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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2017-2018

2160823

Norfolk Southern Railway Company

v.

Nashanta L. Williams

Appeal from Jefferson Circuit Court
(CV-14-901707)

PITTMAN, Judge.

Norfolk Southern Railway Company ("Norfolk Southern") appeals from a judgment ("the Rule 60(b)(5) judgment") of the Jefferson Circuit Court ("the trial court") insofar as that judgment denied a Rule 60(b)(5), Ala. R. Civ. P., motion ("the

Rule 60(b)(5) motion") seeking a determination as to the amount it needed to pay to satisfy a judgment in favor of Nashanta L. Williams ("the underlying judgment") in an action Williams had brought against Norfolk Southern pursuant to the Federal Employers Liability Act ("FELA"), 45 U.S.C. § 51 et seq.[1] In pertinent part, the Rule 60(b)(5) judgment ruled that the so-called "personal-injury exclusion" contained in 26 U.S.C. § 104(a)(2)[2] ("the personal-injury exclusion") excluded the damages awarded to Williams in her FELA action from taxation under the Railroad Retirement Tax Act ("the RRTA"), 26 U.S.C. § 3201 et seq., which imposes employment taxes on the compensation of railroad employees, and that, therefore, Norfolk Southern was not entitled to deduct RRTA employment taxes from the amount necessary to satisfy the underlying judgment. Because we conclude that the trial court erred in ruling that the damages awarded to Williams in the underlying

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[1]In pertinent part, Rule 60(b) provides that "[a] court may relieve a party ... from a final judgment" if "the judgment has been satisfied, released, or discharged ...."

[2]26 U.S.C. 104(a) provides that "gross income does not include ... (2) the amount of any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal physical injuries or physical sickness."

judgment were not subject to the employment taxes imposed by the RRTA, we reverse and remand.

Procedural History

In April 2014, Williams, an employee of Norfolk Southern, brought a FELA action against Norfolk Southern, alleging that she had been injured on the job, that Norfolk Southern was liable for her injuries pursuant to FELA, and that she was entitled to damages for, among other things, past and future lost wages. The action was tried before a jury, and Williams introduced evidence in support of her claims for past and future lost wages as well as her other claims for damages. The trial court subsequently charged the jury regarding Williams's claims for past and future lost wages as well as her other claims for damages. In March 2017, the jury returned a general verdict finding in favor of Williams and awarding her damages in the amount of $360,488. Being a general verdict, the verdict did not indicate how much, if any, of the $360,488 the jury had awarded for past and future lost wages. However, Williams concedes that the $360,488 included an unspecified amount of damages for lost wages. The trial court entered the

underlying judgment on the jury's verdict. Neither party appealed from the underlying judgment.

In April 2017, Norfolk Southern tendered to the clerk of the trial court a sum to satisfy the underlying judgment; that sum reflected a deduction of $19,188.37, which Norfolk Southern contended it was required by the RRTA to withhold as Williams's share of the employment taxes imposed by that act on the $360,488 awarded to her in the underlying judgment. Norfolk Southern further contended that, because it was required by the RRTA to withhold that $19,188.37 and to pay it to the Internal Revenue Service ("the IRS"), it was entitled to deduct $19,188.37 from the amount necessary to satisfy the underlying judgment. The clerk of the trial court refused to accept the sum tendered by Norfolk Southern because it was less than $360,488. Norfolk Southern then filed the Rule 60(b)(5) motion in which it alleged, among other things, that, because the $360,488 awarded to Williams included an unspecified amount of damages for lost wages, the RRTA required Norfolk Southern to withhold from the amount paid to satisfy the underlying judgment $19,188.37, which represented Williams's share of the employment taxes imposed by the RRTA

on the $360,488 awarded to her, and to pay that $19,188.37 to the IRS. Norfolk Southern further alleged that, because the RRTA required it to withhold that amount and to pay it to the IRS, Norfolk Southern was entitled to deduct $19,188.37 from the amount necessary to satisfy the underlying judgment. Opposing the Rule 60(b)(5) motion insofar as it asserted that the $360,488 awarded to her was subject to taxation under the RRTA, Williams asserted that, although an unspecified amount of the $360,488 was for lost wages, none of the $360,488 was subject to taxation under the RRTA because, Williams said, the damages awarded her for lost wages as well as the rest of the $360,488 had been awarded to her on account of her personal injuries and, therefore, the entire $360,488 was excluded from taxation under the RRTA by the personal-injury exclusion.

The trial court held a hearing regarding the Rule 60(b)(5) motion and, thereafter, entered the Rule 60(b)(5) judgment. In pertinent part, that judgment stated: "As to the issue concerning whether the [RRTA] and/or the [IRS] ... requires that RRTA withholdings are to be deducted from [Williams's] general verdict, the court finds it does not based upon the personal injury exclusion." Norfolk Southern

timely appealed from the Rule 60(b)(5) judgment to our supreme court, which transferred the appeal to this court, pursuant to § 12-2-7(6), Ala. Code 1975.

The Parties' Contentions

Norfolk Southern asserts that the RRTA imposes employment taxes on "compensation" received by railroad employees; that, although the definition of "compensation" in the RRTA does not specifically include pay received for time lost or damages awarded for lost wages in a personal-injury action, the RRTA is in pari materia with the Railroad Retirement Act ("the RRA"), 45 U.S.C. § 231 et seq., because the moneys collected pursuant to the RRTA fund the benefits available to railroad employees pursuant to the RRA; that the definition of "compensation" in the RRA does specifically include pay for time lost and provides that a railroad employee shall be deemed to receive pay for time lost when he or she receives payment for a period of absence from the active service of the employer on account of personal injury; that, because the RRTA and RRA are in pari materia, the definition of "compensation" in the RRTA must be interpreted consistently with the definition of "compensation" in the RRA; and that, therefore,

the damages for lost wages awarded to Williams in the underlying judgment constitute "compensation" taxable under the RRTA. Norfolk Southern further asserts that applicable Treasury Regulations and statements of policy by the Railroad Retirement Board ("the RRB") support interpreting the definition of "compensation" under the RRTA as including damages awarded for lost wages in a personal-injury action. In addition, Norfolk Southern asserts that, under the RRA, if a payment is made by a railroad employer with respect to a personal injury suffered by a railroad employee and that payment includes pay for time lost, the total payment must be treated as being for time lost unless specifically apportioned to types of damages other than time lost and, therefore, must be treated as "compensation" under the RRA. Norfolk Southern asserts that, because the RRTA and the RRA are in pari materia, the treatment of such a payment under the RRTA should be consistent with its treatment under the RRA and that, therefore, because the general verdict in favor of Williams awarded her an unspecified amount of damages for lost wages and did not apportion any of the $360,488 awarded to her to types of damages other than lost wages, the entire $360,488

