U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

IN THE MATTER OF:

Petition for Review of Special, Minimum Wage Rate pursuant to Section 14 (c)(5)(A) of the Fair Labor Standards Act by:	**ARB CASE NOS.**	**16-038** **16-054**
	ALJ CASE NO.	**2016-FLS-003**
RALPH MAGERS, PAMELA STEWARD, and MARK FELTON,	**DATE:**	**January 12, 2017**

PETITIONERS,

v.

SENECA RE-AD-INDUSTRIES, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

***For the Petitioners*:**
Emily White, Esq., *Disability Rights Ohio*, Columbus, Ohio
Marc Maurer, Esq., *National Federation of the Blind*, Baltimore, Maryland

For the Respondent:
Stephen P. Postalakis, Esq., David S. Kessler, Esq., *Blaugrund Kessler Myers & Postalakis*, Worthington, Ohio

***For the Administrator, Wage and Hour Division*:**
M. Patricia Smith, Esq.; Jennifer S. Brand, Esq.; Paul L. Frieden, Esq.; Jonathan M. Kronheim, Esq.; Sarah J. Starrett, Esq., *U.S. Department of Labor, Office of the Solicitor*, Washington, District of Columbia

For The National Disability Rights Network and the Autistic Self Advocacy Network:
David T. Hutt, Esq., ***National Disability Rights Network*****, Washington, District of Columbia**

For Blind Industries and Services of Maryland:
Monica Best James, ***Blind Industries and Services of Maryland,*** **Baltimore, Maryland**

Before: Paul M. Igasaki, ***Chief Administrative Appeals Judge*****; E. Cooper Brown,** ***Administrative Appeals Judge;*** **and Anuj C. Desai,** ***Administrative Appeals Judge***

DECISION AND ORDER REVERSING, IN PART, AND REMANDING

The Fair Labor Standards Act's minimum-wage requirement[1] contains a narrow exception for disabled workers.[2] That exception permits an employer to pay a disabled worker less than the minimum wage, but only if the employer can establish, in the words of the Department of Labor's implementing regulations, that the worker's disability impairs the worker's "earning or productive capacity . . . *for the work to be performed*."[3]

Ralph (Joe) Magers, Pamela Steward, and Mark Felton (the Employees) are all disabled, and their employer, Seneca Re-Ad Industries, Inc. (Seneca Re-Ad), paid them less than the minimum wage for several years. In this proceeding, the Employees petition the Secretary of Labor, challenging Seneca Re-Ad's legal right to pay them less than the minimum wage under the exception.

An Administrative Law Judge (ALJ) found that Seneca Re-Ad failed to establish that the Employees were impaired "for the work [they] performed" and that Seneca Re-Ad thus violated the Fair Labor Standards Act by not paying them at least the minimum wage. Because we agree with this conclusion but determine that the ALJ erred in his calculation of damages, we **REMAND** in **ARB Case No. 16-038** for the ALJ to recalculate damages in light of this opinion.

The ALJ also awarded Magers, Steward, and Felton $276,111.72 in attorneys' fees and costs. Because we conclude that he had no authority to award attorneys' fees or costs in this administrative proceeding, we **REVERSE** the ALJ's decision in **ARB Case No. 16-054**.

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[1] 29 U.S.C. § 206 (2015).

[2] 29 U.S.C. § 214(c)(1) (2015).

[3] 29 C.F.R. § 525.3(d) (2016) (emphasis added).

BACKGROUND

1. Legal Background

Since 1938, the Fair Labor Standards Act (FLSA or Act) has established a minimum wage rate—currently $7.25 per hour—below which no employer is permitted to pay an employee in the United States.[4] Despite regular calls by some economists to abolish the minimum wage as a drag on employment,[5] Congress has never done so: the minimum wage survives.

