COURT OF APPEALS
DECISION
DATED AND RELEASED

July 22, 1997

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No. 96-2398

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

PHILLIP ADAM, ANN BETTS, DEBRA BRANDL, THOMAS BURKE, EILEEN CONNORS, MARY CUNDIFF, MARCELLA DECLEENE, JUDY DICKINSON, ANN EILER, CAROL GILSDORF, SUSAN HOWARD, LORI HAGANES JAMROZ, DALE JERABEK, MARCIA JOHNSON, DEBORAH MILLER, DONNA NELEZEN, JUDITH NELSON, DIANE PIVONKA, EDITH REIGERT, DAWN SCHAEFER, SCOTT SIMPSON, PAMELA SCHMIT SPANG, MARY STECKART, KATHLEEN TAUSCHEK, PATRICIA VANDENHOVEN, AND WENDIE S. MAYER,

PLAINTIFFS-RESPONDENTS-CROSS APPELLANTS,

DEBRA ANDERSON, JEFF KROPIDLOWSKI, NANCY JACQUES, DONNA LINDSLEY, LYNDA SLANG, LYNN SMITH, AND MARY CARRIVEAU,

PLAINTIFFS,

V.

BROWN COUNTY,

DEFENDANT-APPELLANT-CROSS RESPONDENT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Brown County: RICHARD J. DIETZ, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Brown County appeals a judgment awarding overtime pay to Brown County employees pursuant to the Fair Labor Standards Act (FLSA).[1] Brown County raises ten issues on appeal. These issues fall into the following categories: (1) Are the parties' claims precluded by their professional status and collective bargaining agreement; (2) did the trial court make sufficient findings and does the evidence support those findings; and (3) should estoppel preclude their claim.

The employees cross-appeal. They argue that the trial court erroneously (1) awarded two instead of three years backpay; (2) determined that uncompensated six minutes per day spent walking between the punch clock and the employee's work station was de minimus; (3) denied Mary Steckart's claim; and (4) denied double damages. We reject the parties' challenges and affirm the judgment.

The employees are registered nurses licensed by the State of Wisconsin and nursing supervisors who work at the Brown County Mental Health Center. All have either a diploma or a degree as nurses. The staff nurses are

[1] The judgment provided that Brown County shall pay each of the 26 plaintiffs varied amounts that ranged from approximately $500 to $10,000. The judgment further provided that Brown County pay attorney fees and costs in the sum of $34,267.30.

members of a bargaining unit whose wages, hours and conditions of employment have been the subject of a collective bargaining agreement with Brown County.

The employees filed a complaint in circuit court alleging unpaid overtime wages pursuant to the FLSA, 29 U.S.C. §§ 207 and 216(b). Nursing supervisors and one nurse claimed that they should be paid for their twenty-minute mealtimes because they are frequently interrupted during mealtimes. The nurses claimed overtime for uncompensated time before and after their shifts.

Following a three-day trial to the court, at which twenty-nine witnesses testified, the trial court issued a memorandum decision that included the following findings. The employees generally work an eight-hour-twenty-minute shift for which they are paid for eight hours, assuming an unpaid twenty-minute lunch break. If the employee punches in later than the assigned shift, or punches out earlier than the end of the shift, he or she is docked pay for each minute less than eight hours twenty minutes. Brown County initiated a written policy that punch-in was to occur no more than five minutes before the commencement of the regular shift, and punch-out was to occur no more than five minutes after the shift ends. All overtime is to be accounted for by an overtime authorization card, referred to as a "green card." Several employees testified that preapproval is required. If the employees' overtime is approved, they are paid one and one-half times their hourly rate. Most employees could not recall ever having a written overtime request turned down. The trial court found, however, that the employees are discouraged from submitting green cards for working a few minutes after their shift.