awarded to Williams should be treated as "compensation" under the RRTA and taxed under that act. Norfolk Southern further contends that the personal-injury exclusion does not apply to employment taxes imposed by the RRTA. Finally, Norfolk Southern asserts that, because the entire $360,488 should be treated as "compensation" under the RRTA, it must withhold $19,188.37 of that amount as Williams's share of the RRTA taxes on the $360,488 and pay that $19,188.37 to the IRS and that, therefore, it is entitled to deduct $19,188.37 from the amount necessary to satisfy the underlying judgment. The United States has filed an amicus curiae brief in which, in substance, it makes the same arguments as Norfolk Southern.

Williams asserts that the personal-injury exclusion does indeed apply to employment taxes imposed by the RRTA and that, therefore, none of the $360,488 awarded to her is subject to taxation under the RRTA because, she says, the entire $360,488, including the unspecified amount of damages for lost wages, was awarded to her "on account of personal physical injuries," 26 U.S.C. § 104(a)(2). In the alternative, although she did not make this argument in the trial court, Williams argues on appeal that the damages awarded to her for lost

wages are not taxable "compensation" under the RRTA because, she says, unlike the RRA, the RRTA does not specifically define "compensation" as including payments for time lost.

Issues Not Before Us

Ordinarily, the threshold issues presented by this appeal would be whether Alabama law or federal law determines whether the general verdict returned by the jury should be treated as including damages for lost wages and, after resolving that issue, whether the controlling law provides that the general verdict should be treated as including those damages.[3]

[3]We do not know of any binding precedent deciding those issues. In Heckman v. Burlington Northern Santa Fe Railway, 286 Neb. 453, 458, 837 N.W.2d 532, 537 (2013), the Nebraska Supreme Court held that it could apply Nebraska law in determining whether a general verdict in a FELA action included damages for lost wages and that, under Nebraska law, if a claim seeking damages for lost wages had been presented to the jury, a general verdict in favor of the plaintiff would be presumed to include damages for lost wages. In Phillips v. Chicago Central & Pacific Railroad, 853 N.W.2d 636, 643-45 (Iowa 2014), the Iowa Supreme Court held that it was unnecessary for it to determine whether Iowa law or federal law determined whether a general verdict in a FELA action would be treated as including an award of damages for lost wages because, under either Iowa law or federal law, if evidence supporting a claim for lost wages had been presented to the jury and the jury had been instructed regarding that claim, a general verdict in a FELA action would be presumed to include damages for lost wages. In Mickey v. BNSF Railway, 437 S.W.3d 207 (Mo. 2014), the Missouri Supreme Court applied Missouri law in determining whether a general verdict in a

However, neither party raised those issues in the trial court, and neither party has raised them on appeal. Rather, both parties' arguments in the trial court and on appeal presuppose that the general verdict in favor of Williams did indeed include an unspecified amount of damages for lost wages, and Williams expressly argues on appeal that "[she] owes no RRTA taxes on her $360,488 jury award even though it contained an amount for lost wages." Williams's brief at 8 (emphasis added). Thus, for purposes of this appeal, we have assumed, without deciding, that the general verdict in favor of Williams included an unspecified amount of damages for lost wages.

In addition, both parties agreed before the jury was charged in the trial court that the personal-injury exclusion excluded any damages that might be awarded to Williams from the taxes imposed by Subtitle A of Title 26 of the United

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FELA action would be treated as including damages for lost wages and held that, under Missouri law, a general verdict in favor of an employee in a FELA personal-injury action would not be presumed to include damages for lost wages. In Liberatore v. Monongahela Railway, 140 A.3d 16, 31 (Pa. Super. Ct. 2016), the Pennsylvania Superior Court applied Pennsylvania law and determined that a general verdict in favor of a plaintiff who had sought damages for lost wages would be presumed to include damages for lost wages.

States Code, 26 U.S.C. §§ 1 through 1563, which imposes what are commonly referred to as income taxes, and the jury was charged that any damages awarded to Williams would not be subject to income taxes. Therefore, the issue whether the damages awarded to Williams are subject to income taxes under Subtitle A of Title 26 of the United States Code is not before us.

Issues Before Us

The issues presented by this appeal are: (1) assuming, without deciding, that a general verdict in a FELA personal-injury action includes an unspecified amount of damages for lost wages, whether that general verdict is subject to employment taxes imposed by the RRTA and (2) if so, how much of it is subject to those taxes. The first issue, in turn, encompasses two subissues: (1) assuming, without deciding, that a general verdict in a FELA personal-injury action includes an unspecified amount of damages for lost wages, whether the damages for lost wages constitute "compensation" under the RRTA and (2) if so, whether the personal-injury exclusion applies to RRTA taxes so as to exempt damages

awarded for lost wages in a FELA personal-injury action from taxation under the RRTA.

Standard of Review

All the issues presented by this appeal are questions of law; therefore, our standard of review is de novo. See Davis v. Bennett, 154 So. 3d 114, 123 (Ala. 2014).

Analysis

Whether Damages Awarded for Lost Wages in a FELA Personal-Injury Action Constitute "Compensation" under the RRTA

The parties have not cited any binding precedent deciding the issue whether damages awarded for lost wages in a FELA personal-injury action constitute "compensation" under the RRTA, and we do not know of any. The decisions of courts in other jurisdictions regarding this issue have not been uniform.

As noted above, Norfolk Southern contends that the RRTA and the RRA are in pari materia and that, therefore, the definition of "compensation" in the RRTA must be interpreted consistently with the definition of "compensation" in the RRA.

