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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

JOHN PAUL MURPHY, Plaintiff and Respondent, v. KENNETH COLE PRODUCTIONS, INC., Defendant and Appellant.	A107219; A108346 (San Francisco County Super. Ct. No. CGC-03-423260)

Kenneth Cole Productions, Inc., (KCP) owner of small, upscale retail clothing stores, appeals from a judgment and a subsequent order regarding attorney fees in its appeal de novo of a decision of the California Labor Commissioner (Labor Commissioner).

On appeal, KCP raises issues regarding classification of plaintiff John Paul Murphy as a nonexempt employee, the court's jurisdiction to hear claims not raised before the Labor Commissioner, and the nature of the payments for meal and rest break violations as a penalty or a wage. KCP's other contention concerns whether KCP had a good faith dispute that precluded imposition of the waiting time penalty.

We will affirm the finding that Murphy was not an exempt employee. We agree with KCP that the court should not have addressed the new claims and that the meal and rest break payments are penalties, and reverse that portion of the judgment and remand for reconsideration of the amount of attorney fees. In all other respects, we affirm.

BACKGROUND

We first examine Murphy's daily work duties as a store manager. Murphy was hired as store manager of the KCP retail clothing store in the San Francisco Centre on

Fifth and Market Streets in June of 2000 and worked for KCP until June 19, 2002. Murphy was paid a weekly salary of $836.50 and was not entitled to commissions on sales.[1] In April of 2001, his pay was increased to $870 a week.

When Murphy was hired, he was given a job description for the store manager position. The store managers were the sales leaders, who were responsible for making sure the store met its sales quotas. They accomplished this task by acting as a leader on the sales floor, making sure inventory was properly managed and handling minor human resources issues according to procedures set out in the corporate operations manual. Murphy was trained by the manager of the Union Street store, who spent two days with Murphy, telling him who the strong sellers among the employees were, explaining security concerns and referring him to the operations manual.

The San Francisco Centre store primarily sold shoes. Murphy had no input into decisions about the shoes sold in the store, their pricing or whether they would be placed on sale. The corporate office and a visual manager directed all advertising. Sales goals were set by the corporate office. Murphy could make recommendations for the district manager's approval as to the needs of the store, but the district manager made the final decision.

District managers were responsible for ensuring that the stores met their sales quotas, had proper management and staffs, approved human resources related issues for the stores, such as issuing warnings and approving applicants for jobs. The district manager in Murphy's area was in charge of seven stores. The position of general manager of a flagship store was similar to Murphy's position, but was a department manager position, which included supervising other managers in their store who were

[1] Murphy testified to the organization of KCP as explained to him by his regional manager. The corporate office in New York handled human resources, merchandising, purchased all products for the stores, set the prices, shipped products to the stores and handled all marketing. District managers and general managers of the flagship stores reported to the two or three regional managers. The flagship store in Murphy's area was on Grant Avenue.

similar to store managers. Their stores were considered separate districts, so they did not report to the regional manager.

Murphy did not have the authority to hire or fire an employee without obtaining approval. There were times that his recommendations on hiring were ignored. If discipline issues were clearly covered by the policy manual**,** Murphy could issue a verbal or written warning, but it needed approval from the district manager. If the issue was not clear, Murphy was required to refer it to human resources or the district manager.

Murphy testified that the operations manual was a guideline for running the store. In addition to general policy issues, it regulated such issues as how shoes were placed on racks, how to put tissue in a shoe, how to present the shoe to the customer, how many shoes to bring out at a time and how to handle merchandise. All employees had access to the operations manual. Murphy was told during his training to follow the procedures in the operations manual. The scheduling policy in the operations manual stated that store managers worked nine-hour shifts, 45 hours per week. The district managers approved all vacations, floating holidays, personal holidays and consecutive days off.

Murphy's store was staffed with seven employees, including three part-time sales people, one full-time sales person, an assistant manager and two floor supervisors. The store was open from 9:30 a.m. to 8:00 p.m. Monday through Saturday and 11:00 a.m. to 6:00 p.m. on Sundays. Murphy often worked more than nine hours a day. Usually the extra hours were spent on the sales floor.

On a typical day, Murphy and another employee arrived around 8:30 or 9:00 a.m. Together, they opened the safe, took the receipts to the bank, returned and opened the register, counted the money, checked faxes and e-mails and opened the store. Company policy required both people to be on the sales floor at all times, due to security problems related to the store's location in a high theft area. Murphy was not allowed to schedule more than two employees for a morning shift. In those morning hours, Murphy did the same tasks as the other employee.

During a typical morning, between 9:30 a.m. and 1:00 p.m., Murphy and the other employee made sales, retrieved shoes from the stockroom, worked on processing the

morning shipment, worked on markdowns or transfers, and if nothing else was happening, they cleaned. In that morning period, Murphy did nothing other than making sales, receiving or transferring product, processing markdowns and cleaning. On weekends, they usually did not receive merchandise and the district manager instructed Murphy to spend his time on the sales floor.

Processing the shipment of products involved scanning the boxes, opening them, matching the contents to the packing slip, pricing the boxes, pulling a sample shoe, labeling it, and preparing the merchandise for the stockroom. Processing transfers involved receiving a faxed list from the corporate office of products to be transferred to other stores. Murphy pulled the product from the stockroom, brought it to the sales floor, checked to make sure the shoes matched, scanned the box and wrote in the shipping information. Similarly, the processing of markdowns involved checking the list from the corporate office and changing the prices on the bottom of each shoe. Cleaning involved dusting the displays and polishing the shoes. At all times, he was doing the same tasks as the other employee and no managerial tasks. They worked on the tasks together during this 9 a.m. to 1 p.m. time period.

During a typical weekday afternoon, the second shift of either one or two people arrived at 1:00 p.m. The morning employee would go to lunch, and Murphy and another employee would begin carrying the merchandise into the stockroom while covering the sales floor. Directives from the corporate office determined the precise details of how the stockroom was organized and where each item was to be stored. Murphy did not work on commission and was efficient in the stockroom, so he often was the employee working in the stockroom while the commissioned employees worked on the sales floor. At some point, Murphy would go to the office to eat while he checked company e-mails and voice mails. By 2:00 p.m. he was either on the sales floor or back in the stockroom working.

At 6:00 p.m., Murphy was scheduled to leave, but he often would have customers on the sales floor, or would do some human resources paperwork. Murphy's duties when he worked the closing shift from noon until 8:00 p.m., were essentially the same as when

he worked the opening shift. Typically, he was on the sales floor or in the stockroom from 12:30 to 4:30 p.m. At 4:30 p.m. he would try to eat lunch while he checked KCP company voice mail and e-mail in the office, and then worked on the sales floor until closing time. After the store was closed, Murphy and a sales associate would verify the bank deposit, clean up the store, put shoes away, vacuum and empty the garbage. Typically, they would finish cleaning around 8:45 or 9:00 p.m.

Murphy performed tasks that he considered to be management duties, including preparing quarterly employee reviews, interviewing job prospects, preparing payroll worksheets, and preparing the sales report to submit to the district manager. He occasionally called the district manager to try to get different merchandise for the store. Completing the payroll and sales reports took about 30 minutes each week.

Murphy spent about an hour a week on communications with the district manager. Although he was not always the one to prepare the weekly work schedule, when Murphy did it, he spent another 30 minutes each week on that task. After receiving a payroll dollar goal and number of hours report from the corporate office, Murphy prepared a schedule to cover the store hours and submitted it for approval to the district manager. The district manager would then instruct Murphy to cut hours, use different employees, or to make other changes.

His human resources duties, which consumed about four hours a month, included writing quarterly and annual employee performance evaluations for the assistant manager and the floor supervisor. The assistant manager and floor supervisor did the evaluations of the other employees.

Murphy added up the time he spent doing tasks that the other employees also performed and his managerial tasks, and calculated that approximately 90 percent of his time was spent doing the same tasks as the sales associates and only 10 or 11 percent was spent on management tasks. No one ever criticized him for spending too much time on nonexempt activities such as assisting customers, making sales, processing merchandise, handling markdowns and cleaning. He squeezed the performance of his management tasks into the afternoons on days when they had less stock or shipments.

