a person working a 12-hour job who also worked one additional 8-hour shift per pay period, thus also working 80 hours, would earn more for working the same number of hours as the person working in an 8-hour job. As a result of the complaints of the 8-hour employees, HMH reduced the base rate of pay for the 12-hour jobs so that, excluding other pay premiums that an employee might have been entitled to, 12-hour and 8-hour employees made approximately the same for 80 hours worked in a pay period. (See testimony of Rayla Nolan, R.T. 186:4 - 188:15 and Exh. 45, Par. 8.)

However, the plot thickened. For several possible reasons, including required class time and low patient census, a 12-hour nurse may work less than the full 12-hour shift which could then result in that person receiving less in a given pay period than an 8-hour job would pay. As an example of what could occur, if we assume that a 12-hour nurse, who was scheduled to work six 12-hour shifts during a pay period, is required to attend one 8 hour class in lieu of one of the 12-hour shifts and is sent home 4 hours early during another because of low patient census, the nurse will lose 8 hours of pay that would have otherwise been earned. That nurse could schedule to work an 8-hour shift to make up the hours but would not make up the pay because the hours lost were overtime hours which paid time and a half. Even though the overtime would have been paid on the lower base rate of a 12-hour job, the 8 hours of additional work, even at the higher rate of an 8-hour job, will not equal the overtime that would have been earned.

While no evidence indicated the specific reason for it, the totality of the evidence of the history of the changes in pay structure establishes that the short-shift premium was introduced to cure, or at least ameliorate, the disparity that could occur when a 12-hour nurse did not get to work all the scheduled hours just as Defendant did when it previously reduced the base rate for 12-hour jobs to prevent a perceived unfairness that otherwise would have affected the 8-hour nurses who would have earned less for working during a pay period than a 12-hour employee.

With the introduction of the SSP, the structure changed. Previously, an 8-hour nurse received a higher rate of pay for doing the same work as a 12-hour nurse who received a lower base rate of pay but also had 24 hours of overtime (at time and a half of the lower base rate) during a pay period. With the advent of the SSP, if a 12-hour nurse worked the full 12-hour shift, that nurse received the lower base rate for 8 hours and one and a half times the lower base rate for 4 hours. However, if the 12-hour employee worked less than 10 hours, that employee would receive the SSP for each hour worked which, when added to the lower 12-hour base rate, equaled the higher 8-hour rate for the time worked. If the employee worked 10 hours or more, the SSP was not paid and that employee's pay would be calculated for all hours worked at the lower base rate of pay. In other words, the same employee would receive higher hourly compensation for working fewer hours than the rate of compensation for working longer hours and it is this result that is the basis of the Class' claim.

D. State Law Requires that Overtime be Paid Based on the Regular Rate of Pay.

While Labor Code Section 510(a) states that overtime compensation must be paid for any work in excess of 8 hours based on an employee's regular rate of pay, the Labor Code does not state how the regular rate of pay is to be determined. The State of California, however, has taken the position that it will adhere to the standards

madopted by the United States Department of Labor, to the extent they are consistent with California law, in determining the regular rate of pay for a given job. (See authorities cited in *Mutuc*, pp. 902-903.)

29 U.S.C., § 207(e) states that the regular rate "shall be deemed to include all remuneration paid to, or on behalf of, the employee" excluding certain enumerated payments set forth therein.

29 C.F.R., § 778.316 states:

> "While it is permissible for an employer and employee to agree upon different base rates of pay for different types of work, it is settled under the Act that where a rate has been agreed upon as applicable to a particular type of work the parties cannot lawfully agree that the rate for the work shall be lower merely because the work is performed during the statutory overtime hours . . ."

Addressing artificial regular rates and devices to evade the overtime requirements, 29 C.F.R., § 778.500 states:

> "(a) Since the regular rate is defined to include all remuneration for employment (except statutory exclusions) . . . the overtime provisions of the Act cannot be avoided by setting an artificially low hourly rate upon which overtime pay is to be based and making up the additional compensation due to employees by other means. The established hourly rate is the 'regular rate' to an hourly employee only if the hourly earnings are the sole source of his compensation. Payment for overtime on the basis of an artificial 'regular rate' will not result in compliance with the overtime provisions of the Act.

(b) . . . the hourly rate paid for the identical work during the hours in excess of the applicable maximum hours standard can not be lower than the rate paid for the nonovertime hours . . ."

29 C.F.R., § 778.327(b) provides:

"It seems clear that where different rates are paid from week to week for the same work and where the differences are justified by no factor other than the number of hours worked by the individual employee--the longer he works the lower the rate--the device is evasive and the rate actually paid in the shorter or non-overtime week is his regular rate for overtime purposes in all weeks."