Time clocks are not situated in direct proximity to works stations, and the employees must punch in a few minutes early to reach their work station at

the start of their shifts. The court found that the time necessary to walk from the punch clock to the work station varied from one to three minutes. The court found "unequivocal and unrebutted by credible evidence that when the employees punch-in they commence work, with the exception of the time it takes to arrive at their work station. They also testified that they work until they punch-out, again with the exception of the time it takes to walk to the time clock." The court found "more credible evidence in this case to be that there is a history of employees punching in somewhat early and punching out after the completion of their shift and that for some periods of time prior to and after the shift, the employees were engaged in productive work." The trial court determined that there was work performed after the usual punch-out that showed up on the time clock records but for which overtime cards were not filled out. The employees were expected to spend some reasonable period of time before or after their usual work day without reasonable expectation of being paid overtime.

The trial court observed:

> The practical problem in this case arises from the fact that, on the one hand, the plaintiffs view themselves as health care professionals with legal and moral responsibilities to patients that sometimes require additional work beyond their usual shifts. They perceive the overtime cards to be demeaning in that, without exception, they perceive ambivalence on the part of the employer to pay overtime, even though it apparently is paid when requested. On the other hand, the employer chooses to pay strict reliance on the time card for some purposes, i.e. docking an employee if they punch-in as early as a minute late or punch-out as early as a minute early. Yet the same employer is unwilling to accept the time clock as an accurate record of hours worked if the time period exceeds the scheduled hours of work

The court also stated that at least one of the witnesses referred to filling out green cards for overtime as a "hassle." Nonetheless, the trial court denied overtime pay for walking from the time clock to the work station as de minimus. The court found that "it is reasonable to anticipate that three minutes is necessary to proceed from the time clock to the work station, and back again after the shift, and that such period of time should legitimately be credited against each of the claims of the plaintiffs." The trial court concluded that the nurses were entitled to their unpaid overtime, less six minutes per day, as evidenced by the time clock records.

The trial court also determined that nursing supervisors were entitled to compensation for meal periods. Nursing supervisors testified that during their twenty-minute lunch periods, they must stay at the health center, carry a beeper and be on call, answer the telephone if paged, respond to emergencies, process admissions and answer crisis calls. Lunch is not at a scheduled time during the shift and can be interrupted according to the demands of the job. Although if the original lunch break is interrupted, some employees have been told to take a twenty-minute break. However, there was testimony to the effect that often no twenty-minute time period transpires without interruptions.

The trial court was unpersuaded by the County's estoppel defense, concluding that the employees had attempted to address their concerns in a variety of ways with the County. The court found that "management and supervisory personnel knew or should have known that work was being performed prior to, and immediately after, assigned shifts consistent with expected professional duties of these employees."

The trial court addressed the time frame for recovery and concluded that claims based on overtime more than two years prior to the action were barred. Last, the court concluded that because the County had reasonable grounds to believe that it was not in violation of the FLSA, the liquidated damages provision should not be applied.

When reviewing findings of fact, we must affirm unless they are clearly erroneous. Section 805.17(2), STATS. The trial court is the final arbiter of witness credibility. We will not upset its findings of credibility unless the fact relied upon is "in conflict with the uniform course of nature or with fully established or conceded facts." *See* ***Chapman v. State,*** 69 Wis.2d 581, 583, 230 N.W.2d 824, 825 (1975). We review conclusions of law de novo. *See* ***Green Scapular Crusade, Inc. v. Town of Palmyra,*** 118 Wis.2d 135, 138, 345 N.W.2d 523, 525 (Ct. App. 1984).

I. Appeal

A. Applicability of FLSA

Brown County argues that the FLSA does not apply to the employees' claims because their labor contract overtime provisions and grievance procedures provide the plaintiffs with the proper forum. We disagree.

> The statutory enforcement scheme grants individual employees broad access to the courts. … No exhaustion requirement or other procedural barriers are set up and no other forum for enforcement of statutory rights is referred to or created by the statute. …
>
> Moreover, we have held that congressionally granted FLSA rights take precedence over conflicting provisions in a collectively bargained compensation arrangement.

Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728, 740-41 (1981) (footnotes and citations omitted).