Murphy resigned on June 19, 2002. A friend told him that KCP had not been paying him correctly.

On October 29, 2002, Murphy filed a complaint with the Labor Commissioner. Murphy was not represented by counsel and he testified that no one informed him that he could raise claims for meal and rest period or pay stub violations. His claim did include a demand for unpaid overtime of $28,742.93, "[i]nterest pursuant to Labor Code Section 98.1 and/or 2802" and "additional wages accrued pursuant to Labor Code Sec. 203 as a penalty of $174.00 per day."

On July 14, 2003, after a hearing, the Labor Commissioner issued a decision finding that KCP failed to establish the conditions necessary to qualify Murphy as an exempt employee. The order awarded $26,667.22 in unpaid overtime, $2,863.99 in interest and a waiting time penalty at the rate of $239.25 a day for 30 days.

On August 6, 2003, KCP filed a notice of appeal de novo from the decision of the Labor Commissioner. (Lab. Code, § 98.2.)[2] On October 24, 2003, the Hastings College of the Law Civil Justice Clinic filed and served a notice of association of counsel on behalf of Murphy. On November 10, 2003, Murphy's new counsel filed a "notice of claims and issues at issue at de novo trial of wage claim," adding claims for meal period, rest period and pay stub violations, plus interest and attorney fees.

In May of 2004, the trial court filed its statement of decision and a judgment awarding Murphy unpaid overtime of $28,412.56, payments for missed meal and rest periods in the amount of $17,431.77, penalties for failing to furnish itemized pay statements of $1,650, section 203 waiting time penalties of $7,895.40 and prejudgment interest, for a total judgment of $64,206.85. The court subsequently granted Murphy's motion for attorney fees and costs in the amount of $62,171.40.

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[2] Except where otherwise indicated, all statutory references are to the Labor Code. Section 98.2, subdivision (a) provides in part: "(a) Within 10 days after service of notice of an order, decision, or award the parties may seek review by filing an appeal to the superior court, where the appeal shall be heard de novo."

KCP appealed from the judgment of the superior court and the fee order.[3]

DISCUSSION

On appeal, KCP argues that the trial court erroneously classified Murphy as a nonexempt employee. It also contends that the trial court improperly addressed new claims regarding meal break, rest break and pay stub itemization violations that had not been raised before the Labor Commissioner. (§§ 226.7, 226.) In connection with these violations, KCP contends that the payments ordered for meal and rest break violations were penalties that are barred by the one-year statute of limitations of Code of Civil Procedure section 340. KCP argues that it had a good faith defense to payment of overtime and should not have been assessed waiting time penalties. It also argues that the attorney fee award should be reduced in the event of a partial reversal.

We have reviewed all of KCP's contentions and find they have no merit except for the contentions that the payments assessed for meal break, rest break and pay stub violations are penalties and that those violations may not be raised for the first time on appeal, as we now explain.

Overtime Compensation and Exempt Employees

The Labor Commissioner and the superior court determined that Murphy was not an exempt executive employee. KCP does not dispute Murphy's characterization of the time he spent doing sales and other nonexempt tasks. Its argument, based primarily on federal law, is that while Murphy was selling shoes and dusting merchandise, he was simultaneously performing such managerial tasks as observing employees, evaluating

[3] By a previous order, we consolidated the two appeals. A brief was filed by the California Employment Law Council, the California Chamber of Commerce, the California Restaurant Association, the Airline Industrial Relations Conference and the California Lodging Industry Association as amici curiae on behalf of KCP.

Briefs were filed by the California Labor Federation, AFL-CIO, International Association of Machinists and Aerospace Workers, District Lodge 725, AFL-CIO, the California Employment Lawyers Association, the Legal Aid Society Employment Law Center, California Rural Legal Assistance, Inc., and the Asian Law Caucus, Inc., the Asian Pacific American Legal Center of Southern California, Golden Gate Women's Employment Rights Clinic, La Raza Centro Legal, The Stanford Community Law Clinic, Katharine & George Alexander Community Law Center and Rocio Zetina as amici curiae on behalf of Murphy.

performance, and was always responsible for everything that happened in the store. KCP quotes Murphy's statement during cross-examination: "At no point did I ever take my manager's cap off," to support its claim that Murphy came within the executive exemption to the overtime requirement.

Governing Regulations – Executive Exemption

Section 510, subdivision (a) provides in part: "Eight hours of labor constitutes a day's work. Any work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek and the first eight hours worked on the seventh day of work in any one workweek shall be compensated at the rate of no less than one and one-half times the regular rate of pay for an employee." Murphy worked in the retail industry, which, at the time of his employment was governed by Industrial Welfare Commission (IWC) wage orders 7-2000 and 7-2001.[4] (Cal. Code Regs., tit. 8, § 11070.)

The wage orders set out the executive exemption from the requirement to pay overtime as follows: "The following requirements shall apply in determining whether an employee's duties meet the test to qualify for an exemption . . . : (1) Executive Exemption. A person employed in an executive capacity means any employee: (a) Whose duties and responsibilities involve the management of the enterprise in which he/she is employed or of a customarily recognized department or subdivision thereof; and (b) Who customarily and regularly directs the work of two or more other employees therein; and (c) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and (d) Who customarily and regularly exercises discretion and independent judgment; and (e) Who is primarily engaged in duties which meet the test of the exemption. . . ." (Cal. Code Regs., tit. 8, § 11070, subd. 1(A)(1)(a)-(e).)

Statutory provisions regulating wages that are enacted to protect employees are liberally construed with "an eye to promoting such protection." (*Ramirez v. Yosemite*

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[4] The two wage orders are essentially the same and are referred to interchangeably as "wage order" or "wage orders."

Water Co. (1999) 20 Cal.4th 785, 794 (*Ramirez*).) Exemptions are narrowly construed, and as affirmative defenses, must be proved by the employer. (*Id.* at pp. 794-795.) The elements of the exemption are stated in the conjunctive and all criteria must be established for the exemption to apply. (*Bell v. Farmers Ins. Exchange* (2001) 87 Cal.App.4th 805, 828-829 [elements of exemption impose independent requirements].)

The trial court in this case determined that KCP failed to establish three of the five elements of the exemption. After reviewing and discussing the evidence, that court concluded that Murphy spent far less than half of his time engaged in managerial duties, did not customarily and regularly exercise discretion and independent judgment, and did not have the requisite level of authority or input regarding hiring and firing decisions.

Review of the determination that Murphy was not an exempt employee is a mixed question of law and fact. (*Ramirez, supra,* 20 Cal.4th at p. 794.) Whether an employee satisfies the elements of the exemption is a question of fact subject to substantial evidence review. (*Nordquist v. McGraw-Hill Broadcasting Co.* (1995) 32 Cal.App.4th 555, 561 (*Nordquist*).) The appropriate manner of evaluating the employee's duties is a question of law that we review independently. (*Ramirez, supra,* at p. 794.) We examine the elements of the exemption in the order that they appear in the wage order.

A*uthority to Hire or Fire*

Subdivision (c) of the relevant wage order requires KCP to prove that Murphy "has the authority to hire or fire other employees," or that his "suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight." KCP argues that it established this element through evidence that Murphy was part of the hiring process, made recommendations and filtered job applicants. This issue presents a purely factual matter that is reviewed under the substantial evidence test.

Murphy testified that he was involved in the hiring process to the extent that he acted as a filter for job applicants. He had no authority to hire anyone without obtaining the district manager's approval. Murphy had "no say" in rate of pay decisions. He testified regarding occasions when he wanted to hire or retain specific individuals, but his

recommendations were not followed. He had no authority to fire anyone, but could only call attention to problems. He was unable to impose discipline on store employees without the approval of the district manager. On at least one occasion, an employee was transferred to Murphy's store over his objection. The only personnel action that Murphy could perform without first obtaining approval was a change of address. He needed approval for hiring, firing, transferring personnel and changing pay rates.