> "'[T]he [RRA], first passed in 1934, provides a system of retirement and disability benefits for persons who pursue careers in the railroad industry.' Hisquierdo v. Hisquierdo, 439 U.S. 572,

> 573, 99 S. Ct. 802, 59 L.Ed.2d 1 (1979) (internal citation omitted). For that reason, railroad workers do not receive social security benefits, but rather, retirement benefits under the RRA. Heckman v. Burlington Northern Santa Fe Railway Co., 286 Neb. 453, 837 N.W.2d 532 (2013).
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> > "[']The RRTA is a subsection of the Internal Revenue Code (IRC). Retirement benefits paid through the RRA are funded through the RRTA. Under the RRTA, taxes are imposed on compensation earned by railroad employees. The RRTA implements a dual tax system, in which railroad employers must withhold their tax shares, as well as their employees' tax shares, and then provide both shares to the Internal Revenue Service (IRS). The first part of this dual system is "Tier 1." Tier 1 taxes are imposed against both railroad employee and railroad employer. They are analogous to taxes imposed on nonrailroad workers by the Federal Insurance Contributions Act (FICA). The second part of the dual system, "Tier 2," also imposes taxes against both railroad employee and railroad employer. "[Tier 2] benefits are similar to those that workers would receive from a private multi-employer pension fund." RRTA taxes also include certain Medicare withholdings.[']
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> "Cowden v. BNSF Ry. Co. [(No. 4:08CV01534ERW, July 7, 2014) (E.D. Mo. 2014) (not published in F. Supp. 3d)] (internal citations omitted)."

Liberatore v. Monongahela Ry., 140 A.3d 16, 23 (Pa. Super. Ct. 2016) (footnote omitted).

Subject to certain specific exclusions not here pertinent, the RRTA defines "compensation" as "any form of money remuneration paid to an individual for services rendered as an employee to one or more employers." 26 U.S.C. § 3231(e)(1). The definition of "compensation" in the present version of the RRTA does not specifically include pay for time lost, although earlier versions of it did.

"[T]he 1970 version of [26 U.S.C.] § 3231(e) stated,

> "[']"(1) The term "compensation" means any form of money remuneration earned by an individual for services rendered as an employee to one or more employers, or as an employee representative, including remuneration paid for time lost as an employee, but remuneration paid for time lost shall be deemed earned in the month in which such time is lost ....
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> "[']"(2) A payment made by an employer to an individual through the employer's payroll shall be presumed, in the absence of evidence to the contrary, to be compensation for service rendered by such individual as an employee of the employer in the period with respect to which the payment is made. An employee shall be deemed to be paid "for time lost" the amount he is paid by an employer with respect to an identifiable period of absence from the active service of the employer, including absence on account of personal injury, and the amount he is paid by the employer for loss of earnings resulting from his displacement to a less

> remunerative position or occupation. If a payment is made by an employer with respect to a personal injury and includes pay for time lost, the total payment shall be deemed to be paid for time lost unless, at the time of payment, a part of such payment is specifically apportioned to factors other than time lost, in which event only such part of the payment as is not so apportioned shall be deemed to be paid for time lost.[']

"26 U.S.C. § 3231(e) (1970). Therefore, under this language, RRTA 'compensation' included payments 'for time lost,' which, in turn, included personal injury payments.

"In 1975, Congress amended § 3231(e). Specifically, Congress amended the first sentence of subsection (1) to simply state, 'The term "compensation" means any form of money remuneration paid to an individual for services rendered as an employee to one or more employers.' 26 U.S.C. § 3231(e)(1) (Supp. 1975). While Congress omitted the clause regarding payment for time lost in subsection (1), it retained this language in subsection (2), which read as follows under the 1975 amendment:

> "[']An employee shall be deemed to be paid compensation in the period during which such compensation is earned only upon a written request by such employee, made within six months following the payment, and a showing that such compensation was earned during a period other than the period in which it was paid. An employee shall be deemed to be paid "for time lost" the amount he is paid by an employer with respect to an identifiable period of absence from the active service of the employer, including absence on account of personal injury, and the amount he is paid

> by the employer for loss of earnings resulting from his displacement to a less remunerative position or occupation. If a payment is made by an employer with respect to a personal injury and includes pay for time lost, the total payment shall be deemed to be paid for time lost unless, at the time of payment, a part of such payment is specifically apportioned to factors other than time lost, in which event only such part of the payment as is not so apportioned shall be deemed to be paid for time lost.[']
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> "26 U.S.C. § 3231(e)(2) (Supp. 1975). Finally, in 1983, Congress substantially changed § 3231(e); Congress removed all language addressing payments for time lost and payments for personal injury from § 3231(e). 26 U.S.C. § 3231(e) (Supp. II 1984)."

Cowden v. BNSF Ry. (No. 4:08CV01534ERW, July 7, 2014) (E.D. Mo. 2014) (not published in F. Supp. 3d).

The definition of "compensation" in the RRA does specifically include pay for time lost, which, in turn, is defined as including pay for an absence from active service on account of personal injury. In pertinent part, 45 U.S.C. § 231(h)(1) and (2) provide:

> "(1) The term 'compensation' means any form of money remuneration paid to an individual for services rendered as an employee to one or more employers or as an employee representative, including remuneration paid for time lost as an employee, but remuneration paid for time lost shall be deemed earned in the month in which such time is lost. ...

> "(2) An employee shall be deemed to be paid 'for time lost' the amount he is paid by an employer with respect to an identifiable period of absence from the active service of the employer, including absence on account of personal injury, and the amount he is paid by the employer for loss of earnings resulting from his displacement to a less remunerative position or occupation. If a payment is made by an employer with respect to a personal injury and includes pay for time lost, the total payment shall be deemed to be paid for time lost unless, at the time of payment, a part of such payment is specifically apportioned to factors other than time lost, in which event only such part of the payment as is not so apportioned shall be deemed to be paid for time lost."

(Emphasis added.)