The minimum wage is one of the cornerstones of the Act. It is found in Section 6 of the Act, which we will refer to as the Minimum Wage Provision.[6]

The FLSA also includes several provisions that permit narrow[7] exceptions to the Minimum Wage Provision. One of those exceptions, found in section 14(c) of the Act,[8] is for what the law refers to as "handicapped workers," but who in modern parlance are now called "disabled workers." Section 14(c), which we will refer to as the Disabled Workers Exception Provision, authorizes the Secretary of Labor (Secretary) to issue certificates to employers who seek to hire disabled workers. We will refer to these as Subminimum Wage Disability Certificates or Disability Certificates.

We explain some of the details of the statute below, but we note here one key aspect: the statute does not provide a blanket exception from an employer's minimum wage obligation for all employees who have a disability; rather, it only authorizes the Secretary to permit employers to pay subminimum wages to those "whose earning or productive capacity is impaired *by* . . . [their] physical or mental deficiency."[9]

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[4] 29 U.S.C. § 206.

[5] *See Why Some Economists Oppose Minimum Wage*, THE ECONOMIST (Jan. 22, 2014), available online at http://www.economist.com/blogs/economist-explains/2014/01/economist-explains-11.

[6] 29 U.S.C. § 206.

[7] *See Auer v. Robbins*, 519 U.S. 452, 462 (1997) (quoting *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960)) ("FLSA exemptions are to be 'narrowly construed against . . . employers' and are to be withheld except as to persons 'plainly and unmistakably within their terms and spirit.'").

[8] 29 U.S.C. § 214(c).

[9] 29 U.S.C. § 214(c)(1)(A) (emphasis added).

The Secretary has promulgated regulations implementing the Disabled Workers Exception Provision, and they are found in 29 C.F.R. Part 525. We explain some of the details of the regulations and their structure below, but one crucial aspect of the regulations is the phrase "worker with a disability." Recognizing the statutory limitation on the Secretary's authority to permit subminimum wages, the regulations define a "worker with a disability" as "an individual whose earning or productive capacity is impaired by a physical or mental disability . . . *for the work to be performed*."[10] Like the statute, then, the regulations recognize that employers may not pay a subminimum wage to every disabled individual for every job.

2. Factual Background

The ALJ's Decision and Order (D. & O.) contains a detailed recitation of the facts that he found.[11]

We issue no exceptions to those facts, but provide a brief recitation of facts to facilitate the reading of this opinion; however, to the extent necessary for our legal conclusions in this opinion, we adopt those facts that the ALJ found, even if not explicitly included in this section.

Ralph (Joe) Magers, Pamela Steward, and Mark Felton each have at least one disability. Magers is legally blind, Steward is blind in one eye and has been diagnosed with an intellectual disability, and Felton has Asperger's Syndrome. At times, when referring to the three of them collectively, we will use the term "Employees."

Seneca Re-Ad, their employer, is a nonprofit that contracts with the Seneca County (Ohio) Board of Developmental Disabilities to, among other things, provide employment for those with developmental disabilities. During the period relevant to this case, Seneca Re-Ad held a Subminimum Wage Disability Certificate.

The Seneca Re-Ad facility where the Employees work is in Fostoria, Ohio. It is located in a factory owned by Roppe Industries, a for-profit company that manufactures rubber flooring and other products. Seneca Re-Ad has a contract with Roppe, and many of the jobs at the Fostoria facility involve work under that contract.

Some of these jobs are paid on a "piece rate" basis. For the "piece rate" work, the Employees' hourly rate varied based on how quickly the Employees worked at any given time: some of the time they earned less than the minimum wage and some of the time more.

Some of the jobs, and in particular what was known as the Creform line work, were paid on an hourly basis. To determine how much to pay the Employees for the Creform line work, Seneca Re-Ad (1) established a prevailing wage rate for the work based on an annual survey of comparable jobs in Seneca County; (2) from time to time, established a "production standard" by testing a nondisabled worker (the "standard setter") to determine how quickly the standard setter

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[10] 29 C.F.R. § 525.3(d) (emphasis added).

[11] D. & O. at 5-23.

could perform the work; (3) once every six months, determined an employee's production rate by testing each employee to determine how quickly she or he could perform the work; and then (4) took the ratio of a given employee's production rate to the "production standard" and multiplied that ratio by the prevailing wage. As way of example, if the prevailing wage is set at $8.00 per hour, and an employee can work half as quickly as the standard-setter, the employee's pay would be $4.00 per hour.