Brown County argues that "the collective bargaining agreement can and does outright preclude the plaintiffs' claim." ***Leahy v. City of Chicago,*** 96 F.3d 228, 232 (7th Cir. 1996). Brown County reads ***Leahy*** too broadly. While labor agreements may make reasonable provisions to guide the computation of hours where precise computation is difficult, the FLSA guarantees compensation for all work engaged in by employees covered by the Act, and any "contract falling short of that basic policy, like an agreement to pay less than the minimum wage requirements, cannot be utilized to deprive employees of their statutory rights." ***Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123,*** 321 U.S. 590, 602-03 (1944). We are satisfied that the employees demonstrated that they were entitled to the protection of the FLSA.

Next, Brown County contends that the employees qualify for the professional exemption from overtime coverage under 29 U.S.C. § 213(1)(a)1. We disagree. Whether employees fall within an exemption is primarily a question of fact. ***Brennan v. Southern Prods.,*** 513 F.2d 740, 744 (6th Cir. 1975). "Employers must prove by clear and convincing evidence that an employee qualifies for exemption." ***Shockley v. City of Newport News,*** 997 F.2d 18, 21 (4th Cir. 1993). There is a presumption of coverage, and the exemptions are to be narrowly construed and limited to those who plainly and unmistakably fall within their terms and spirit. ***Thomas v. County of Fairfax,*** 758 F. Supp. 353, 358 (E.D. Vir. 1991).

> A professional employee is an employee whose primary duty requires knowledge of an advance type, consistent exercise of discretion and judgment, and whose work is

> predominantly intellectual, varied in nature, cannot be standardized in a set period of time, nor requires more than twenty percent of the time to be spent on nonessential and incidental tasks.

Klein v. Rush-Presbyterian-St. Luke's Med. Ctr., 990 F.2d 279, 283 (7th Cir. 1993). One requirement is that a professional or executive employee be compensated on a salary basis. A salaried employee is one who receives each pay period a predetermined amount "not subject to reduction because of variations in the quality or quantity of the work performed …. The employee must receive his [or her] full salary without regard to the number of days or hours worked." ***Id.*** (quoting 29 C.F.R. § 541.118(a)).

Other regulations define professionals as employees who receive a salary as distinct from an hourly wage provided that their pay may not be docked for an absence from work for less than one day and that they are not subject to having less than one week's pay docked for a disciplinary infraction that is not a breach of a major safety regulation. *See* ***id.*** at 284-85.

Here, the nurses and nursing supervisors are not salaried employees. They are required to punch a time clock and, should they punch in a minute late, they are docked a minute's pay. The trial court found no evidence of record that they are given any opportunity to use accrued time. The court also found that there is no evidence that the employee is not subject to having less than a week's pay docked for a disciplinary infraction that is not a breach of a major safety regulation. *See* ***id***. at 283. These findings are not assailed on appeal and support the court's conclusion that the employees are not exempt professionals under the FLSA. We agree that nurses and nursing supervisors are not "bona fide … professional" employees within the meaning of 29 U.S.C. § 213(a)(1) and are not exempted from coverage under the FLSA. *See* ***id.*** at 283-84.

B. Violation of FLSA

Brown County argues that because it had no actual or constructive notice of unpaid overtime worked, it could not have violated the FLSA. The employees have the burden of proving that the County had notice that the employees were performing unpaid overtime work. ***Reich v. Department of Conservation & Natural Resources,*** 28 F.3d 1076, 1081-84 (11th Cir. 1994). The issue of actual or constructive notice is one of fact to be reviewed for clear error. ***Id.*** at 1082. The County contends that in absence of overtime cards, it was without notice that overtime as indicated on time clock records should be compensated. We disagree. The time clock records as well as the testimony of the nurses support the court's findings that the County had notice.