In Loos v. BNSF Railway, 865 F.3d 1106 (8th Cir. 2017), the United States Court of Appeals for the Eighth Circuit rejected the argument of BNSF Railway and the United States, as amicus curiae, that, because the RRTA and the RRA are in pari materia, the definition of "compensation" in the RRTA should be interpreted consistently with the definition of "compensation" in the RRA. The Eighth Circuit Court of Appeals concluded that Congress's omission of the language specifically including pay for time lost in the definition of "compensation" in the RRTA while retaining that language in the definition of "compensation" in the RRA "suggests that Congress did not intend the RRTA to include pay for time

lost." 865 F.3d at 1118. The Eighth Circuit Court of Appeals further concluded that the plain text of the RRTA indicated that the definition of compensation in the RRTA could not include pay for time lost because it defined compensation as remuneration "for services rendered" and pay for time lost could not be "for services rendered":

> "Under the RRTA's plain text, damages for lost wages are not remuneration 'for services rendered.' Damages for lost wages are, by definition, remuneration for a period of time during which the employee did not actually render any services. Instead, the damages compensate the employee for wages the employee should have earned had he been able to render services. Unlike FICA [the Federal Insurance Contributions Act], the plain language of the RRTA refers to services that an employee actually renders, not to services that the employee would have rendered but could not. See 26 U.S.C. § 3231(e)(1); see also id. § 3231(d) (defining 'service'). Thus, damages for lost wages do not fit within the plain meaning of the RRTA."

865 F.3d at 1117-18.

On issues of federal law, the United States Supreme Court's decisions are the only decisions of a federal court that are binding on Alabama courts, although the decisions of other federal courts can serve as persuasive authority. See Glass v. Birmingham Southern R.R., 905 So. 2d 789, 794 (Ala. 2004). We note that the Eighth Circuit Court of Appeals'

interpretation of 26 U.S.C. § 3231(e)(1) in Loos would insert the word "actually" between "services" and "rendered" in the phrase "for services rendered," despite the fact that the word "actually" does not appear there in the "plain text" of that Code section. We conclude that the legislative history does not support the Eighth Circuit Court of Appeals' interpretation of 26 U.S.C. § 3231(e)(1). As indicated in the excerpt from Cowden quoted above, the 1970 version of 26 U.S.C. § 3231(e)(1) stated:

> "The term 'compensation' means any form of money remuneration earned by an individual for services rendered as an employee to one or more employers, or as an employee representative, including remuneration paid for time lost as an employee, but remuneration paid for time lost shall be deemed earned in the month in which such time is lost ...."

(Emphasis added.) Thus, in 1970, Congress viewed "remuneration paid for time lost" as a subset of "remuneration earned by an individual for services rendered as an employee." If Congress intended the language "for services rendered as an employee" to mean "only for services actually rendered as an employee" and to exclude pay for time lost, which would be pay for time when services had not actually been rendered, it would not have specified that remuneration "for services rendered"

included remuneration "for time lost as an employee" in the 1970 version of 26 U.S.C. § 3231(e)(1).

The 1975 amendment of 26 U.S.C. § 3231(e) further illustrates that the language "for services rendered as an employee" in that Code section cannot mean "only for services actually rendered." As the court pointed out in Cowden, supra, in 1975

> "Congress amended the first sentence of subsection (1) to simply state, 'The term "compensation" means any form of money remuneration paid to an individual for services rendered as an employee to one or more employers.' 26 U.S.C. § 3231(e)(1) (Supp. 1975). While Congress omitted the clause regarding payment for time lost in subsection (1), it retained this language in subsection (2), which read as follows under the 1975 amendment:
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> > "[']An employee shall be deemed to be paid compensation in the period during which such compensation is earned only upon a written request by such employee, made within six months following the payment, and a showing that such compensation was earned during a period other than the period in which it was paid. An employee shall be deemed to be paid "for time lost" the amount he is paid by an employer with respect to an identifiable period of absence from the active service of the employer, including absence on account of personal injury, and the amount he is paid by the employer for loss of earnings resulting from his displacement to a less remunerative position or occupation. If a payment is made by an employer with respect

> to a personal injury and <u>includes pay for time lost</u>, the total payment shall be deemed to be paid for time lost unless, at the time of payment, a part of such payment is specifically apportioned to factors other than time lost, in which event only such part of the payment as is not so apportioned shall be deemed to be paid for time lost.[']

"26 U.S.C. § 3231(e)(2) (Supp. 1975)."

(Emphasis added.) Thus, if Congress intended the language "for services rendered as an employee" to mean "only for services actually rendered," it would not have referred to pay for time lost in subsection (2).

Although the 1983 amendment of 26 U.S.C. § 3231(e) omitted all specific references to pay for time lost from that Code section, there is nothing in the legislative record affirmatively indicating that Congress no longer considered pay for time lost to be a subset of pay for services rendered, that Congress intended to exclude pay for time lost from inclusion in the definition of "compensation" under the RRTA, or that Congress intended the language "remuneration ... for services rendered" to mean something different than it had meant before the 1983 amendment. It is reasonable to assume that, given Congress's indication before the 1983 amendment

that "pay for time lost" was a subset of "remuneration ... for services rendered," Congress would have expressly indicated that "remuneration ... for services rendered" no longer included "pay for time lost" if that had been Congress's intent.

"Congress has delegated to [the Secretary of the Treasury and that secretary's delegate,] the Commissioner [of Internal Revenue,] ... the task of prescribing 'all needful rules and regulations for the enforcement' of the Internal Revenue Code. 26 U.S.C." United States v. Correll, 389 U.S. 299, 307 (1967); see 26 C.F.R. 301.7805-1(a). In the Treasury Regulations regarding 26 U.S.C. § 3231, the Commissioner of Internal Revenue ("the commissioner") has reached a similar conclusion. The pertinent regulations are codified at 26 C.F.R. 31.3231(e)-1(a)(3) and (4), which provide:

> "(3) The term compensation is not confined to amounts paid for active service, but includes amounts paid for an identifiable period during which the employee is absent from the active service of the employer and, in the case of an employee representative, amounts paid for an identifiable period during which the employee representative is absent from the active service of the employee organization.
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> "(4) Compensation includes amounts paid to an employee for loss of earnings during an identifiable

> period as the result of the displacement of the employee to a less remunerative position or occupation as well as pay for time lost."

(Emphasis added.)

