

of underground miners who spend time in traveling between the portal of the mine and the working face at the beginning and end of each workday. Before enactment of the Portal Act, time thus spent constituted hours worked. Under the law as changed by the Portal Act, if there is a contract between the employer and the miners calling for payment for all or a part of this travel, or if there is a custom or practice to the same effect of the kind described in section 4, the employer is still required to count as hours worked, for purposes of the Fair Labor Standards Act, all of the time spent in the travel which is so made compensable.<sup>32</sup> But if there is no such contract, custom, or practice, such time will be excluded in computing worktime for purposes of the Act. And under the provisions of section 4(c) of the Portal Act,<sup>33</sup> if a contract, custom, or practice of the kind described makes such travel compensable only during the portion of the day before the miners arrive at the working face and not during the portion of the day when they return from the working face to the portal of the mine, the only time spent in such travel which the employer is required to count as hours worked will be the time spent in traveling from the portal to the working face at the beginning of the workday.

**§ 790.6 Periods within the “workday” unaffected.**

(a) Section 4 of the Portal Act does not affect the computation of hours worked within the “workday” proper, roughly described as the period “from whistle to whistle,” and its provisions have nothing to do with the compensability under the Fair Labor Standards Act of any activities engaged in by an employee during that period.<sup>34</sup> Under

<sup>32</sup> Cf. colloquies between Senators Donnell and Hawkes, 93 Cong. Rec. 2179, 2181, 2182; colloquy between Senators Ellender and Cooper, 83 Cong. Rec. 2296-2297; colloquy between Senators McGrath and Cooper, 93 Cong. Rec. 2297-2298. See also Senate Report, p. 48.

<sup>33</sup> See § 790.3 and Conference Report pp. 12, 13. See also Senate Report, p. 48.

<sup>34</sup> The report of the Senate Judiciary Committee states (p. 47), “Activities of an employee which take place during the workday are \* \* \* not affected by this section (section

the provisions of section 4, one of the conditions that must be present before “preliminary” or “postliminary” activities are excluded from hours worked is that they ‘occur either prior to the time on any particular workday at which the employee commences, or subsequent to the time on any particular workday at which he ceases’ the principal activity or activities which he is employed to perform. Accordingly, to the extent that activities engaged in by an employee occur after the employee commences to perform the first principal activity on a particular workday and before he ceases the performance of the last principal activity on a particular workday, the provisions of that section have no application. Periods of time between the commencement of the employee’s first principal activity and the completion of his last principal activity on any workday must be included in the computation of hours worked to the same extent as would be required if the Portal Act had not been enacted.<sup>35</sup> The principles for determining hours worked within the “workday” proper will continue to be those established under the Fair Labor Standards Act without reference to the Portal Act,<sup>36</sup> which is concerned with this question only as it relates to time spent outside the “workday” in activities of the kind described in section 4.<sup>37</sup>

4 of the Portal-to-Portal Act, as finally enacted) and such activities will continue to be compensable or not without regard to the provisions of this section.”

<sup>35</sup> See Senate Report, pp. 47, 48; Conference Report, p. 12; statement of Senator Wiley, explaining the conference agreement to the Senate, 93 Cong. Rec. 4269 (also 2084, 2085); statement of Representative Gwynne, explaining the conference agreement to the House of Representatives, 93 Cong. Rec. 4388; statements of Senator Cooper, 93 Cong. Rec. 2293-2294, 2296-2300; statements of Senator Donnell, 93 Cong. Rec. 2181, 2182, 2362.

<sup>36</sup> The determinations of hours worked under the Fair Labor Standards Act, as amended is discussed in part 785 of this chapter.

<sup>37</sup> See statement of Senator Wiley explaining the conference agreement to the Senate, 93 Cong. Rec. 3269. See also the discussion in §§ 790.7 and 790.8.

(b) “Workday” as used in the Portal Act means, in general, the period between the commencement and completion on the same workday of an employee’s principal activity or activities. It includes all time within that period whether or not the employee engages in work throughout all of that period. For example, a rest period or a lunch period is part of the “workday”, and section 4 of the Portal Act therefore plays no part in determining whether such a period, under the particular circumstances presented, is or is not compensable, or whether it should be included in the computation of hours worked.<sup>38</sup> If an employee is required to report at the actual place of performance of his principal activity at a certain specific time, his “workday” commences at the time he reports there for work in accordance with the employer’s requirement, even though through a cause beyond the employee’s control, he is not able to commence performance of his productive activities until a later time. In such a situation the time spent waiting for work would be part of the workday,<sup>39</sup> and section 4 of the Portal Act would not affect its inclusion in hours worked for purposes of the Fair Labor Standards Act.

[12 FR 7655, Nov. 18, 1947, as amended at 35 FR 7383, May 12, 1970]

**§ 790.7 “Preliminary” and “postliminary” activities.**

(a) Since section 4 of the Portal Act applies only to situations where employees engage in “preliminary” or “postliminary” activities outside the workday proper, it is necessary to consider what activities fall within this description. The fact that an employee devotes some of his time to an activity of this type is, however, not a sufficient reason for disregarding the time devoted to such activity in computing hours worked. If such time would otherwise be counted as time worked

under the Fair Labor Standards Act, section 4 may not change the situation. Whether such time must be counted or may be disregarded, and whether the relief from liability or punishment afforded by section 4 of the Portal Act is available to the employer in such a situation will depend on the compensability of the activity under contract, custom, or practice within the meaning of that section.<sup>40</sup> On the other hand, the criteria described in the Portal Act have no bearing on the compensability or the status as worktime under the Fair Labor Standards Act of activities that are not “preliminary” or “postliminary” activities outside the workday.<sup>41</sup> And even where there is a contract, custom, or practice to pay for time spent in such a “preliminary” or “postliminary” activity, section 4(d) of the Portal Act does not make such time hours worked under the Fair Labor Standards Act, if it would not be so counted under the latter Act alone.<sup>42</sup>

(b) The words “preliminary activity” mean an activity engaged in by an employee before the commencement of his “principal” activity or activities, and the words “postliminary activity” means an activity engaged in by an employee after the completion of his “principal” activity or activities. No categorical list of “preliminary” and “postliminary” activities except those named in the Act can be made, since activities which under one set of circumstances may be “preliminary” or “postliminary” activities, may under other conditions be “principal” activities. The following “preliminary” or “postliminary” activities are expressly mentioned in the Act: “Walking, riding, or traveling to or from the actual place

<sup>40</sup> See Conference Report, pp. 10, 12, 13; statements of Senator Donnell, 93 Cong. Rec. 2178-2179, 2181, 2182; statements of Senator Cooper, 93 Cong. Rec. 2297, 2298. See also §§ 790.4 and 790.5.

<sup>41</sup> See Conference Report, p. 12; Senate Report, pp. 47, 48; statement of Senator Wiley, explaining the conference agreement to the Senate, 93 Cong. Rec. 4269; statement of Representative Gwynne, explaining the conference agreement to the House of Representatives, 93 Cong. Rec. 4388. See also § 790.6.

<sup>42</sup> See § 790.5(a).

<sup>38</sup> Senate Report, pp. 47, 48. Cf. statement of Senator Wiley explaining the conference agreement to the Senate, 93 Cong. Rec. 4269; statement of Senator Donnell, 93 Cong. Rec. 2362; statements of Senator Cooper, 93 Cong. Rec. 2297, 2298.

<sup>39</sup> Colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2297, 2298.