The court relied on testimony to the effect that supervisory and managerial personnel conveyed to the nursing staff that "they were expected to perform certain tasks without an eye to the time clock, that is, that if they were expected to work for a few minutes during a lunch break or for a few minutes after their shift, that it was 'expected' that a green card would not be submitted." The court found "from the totality of the testimony, that management was aware generally that work was being performed for the benefit of the employer even though overtime cards were not being utilized." The trial court pointed out that the County had access to its time clock records, which it used very accurately for the purposes of docking pay. The time punch records often showed a discrepancy between the hours worked and the overtime hours requested by means of green cards. The court found that practically every employee testified that overtime concerns were addressed with management and that they believed there was some sort of policy of discouragement. The court inferred that management and supervisory personnel knew or should have known that work was being performed

prior to and immediately after the assigned shifts "consistent with the expected professional duties of these employees."

"Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." ***Id***. at 1082 (quoting ***Anderson v. Bessemer City***, 470 U.S. 564, 574 (1985)). The court's inference that the County knew that uncompensated overtime was being worked was reasonable. Thomas Burke, a nurse, testified that as a nurse, he is expected to stay for emergencies: "I've talked to some of the supervisors and they've indicated to me that as an RN we have certain obligations to care for clients and if there's emergencies taking place specifically we are expected to stay and follow through with the emergency. Then, of course, we punch out after we're finished with that process." Burke testified he was criticized for filling out green cards for overtime. His supervisors made "extremely harsh" comments that he was not using his time efficiently. One sarcastically asked if he had really been working. As a result, he stopped using the green card system after his first year of employment in 1989, except in rare instances when a supervisor initiated it.

Several other employees testified to the same effect. Dawn Schaeffer, a nursing supervisor, testified that she never submitted a green card when working through a lunch break because she was told not to. She is not required to do charting or other tasks during lunch, but "if I was that busy per se as this weekend when I did not have any break and I was doing the work of three RNs including my own position, no, I wouldn't have even had the time to even get a break." Schaeffer does not eat in the dining room because it is too loud to hear the overhead pages. "We need to respond to all the crisis calls that are coming in. We have admissions coming through the lobby or the back ambulance entrance. … A patient might have … fallen down. A staff needs to talk to you about

something. Somebody's having some problems. You need to be able to respond at a hundred percent of the time and then some." When Schaeffer worked twenty-five minutes overtime responding to an administrator's request, she was asked, "what are you still doing here. You're supposed to be at home." As a result, Schaeffer did not submit a green card.

Brown County argues that Schaeffer's testimony was undercut on cross-examination because she agreed that she was questioned only one time about submitting a green card for working over her shift. Brown County also argues that testimony of other witnesses fails to support the court's findings. Brown County's contentions essentially argue the weight and credibility of the testimony. It is the trial court's function, not the appellate court's, to resolve conflicts in the testimony and assess weight and credibility. Section 805.17(2), STATS. We must search the record to locate evidence to support findings reached by the trial court, not for evidence to support findings the court did not but could have reached. ***In re Estate of Dejmal,*** 95 Wis.2d 141, 154, 289 N.W.2d 813, 819 (1980). We are satisfied that the employees' testimony, as well as the County's time clock records, support the inference that Brown County knew or should have known that employees worked uncompensated overtime.

Next, Brown County argues that the court made insufficient findings and that the record fails to support its findings of violations of the FLSA. The County also argues that the trial court "totally misinterpreted" how the payroll accounting system works and no competent evidence supports the court's findings that the employees were discouraged from submitting green cards. We disagree.

The FLSA requires employers to pay overtime to employees who work more than forty hours in a workweek. 29 U.S.C. § 207(a). The trial court

held that the payroll accounting system itself was appropriate, but that the way the system was practiced, i.e., the submitting of "green cards," was discouraged for pre- and post-shift tasks, especially where the time involved was fifteen minutes or less. Whether the nurses and nursing supervisors worked overtime for the County without compensation presents an issue of fact. Without attempting to summarize all of the testimony, we offer a brief summary that supports the trial court's findings that employees worked uncompensated overtime and were discouraged from submitting green cards.