The exclusions from the calculation of the regular rate, as provided by 29 U.S.C. § 207(e) are:

"(1) sums paid as gifts . . . on . . . special occasions as a reward for service, the amounts of which are not measured by or dependent on hours worked . . . ;

(2) payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of employer to provide sufficient work, or other similar cause; . . . and other similar payments to an employee which are not made as compensation for his hours of employment;

(3) sums paid in recognition of services performed during a given period if either (a) . . . that payment . . . [is not made pursuant to any] agreement, or promise causing the employee to expect such payments regularly; or (b) the payments are made pursuant to a bona fide profit-sharing plan . . . ; or (c) the payments are talent fees . . . ;

(4) contributions irrevocably made by an employer . . . to a bona fide plan for providing . . . benefits for employees;

(5) extra compensation provided by a premium rate paid for work by the employee in any day or workweek because such hours worked in excess of eight in a day or in excess of the maximum workweek applicable to such employee under Subsection (a) . . . ;

(6) extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays. . . where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in non-overtime hours on other days;

(7) extra compensation provided by a premium rate to the employee, in pursuance of an applicable employment contract . . . for work outside of the hours established in good faith by the contract . . . as the basic, normal, or regular workday (not exceeding eight hours) . . . where such premium rate is not less than one and one-half times the rate established in good faith . . . ; or

(8) and value . . . derived from employer-provided grants or rights provided pursuant to a stock option, . . . or purchase program. . . ."

The Code of Federal Regulations states, in turn, that the only exclusions from the remuneration used to calculate the regular rate of pay of an employee are those contained in Section 207(e), saying that "all remuneration for employment paid to employees which does not fall within one of these . . . exclusionary clauses must be added into the total compensation received by the employee before his regular hourly rate of pay is determined." [29 C.F.R., § 778.200(c)]

As the foregoing federal regulations are not inconsistent with California law, they, and the numerous cases interpreting them, will be a basis of the analysis of the issues presented in Phase One of this trial.

E. The Short-Shift Premium Should Have Been Included in the Calculation of the Regular Rate Of Pay for the Employees Working 12-Hour Jobs.

It is established beyond question or further discussion that the regular rate of pay is the hourly rate actually paid the employee for the normal non-overtime work week for which he is employed. (*See Bay Ridge Operating Co., Inc. v. Aaron, et al., Huron Stevedoring Corporation* (1948) 334 U.S. 446; *Walling v. Youngerman-Reynolds Hardwood Co.* (1945) 325 U.S. 419 and 29 U.S.C. Sec. 207(e).) Section 207(e) sets forth payments that are excluded from the calculation of the regular rate and, according to 29 C.F.R. Sec. 778.200(c), only "the statutory exclusions are authorized. It is important to determine the scope of these exclusions, since all remuneration for employment paid to employees which does not fall within one of these . . . exclusionary clauses must be added into the total compensation received by the employee before his regular hourly rate of pay is determined."

Of those exclusions set forth in Section 207(e), only one, number (2), could be the basis for not including the SSP. That exception excludes payments made for occasional periods when no work is performed due to " . . . failure of the employer to provide sufficient work." 29 C.F.R. Sec. 778.218(c) states that the latter phrase " . . . is intended to refer to occasional, sporadically recurring situations where the employee would normally be working but for such a factor as machinery breakdown, failure of expected supplies to arrive, weather conditions affecting the ability of the employee to perform the work and similarly unpredictable obstacles beyond the control of the employer. The term does not include reduction in work schedule, ordinary temporary layoff situations, or any type of routine, recurrent absence of the employee."

The SSP does not fall within this exception for three reasons. First, by its own terms, the exception does not cover a reduction in work schedule and, as a result, when

a nurse scheduled to work 12 hours is sent home before the expiration of that shift because a low patient census does not require the nurse's services, a reduction in schedule has occurred. Secondly, according to Defendant's expert, Dr. Ward, such short shifts occurred 8.59% of the time where patient care was being delivered during the Class period, more than 127,000 shifts per year. (R.T. 1861)

In addition to the shifts in which patient care is rendered, the SSP is also paid to nurses for educational classes of less than 10 hours and such duty is considered by Defendant to be a part of the nurses' regular work time (R.T. 1679, 1806). Such class time occurs in more than 5% of all shifts, and work and class short shifts, together, occur in 13.43% of all shifts (R.T. 1679) which would represent more than 180,000 of all shifts worked. Dr. Ward's analysis of the length of shifts worked was extensive and produced numerous statistics including the ones just cited which the Court has found to be appropriate numbers to be considered in the analysis of the issue of "occasional and sporadic." Defendant contends that class time should not be included in the analysis of the issue, but such contention is at odds with its own policy of including classes as work time and the Court believes that it is appropriate to include it. A short shift occurring in 13.43% of all shifts worked represents approximately one in every eight shifts, and the Court finds that such occurrence is something considerably more than occasional or sporadic in the context of the issue of what remuneration must be included in determining the regular rate. Obviously, short shifts occurring 8.59% of the time makes a less compelling argument but nevertheless is approximately one in every 11 to 12 shifts worked, and, in the same context, even if that percentage was to be used, is something more than occasional or sporadic. While individual nurses may work a short shift only occasionally or sporadically, collectively, the occurrence of short shifts is a regular event and, as a result, the short shifts cannot be characterized as only occasional or sporadic.