Those regulations first became effective in 1994 when the commissioner updated the regulations regarding the RRTA to reflect changes to the RRTA that had occurred since 1964. See Update of Railroad Retirement Tax Act Regulations, 59 Fed. Reg. 66188 (Dec. 23, 1994); and Phillips v. Chicago Cent. & Pac. R.R., 853 N.W.2d 636, 642 (Iowa 2014). Before adopting those regulations in 1994, the commissioner, in 1993, had published, in the Federal Register, proposed changes to the previous version of those regulations. See 58 Fed. Reg. 28366 (May 13, 1993). Thereafter, written comments were received, and a public hearing was held on August 30, 1993. See Update of Railroad Retirement Tax Act Regulations, supra. In the written comments received before the adoption of the final regulations in 1994, one commentator suggested that the regulations now codified as 26 C.F.R. § 31.3231(e)-1(a)(4), providing that compensation includes payments for time lost, should be deleted because Congress had removed the language specifically referring to pay for time lost from 26 U.S.C. §

3231(e) in the 1983 amendment of the RRTA. Id. The commissioner declined to make that change. Id. The commissioner explained that, although the 1983 amendment of the RRTA had removed the language specifically including pay for time lost in the definition of compensation, "[t]he legislative history does not indicate that Congress intended to exclude payments for time lost from compensation ...." Id.

Since the commissioner adopted the present versions of 26 C.F.R. § 31.3231(e)-1(a)(3) and (4) in 1994, Congress has amended the RRTA's definition of compensation four times without any indication that the commissioner's interpretation of the definition of compensation in those regulations is erroneous. See Phillips, 853 N.W.2d at 642-43. "It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'" Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 846 (1986) (quoting National Labor Relations Bd. v. Bell Aerospace Co., 416 U.S. 267, 274-75 (1974))."

Moreover, we conclude that the commissioner's interpretation is entitled to deference.

> "When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.
>
> "'The power of an administrative agency to administer a congressionally created ... program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.' Morton v. Ruiz, 415 U.S. 199, 231 (1974). If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."

Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-44 (1984) (footnotes omitted).

> "The principles underlying our decision in Chevron[, USA, Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984),] apply with full

> force in the tax context. Chevron recognized that '[t]he power of an administrative agency to administer a congressionally created ... program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.' 467 U.S., at 843 (internal quotation marks omitted). It acknowledged that the formulation of that policy might require 'more than ordinary knowledge respecting the matters subjected to agency regulations.' Id., at 844 (internal quotation marks omitted). Filling gaps in the Internal Revenue Code plainly requires the Treasury Department to make interpretive choices for statutory implementation at least as complex as the ones other agencies must make in administering their statutes."

Mayo Found. for Med. Educ. & Research v. United States, 562 U.S. 44, 55-56 (2011); see BNSF Ry. v. United States, 775 F.3d 743, 751 n.55 (5th Cir. 2015) ("[In Mayo Foundation], the Supreme Court made clear that [Treasury] regulations receive Chevron deference.").

As discussed above, we have concluded that neither the legislative history of 26 U.S.C. § 3231(e) nor the present text of that Code section clearly indicates that Congress intended to eliminate pay for time lost from the definition of compensation in 26 U.S.C. § 3231(e). Thus, "the statute is silent or ambiguous with respect to th[at] specific issue." Chevron, 467 U.S. at 843. Congress has delegated to the commissioner authority to "prescribe all needful rules and

regulations for the enforcement" of the Internal Revenue Code. 26 U.S.C. § 7805(a) and 26 C.F.R. 301.7805-1(a). Moreover, our analysis of the legislative history of 26 U.S.C. § 3231, which we have discussed above, leads us to conclude that the commissioner's interpretation of the term "compensation" in the RRTA as including pay for time lost is a permissible construction of 26 U.S.C. § 3231(e). Therefore, we must defer to that interpretation. See Chevron. Accordingly, we conclude that pay for time lost constitutes compensation under the RRTA and, therefore, that the damages awarded to Williams for lost wages constitute compensation under the RRTA.

Whether the Personal-Injury Exclusion Applies to RRTA Taxes

Having determined that the damages awarded to Williams for lost wages constitute compensation under the RRTA, the next issue is whether the personal-injury exclusion applies to RRTA taxes. We have not been directed to any binding authority deciding that issue, and we do not know of any.

Several federal district courts have considered this issue and concluded that the personal-injury exclusion does indeed apply to RRTA taxes and that, therefore, damages for lost wages awarded in a FELA personal-injury action are not

subject to taxation under the RRTA. See Loy v. Norfolk Southern Ry. (No. 3:12-CV-96-TLS, April 12, 2016) (N.D. Ind. 2016) (not reported in F. Supp. 3d); Marlin v. BNSF Ry., 163 F. Supp. 3d 576 (S.D. Iowa 2016); and Cowden, supra. In Loy and Marlin, the courts followed the reasoning of the court in Cowden in reaching that conclusion. The Cowden court, which had first concluded that pay for time lost constituted compensation under the RRTA, proceeded to conclude that, based on the reasoning of caselaw that had held that the personal-injury exclusion applied to Federal Insurance Contribution Act ("FICA") taxes, compensation awarded on account of personal injury is excluded from taxation under the RRTA by the personal-injury exclusion:

> "The Court finds FELA judgments for lost pay fall within the definition of 'compensation' for RRTA purposes. This conclusion, however, does not end the inquiry. [Cowden] still contends certain exclusions apply to his particular award, and, because the verdict is general, the Court must determine what part, if any, of the verdict is subject to withholding under the RRTA. The Court now turns to these questions.
>
> "....
>
> "Turning to 26 U.S.C. § 104, [Cowden] argues his verdict is excluded from 'gross income' under subsection (a)(2), which excludes from income 'the amount of any damages (other than punitive damages)

> received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal physical injuries or physical sickness[.]' [Cowden] contends, because wages are a subset of income, income exclusions like § 104(a)(2) must apply to wages, too.
>
> "The Court agrees. The term 'income' is broader than 'wages.' Anderson v. U.S., 929 F.2d 648, 650 (Fed. Cir. 1991); Rowan Cos., Inc. v. U.S., 452 U.S. 247, 254 (1981) ('In short, "wages" is a narrower concept than "income[.]"'). Therefore, if [Cowden's] verdict qualifies as an exclusion from income, it must also qualify as an exclusion from wages. Redfield v. Ins. Co. of N. Am., 940 F.2d 542, 548 (9th Cir. 1991) ('Our conclusion that Redfield's "economic damages" were excluded from the definition of "gross income" dictates a conclusion that the sums were not subject to FICA withholding either.'). In addition, the RRTA imposes a tax 'on ... income[.]' 26 U.S.C. § 3201(a)-(b). [BNSF Railway] does not, and cannot, dispute [that Cowden's] verdict, in part, constitutes 'damages ... on account of personal physical injuries or physical sickness[.]' 26 U.S.C. § 104(a)(2). Thus, the Court finds, because wages are a subset of income, the personal injury exclusion must apply."