Diane Pivonka, a nursing supervisor, testified that there were times she was docked for punching in one minute late and then not given credit for punching out twenty-five minutes after the end of shift. Scott Simpson, a nurse, described emergencies that required overtime: "[F]or example an admission, an acting out client cutting themselves, someone who struck out who needs seclusion; a medical emergency." He explained that it was not feasible during emergencies to obtain pre-approval to submit a green card for unexpected overtime. He said that it is at the point of an emergency "that you're supposed to notify the supervisor that you may not be able to complete all your work on time, and that process which would seem rather simple is not always so simple because it may take several pages to get a hold of the supervisor." "[I]t's not just filling out the card.. … [T]the policy is pre-approval and … notifying the supervisor the time that you leave. So that's two separate contacts with the supervisor that[] have to be made on evenings when the tension [has] been the highest …."

Simpson has received sarcastic remarks from management when submitting a green card. Simpson testified that when he would notify the P.M. supervisor when he would be leaving: "There was a noticeable lack of cordiality to the point where when it was an occasion when the three of us, the three P.M.

RNs, were leaving together on a night when we were all requesting overtime and one would need to make the call to the supervisor to let her know when we were leaving[,] none of us wanted to make that call." He testified he was paid the overtime on that occasion. However, he testified that the punch out clocks were a more accurate indication of hours actually worked.

Kathleen Tauschek, a nurse, testified: "It was strongly discouraged to put in green cards or when … we … would fill in the green cards we were told that it was not appropriate …. " Her unit coordinator took her into his office and told her overtime hours would not be approved. Although some overtime cards had been approved, others were denied. She testified that she was required to itemize each of her activities when requesting overtime.

Wendie Mayer, a nurse, testified that she submitted a green card for working through lunch break. Her coordinator signed it but the next day said "that management gave her a hard time for that; that she could not sign 'em again." Mayer stated that this incident discouraged her from filling out green cards for other times she worked overtime.

Mary Steckart, a nurse, testified that a staff shortage on her unit required her to work through lunch periods and breaks. She testified that one evening she worked the P.M. shift two and one-half hours overtime. When she notified her supervisor to submit a green card, the supervisor proceeded "to just rant and rave at me why–why was I still there." Steckart testified that she felt harassed and filed a grievance.

Phillip Adam, a nurse, testified that in order to receive reports on the condition of clients from the nurses who were leaving, he had to punch in fifteen minutes before the beginning of his shift. He testified that at times he had the

responsibility for three units and seventy-five clients at the start of the shift. The units were spread out, and he would have to report to each of them to receive reports on the clients' behavior and physical status from the day. As a result, he was obliged to be present at the same starting time at three units for three different reports.

Adam generally did not submit overtime authorization cards "[b]ecause I felt that I would receive negative feedback requesting payment for the extra time that I worked." In 1987 he had to work through his twenty-minute lunch break as staff nurse on the adolescent, alcohol and drug abuse treatment unit. He chose to fill out a green card to seek payment for that time. A day or so later the assistant director of nurses brought the card to him and said that "we will let it pass this time" but in the future pre-authorization was necessary.

Ann Eiler, a nursing supervisor, testified that because all overtime must be pre-approved, "that in itself was a discouragement because so often almost all of the time you can't determine that you're going to be there late until the actual time happens … so you can't really pre-plan." When she worked as a staff nurse, she was instructed not to submit a green card unless she had received prior approval for overtime.

We are persuaded that the trial court's twenty-three-page memorandum decision, supplemented with two additional written decisions, represents detailed and comprehensive findings. The nurses and the nursing supervisors produced the County's own time clock records and computer generated time history reports. They reviewed the reports, made adjustments where necessary and confirmed their accuracy. "[A]n employee has carried out his burden if he proves that he has in fact performed work for which he was

improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." ***Anderson v. Mt. Clemens Pottery Co.,*** 328 U.S. 680, 687 (1946), *superseded by statute on other grounds*, ***Carter v. Panama Canal Co***., 463 F.2d 1289, 1293 (D.C. Cir. 1972). Upon review of the record, we cannot say that the trial court's view of the evidence is clearly erroneous.