For the work paid on an hourly basis, the Employees were always paid below the minimum wage.

During the period at issue in this case, Felton was paid as little as $2.49 per hour, Magers as little as $2.02 per hour, and Steward as little as $2.00 per hour.

3. Procedural Background

Magers, Steward, and Felton petitioned the Secretary of Labor for a review of their subminimum wage under 29 U.S.C. § 214(c)(5) and 29 C.F.R. § 522.22.

Pursuant to the Department's regulations, the Employees sent their petition to the Administrator of the Wage and Hour Division, who then forwarded it to the Chief Administrative Law Judge.[12]

The Chief Administrative Law Judge appointed Judge Bell as the Administrative Law Judge (ALJ), and Judge Bell conducted a hearing in a public courtroom at the Seneca County Court of Common Pleas in Tiffin, Ohio. The hearing took a full business week, five weekdays, Monday, January 4, 2016, through Friday, January 8, 2016. In the midst of that week, on Wednesday, January 6, 2016, the ALJ also visited Seneca Re-Ad's manufacturing facility in Fostoria, Ohio (about 15 miles west of Tiffin) and had an opportunity to observe the production activities.

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[12] 29 C.F.R. § 522.22(a).

The ALJ's Decision and Order on the merits: On February 2, 2016, the ALJ issued a 56-page Decision and Order, in which he concluded as follows:

(1) Seneca Re-Ad violated the Act's Minimum Wage Provision because it was not entitled to employ Magers, Steward, or Felton under the Act's Disabled Workers Exception Provision:

a) Seneca Re-Ad is subject to the Act; and
b) Seneca Re-Ad failed to meet its burden to show that the Employees are disabled for the work they were performing and thus failed to show that they are "worker[s] with a disability" within the meaning of the regulations; and
c) in the alternative, Seneca Re-Ad failed to prove that it had properly calculated the Employees' wage rates.

(2) Magers, Steward, and Felton were thus entitled to the following remedies:

a) an order requiring Seneca Re-Ad to pay the Employees at the Ohio minimum wage rate starting immediately;
b) back pay in an amount calculated by determining the difference between the amount each of the Employees was paid and the Ohio minimum wage; and
c) "liquidated damages" in an amount equal to the back-pay award.

(3) The Employees could seek an award of attorneys' fees and costs.

On February 18, 2016, Seneca Re-Ad then sought review of the ALJ's Decision and Order before this Board. The Board accepted review and docketed the appeal as Case No. 16-038. The Employees responded to Seneca Re-Ad's request for review on February 24, 2016.

On March 4, 2016, Seneca Re-Ad filed a motion to this Board seeking a stay of two aspects of the ALJ's Order: (1) to immediately begin paying the Employees the minimum wage, and (2) to brief the Employees' attorneys' fee request. On March 10, 2016, the Board denied that motion.

On March 28, 2016, after further briefing, the ALJ issued a second Decision and Order, awarding the Employees $276,111.72 in attorneys' fees and costs (Attorneys' Fees D. & O.).

On April 11, 2016, Seneca Re-Ad sought review of the ALJ's Attorneys' Fees D. & O. before this Board. The Board accepted review and docketed that case as Case No. 16-054.

On May 6, 2016, Blind Industries and Services of Maryland filed an amicus brief in support of the Employees; on May 11, 2016, the National Disability Rights Network and the Autistic Self Advocacy Network filed an amicus brief in support of the Employees.

On May 13, 2016, the Administrator of the Wage and Hour Division filed an amicus brief. That brief supported the Employees on most issues, but supported Seneca Re-Ad on two, arguing (1) the statute of limitations in the Portal to Portal Act applied to this proceeding; and (2) the Employees were not entitled to attorneys' fees or costs.

On May 23, 2016, Seneca Re-Ad filed a Reply Brief.