KCP refers to portions of the record that it contends would support a finding contrary to that of the trial court. But when reviewing a finding under a substantial evidence standard, we must "consider the evidence in the light most favorable to the prevailing party, giving that party the benefit of every reasonable inference and resolving conflicts in support of the judgment." (*Nordquist*, *supra*, 32 Cal.App.4th at p. 561.) Murphy's testimony supports the determination that Murphy did not have the requisite level of input to hiring and firing decisions. This finding alone is sufficient to uphold the determination that Murphy was not exempt. Because KCP bases its contention that it had a good faith belief that Murphy was exempt on all contested subdivisions of the exemption, we will also discuss those subdivisions.

Exercises Discretion and Independent Judgment

Subdivision (d) of the wage order requires KCP to prove that Murphy "customarily and regularly exercises discretion and independent judgment." KCP argues that Murphy had the authority to do such tasks as direct and train sales associates, decide who would take out the trash and who would open boxes of merchandise. It claims that he "oversaw all aspects" of the store and was responsible for everything that happened in the store.

In *Nordquist*, *supra*, 32 Cal.App.4th at pages 563-564, the court discussed the terms "discretion and independent judgment" in connection with the administrative exemption as described in the 1989 version of the Department of Industrial Relations, Division of Labor Standards Enforcement (DLSE), Operations and Procedures Manual.[5]

[5] For convenience, all versions of the Division of Labor Standards Enforcement, Operations and Procedures Manual are referred to as the "DLSE Manual."

"Discretion and independent judgment involves the comparison and evaluation of possible courses of conduct, and acting or making a decision after considering various possibilities. It implies that the employee has the power to make an independent choice free from immediate supervision and with respect to matters of significance. The decision may be in the form of a recommendation for action subject to the final authority of a superior, but the employee must have sufficient authority for the recommendations to affect matters of consequence to the business or its customers."[6]

The June 2002 version of the DLSE Manual refers to the Code of Federal Regulations for the definition of the terms "discretion and independent judgment" *in each of the exempt classifications*. (DLSE Manual, June 2002, ¶¶ 51.5-51.5.1, pp. 51-2 – 51.3, <http://www.dir.ca.gov/dlse/DLSEManual/dlse_enfcmanual.pdf> (as of Dec. 2, 2005).) The text of the federal regulation as printed in the DLSE Manual states: "(a) In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered. The term as used in the regulations in subpart A of this part, more over, implies that the person has the authority or power to make an independent choice, free from immediate direction or supervision and with respect to matters of significance. . . ." (*Id.* at Addendum II, p. 12 [citing 29 C.F.R. § 541.207, now 29 C.F.R. § 541.202(a)].)

Substantial evidence supports the trial court's determination that Murphy had virtually no discretion to compare courses of conduct and decide on an action. His conduct, including sales goals, weekly budgets, pricing merchandise, and the smallest details of how to display shoes, was governed by the corporate office and district manager. All decisions of significance had to be approved by the district manager. A most significant point in a substantial evidence review is that the trial court here assessed

[6] KCP correctly argues that *Nordquist* refers to the superseded DLSE Manual, and that such manuals were held to be void as regulations because of failure to comply with the Administrative Procedure Act. (Citing *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 571.) But although the policy may be void, the wage orders are not, and we need not reject the agency's interpretation if we agree that it is correct. (*Id.* at p. 577.)

all of the evidence, and expressly rejected KCP's evidence, finding Murphy's testimony to be more credible. This testimony is substantial evidence that supports the trial court's determination that Murphy was not an exempt employee.

Primarily Engaged in Exempt Duties

Subdivision (e) of the wage order requires KCP to prove that Murphy was "primarily engaged" in duties which meet the test of the exemption. KCP argues that the trial court made a legal error by counting the time Murphy engaged in nonexempt activities rather than totaling the hours spent performing exempt activities. KCP ignores the fact that the trial court also found, based on Murphy's testimony, that only 10 percent of his time was spent on exempt management activities. The core of KCP's argument is its theory that Murphy simultaneously was performing both exempt and nonexempt duties.

KCP's argument is based principally on federal cases involving the primary duty concept and the formerly utilized "short test" for certain employees. Under the federal test, whether an employee is a bona fide executive employee may be determined in one of two ways under federal regulations promulgated by the Secretary of Labor. (*Donovan v. Burger King Corp.* (2nd Cir. 1982) 675 F.2d 516, 517-518 (*Donovan II)*.) Employees earning less than $250 per week are subject to the so-called long test, with multiple requirements, while those earning $250 or more are governed by the two-part short test. (*Id.* at p. 518.)

At the time that *Donovan II* was decided, the federal long test criteria were that the " 'primary duty' " of exempt employees: " must be management, . . . they must regularly direct the work of two or more other employees, . . . they must have 'authority to hire and fire' or have their personnel recommendations accorded 'particular weight' . . . they must regularly exercise 'discretionary powers' [and] they must not devote more than 40% of their workweek to activities 'not directly and closely related' to management. . . ." (*Donovan II, supra*, 675 F.2d at p. 518.)

Criteria for the more mechanical short test provided that the employee's primary duty is management and that he or she regularly directs the work of two or more other

employees. (*Donovan II, supra,* 675 F.2d at p. 518.) The *Donovan II* court noted that time spent on management tasks is not determinative under the federal short test and an employee who spends less than half of his or her time on managerial tasks may still be exempt if other pertinent factors so indicate.[7] (*Id.* at p. 521.)

California does not utilize the federal short test and has not adopted the primary duty concept. Under California law, the exemption does not focus on defining the worker's principal function, but requires that an employee be "primarily engaged in the duties that meet the test of the exemption." (§ 515, subd. (a).) By statute, " 'primarily' means more than one-half of the employee's worktime" is spent engaging in exempt duties. (§ 515, subd. (e); *Ramirez, supra,* 20 Cal.4th at p. 797.)

A California court performs "a purely quantitative" test to assess the work actually performed by the employee, in which the court itemizes "the types of activities that it considers to be [exempt], and the approximate average times that it finds the employee spent on each of these activities." (*Ramirez, supra,* 20 Cal.4th at pp. 797, 802-803, fn. 5.)

In this case, KCP relied solely on its abstract classification of Murphy as a manager, who "wore his manager's cap the entire time" rather than assessing the time Murphy actually spent performing exempt tasks. Murphy wore many caps. KCP argues that the trial court applied the wrong legal standard, contending that: "The issue is *not* how much time an employee spends in *non*-exempt duties. The issue is how much time the employee spends in *exempt* duties."

Contrary to KCP's contention, the trial court expressly recognized that Murphy performed some managerial tasks, "such as handling personnel issues, working through the weekly scheduling, payroll and business recap processes and paperwork, and

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[7] The court in *Donovan II* discussed the other pertinent factors in that case. "[I]t is clear that the restaurants could not operate successfully unless the managerial functions of Assistant Managers, such as determining amounts of food to be prepared, running cash checks, scheduling employees, keeping track of inventory, and assigning employees to particular jobs, were performed. For that reason, as well as the fact that much of the oversight of the operation can be carried out simultaneously with the performance of non-exempt work, we believe the principal or most important work of these employees is managerial." (*Donovan II, supra,* 675 F.2d at p. 521.)

communicating with the district and regional managers and the corporate office on behalf of the store, all of which together took about 10 [percent] of his time." The court did calculate how much time Murphy spent in exempt duties. The court also concluded that Murphy spent 90 percent of his time engaged in such nonexempt tasks as sales, processing shipments of products, stocking products, and cleaning the store. These findings are supported by substantial evidence in the form of Murphy's uncontroverted testimony. KCP failed to prove the elements required by California law regarding the relevant exemption.

In addition to evaluating Murphy's view of the job, we note that from the employer's standpoint KCP did not seem to treat Murphy like a manager by allocating resources to carry out managerial tasks and thereby relieve him of day to day nonexempt employee tasks. It did not give him the time or the assistance that he needed to accomplish primarily management tasks. Rather, KCP's expectations of Murphy encouraged him to spend the vast majority of his time at work doing the same work as those he was supposedly managing. Murphy was a nominal coxswain who performed most of the time as an oarsman alongside the rest of the crew.[8]

For these reasons, and because of the lack of relevant evidence produced by KCP, we agree with the trial court that KCP failed to meet its burden under California law of proving Murphy was exempt.