In Mickey v. BNSF Railway, 437 S.W.3d 207 (Mo. 2014), the Missouri Supreme Court reached a similar conclusion.

The Cowden and Mickey courts relied on caselaw holding that the personal-injury exclusion applies to FICA taxes for their conclusions that the personal-injury exclusion applies to RRTA taxes. The personal-injury exclusion is in Subtitle A of Title 26, which imposes income taxes, while FICA and the

RRTA are in Subtitle C of Title 26. We have not been directed to any provision of Title 26 that indicates that the personal-injury exclusion applies to RRTA taxes. Caselaw has held that the personal-injury exclusion applies to FICA taxes based on the reasoning stated by the Cowden court above, i.e., that wages are a subset of income and, therefore, an exclusion applicable to income must necessarily be applicable to wages. Although that reasoning may be a valid basis for applying the personal-injury exclusion to FICA taxes, using that reasoning to justify applying the personal-injury exclusion to RRTA taxes fails to take into account the legislative history of the RRTA. As noted above, the 1970 version of 26 U.S.C. § 3231(e)(1) specifically provided that compensation taxable under the RRTA included pay for time lost, and the 1970 version of 26 U.S.C. § 3231(e)(2) specifically provided that pay for time lost included pay for absence on account of personal injury. If Congress intended the personal-injury exclusion to apply to RRTA taxes, it would not have specifically provided in the 1970 version of the RRTA that compensation taxable under the RRTA included pay for absence on account of personal injury. Moreover, as discussed above,

nothing in the subsequent legislative history of 26 U.S.C. § 3231(e) indicates that Congress intended to eliminate pay for time lost or pay for absence on account of personal injury from the definition of compensation taxable under the RRTA.

The RRA, which provides benefits funded by the RRTA, still specifically includes pay for time lost in the definition of compensation under that act and specifically provides that pay for time lost includes pay for absence on account of personal injury. See 45 U.S.C. § 231(h)(1) and (2). As the Pennsylvania Superior Court pointed out in Liberatore, supra:

> "Under the RRA, a railroad employee receives an increase in benefits based upon his 'average monthly compensation.' 45 U.S.C. § 231b(b)(1). That 'compensation' includes pay for time lost 'on account of personal injury.' 45 U.S.C. § 231(h)(2). Because an employee's RRA benefits increase based upon 'time lost' pay in a personal injury award, it follows that the same 'time lost' award should be taxed under RRTA to pay for those benefits. The Department of Justice, Tax Division, in its amicus brief explained the relationship between the two statutes as follows:
>
> > "[']The RRA and the RRTA work in concert to provide retirement benefits for railroad workers. Under the RRA, when an employee receives compensation, the amount thereof adds to his creditable service and affects the level of benefits to which he will be entitled when he retires. The RRTA

> imposes a tax on the compensation paid to railroad employees in order to fund the benefits they will later receive. Both statutes, therefore, use the same definition of "compensation" to ensure that there is sufficient funding to pay the benefits that will later be owed.[']
>
> "United States of America's Amicus Brief at 4.
>
> "Conversely, the [Social Security Act ('SSA')] does not explicitly include an employee's pay for lost time due to personal injury when calculating benefits. See 45 U.S.C. §§ 409, 415. Therefore, it follows that for purposes of collecting SSA taxes, FICA also does not tax an award for time lost due to personal injury."

140 A.3d at 29-30. We agree with the reasoning of the Pennsylvania Superior Court in Liberatore and reject the reasoning of the Cowden and Mickey courts. Therefore, we conclude that the personal-injury exclusion does not apply to RRTA taxes.

How Much of the General Verdict Is Subject to RRTA Taxes

As discussed above, we have assumed, without deciding, that the general verdict included an unspecified amount of damages for lost wages. Because the verdict was a general one, there is no way to determine how much of the $360,488 the jury awarded for lost wages. However, under the RRA, the entire $360,488 must be treated as pay for time lost for purposes of

determining Williams's creditable service and, hence, the benefits to which she will be entitled. See 45 U.S.C. §§ 231(h)(2) and 231b(b)(1); Liberatore, 140 A.3d at 29. 45 U.S.C. § 231(h)(1) provides that compensation under the RRA includes pay for time lost. 45 U.S.C. § 231(h)(2) provides:

> "(2) An employee shall be deemed to be paid 'for time lost' the amount he is paid by an employer with respect to an identifiable period of absence from the active service of the employer, including absence on account of personal injury, and the amount he is paid by the employer for loss of earnings resulting from his displacement to a less remunerative position or occupation. If a payment is made by an employer with respect to a personal injury and includes pay for time lost, the total payment shall be deemed to be paid for time lost unless, at the time of payment, a part of such payment is specifically apportioned to factors other than time lost, in which event only such part of the payment as is not so apportioned shall be deemed to be paid for time lost."

(Emphasis added.) As noted above, the 1970 version of the RRTA specifically included pay for time lost in the definition of compensation under the RRTA and specifically provided that pay for lost time included pay for absence on account of personal injury. Moreover, like 45 U.S.C. § 231(h)(2) of the RRA, the 1970 and 1975 versions of 26 U.S.C. § 3231(e)(2) provided:

> "If a payment is made by an employer with respect to a personal injury and includes pay for time lost, the total payment shall be deemed to be paid for

> time lost unless, at the time of payment, a part of such payment is specifically apportioned to factors other than time lost, in which event only such part of the payment as is not so apportioned shall be deemed to be paid for time lost."