On June 10, 2016, and with the Board's leave, the Employees filed a Sur-Reply Brief on the narrow issue of the Portal to Portal Act's statute of limitations.

JURISDICTION AND STANDARD OF REVIEW

29 C.F.R. § 525.22(g) authorizes the Secretary to review the record and "either adopt the decision of the ALJ or issue exceptions."[13] The Secretary has delegated that authority to this Board.[14]

DISCUSSION

As we explain in more detail below, we conclude as follows:

(1) The Fair Labor Standards Act applies.[15] We issue no exceptions to the ALJ's conclusion on this question.[16]

(2) The Disabled Workers Exception Provision does not permit Seneca Re-Ad to pay Magers, Steward, or Felton less than the minimum wage, because Seneca Re-Ad failed to show that Magers, Steward, and Felton are impaired for the work they performed.[17] Although as a

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[13] 29 C.F.R. § 525.22(g). As we explain in more detail below, we largely agree with the ALJ, although we do not formally "adopt the decision of the ALJ." Instead, we "issue exceptions." In large part, though, the "exceptions" we issue are to the contours of the ALJ's reasoning not his conclusion. In two respects, though, we disagree with the ALJ's conclusion: (1) he erred in calculating the Employees' damages based on the Ohio minimum wage, rather than the federal minimum wage; and (2) he erred in awarding the Employees attorneys' fees and costs.

[14] *See* Delegation of Authority and Assignment of Responsibility to the Administrative Review Board, 77 Fed. Reg. 69,377, 69378 (Nov. 16, 2012).

[15] *See infra* Part 1.

[16] D. & O. at 23-25.

[17] *See infra* Part 2.

formal matter we do not "adopt" the ALJ's Decision on this question, we agree with both the ALJ's conclusion and the thrust of his reasoning.[18]

(3) It is unnecessary for us to determine whether Seneca Re-Ad properly calculated the commensurate wage because it had no right to pay the Employees less than the minimum wage.[19] We thus issue no exceptions to the ALJ's Decision on this question.[20]

(4) The Portal to Portal Act's statute of limitations does not apply in this administrative proceeding.[21] We issue exceptions to some of the reasoning in the ALJ's Decision, but agree with his conclusion on this question.[22]

(5) Seneca Re-Ad is liable to Magers, Steward, and Felton in the amount of the difference between the amount they were paid and the federal minimum wage, plus an equal amount in liquidated damages.[23] Because the ALJ's Decision calculated damages based on the Ohio minimum wage rather than the federal minimum wage, we issue an exception to the ALJ's calculation of damages;[24] however, we agree that Magers, Steward, and Felton are entitled to both their "unpaid minimum wages" and an equal amount in liquidated damages. We also agree with the ALJ that Magers, Steward, and Felton are not entitled to interest, and we thus issue no exception to his conclusion on this question.[25] In ARB Case No. 16-038, we thus remand for the ALJ to recalculate damages in light of the federal minimum wage.

(6) Magers, Steward, and Felton are not entitled to attorneys' fees or costs in this administrative proceeding.[26] We thus issue an exception to the ALJ's conclusion that he had

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[18] D. & O. at 25-36.

[19] *See infra* Part 3.

[20] D. & O. at 37-40.

[21] *See infra* Section 4.A.

[22] D. & O. at 41-45.

[23] *See infra* Section 4.B.

[24] *See generally* D. & O. at 45-53. Although Seneca Re-Ad did not challenge the specifics of the ALJ's calculation of damages, we address the question because the ALJ's decision to award damages based on the state minimum wage went beyond the authority he had in this federal administrative proceeding.

[25] *See* D. & O. at 53-55; *see generally Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 715-16 (1945); *Elwell v. Univ. Hosps. Home Care Servs.*, 276 F.3d 832, 841-42 (6th Cir. 2002).

[26] *See infra* Section 4.C.

authority to award attorneys' fees and costs,[27] and, in ARB Case No. 16-054, we reverse his Attorneys' Fees D. & O.