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[8] Our determination is based on the facts of this case. We are not holding that every manager who otherwise meets the criteria for exempt status would lose that status by assisting nonexempt employees in performing nonexempt job duties. For example, the court in *Ramirez*, *supra*, 20 Cal.4th 785 concerning the exemption for outside salespeople, stated that activities related to sales such as travel time count as time spent selling, while travel time to a destination to engage in both sales and nonsales activities is apportioned among the two types of activities. (*Id.* at p. 801.) Thus, the working manager, who directs the work of others, has authority to hire and fire, exercises independent judgment and is primarily engaged in exempt duties would not lose the exemption merely by helping out with nonexempt tasks. The problem with KCP's proof in this case is that it failed to show that Murphy met the criteria of the exemption.

Raising New Claims In De Novo Appeal

Murphy concedes that he did not raise the claims of rest break, meal break and itemized pay stub violations in his claim filed on October 29, 2002 with the Labor Commissioner.[9] These claims were not mentioned until November of 2003, when Murphy filed a "notice of claims and issues at issue at de novo trial of wage claim" in the appeal de novo proceeding. The trial court allowed the claims, stating that hearing the new claims served the interests of judicial economy, preserving the rights of the parties and discouraging appeals by subjecting appealing employers to additional liability.

The trial court found that Murphy had no assistance filing his claim and that he did not know he could make a claim for meal and rest period and itemized wage statement violations. But Murphy knew about KCP's failure to provide meal and rest breaks and testified that he had complained to his district manager that it was impossible to comply with rest and meal break requirements.[10] If nothing else, his testimony shows that Murphy was aware of the requirement, aware of the problem, and elected not to mention it when he filed his claim.

KCP objected below and renewed its objection on appeal. It argues that the court had no jurisdiction to hear the claims added by Murphy after he received counsel for the appeal de novo. (§§ 226.7, 226, subd. (e).) Murphy contends that because an appeal de

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[9] We note that section 98, subdivision (e), regarding complaints to the Labor Commissioner provides that matters not pleaded in the answer may be allowed "only on terms and conditions the Labor Commissioner shall impose." There are no similar provisions regarding raising new matter in the code section concerning appeals.

[10] With his posttrial brief, Murphy filed a declaration from a deputy labor commissioner stating that her office provides "some assistance" to claimants in filling out forms, it does not "typically notify claimants of all of the possible claims that may apply in that claimant's particular situation." The deputy also stated that the Labor Commissioner's office does not process claims for recordkeeping violations under section 226, subdivision (e), stating: "An individual who wanted to pursue such a claim before our office would be told that the claim could not be brought in our office, and would have to be filed in court." This statement does not help Murphy, who failed to file a claim in any forum and could have filed a timely civil action.

novo requires an entirely new trial with new evidence, he can raise any new wage-related claim.[11] We now examine this unique review process.

An employee seeking payment of wages due has two options: (1) file an ordinary civil action against the employer (exhaustion is not required); or (2) file a wage claim with the Labor Commissioner pursuant to sections 98-98.8 and obtain a so-called Berman hearing. (*Smith v. Rae-Venter Law Group* (2002) 29 Cal.4th 345, 350 (*Smith*).) Murphy elected to file a wage claim for unpaid overtime, waiting time penalties and interest with the Labor Commissioner.

The proceeding before the Labor Commissioner is initiated by the employee filing a complaint pursuant to section 98, subdivision (a). Within 30 days, if the Labor Commissioner determines that a hearing will be held, the Labor Commissioner so notifies the employer. When the hearing is set, a copy of the complaint stating the amount of compensation at issue and notice of the time and place of the hearing is served on the employer. (§ 98, subd. (b).) Ten days after the notice of an award is served, the parties may seek review of that award. (§ 98.2, subd. (a).) The award is based on the original complaint that gave notice to the employer of the matters at issue and upon which a subsequent appeal is based.

"If no party takes an appeal, the commissioner's decision will be deemed a judgment, final immediately and enforceable as a judgment in a civil action." (*Smith, supra,* 29 Cal.4th at p. 356.) Following a decision of the Labor Commissioner, either party may "seek review by filing an appeal to the superior court, where the appeal shall be heard de novo." (§ 98.2.) The notice requesting appeal filed in the superior court is not a pleading and provides no new information.[12] (*Rogers v. Municipal Court* (1988) 197 Cal.App.3d 1314, 1318-1319 ["the notice of appeal imparts no information to the

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[11] Murphy concedes that he could not raise nonwage related claims such as a defamation claim or a claim that his car was damaged in the employee parking lot.

[12] When an employer files a notice of appeal, the employee is not required to take any action to preserve the right to challenge any portion of the Labor Commissioner's award. (*Mamika v. Barca* (1998) 68 Cal.App.4th 487, 490, fn. 2; *Miller v. Foremost Motors, Inc.* (1993) 16 Cal.App.4th 1271, 1274-1275.)

opposing side which will affect the trial of the issues"].) Murphy argues that the peculiar nature of the superior court's review of decisions of the Labor Commissioner evidences the intent to allow employees to raise all wage-related claims, regardless of whether such claims were previously presented to the Labor Commissioner.

We recognize that such an appeal to the superior court results in a completely new trial, but we see no authority for allowing the introduction of entirely new and different claims at that level. "The timely filing of the notice of appeal (1) forestalls the finality of the Labor Commissioner's decision; (2) terminates the jurisdiction of the Labor Commissioner; and (3) vests jurisdiction to conduct a trial de novo in the appropriate court." (*Pressler v. Donald L. Bren Co.* (1982) 32 Cal.3d 831, 836 (*Pressler*).) " 'Although denoted an "appeal," unlike a conventional appeal in a civil action, hearing under the Labor Code is de novo. [Citation.] " 'A hearing *de novo* . . . literally means a new hearing,' that is, a new trial." [Citation.] The decision of the commissioner is "entitled to no weight whatsoever, and the proceedings are truly 'a trial anew in the fullest sense.' " ' " (Italics in original.) (*Sampson v. Parking Service 2000 Com., Inc.* (2004) 117 Cal.App.4th 212, 219-220 (*Sampson*).)

"Review is of the facts presented to the trial court, which may include entirely new evidence." (*Sampson, supra,* 117 Cal.App.4th at pp. 219-220.) The proceeding in the superior court allows both parties to: " . . .'present their evidence directly to the court, which sees the witness, hears their testimony and accepts any documentary or physical evidence. Neither party is limited to the evidence presented at the administrative hearing and may introduce any relevant evidence.' " (*Sales Dimensions v. Superior Court* (1979) 90 Cal.App.3d 757, 762 (*Sales Dimensions*).) Despite the de novo nature of the review, the court in *Sales Dimensions* recognized that: "an interpretation of [section 98.2] must be arrived at which, if possible, gives effect to both the term 'review' and the term 'de novo.' " (*Sales Dimensions, supra,* 90 Cal.App.3d at p. 762.) Murphy's assertion that any new wage claim can be raised on appeal disregards the term "review" in the statute. The appeal taken is expressly from the "order, decision, or award," and not from whatever new matter the parties may thereafter seek to raise. (§ 98.2, subd. (a).)

In 1937, our Supreme Court discussed a similar provision for review of the Labor Commissioner's decision in an action between an artist and an agent. The relevant statute provided for an appeal, which was to be heard de novo in the superior court. (*Collier & Wallis, Ltd. v. Astor* (1937) 9 Cal.2d 202, 204 (*Collier*).) In commenting on the nature of such an appeal de novo, the Supreme Court stated: "A hearing de novo literally means a new hearing, or a hearing the second time. [Citation.] Such a hearing contemplates an entire trial of the controversial matter *in the same manner in which the same was originally heard.*" (*Id.* at p. 205, italics added; see also *Pressler, supra,* 32 Cal.3d at p. 836.) "As thus construed, the section simply gives to the party dissatisfied with the determination of the labor commissioner a hearing *of the matter submitted to the labor commissioner* before the superior court." (*Collier, supra,* at p. 205.) (Italics added.) These comments indicate the intent to give effect to the review aspect of the de novo proceeding. Although there is a new trial with the possibility of new evidence, and the administrative decision is given no weight, the subject matter of the review must be the same as that submitted to the Labor Commissioner; otherwise the proceeding is not a review.