Although that language of 26 U.S.C. § 3231(e)(2) that appeared in the 1970 and 1975 versions of the RRTA was subsequently omitted from the version of that act resulting from the 1983 amendment, as we discussed above, the legislative history of the 1983 amendment of the RRTA does not contain a clear indication that Congress intended to disavow the treatment of pay for lost time, including pay for absence on account of personal injury, as compensation under the RRTA. Likewise, there is no legislative history clearly indicating that Congress, in amending the RRTA in 1983, intended to treat a general verdict including an unspecified amount of damages for time lost under the RRTA in a manner different from that in which it would be treated under 45 U.S.C. § 231(h)(2) of the RRA. See Phillips, 853 N.W.2d at 644 ("While it is true there is no [provision comparable to 45 U.S.C. § 231(h)(2)] in the RRTA, there is no logical reason to conclude that such silence is an indication Congress intended a different rule to apply for purposes of tax withholding under the RRTA."). In Heckman

v. Burlington Northern Santa Fe Railway Co., 286 Neb. 453, 837 N.W.2d 532 (2013), the Nebraska Supreme Court relied on the treatment of a general verdict containing an unspecified amount of damages for lost wages under 45 U.S.C. § 231(h)(2) and opinions of the RRB concerning that Code section to conclude that a general verdict containing an unspecified amount of damages for lost wages would be deemed to be entirely damages for lost wages for purposes of RRTA taxes:

> "Having determined that time lost is compensation and that the verdict in favor of Heckman was based in part on time lost, we must now determine what part of the general verdict is subject to taxation under the RRTA. The RRB, the federal agency charged with administering the RRA and funded by the RRTA, has issued legal opinions that provide guidance in answering this question.
>
> "The RRB's opinions indicate that absent specific allocations to other components, the RRB treats the total FELA award as pay for time lost if the payment for personal injury is based in part on pay for time lost. See, RRB Legal Opinions L-87-91 (July 1, 1987) and L-92-18. When a jury returns a general verdict in a lump sum, the RRB has interpreted 45 U.S.C. § 231(h) to require payment of RRTA taxes on the entire judgment amount. RRB Legal Opinion L-87-91. It concluded when 'no part of the verdict was allocated to factors other than pay for time lost, [then] the whole verdict may be considered pay for time lost.' Id. The RRB has stated:
>
> > "[']If one of the claims for damages is lost wages and the jury was instructed that

> it could include lost wages in determining damages, then it can be concluded that the judgment is, at least in part, based on pay for time lost. If this is so, under [45 U.S.C. § 231](h)(2) ... the entire amount is pay for time lost.[']
>
> "RRB Legal Opinion L-92-18.
>
> "For guidance, the RRB suggested that the types of damages included in the jury verdict could be inferred by examining a copy of the complaint filed by the injured party and the instructions submitted to the jury. Id. In the case at bar, we have concluded that part of Heckman's damages included lost wages. Therefore, Heckman's general verdict, based in part on lost wages, would be deemed paid entirely for lost wages and therefore subject to RRTA taxes on the entire verdict."

286 Neb. at 464, 837 N.W.2d at 540-41.

Because the entire $360,488 awarded to Williams will be treated as pay for time lost for purposes of determining her benefits under the RRA, we conclude that the entire $360,488 should also be treated as pay for time lost for purposes of the RRTA and, therefore, is subject to withholding of RRTA taxes. See 45 U.S.C. § 231(h)(2); Heckman; and Liberatore.

Conclusion

In summary, we conclude that, assuming, without deciding, that the general verdict in favor of Williams contained an unspecified amount of damages for lost wages, the entire

$360,488 should be treated as compensation subject to the taxes imposed by the RRTA and that the personal-injury exclusion does not exclude the $360,488 from taxation under the RRTA. Therefore, we reverse the trial court's judgment and remand the cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Thompson, P.J., and Thomas, J., concur.

Donaldson, J., concurs specially.

Moore, J., dissents, with writing.

DONALDSON, Judge, concurring specially.

I concur. I write only to note that the scope of judicial review of certain administrative-agency decisions in federal courts, as set out in Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), may be evolving. See, e.g., SAS Inst., Inc. v. Iancu, ___ U.S. ___, ___, 138 S. Ct. 1348, 1358 (2018)(observing that "whether Chevron should remain is a question we may leave for another day").

MOORE, Judge, dissenting.

In this case, the main opinion concludes that a judgment in favor of Nashanta L. Williams in an action brought by Williams, pursuant to the Federal Employers Liability Act ("FELA"), 45 U.S.C. § 51 et seq., against Norfolk Southern Railway Company is not subject to the personal-injury exclusion of 26 U.S.C. § 104(a)(2) and that, therefore, the damages awarded in her FELA action are not excluded from taxation under the Railroad Retirement Tax Act ("the RRTA"), 26 U.S.C. § 3201 et seq.

First, I note that I agree with that part of the main opinion that concludes that we may assume that the general verdict in favor of Williams contained an unspecified amount of damages for time lost. The main opinion also concludes that the current definition of "compensation" in 26 U.S.C. § 3231(e) encompasses time lost, even though specific references to "time lost" have been deleted from the statute. As recognized in the main opinion:

> "[T]he 1970 version of [26 U.S.C.] § 3231(e) stated,
>
> > "['](1) The term "compensation" means any form of money remuneration earned by an individual for services rendered as an employee to one or more employers, or as an

> employee representative, including remuneration paid for time lost as an employee, but remuneration paid for time lost shall be deemed earned in the month in which such time is lost ....
>
> "[']](2) A payment made by an employer to an individual through the employer's payroll shall be presumed, in the absence of evidence to the contrary, to be compensation for service rendered by such individual as an employee of the employer in the period with respect to which the payment is made. An employee shall be deemed to be paid "for time lost" the amount he is paid by an employer with respect to an identifiable period of absence from the active service of the employer, including absence on account of personal injury, and the amount he is paid by the employer for loss of earnings resulting from his displacement to a less remunerative position or occupation. If a payment is made by an employer with respect to a personal injury and includes pay for time lost, the total payment shall be deemed to be paid for time lost unless, at the time of payment, a part of such payment is specifically apportioned to factors other than time lost, in which event only such part of the payment as is not so apportioned shall be deemed to be paid for time lost.[']

"26 U.S.C. § 3231(e) (1970)."

Cowden v. BNSF Ry. (No. 4:08CV01534ERW, July 7, 2014) (E.D. Mo. 2014) (not published in F. Supp. 3d). In 1975, Congress amended subsection (e)(1) to state: "'The term "compensation"

means any form of money remuneration paid to an individual for services rendered as an employee to one or more employers.'" Id. (quoting 26 U.S.C. § 3231(e)(1) (Supp. 1975)). In 1983, Congress removed all language addressing payments for time lost and payments for personal injury from 26 U.S.C. § 3231(e). Id. The main opinion in this case considers the legislative history of the definition of "compensation," concluding that payments for time lost and payments for personal injury are included in that definition. ___ So. 3d at ___.