1. Seneca Re-Ad is subject to the Fair Labor Standards Act

Seneca Re-Ad is subject to the Fair Labor Standards Act. Seneca Re-Ad argued below that it is not subject to the Act because the Employees failed to allege or prove that Seneca Re-Ad was engaged in interstate commerce. In its request for review to this Board, Seneca Re-Ad does not seriously challenge this conclusion. Its initial submission does briefly allude to this point,[28] but Seneca Re-Ad does not appear to press the argument and so we need not seriously address any argument that Seneca Re-Ad is not subject to the Act.

To the extent that Seneca Re-Ad believes the ALJ erred on this point, we disagree: the fact that Seneca Re-Ad sought and then obtained a Subminimum Wage Disability Certificate is effectively a concession that it is subject to the Act. If Seneca Re-Ad really were not subject to the Act, then it wouldn't even be subject to the Minimum Wage Provision at all. If this argument were to be taken seriously, Seneca Re-Ad presumably could pay *anyone*, not just a disabled worker, less than the minimum wage. We find that prospect too absurd to merit analysis.

We issue no exceptions to the ALJ's conclusion on this point.[29]

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[27] D. & O. at 55; Attorneys' Fees D. & O.

[28] Memorandum in Support of Request for Review by Secretary of Labor of Respondent Seneca Re-Ad Industries, Inc. (Memorandum in Support of Request for Review) at 30 ("In its Post-Hearing Brief, Respondent addressed that the Petitioners had the burden to prove that Respondent is covered by the Act, and they failed to make the attempt. The record is totally devoid of evidence on this issue.").

[29] *See* D. & O. at 23-25.

2. Seneca Re-Ad is not entitled to pay Magers, Steward, or Felton less than the minimum wage under the FLSA's Disabled Workers Exception Provision.[30]

A. *To be entitled to pay an employee less than the minimum wage, Seneca Re-Ad must demonstrate that that employee is "impaired by a physical or mental disability . . . for the work to be performed."*

i The FLSA sets forth and limits the Secretary's authority to permit employment at rates below the minimum wage.

The only authority the Secretary has to permit employment at rates below the minimum wage derives from the FLSA's Disabled Workers Exception Provision. In relevant part, it reads, "The Secretary, to the extent necessary to prevent curtailment of opportunities for employment, shall by regulation or order provide for the employment, under special certificates, of individuals . . . whose earning or productive capacity is impaired by . . . physical or mental deficiency . . . at wages which are . . . lower than the minimum wage."[31]

The Disabled Workers Exception Provision limits the Secretary's authority in two significant ways. First, the statute precludes the Secretary from authorizing a subminimum wage unless it is "necessary to prevent curtailment of opportunities for employment." Second, and of particular importance for this case, Congress's authorization does not apply to "disabled individuals"; rather, the authorization is limited to those "individuals . . . whose earning or productive capacity" is impaired "by" a disability (i.e., "physical or mental deficiency"). The statute does not permit the paying of a subminimum wage to all disabled individuals, only to those whose earning or productive capacity is in fact impaired *by* their disability.

Thus, the statute requires there to be a causal connection between the individual's disability (i.e., the individual's "physical or mental deficiency") and the "impair[ment]" to his/her "earning or productive capacity." Under the statute, then, the Secretary is not permitted to authorize a subminimum wage for an individual simply because that individual has a "physical or mental deficiency"; rather, the Secretary can only "provide[] for the employment of" an individual at a subminimum wage rate if that individual's "earning or productive capacity is impaired by" the individual's "physical or mental deficiency."

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[30] This issue presents important questions of first impression before this Board. We thus think it incumbent on this Board to explain in some detail why the thrust of the ALJ's conclusion on this question was correct. *See* D. & O. at 25-36. Thus, formally within the meaning of the regulation, we do not "adopt" this aspect of the ALJ's decision. *See* 29 C.F.R. § 525.22(g). However, as we explain in more detail below, we agree with both the ALJ's conclusion and the thrust of his reasoning on this issue.

