

**STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU**

IN THE MATTER OF THE WAGE CLAIM)	Case No. 2718-2004
OF KIERAN A. KLUBBEN,)	
Claimant,)	
)	AGENCY FINAL DECISION:
vs.)	ORDER GRANTING MOTION
)	TO DISMISS AND NOTICE OF
FEDEX GROUND PACKAGE SYSTEM,)	JUDICIAL REVIEW RIGHTS
INC., A Delaware Corporation,)	
)	
Respondent.)	

Hearing Examiner Terry Spear held a telephonic oral argument on the respondent's motion to dismiss on November 19, 2004. Kieran A. Klubben, claimant, was not available at either the number on the notice of hearing and telephone conference or the other number (406-248-4870) in the hearings file. Steven W. Jennings, Crowley, Haughey, Hanson, Toole & Dietrich, P.L.L.P., represented the respondent corporation.

Respondent moved for dismissal of this appeal on three grounds: first, that the claimant failed timely to appeal; second, that the Portal to Portal Act bars recovery of wages for time spent before and after actual performance of the principal activity or activities which the employee was employed to perform and third, the claimant failed to cite or present new or additional facts on appeal. The claimant did not file a response to the motion, although given a specific deadline for a response in the October 25, 2004, "Order Setting Hearing and Prehearing Schedule," pp. 1-2, Par. 1.

The record reflects no factual disputes about either the circumstances leading to the late appeal or the activities involved in the underlying claim. The claimant mistakenly calendared the appeal deadline as September 27 rather than September 20, 2004, as stated in the Employment Relations Division's dismissal. He filed his appeal with a September 26, 2004, post-mark. The activities for which he made his underlying wage and hour claim involve time he spent from the moment he signed in at the employer's premises until he finished entrance security checks and punched in on the employer's time clock, as well as time he spent at the end of each shift, from punching out on the time clock until he cleared security exit procedures and left the employer's controlled premises (6 minutes each shift). He has not controverted respondent's authority and argument that the Portal to Portal Act applies.

The Portal to Portal Act, at 29 U.S.C. § 254(a), protects an employer from any minimum wage and overtime liability for time an employee spends on:

(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and (2) activities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

Whether particular activities are "preliminary to or postliminary to" or "an integral and indispensable part" of the principal activities for which the employee was employed is a question of law not of fact. *Ballou v General Electric Co.* (1st Cir. 1970) 433 F.2d 109, *cert. den.* (1971) 401 US 1009. As the employer's need for the activity increases, the likelihood that it is an integral and indispensable part of the principal employment activities of the employee increases. *See, Reich v. N.Y.C.T.A.* (2d Cir. 1995), 45 F.3d 646, 650. However, "when the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded." *Anderson v. Mt. Clemens Pottery Co.* (1946), 328 U.S. 680, 692. The alleged 6 minutes a shift were both *de minimis* and far outside the actual duties for which the claimant was employed.

Thus, even if the claimant had presented good reason for his failure timely to appeal, which he has not, the record establishes, as a matter of law, that he is not entitled to recover on his claim. Therefore, the claim is hereby dismissed on the merits.

DATED this 19th day of November, 2004.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: /s/ TERRY SPEAR

Terry Spear
Hearing Examiner

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NOTICE: You are entitled to judicial review of this final agency decision in accordance with Mont. Code Ann. § 39-3-216(4), by filing a petition for judicial review in an appropriate district court within 30 days of service of the decision. See also Mont. Code Ann. § 2-4-702.