Next, Brown County argues that it is impossible for the nurses to remember whether they performed indispensable duties to the exact minute, and that the testimony of its witnesses, Candace Krause and Michael Konecny, was more reliable. The trial court could believe testimony that the nurses did not stay overtime unless they had essential tasks to complete. As nurse Eiler stated: "It's not pre-plan that you're going to be there late. I never want to work past my eight hours. I want to leave when I'm at the end of my scheduled shift." The court was entitled to believe the testimony that when the nursing staff "did work hours beyond their normal shift, it was because the events or the requirements of the nursing care required that."

Next, Brown County contends that an employer as a matter of law has a right to rely on the handwritten overtime cards rather than the time clock records. We disagree that this issue is one of law. Brown County relies on ***Walling v. Woodruff,*** 49 F. Supp. 52, 56 (C.C. Ga. 1942): "An employer does not violate the act or the regulation by relying in good faith upon employees to keep and report their own time and by using the record so made as the record of time required by the regulation, *if neither the employer or his agents do or say anything to cause the employees to keep an incorrect record."* (Emphasis added.) Here, accurate records were kept by the automated punch clock. The trial court essentially found as a factual issue that Brown County contributed to the

underreporting of overtime hours by discouraging the use of green cards. This finding is supported by the record. Consequently, Brown County's argument must be rejected.

Next, the County argues that no valid reason was given for failing to submit overtime cards, which are a reasonable business necessity. It complains that it never discouraged the submission of green cards because there is no evidence that it formally disciplined or threatened an employee for submitting a time card. We disagree that evidence of discipline or threats are necessary to demonstrate discouragement. Although some nurses testified that they were not discouraged from submitting green cards, others testified that the logistics of pre-approval for emergency overtime are a form of discouragement. Others testified that they would rather not subject themselves to sarcastic and demeaning remarks at the end of their shifts. This testimony is sufficient to find evidence of discouragement.

Next, Brown County argues that bona fide meal periods are not considered hours worked and, therefore, not all the nursing supervisors' meal times are compensable because they were merely "on-call' and predominantly in pursuit of personal or private interests. *See* ***Leahy,*** 96 F.3d at 230-31 n. 2. We disagree. The FLSA requires remuneration for meal periods during which an employee is unable to comfortably and adequately pass the meal time because the employee's attention is devoted primarily to official responsibilities. ***Id.*** A bona fide meal period requires that "'[t]he employee must be completely relieved from duty for the purpose of eating regular meals …. '" ***Id.*** (quoting 29 C.F.R. § 785.19(a)).

The trial court could reasonably conclude that remaining poised to respond to any crisis within five minutes is not "relieved from duty." The trial

court found that the meal time interruptions were regular and recurring. The record certainly supports that finding. The nursing supervisors are restricted to stay in the health center by their beeper, and one employee testified that it was difficult to find enough uninterrupted time to even take a bathroom break. Ann Eiler, a nursing supervisor, testified that she is required to respond within five minutes to all pages, messages and phone calls. She must be ready to respond at all times. She chose to eat in her office to facilitate receiving calls. "[E]very time I try to take a lunch break there's an interruption of some type …." When required to work through breaks and lunch periods, she has submitted green cards but was never paid the overtime requested. She testified that for approximately the last four years, she has unsuccessfully attempted to work out their dissatisfaction with unpaid meal times with management.

Brown County's suggestion, that meal times could be retaken and that overtime cards could be submitted, is essentially its the version of the facts. The testimony also permits an opposing inference. We conclude that the record supports the trial court's determination that the nursing supervisors' meal times were not spent predominantly in pursuit of personal or private interests.

Next, Brown County argues that Dale Jerabek's claim for unpaid overtime is precluded by the record. Brown County contends that Jerabek blatantly violated the time clock requirement. The employee brief does not specifically respond to this argument. The trial court's opinion stated:

> With respect to employee, Dale Jerabek, his conduct was an abuse of the procedure. However, again as an exception to the response which the County took as to the other employees, Mr. Jerabek was counselled and threatened with discipline under the labor contract and work rules for his blatant violation of the time clock requirements. In response to this, his conduct improved and he began punching in and out in a manner more consistent with the

> other employees. No follow-up discipline was ever initiated by the County and, *for the time period for which these employees are entitled to back pay,* Mr. Jerabek stands in the same position as those other employees. (Emphasis added.)