[31] 29 U.S.C. § 214(c)(1)(A).

ii. Consistent with this statutory authorization, the Department's regulations limit the subminimum wage to those "whose earning or productive capacity is impaired by a physical or mental disability . . . for the work to be performed."

The Department of Labor's regulations define a "worker with a disability" as "an individual whose earning or productive capacity is impaired by a physical or mental disability . . . *for the work to be performed*."[32] The term "worker with a disability" is thus a term of art specifically for the subminimum wage program. Importantly, the regulations do not define a "worker with a disability" as simply "a worker who has a disability" or a "disabled worker." Instead, only an individual whose physical or mental disability impairs his or her earning or productive capacity "for the work to be performed" can satisfy the definition of a "worker with a disability." Thus, within the meaning of the regulations, the individual's "physical or mental disability" must be the cause of the reduced productivity "for the work to be performed."

The definition of a "worker with a disability" also explicitly states that "a disability which may affect earning or productive capacity for one type of work may not affect such capacity for another,"[33] thus further supporting the notion that just because an individual has a disability does not necessarily mean that that individual can always be treated as a "[w]orker with a disability" for purposes of paying less than the minimum wage. An individual can be a "worker with a disability" for some work but not a "worker with a disability" for other work.

The Department's regulations further provide that an employer may only pay less than the minimum wage to individuals who satisfy that definition.[34]

B. *Seneca Re-Ad failed to meet its burden of demonstrating that Magers, Steward, or Felton is "impaired by a physical or mental disability . . . for the work to be performed."*

i. The ALJ correctly required Seneca Re-Ad to show a causal connection between an individual's condition (i.e., the "physical or mental disability" as

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32 29 C.F.R. § 525.3(d) (emphasis added).

33 29 C.F.R. § 525.3(d).

34 *See* 29 C.F.R. § 525.5(a) ("An individual whose earning or productive capacity is not impaired for the work being performed cannot be employed under a certificate issued pursuant to this part and must be paid at least the applicable minimum wage."); *id.* § 525.12(b) (noting that the special minimum wage certificate applies to all workers but only if "such workers are in fact disabled for the work they are to perform"); *cf. id.* § 525.9(a)(1) (noting that "the nature and extent of the disabilities of the individuals employed *as these disabilities relate to* the individuals' productivity" is one of the factors to determine whether an employer can pay a subminimum wage rate to an employee (emphasis added)).

diagnosed by an appropriate medical professional) and a lower "earning or productive capacity . . . for the work to be performed."

To pay an employee less than the minimum wage, Seneca Re-Ad must show a causal connection between an individual's condition (i.e., the "physical or mental disability" as diagnosed by an appropriate medical professional) and a lower "earning or productive capacity . . . for the work to be performed." Indeed, to say that someone is disabled "for the work to be performed" necessarily means that there is a connection between that person's disability and the tasks—the "work"—that the person is to perform. The phrase "for the work to be performed" itself implies a causal connection between the disability and the work to be performed.

Thus, as the regulations contemplate,[35] for any given disabled person, there are almost certainly some jobs for which that individual is not a "worker with a disability." The ALJ gave an example to illustrate the point: an individual with less strength in her hands would not necessarily be viewed as disabled for operating a machine with foot controls.[36] Another example, one of direct relevance for Magers and Steward, might be helpful as well: an individual who is legally blind would not necessarily be considered a "worker with a disability" for a job as a musician (e.g., Stevie Wonder, Ray Charles, Andrea Bocelli, Ronnie Milsap), a federal judge (e.g., The Honorable David S. Tatel of the U.S. Court of Appeals for the D.C. Circuit), a writer (e.g., Helen Keller, John Milton, Jorge Luis Borges), a mathematician (e.g., Leonard Euler), or a politician (e.g., former New York Governor David Patterson, the first Senator from Oklahoma Thomas Gore). Of relevance for Felton, an individual with Asperger's Syndrome would not necessarily be considered a "worker with a disability" for being an actor or actress (e.g., Dan Aykroyd, Daryl Hannah), a singer (e.g., Susan Boyle), a scientist (e.g., Temple Grandin), or an economist (e.g., Nobel-prize winner Vernon L. Smith).[37] Paying an individual who is legally blind or has Asperger's less than the minimum wage for any of those jobs would almost certainly violate the FLSA, even if the employer had a Disability Certificate.