Murphy places particular emphasis on quotes from *Post v. Palo/Haklar & Associates* (2000) 23 Cal.4th 942, 949-950 (*Post*) and *Smith, supra,* 29 Cal.4th at page 371. The court in *Post* stated that an appeal de novo encompasses "a disputed question concerning any issue of law or fact . . . ." (*Post, supra*, 23 Cal.4th at p. 950 [concerning review of Labor Commissioner's decision that claimant was not an employee].) The quote from *Smith* is: "statutory constraints on the commissioner's authority to award interest on the nonwage items did not similarly bind the trial court, which heard Smith's claim de novo."**13** (*Smith, supra*, 29 Cal.4th at p. 371.)

The issue in *Smith,* was whether the addition of prejudgment interest on appeal of the Labor Commissioner's decision was sufficient to constitute success on appeal.

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13 The holding in *Smith, supra*, 29 Cal.4th at page 370 regarding meaning of the requirement that an appealing party be "unsuccessful in the appeal" was superseded by the 2003 amendment to section 98.2, subdivision (c) as stated in *Sampson, supra,* 117 Cal.App.4th at page 220 and footnote 8.

(*Smith, supra,* 29 Cal.4th at pp. 370-371.) The employee sought interest from the Labor Commissioner, who was not authorized to award it on nonwage claims. On appeal, the superior court awarded the requested interest. (*Id.* at pp. 352-353.) Not only was the request for prejudgment interest in *Smith* raised below, but adding interest to an award is a consequence of continuing the litigation. (*Id.* at pp. 371-372, fn. 12.) Adding a new claim for alleged wrongs that were never presented below is not a natural consequence of continuing the litigation.

In both of the cited cases, the employees had raised the same general issue before the Labor Commissioner. (*Post, supra,* 23 Cal.4th at p. 950 [issue of employee status decided by Labor Commissioner]; *Smith, supra,* 29 Cal.4th at p. 352 [employee sought prejudgment interest from Labor Commissioner, who was not authorized to award it on nonwage claims].) The cases did not concern entirely new issues never previously submitted for decision.

The legislative history regarding the enactment of section 98.2 indicates that the Legislature was concerned with strengthening the administrative law system for resolving wage claims by shortening the hearing and decision process. (Assem. Com. on Labor Relations, Rep. on Assem. Bill No. 1522 (1975-1976 Reg. Sess.) as amended Jan. 8, 1975, p. 1.) Formerly, the Labor Commissioner was required to initiate a court action to obtain an enforceable judgment. (Legis. Analyst, analysis of Assem. Bill No. 1522 (1975-1976 Reg. Sess.) p.1.) Assembly Bill No. 1522 was proposed to solve the problem of enforcement by making the Labor Commissioner's orders enforceable judgments if no request for appeal was filed. (Assem. Off. of Research, 3d reading analysis of Assem. Bill No. 1522 (1975-1976 Reg. Sess.) as amended May 3, 1976, p. 1.) The provision allowing appeal and a trial de novo was inserted out of concerns regarding the exercise of judicial powers by administrative agencies. (Legis. Counsel, Supp. Rep. on Enrolled Bill, Assem. Bill No. 1522 (1975-1976 Reg. Sess.) Sept. 21, 1976, pp. 1-2.) Although the legislative history is not dispositive of the issue, nothing therein indicates an attempt to prolong the processing of a wage claim by allowing assertion of new claims at the time of the appeal. The purpose of sections 98, 98.1, and 98.2 is to provide a structure for a

timely, fair process for resolving a claim so that the employer and employee receive a final, expeditious determination of the claim.

Review of the foregoing authorities clarifies the nature of the section 98.2 provision for review of the Labor Commissioner's decision. Although new evidence may be presented, new witnesses may testify and the de novo review envisions an entirely new trial, no authority sanctions the superior court's consideration of entirely new issues and disputes that were never previously submitted to the Labor Commissioner or a court.[14] Section 98.2 subdivision(a) plainly states that the parties may seek "review" by filing an appeal where the appeal is heard de novo. The process is a review of the "decision or award" rendered by the Labor Commissioner reviewed by a new trial in superior court and not a de novo trial of new claims never heard below.

We note that the superior court may add interest to an amount due even though it was not considered by the Labor Commissioner. (*Smith, supra,* 29 Cal.4th at pp. 353, 371 & fn. 11 [court awarded prejudgment interest on nonwage claim that had been denied in the Berman hearing]; *Nordquist*, *supra*, 32 Cal.App.4th at p. 576.) But interest is a result of the continuation of the dispute, not a new and different claim that could have been raised below. (*Smith*, *supra*, 29 Cal.4th at pp. 371-372, fn. 12.)

Murphy was not seeking interest on the amounts due. Rather, he was seeking new payments for alleged different transgressions by the employer that he failed to raise before the appeal. Murphy was not asking the court to review de novo, but to adjudicate new and separate claims never raised below. Such a process does not constitute a review as contemplated by section 98.2. The party dissatisfied with the Labor Commissioner's decision is given the right to appeal that decision and have it heard fresh in superior court, but cannot initiate new causes of action unrelated and not considered by the Labor Commissioner after the statute of limitations has run.

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[14] Contrary to the concerns of amicus curiae, refusing to create authority for raising new claims in such an appeal does not deprive employees of the right to seek relief for wage claims. The employee at all times has the right to file a timely civil complaint for the claim or to raise it before the Labor Commissioner.

The matter before us concerns only an attempt to raise itemized pay stub violations, meal break and rest break violations for the first time on de novo appeal. We confine our holding to the claims sought to be raised in this case, which, as will be explained in the following section, are new penalty claims on which the statute of limitations expired prior to filing of the request for de novo appeal.

Murphy was not without recourse for meal break and rest break violations after he left his job. If the statute of limitations had not run on Murphy's new claims, he could have filed a civil complaint and sought consolidation with the appeal. (*Sales Dimensions, supra,* 90 Cal.App.3d at p. 764.) Alternatively, he could have filed another timely complaint with the Labor Commissioner seeking meal break and rest break monetary sanctions. The parties do not dispute the fact that the payment for the pay stub violation is a penalty.[15] The statute of limitations on a penalty is the one-year period in Code of Civil Procedure section 340. Since Murphy's last day of work was in June of 2002, the time for raising penalty claims expired in June of 2003, before KCP filed its notice of appeal and before Murphy ever raised these new issues.[16]

The parties do dispute the nature of the payments for meal and rest break violations. KCP claims that they are also penalties, while Murphy claims they are wages. Because the correct characterization affects the relevant statute of limitations and the nature of the issue Murphy attempted to raise, we now turn to an examination of the nature of the payments for failure to provide meal and rest period breaks.

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[15] Section 226.3 expressly provides for a civil penalty for violations of section 226, subdivision (a).

[16] The trial court stated that Murphy's new claims could be raised for the first time in the superior court and, once raised, the claims "relate[d] back" to the date of the original wage claim in October of 2002. (See, e.g., *Cuadra v. Millan* (1998) 17 Cal.4th 855, 867, 870 [filing of administrative wage complaint fixes date on which action is commenced for purposes of statute of limitations].) Although KCP has not challenged the court's decision to relate the appellate claim back to the date of filing the original claim, our holding that Murphy cannot add new penalty claims on appeal makes it unnecessary to discuss the doctrine of relation back.

Meal/Rest Period Payment as a Penalty

Murphy was employed by KCP from June of 2000 to June of 2002. Effective October of 2000, sanctions for meal and rest period violations were set out only in an IWC wage order. (Cal. Code Regs., tit. 8, § 11010.)[17] Section 226.7, subdivision (b), effective January 1, 2001, provides the same sanction: "If an employer fails to provide an employee a meal period or rest period in accordance with an applicable order of the Industrial Welfare Commission, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not provided."