Jerabek, employed at the health center for twenty-two years, testified that during an annual evaluation his manager mentioned concerns of other supervisors about his early reporting. However, his nurse manager said it was fine to come in early. Jerabek testified that in July of 1994, when the policy regarding scheduled starting time was posted, he conformed his reporting to work to the official policy. It is the trier of fact's function to assess weight and credibility and resolve conflicts in the testimony. Section 805.17(2), STATS. We are satisfied that the record supports the court's findings that for the period in question, Jerabek is entitled to back pay.

C. Estoppel

Finally, Brown County argues that estoppel precludes the recovery of overtime. It contends that the trial court erroneously applied the Wisconsin doctrine of estoppel instead of a federal doctrine of estoppel. Brown County relies on ***Newton v. City of Henderson,*** 47 F.3d 746, 749 (5th Cir. 1995), which stated that an employee would be "estopped from claiming that she had worked more hours than the hours she claimed in her time sheets." ***Newton*** goes on to say that "an employee would not be estopped from claiming additional overtime if '[t]he court found that the employer knew or had reason to believe that the reported information was inaccurate.'" ***Id.*** (quoting ***Brumbelow v. Quality Mills, Inc***., 462 F.2d 1324, 1327 (5th Cir. 1972)). Brown County argues that "[t]here was not a scintilla of evidence that the employer actually 'discouraged' the submission of overtime cards."

Brown County is mixing issues of law with issues of fact. We will address each separately. Insofar as the application of federal rather than doctrines of estoppel, Brown County fails to identify any material difference in the two. Applying ***Newton*** to the record before us, we reach the same conclusion as the trial court. The employer had reason to believe the lack of overtime reported on green cards was inaccurate, based upon the time clock punches and the conversations it had with nurses regarding responding to emergencies and unpaid lunches. "An employer who is armed with [knowledge that an employee is working overtime] cannot stand idly by and allow an employee to perform overtime work without proper compensation, even if the employee does not make a claim for the overtime compensation." ***Id.*** at 748. (quoting ***Forrester v. Roth's IGA Foodliner, Inc.***, 646 F.2d 413, 414 (9th Cir. 1981)). Based upon the record, under federal as well as state law, the employees would not be estopped from pursuing their claims.

With respect to the County's challenge to the sufficiency of the evidence supporting the finding that the employer discouraged the submission of green cards for overtime, our conclusion is the same as it was the other times the County raised this issue.

II. Cross-Appeal

A. The trial court should have awarded three years backpay

Next, the employees argue that the employer's violation was "willful," permitting the imposition of a three-year statute of limitations. We disagree. Under ***Anderson,*** 328 U.S. at 689-90, an employer is not required to rely solely on the punch times. The testimony supports the findings that for the most part, when submitted, green cards were paid. Management attempted to

respond to the unpaid overtime problem by restricting early and late punches to no more than five minutes. The trial court's finding that the County's failure to rely on the green card system was more akin to negligence than willful and reckless disregard of the employees rights is not clear error. As a result, we do not overturn this finding on appeal.[2]

B. Whether six minutes per day is de minimus

Relying on ***Anderson***, 328 U.S. at 690-91, the employees argue that the trial court erroneously determined that up to six minutes a day would be noncompensable as de minimus. We disagree. Under ***Anderson,*** walking time may be compensable, but time is considered de minimus if it involves small periods so insignificant they cannot as a practical administrative matter be recorded for payroll purposes. ***Id.*** at 691-92.

> We do not, of course, preclude the application of a de minimus rule where the minimum walking time is such as to be negligible. The workweek contemplated by [29 U.S.C. § 207(a)] must be computed in light of the realities of the industrial world. When the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded. Split-second absurdities are not justified by the actualities of working conditions or by the policy of the Fair Labor Standards Act.