Thirdly, Section 207(e)(2) also requires that the payment must not be one made as compensation for the employee's hours of employment. The SSP does not meet

that requirement as it is a payment made for hours worked. Despite Defendant's protestations to the contrary, it is not a payment for hours not worked. The premium is an hourly rate and is paid for each hour the nurse worked on that shift. In other words, if the nurse worked 8 hours, the premium per hour is paid for each of the 8 hours. If the nurse worked 9.9 hours, it is paid for each of the 9.9 hours. When the nurse worked 8 or 9.9 hours, the premium is not paid for nor calculated on the 4 or 2.1 hours (the "disappointment" time) that the nurse did not work. Semantics can not change the nature of the payment as one made for time actually worked during the regular work day. Exemptions from inclusion of pay in the calculation of the regular rate are narrowly construed and the burden of proving the exemption is on the employer. *Idaho Sheet Metal Works, Inc. v. Wirtz* (1966) 383 U.S. 190; *Local 246, Utility Workers Union v. So. California Edison* (9th Cir. 1996) 83 F.3rd 292; *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785. Defendant has failed in its burden to demonstrate that the SSP payments qualify as an exemption.

Defendant cited and argued two cases in particular that it contends supports its contention that the SSP does not have to be included in the calculation of the regular rate but the Court finds that neither is applicable and would not lead to a conclusion contrary to that just stated. One, *DeWaters v. Macklin Co.* (6th Cir. 1948) 167 F.2d 694, found that an employer's profit sharing plan did not have to be included in the calculation of the regular rate. The plan in question certainly qualified for exemption under both 29 U.S.C. 207(e)(1) and (3)(b) and there is nothing about this decision which is useful in resolving the issues herein. The other, *Brennan v. Valley Towing Co., Inc.* (9th Cir. 1975) 515 F.2d 100, addressed a somewhat complicated compensation system involving guaranteed monthly salaries for regular 47-hour, six-day workweeks, with additional compensation for hours worked beyond the regular schedule. It is not useful to recite all of the facts but the issue presented by the extra pay after the 47-hour workweek related to whether the proper rate of overtime was being paid. The Court does not find this case to be instructive. These cases (and many others) highlight the

numerous and often varying methods of compensation that have been created over the years and the difficulties that can sometimes be encountered in an analysis of whether the underlying statutory and regulatory provisions relating to wages and overtime have been compiled with, but they do not advance the analysis herein.

F. The Failure to Include the Short-Shift Premium in the Calculation of the Regular Rate of Pay Resulted In a Pay Structure that Was an Artifice or Subterfuge.

Defendant argues that its calculation of the regular rate of pay does not eliminate overtime, that its use of the SSP serves a rational function unrelated to the hours worked and that its pay system for the 12-hour nurses is not an artifice or subterfuge. (See Defendant's Post Trial Brief, pages 12-18.) The first of such arguments, that its calculation of the regular rate of pay does not eliminate overtime, misses the point. The violation of the overtime laws claimed in this action is not that Defendant has not paid for overtime hours worked but that the pay for overtime of 10 hours or more has been less than it should have been. While Defendant points out that it has properly included other pay differentials and premiums in the calculation of the regular rate, such fact does not excuse the failure to include the SSP in the calculation. Similarly, the fact that it pays overtime on the vast majority of the shifts worked is not dispositive, or even informative, of any issue in the case. The claim relates to the failure to pay the proper amount of overtime and not that overtime has not been paid at all.

Substantial evidence was presented by Defendant to the effect that the 12-hour shifts permit greater flexibility in scheduling of patient care and that such shifts are favored by a large proportion of the nurses because of the fewer days worked in a pay period with the resultant flexibility in their own personal schedules. Defendant has also argued that its use of the SSP, in conjunction with the 12-hour shifts, permits it to have even greater flexibility in scheduling because it can send nurses home before the end of the scheduled shift without the nurse suffering as large a loss of pay as would otherwise occur and that the payment of the SSP encourages nurses to work additional shifts which the hospital may need to provide patient coverage and also encourages