The trial court determined that Murphy was not provided with the opportunity to take meal or rest breaks due to KCP's policies and scheduling and awarded statutory payments for each day that each type of violation occurred beginning in October of 2000. The trial court, relying on the lack of the word "penalty" in the relevant order and statute, concluded that payments for missed meal and rest periods are compensation, like overtime pay, and are governed by the three-year statute of limitations. (Code Civ. Proc., § 338.) But case law indicates that the absence of the term "penalty" is not necessarily dispositive and that the intent and effect of the provisions is to impose a penalty.

Courts have discussed the general characteristics of a penalty. For example, when considering a statute that reduced a court reporter's compensation by one-half when a transcript was late, the court in *County of San Diego v. Milotz* (1956) 46 Cal.2d 761, stated: "the statute must be held to provide a penalty or forfeiture for noncompliance, notwithstanding its use of the words 'shall have his compensation reduced.' " (*Id.* at p. 767.) " 'The term "penalty" has a very comprehensive meaning. While often used as

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[17] Section 11(D) of the wage order provides: "If an employer fails to provide an employee a meal period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each work day that the meal period is not provided." Section 12 (B) provides: "If an employer fails to provide an employee a rest period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each work day that the rest period is not provided." (Cal. Code Regs., tit. 8, § 11010, subds. 11(D), 12(B).)

synonymous with the word "punishment," or as including a sum payable upon the breach of a private contract, it has also the more restricted meaning of a sum of money made payable by way of punishment for the nonperformance of an act or for the performance of an unlawful act, and which, in the former case, stands in lieu of the act to be performed.' " (*Id.* at p. 766.)

" '[T]he settled rule in California is that statutes which provide for recovery of damages additional to actual losses incurred, such as double or treble damages, are considered penal in nature [citations], and thus governed by the one-year period of limitations . . . ." (*Prudential Home Mortgage Co. v. Superior Court* (1998) 66 Cal.App.4th 1236, 1242.) "Claims based upon statutes which provide for mandatory recovery of damages additional to actual losses incurred, such as treble damages, are considered penal in nature, and thus are governed by the one-year limitations period under section 340, subdivision (1)." (*Menefee v. Ostawari* (1991) 228 Cal.App.3d 239, 243.) "The statutory penalty there referred to [in Code of Civil Procedure section 340] is one which an individual is allowed to recover against a wrong-doer, as a satisfaction for the wrong or injury suffered, and without reference to the actual damage sustained, or one which is given to the individual and the state as a punishment for some act which is in the nature of a public wrong." (*County of Los Angeles v. Ballerino* (1893) 99 Cal. 593, 596.) The foregoing cases indicate that a statute like section 226.7 that imposes a payment without regard to the actual loss suffered, is in the nature of a penalty.

In addition to the case law, the history of the relevant wage order indicates an intent to create a penalty. The IWC adopted the wage order at a hearing on June 30, 2000, where Commissioner Broad explained that at that time there was no incentive for employers to comply with the meal and rest period requirements. (<http://www.dir.ca.gov/IWC/PUBHRG6302000.pdf> (as of Dec. 2, 2005) [transcript of 6/30/2000 hearing], pp. 25-27.) A representative of the California Labor Federation addressing the IWC noted that even though an employee is paid for time worked through meal or rest periods, a remedy was needed to provide a disincentive for employers to deny meal and rest breaks. (*Id.* at p. 28.) Two other speakers protested and questioned

the IWC's authority to establish what they referred to as a new penalty for missing a meal period. (*Id.* at pp. 28-29.) Commissioner Broad stated that overtime is treated as a penalty and that the IWC would adopt the new penalty under the same authority.[18] (*Id.* at p. 30.) In a ruling on the legal issue, counsel stated that the IWC had the authority to adopt a regulation imposing a penalty. (*Id.* at p. 34.) The IWC promptly voted to adopt the regulation. (*Id.* at pp. 34-35.)

Regarding the Legislature's subsequent enactment of section 226.7, the legislative history indicates that the Legislature also intended a penalty. The statute is located with other provisions for penalties in the Labor Code.[19] The Assembly Floor analysis of Assembly Bill No. 2509, provided that the bill would: "Delete the provisions related to penalties for an employer who fails to provide a meal or rest period, and instead codify the lower penalty amounts adopted by the Industrial Welfare Commission (IWC)."[20] (<http://www.leginfo.ca.gov/pub/99-00/bill/asm/ab_2501-2550/ab_2509_cfa_20000907_101801_asm_floor.html> (as of Dec. 2, 2005).) The analysis in the enrolled bill reports prepared by the Department of Finance and the IWC for Assembly Bill No. 2509 stated that payment of regular wages for the short time of a meal or rest period violation does nothing to discourage noncompliance. The reports discuss the payment in terms of imposing a monetary penalty. (Depts. of Finance and Industrial Relations, Enrolled Bill Reps. on Assem. Bill No. 2509 (1999-2000 Reg. Sess.) (Aug. & Sept. 2000) pp. 2, 9.)

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18 Courts have referred to overtime pay as "premium" or "penalty" pay interchangeably. (See, e.g., *Industrial Welfare Com. v. Superior Court* (1980) 27 Cal.3d 690, 713.) We express no opinion on the appropriate characterization of overtime pay.

19 Continuing violations of section 226.7 may expose the employer to prosecution for a misdemeanor. (§ 1199.)

20 The deleted provisions provided for a $50 fine for each violation and payment to the employee of twice the average hourly pay. (http://www.leginfo.ca.gov/pub/99-00/bill/asm/ab_2501-2550/ab_2509_bill_20000825_amended_sen.pdf> (as of Dec. 2, 2005).) Various versions of the bill including the concurrence in senate amendments, are located at <http ://www.leginfo.ca.gov/bilinfo.html> under the 1999-2000 session for Assembly Bill No. 2509 (as of Dec. 2, 2005).

Murphy notes that other provisions are considered wages even though they do not correspond exactly to the number of hours worked. (Citing, e.g., Reporting Time Pay pursuant to Cal. Code Regs., tit. 8, § 11040, subd. 5, unemployment insurance payments, health and welfare fund payments.) But such benefits are a part of the compensation given in exchange for an employee's labor. (*Department of Industrial Relations v. UI Video Stores, Inc.* (1997) 55 Cal.App.4th 1084, 1091 (*Department of Industrial Relations*).) Payment imposed on the employer due to impermissible conduct is not an employee benefit given for labor performed, but is a sanction or punishment for failure to provide work accommodations such as adequate meal breaks.

Murphy relies, in part, on *Tomlinson v. Indymac Bank, F.S.B.* (C.D.Cal. 2005) 359 F.Supp.2d 891 (*Tomlinson*) which held that the meal and rest period sanction is not a penalty. The district court judge in *Tomlinson* considered the issue of whether compensation for missed meal and rest breaks constitutes a penalty, and is therefore not available in an action under the unfair competition law. (*Id.* at pp. 893, 895-896; Bus. & Prof. Code, § 17200 et seq.) The district court concluded that a section 203 waiting time payment constituted a penalty rather than payment of wages because the statute compelled more than mere restoration of the status quo by compensating plaintiffs for time worked. (*Tomlinson, supra*, 359 F.Supp.2d at p. 895.)

When considering rest and meal period violations, the district court accepted the argument that imposing a payment in the amount of one hour's pay for a 10-minute break was restitution because it was "akin to payment of overtime wages to an employee: both are 'earned wages' and thus recoverable under the UCL." (*Tomlinson, supra*, 359 F.Supp.2d at p. 896.) The district court apparently believed that payment for missed rest and meal periods constituted: "paying workers a premium for time worked without a meal break or rest breaks." (*Id.* at p. 896.)

We disagree with the district court judge's interpretation. While the Labor Code allows employers to require overtime work, albeit at a higher rate of compensation, it

does not allow employers to deny meal and rest breaks.[21] The payments imposed by the wage order and section 226.7 are not compensation for the missed 10 or 30 minute rest or meal break, but are fixed at one additional hour of pay. That payment is not compensation for labor performed, but is an arbitrary amount imposed on the employer in addition to the salary already paid during the time the employee was not eating or not resting.[22] It is not overtime pay for an allowed work period, but a penalty for violating the law that prohibits work during those times.