In Pinigis v. Regions Bank, 977 So. 2d 446, 450-52 (Ala. 2007), our supreme court observed, with regard to statutory construction:

> "We note that '[t]he intent of the Legislature is the polestar of statutory construction.' Siegelman v. Alabama Ass'n of School Bds., 819 So. 2d 568, 579 (Ala. 2001). See also Richardson v. PSB Armor, Inc., 682 So. 2d 438, 440 (Ala. 1996); Jones v. Conradi, 673 So. 2d 389, 394 (Ala. 1995); Ex parte Jordan, 592 So. 2d 579, 581 (Ala. 1992). '[T]he starting point for all statutory interpretation is the language of the statute itself,' and '[i]f the statutory language is clear, no further inquiry is appropriate.' Federal Reserve Bank of Atlanta v. Thomas, 220 F.3d 1235, 1239 (11th Cir. 2000). 'If the statutory language is ambiguous, however, courts may examine extrinsic materials, including legislative history, to determine [legislative] intent.' Id. It is also true

> that '[i]n attempting to ascertain the legislative intent of a particular statute or provision therein, it is permissible to look to the law as it existed prior to such statute's enactment.' Reeder v. State ex rel. Myers, 294 Ala. 260, 265, 314 So. 2d 853, 857 (1975). ...
>
> "....
>
> "It is well settled that when the legislature makes a 'material change in the language of [an] original act,' it is 'presumed to indicate a change in legal rights.' 1A Norman J. Singer, Statutes and Statutory Construction § 22:30 (6th ed. 2002) (footnote omitted). In other words, the 'amendment of an unambiguous statute indicates an intention to change the law.' Id. (emphasis added). See State v. Lammie, 164 Ariz. 377, 379, 793 P.2d 134, 136 (Ariz. Ct. App. 1990) ('when the legislature amends statutory language, it is presumed that it intends to make a change in existing law'); Matter of Stein, 131 A.D.2d 68, 72, 520 N.Y.S.2d 157, 159 (App. Div. 1987) ('When the Legislature amends a statute, it is presumed that the amendment was made to effect some purpose and make some change in the existing law.... By enacting an amendment of a statute and changing the language thereof, the Legislature is deemed to have intended a material change in the law.... Moreover, a statute will not be held to be a mere reenactment of a prior statute if any other reasonable interpretation is attainable ....'), appeal dismissed 72 N.Y.2d 840, 530 N.Y.S.2d 555, 526 N.E.2d 46 (1988)."

For purposes of this special writing, I will presume that § 3231(e) is ambiguous and that we may, therefore, review the legislative history of that statute and other extrinsic materials to determine Congress's intent in modifying the

language of the statute. In Loos v. BNSF Railway, 865 F.3d 1106, 1118 (8th Cir. 2017), the United States Court of Appeals for the Eighth Circuit concluded, after reviewing the legislative history of § 3231(e), that the omission of pay for time lost from the RRTA's current definition of "compensation" appeared to be intentional, particularly in light of the current definition of "compensation" in the the Railroad Retirement Act ("the RRA"), 45 U.S.C. § 231 et seq., which continues to include pay for time lost. Although I find that reasoning to be sound, I am inclined to agree with the main opinion that the interpretation of § 3231(e) in 26 C.F.R. 31.3231(e)-1(a)(3) and (4) provided by the Internal Revenue Service ("the IRS"), which interpretation includes pay for time lost in the definition of "compensation" in § 3231(e), is entitled to deference, see Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-44 (1984), and, further, that Congress's revisiting of that statute without pertinent change despite that interpretation indicates Congress's agreement with the IRS's interpretation.

I cannot agree, however, with the conclusion in the main opinion that the personal-injury exclusion does not apply to the judgment in favor of Williams.

The main opinion relies on the discussion in Liberatore v. Monongahela Railway, 140 A.3d 16, 23 (Pa. Super. Ct. 2016), which interprets the RRTA alongside the RRA. Additionally, the main opinion observes that the RRA provides that pay for time lost includes pay for absence on account of personal injury. In Mickey v. BNSF Railway, 437 S.W.3d 207, 213-14 (Mo. 2014), the reasoning of which the main opinion eschews in favor of that in Liberatore, the Supreme Court of Missouri discussed a number of reasons why the term "compensation" has a different meaning under the RRTA than it has under the RRA. Those reasons included that damages for lost wages resulting from personal injury are treated differently than are other lost wages; that lost wages resulting from personal injury are based on the loss of the capacity to earn and that it would be speculative to presume that any future lost earnings would be subject to the RRTA; that Congress amended the RRTA's definition of "compensation" to eliminate all references to personal-injury payments while leaving that language in the

RRA; and that the purposes of the RRTA and the RRA are different. Id. at 213-14. I find this reasoning persuasive, particularly the reasoning referencing Congress's amendments to the language of the RRTA defining "compensation."

In 26 C.F.R. 31.3231(e)-1(a)(1), the IRS has stated that "[t]he term compensation has the same meaning as the term wages in section 3121(a)," which defines "wages" under the Federal Insurance Contributions Act ("FICA"), 26 U.S.C. § 1400 et seq. As recognized in the main opinion, "federal circuit courts of appeal hold that a personal injury award, which is excluded from income taxes under section 104(a)(2) of the [Internal Revenue] Code, necessarily also is excluded from FICA withholding taxes on wages." Mickey, 437 S.W.3d at 211. The main opinion declines, however, to apply the reasoning of federal courts regarding FICA wages to "compensation," as defined in the RRTA, based on the applicable legislative history. In my opinion, the amendments to § 3231(e) of the RRTA, which removed any and all language from that section that spoke to personal injury, reveal that Congress intended a material change in the law. See Piniqis, supra. The fact that similar language remains in the RRA, a separate and

distinct statute, is not persuasive in light of the considerations inherent in the amendments to the RRTA. See Mickey, supra. Because the amendments made to the RRTA by Congress changed the definition of "compensation" and deliberately excluded any reference to personal injury, I conclude that Congress intended to modify that definition for purposes of the RRTA. To redefine those terms in accordance with the RRA, despite the clear legislative history of the RRTA, would result in the amendments to the RRTA having no effect. I cannot conclude that this was the intent of Congress in making those amendments.

Because I disagree with the conclusion in the main opinion that the personal-injury exclusion does not apply to the underlying judgment in favor of Williams in her FELA action, I respectfully dissent.