Id. at 692. ***Anderson***, however, was superseded by the Portal Act as explained in ***Carter***, 463 F.2d at 1293. The effect of the Act is to block employees' attempts to recover overtime wages for time in transit to work stations. ***Id***. at 1294.

[2] The employees also argue that the trial court erroneously concluded that the FLSA did not apply to public sector employees before September 6, 1991. We need not reach this issue. Because we conclude that the trial court properly applied a two-year statute of limitation, claims before December 7, 1991, are time barred.

The testimony varied with respect to the time it normally takes from punch in to arrive at the work station to begin work, from thirty seconds to three minutes. The employees do not attempt to argue that the Portal Act does not apply to their claims. In any event, we are satisfied that this preliminary and incidental amount of time walking from and to the punch clock may properly be disregarded as de minimus.

C. Mary Steckart's claim

Next, Mary Steckart, a staff nurse, argues that the trial court erroneously denied her claim for interrupted meal times. At trial, Steckart testified that "I kind of estimated that I did not get lunch breaks a hundred percent of the time that I worked the P.M. shift" during staff shortages in 1991 and 1992. She further testified that "I guesstimated that half of the time fifty percent of the time on the P.M. shift I did not get my evening supper break or any break whatsoever …." Steckart signed an affidavit stating "Many more times than not, I worked through my scheduled lunch and break times …." A supervisor testified that she did not doubt Steckart's testimony.

The trial court found: "Her testimony is limited to a statement that she is interrupted more than 50% of the time. There is no testimony that indicates she is required to be on call, to answer beeper pages, walkie talkie calls, or intercom requests. Her circumstances are substantially different than those of the nurse supervisors and she has failed to meet her burden of proof."

The assessment of the weight of testimony is a trial court, not appellate function. Section 805.17(2), STATS. Here, the trial court concluded that Steckart's testimony was too imprecise to support a finding that she missed any specific number of lunch breaks. Also, unlike the nursing supervisors, Steckart's

testimony would not support a finding that she had little or no uninterrupted time to pursue purely personal interests when she did obtain lunch breaks. Based on the record, we cannot conclude that the trial court's finding amounted to clear error.

D. Double Damages Award

Next, the employees contend that the trial court erroneously failed to award them liquidated damages. We disagree. "The Fair Labor Standards Act directs the award of liquidated damages in an amount equal to the plaintiff's actual damages … except that the district judge can in his discretion excuse the defendant from paying liquidated damages if he finds that the defendant was acting in good faith and reasonably believed its conduct was lawful when it violated the Act." ***Avitia v. Metropolitan Club of Chicago,*** 49 F.3d 1219, 1223 (7th Cir. 1995). "Double damages are the norm, single damages the exception, the burden on the employer." ***Id.***

Brown County argues that it had reasonable grounds to believe that professional employees need only meet the "duties test" to be exempt from the FLSA, citing ***Mueller v. Thompson,*** 858 F.Supp. 885 (Wis. W.D. 1994), *reversed,* ***Mueller v. Reich***, 54 F. 3d 438 (7th Cir. 1995), *vacated by* ***Wisconsin v. Mueller***, 117 S.Ct. 1077 (1977); *see also* ***Auer v. Robbins,*** 117 S.Ct. 905, 909 (1997).

The trial court observed that many of the issues raised in this case were close questions requiring interpretation of relatively recent federal law. It found that Brown County had reasonable, although erroneous, grounds to believe that the employees were exempt professionals. We conclude the trial court did not erroneously exercise its discretion in denying double damages.

Finally, the employees have filed a motion requesting actual attorneys fees and costs on appeal pursuant to 29 U.S.C. § 216(b). A fee "to compensate counsel for their services in connection with the appeal can be awarded in a Fair Labor Standards Act case when the appellate court considers such an award appropriate." ***Montalvo v. Tower Life Bldg.,*** 426 F.2d 1135, 1150 (5th Cir. 1970). Here, the employees prevailed on appeal but did not prevail on the cross-appeal. Therefore, we decline to award attorney fees.

By the Court.—Judgment affirmed. No costs on appeal.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.