The parties have brought to our attention the fact that the DLSE has recently changed its interpretation of the payment imposed for meal and rest break violations. At the time of the trial court's decision, Murphy submitted a June 11, 2003 opinion by the DLSE stating that meal and rest break payments constituted a premium wage and not a penalty. At the present time, the DLSE has changed its interpretation and announced that the payment for meal and rest break violations is a penalty. It has issued that position in a precedent decision, by memo dated June 17, 2005, in case number 12-56901RB. Murphy urges us to ignore the DLSE's changing positions, arguing its inconsistency entitles its opinion to no deference.

" 'In the general case, of course, an administrative agency may change its interpretation of a statute, rejecting an old construction and adopting a new. [Citations.] Put simply, "[a]n administrative agency is not disqualified from changing its mind . . . ." [Citation.]' " (*Californians for Political Reform Foundation v. Fair Political Practices Com.* (1998) 61 Cal.App.4th 472, 488.) The judge in *Tomlinson, supra,* 359 F.Supp.2d at

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[21] Compare section 510, stating: "[A]ny work in excess of eight hours . . . shall be compensated at the rate of no less than one and one-half times the regular rate of pay . . ." with section 512: "An employer *may not employ* an employee . . . without providing the employee with a meal period of not less than 30 minutes . . . ." (Italics added.)

[22] Section 200, subdivision (a) defines wages as: "[A]ll amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation." Wages include other benefits that are a part of compensation such as vacation and sick pay. (*Department of Industrial Relations, supra,* 55 Cal.App.4th at p. 1091.)

page 896, footnote 3, noted the DLSE's change of interpretation, but disagreed with the reasoning supporting that opinion and rejected it.

Assembly Concurrent Resolution No. 43, filed with the Secretary of State on July 18, 2005, states that the DLSE has no authority to promulgate a proposed regulation regarding meal and rest breaks and that the proposed regulation is inconsistent with existing law and regulations.[23] A concurrent resolution is not a law, but only an expression of opinion. (*American Federation of Labor v. Eu* (1984) 36 Cal.3d 687, 709, fn. 20; 1A Singer, Sutherland, Statutes and Statutory Construction (6th ed. 2002 rev.) § 29:3, pp. 670-671.) "The Legislature has no authority to interpret a statute. That is a judicial task. The Legislature may define the meaning of statutory language by a present legislative enactment which, subject to constitutional restraints, it may deem retroactive. But it has no legislative authority simply to say what it *did* mean." (*Del Costello v. State of California* (1982) 135 Cal.App.3d 887, 893, fn. 8.) (Italics in original.) The IWC and the Legislature enacted a regulation and a statute, and postenactment statements of purported intent are "of limited legal value to an understanding [of] the clear meaning and legal effect of statutes." (2A Singer, Sutherland, Statutes and Statutory Construction (6th ed. 2000 rev.) § 48:20, pp. 488-489.)

The task of this court is to interpret the statute and IWC regulation, both enacted in 2000. We cannot base that interpretation on a postenactment expression of current political or legislative opinion in 2005 in the absence of a duly enacted statute. (See, e.g., *California Labor Federation v. Industrial Welfare Com.* (1998) 63 Cal.App.4th 982, 995-996 [court may not overturn IWC action based on subsequent Senate resolution].)

Nor do we base our decision on any deference to the DLSE position, but on our independent agreement with it, based on our analysis of the wording, history and apparent intent of the Legislature when enacting section 226.7, and the IWC when it promulgated the wage order. We conclude that the payment imposed for impermissibly failing to provide a meal or rest break is a penalty. As a penalty, it had to be raised

[23] (Legis. Counsel's Dig., Assem. Conc. Res. No. 43 (2005-2006 Reg. Sess.); <http://www.leginfo.ca.gov/pub/bill/asm/ab_0001-0050/acr_43_bill_20050718_chaptered.html> (as of Dec. 2, 2005).)

within one year of the last date that the claim accrued. That limitation period expired before KCP filed its request for appeal and before Murphy first raised it in his "notice of claims and issues at issue at de novo trial of wage claim."[24]

Waiting Time Penalties: Willful Failure to Pay - Good Faith Dispute

KCP argues that the trial court erroneously awarded waiting time penalties because KCP demonstrated there was a good faith dispute as to Murphy's right to payment of overtime wages. KCP claims that the proper legal standard excuses it from the penalty so long as it presented a defense, which if successful, would have precluded any recovery by Murphy. We reject this argument because KCP's defense was not supported by the evidence or the law.

The standard of review for this issue involves an analysis of a mixed question of fact and law, with deference to the trial court's fact finding and independent review of questions of law. (*CUNA Mutual Life Ins. Co. v. Los Angeles County Metropolitan Transportation Authority* (2003) 108 Cal.App.4th 382, 391.) As we explain below, the controlling historical facts established by the trial court were largely undisputed. Those facts are supported by substantial evidence. We consider de novo the legal concept of a good faith dispute, "exercise judgment about the values that animate legal principles" and apply the law to the facts. (*People v. Louis* (1986) 42 Cal.3d 969, 987; *Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 801.)

The trial court found that "[t]here was no factual uncertainty as to what plaintiff actually was doing, and how much time it took him to do it. Defendant produced no percipient witnesses controverting plaintiff's testimony and his witness' testimony as to how much time plaintiff spen[t] performing each of his duties. . . . [¶] [T]here is much evidence to show that defendant knew or should have known how plaintiff was actually spending his time. . . ." The court noted that the district manager regularly visited the store and reviewed the work schedule and had the opportunity to observe Murphy's work.

[24] Because we find that the penalty claims for meal and rest break violations could not be raised for the first time in the appeal, we do not address the contention that only one penalty could be imposed for each day in which a meal or rest break violation occurred.

Furthermore, the court found that Murphy had complained about KCP's labor practices and KCP did nothing. The court concluded that the law on this issue is clear and well-settled and the failure to pay overtime was unreasonable "given the factual record."

The trial court's factual determination of what occurred regarding KCP's good faith defense that Murphy was an exempt manager is reviewed under the deferential substantial evidence standard. "[T]he crucial determination is whether there is substantial evidence in support of the trial court's findings of fact. ' "[T]he power of an appellate court *begins* and *ends* with the determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the finding of fact." ' [Citation.] It will not reweigh the evidence." (*Road Sprinkler Fitters Local Union No. 669 v. G&G Fire Sprinklers, Inc.* (2002) 102 Cal.App.4th 765, 781 (*Road Sprinkler*).) "A reviewing court begins with the ' " 'presumption that the record contains evidence to sustain every finding of fact.' " ' [Citation.] To overcome the trial court's factual findings, [the appellant] must ' " 'demonstrate that there is *no* substantial evidence to support the challenged findings.' " . . ." (*Id.* at p. 782.)

As we explain below, the controlling historical facts as established by the trial court were largely undisputed.

The applicable law is set out in section 203, which provides for waiting time penalties as follows: "If an employer willfully fails to pay, without abatement or reduction, in accordance with Sections 201, 201.5, 202, and 205.5, any wages of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; but the wages shall not continue for more than 30 days." The regulation further defining the waiting time penalty states that "a good faith dispute that any wages are due will preclude imposition of waiting time penalties under Section 203." (Cal. Code Regs., tit. 8, § 13520.) The regulation defines the meaning of "a good faith dispute" as one that occurs: "when an employer presents a defense, based in law or fact which, if successful, would preclude any recovery on the part of the employee. The fact that a defense is ultimately unsuccessful will not preclude a finding that a good faith

dispute did exist. Defenses presented which, under all the circumstances, are unsupported by any evidence, are unreasonable, or are presented in bad faith, will preclude a finding of a 'good faith dispute.' " (Cal. Code Regs., tit. 8, § 13520, subd. (a).)

KCP argues that the Supreme Court's decision in *In re Trombley* (1948) 31 Cal.2d 801 (*Trombley*) provides a rule that prevents assessment of waiting time penalties in this case. The *Trombley* court stated that the term willful means: "knowingly and intentionally to refuse to pay wages which [an employer] knows are due" and "a dispute in good faith as to whether any wages were due would be a defense to an action for such penalties." (*Id.* at pp. 807-808.) *Trombley* states a general proposition and does not change the standard that a defense that is unsupported by any evidence, is unreasonable, or is presented in bad faith is not a good faith dispute.[25]

The record supports the trial court's determination that KCP did not have a good faith factual dispute over Murphy's status. It is undisputed that Murphy complained about the lack of overtime pay to the general manager at the flagship Grant Avenue store and that she told Murphy she had spoken to the district manager about the problem and would speak to the human resources department as well. He also complained to an unnamed person in the corporate office payroll department. This evidence supports the finding that KCP knew of Murphy's claim to overtime pay, but did nothing to discern

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[25] Contrast and compare the federal standard. Under the federal Fair Labor Standards Act (FLSA), courts have the discretion not to award liquidated damages in an action for unpaid overtime if the employer shows that the omission was in good faith and the employer had reasonable grounds for believing the failure to pay was not a violation of the FLSA. (*Alvarez v. IBP, Inc.* (9th Cir. 2003) 339 F.3d 894, 909.) The "employer bears the 'difficult' burden of proving both subjective good faith and objective reasonableness . . . ." (*Id.* at p. 910 [noting that expost explanation is not a substitute for taking affirmative "steps" to ensure compliance with the law].) Good faith under the FLSA requires proof of an honest intention to ascertain and comply with the law. (*Bratt v. County of Los Angeles* (9th Cir. 1990) 912 F.2d 1066, 1072; compare with *Walton v. United Consumers Club, Inc.* (7th Cir.1986) 786 F.2d 303, 312 [using objective standard of whether employer had reasonable grounds for believing that act or omission was not a violation of the FLSA].)

Murphy's actual job duties required at his store or respond to his concerns about overtime.

KCP presented no evidence to controvert Murphy's testimony about the hours spent on nonmanagerial tasks. Even when faced with the issue at trial, KCP failed to present evidence that Murphy was actually performing exempt duties. KCP witnesses at trial included Susan Kelly, the regional manager from March of 2002 through October of 2003. She testified about problems with Murphy's job performance pertaining to recruiting and hiring. Only three months of her employment with KCP overlapped Murphy's employment. She not had seen Murphy in his store before April of 2002 to observe how he spent his time. The last time she saw him in his store was in May of 2002. Kelly testified extensively about the KCP job description for store managers. She did not testify that she knew how Murphy actually spent his time in light of KCP's actual policies. An employer may not rely solely on its job description to establish the number of hours an employee works at exempt tasks. (*Ramirez, supra,* 20 Cal.4th at p. 802.)

KCP presented the testimony of Gayle Catropa, a human resources vice president from the New York office. She visited Murphy's store several times, but was not necessarily present to observe what duties Murphy actually performed. Tiffany Bellotti, manager of the Folsom outlet store, testified about her own job duties. She never worked at Murphy's store and had no personal knowledge of his daily activities.

As the trial court stated, KCP produced no witnesses controverting Murphy's testimony about the nature of his daily duties. Substantial evidence and KCP's lack of same support the trial court's finding. KCP did not present any evidence that Murphy was performing in a manner other than as he explained. KCP's witnesses merely stated the contents of KCP's job descriptions or general policies. None of Murphy's supervisors contradicted his testimony regarding his day to day activities.

KCP's main defense was not a factual dispute, but a legal argument based on an inapplicable legal principle that could not have been successful under California law. KCP's legal defense, that Murphy was simultaneously performing both managerial and nonmanagerial tasks, so that all of his time (or at least more than 50 percent of it) should

be counted as management time, was based on federal "short test" cases. As the trial court stated, the law in this area is clear. No California authority supports KCP's view, and KCP could not have relied on it in good faith.[26]

To the contrary, California's unique approach to determining which employees are exempt was explained by our Supreme Court in *Ramirez*. When an employee engages in both exempt and nonexempt activities, the time "must be apportioned among the two types of activities for purposes of determining the total amount of time spent doing [exempt] and [nonexempt] work." (*Ramirez, supra*, 20 Cal.4th at p. 801.) This explanation contradicts KCP's argument that Murphy's time spent stocking, cleaning, and doing other nonexempt tasks should count toward the 50 percent requirement.

This is not a case where the law was unclear, or state appellate courts issued conflicting opinions. California has expressly rejected the federal "primary duty" method of evaluating an employee's status that supports the analysis in most of the cases KCP relied on. In its Statement As To The Basis, the IWC explained that it omitted the phrase "primary duty" because "that phrase refers to a federal test that provides less protection to employees."[27] (<http://www.dir.ca.gov/Iwc/statementbasis.htm> (as of Dec. 2, 2005), p. 3.) In *Ramirez, supra*, 20 Cal.4th at page 801, the court recognized "California's distinctive quantitative approach to determining which employees are [exempt] outside salespersons . . . ." The court explained that the number of hours worked at exempt tasks is not determined by the employer's job description, but by an inquiry into the realistic requirements of the job and "how the employee actually spends his or her time." (*Ramirez, supra*, at p. 802.)

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[26] Moreover, as previously noted, the evidence did not support the supposition that more than 50 percent of Murphy's time was spent on management tasks. The only evidence on that point was Murphy's testimony that he spent about 10 percent of his time on such tasks.

[27] " . . . 'A statement of basis is an explanation of how and why the commission did what it did.' . . ." (*California Hotel & Motel Assn. v. Industrial Welfare Com.* (1979) 25 Cal.3d 200, 216.)

Cases discussing the nature of a good faith dispute do not help KCP. For example, in *Road Sprinkler, supra,* 102 Cal.App.4th at page 781, the court applied a substantial evidence review to uphold a trial court's imposition of waiting time penalties in the face of a purported good faith dispute. The *Road Sprinkler* case involved an employer that expressly ignored the direction of the DLSE that the employees were entitled to a higher wage. (*Road Sprinkler, supra,* at p. 771.) KCP has not ignored an express direction, but instead, has chosen to ignore the governing California law applicable to Murphy's activities.

In *Barnhill v. Robert Saunders & Co.* (1981) 125 Cal.App.3d 1, the court determined that the employer did have a good faith defense to its action of setting off a debt against final wages. This finding was based on the fact that the law was unclear on the issue, and several Court of Appeal opinions had expressed the view that such setoffs were appropriate. (*Id.* at p. 8.) No legal uncertainty exists in this case. KCP's contention that the law is unclear is based on the improper reliance on the federal standard that has been rejected in California by our Supreme Court. For that reason, the legal contention is unreasonable.

We are not holding that an employer who unsuccessfully seeks to expand or contract the legal interpretation of wage regulations with reasonable, nonfrivolous arguments will be penalized. We are applying de novo the law to the evidence and are only holding in this case that the defense of a good faith dispute was so unsupported by the evidence and legal argument that the waiting time penalty should be affirmed.

Attorney Fees

KCP apparently concedes that newly enacted attorney fee provisions apply to matters that are pending on appeal on the effective date of the statute. (*Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal.3d 917, 931-932.) Section 98.2, subdivision (c), effective prior to the decision and judgment in the superior court in this case, added the sentence regarding attorney fee awards against an unsuccessful appellant: "An employee is successful if the court awards an amount greater than zero." (Stats.

2003, ch. 93, § 2(c), p. 97; see Historical and Statutory Notes, 44 West's Ann. Labor Code (2005 pocket pt.) foll. § 98.2, p. 11.)

Nevertheless, KCP requests that the fee award be reduced if there is a partial reversal. Murphy suggests that the matter be remanded to the trial court to determine the value of the services rendered in light of our partial reversal. We will remand for the trial court's consideration of the appropriate amount of attorney fees.

CONCLUSION

The judgment is reversed as to the new penalty issues that were not raised prior to the appeal. The matter is remanded to the superior court to reconsider the appropriate fee award in light of this partial reversal. In all other respects, the judgment is affirmed. The parties shall bear their own costs on appeal.

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Marchiano, P.J.

We concur:

_____
Swager, J.

_____
Margulies, J.

Murphy v. Kenneth Cole Productions, Inc., A107219 & A108346

Trial Court: San Francisco County Superior Court

Trial Judge: Honorable Anne Bouliane

Attorneys:
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Murphy v. Kenneth Cole Productions, Inc., A107219 & A108346