To pay an individual less than the minimum wage under the Disabled Workers Exception Provision and the Department of Labor's implementing regulations, there must be a causal connection or, as the ALJ put it, a causal "nexus" between an individual's disability and reduced productivity "for the work to be performed." Although the ALJ used the phrase "*clear* nexus,"[38]

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[35] 29 C.F.R. § 525.3(d) (noting that "a disability which may affect earning or productive capacity for one type of work may not affect such capacity for another").

[36] *See* D. & O. at 25.

[37] As one scholar has put it, many "disabling qualities might actually enhance and accentuate other abilities." Caroline Gray, *Narratives of Disability and the Movement from Deficiency to Difference*, 3 CULTURAL SOC. 317, 327 (2009).

[38] D. & O. at 25 (emphasis added).

we are not sure exactly what the modifier "clear" adds. It suffices to say that there must be a "nexus," by which we mean a causal connection.

Key is that before an employer is permitted to pay a disabled individual less than the minimum wage under the Disabled Workers Exception Provision, an employer must show that that specific individual's disability is the cause of that individual's impaired earning or productive capacity in the particular job that that individual is to perform. If an employer cannot demonstrate that, it simply may not pay the employee less than the minimum wage under the Disabled Workers Exception Provision and the Department's implementing regulations.

ii. It is the employer's—here, Seneca Re-Ad's—burden to show that its disabled employees—here, Magers, Steward, and Felton—are disabled "for the work to be performed."

It is the employer's—here, Seneca Re-Ad's—burden to show that its disabled employees—here, Magers, Steward, and Felton—are disabled "for the work to be performed."[39] Thus, if the evidence shows merely that an employee has both a disability and a lower than average productive capacity for a particular job, but there is insufficient evidence showing a causal connection between the two, the employer may not pay the employee less than the minimum wage.

iii. The evidence on which Seneca Re-Ad relied is insufficient to meet its burden.

While we need not lay out all the possible ways/types of evidence an employer could use to show a causal connection between a disability and reduced productive capacity for a particular job, the type of evidence on which Seneca Re-Ad relied here is intrinsically insufficient to meet its burden where, as here, there is nothing inherent in the job tasks themselves that would make a person less productive simply by having the particular disabilities of Magers (legally blind), Steward (legally blind in one eye and with an intellectual disability) or Felton (Asperger's Syndrome).[40]

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[39] *See* 29 C.F.R. § 525.22(d) (in petitions before an ALJ for "determining whether the special minimum wage rate is justified"—i.e., this very type of proceeding—noting that "the burden of proof on *all* matters relating to the propriety of a wage at issue shall rest with the employer"); *Klem v. Cty. of Santa Clara*, 208 F.3d 1085, 1089 (9th Cir. 2000) ("An employer who claims an exemption from the FLSA bears the burden of demonstrating that the exemption applies."); *cf. also* 29 U.S.C. § 214(c)(5)(C) (in petitions challenging the subminimum wage rate, noting that "the employer shall have the burden of demonstrating that the special minimum wage rate is justified as necessary in order to prevent curtailment of opportunities for employment").

[40] Having observed the tasks Magers, Steward, and Felton performed, the ALJ explicitly found as a fact that "[t]here is nothing about the work itself which would inherently favor production rates by a non-disabled person over the production rate of an individual with one of more disabilities." D. & O. at 34-35.

Seneca Re-Ad relied on two types of evidence: (i) observational evidence by its own staff and a consultant (a former investigator for the Department's Wage and Hour Division) that it hired specifically for the purposes of this proceeding; and (ii) "work measurements" (or "time studies") to show that Magers, Steward, and Felton were slower at the particular job tasks than a worker without a disability.

First, observations by those who do not have medical expertise about a disabled individual's condition/specific symptoms and any particular task impairments accompanying that condition are insufficient evidence to establish the link. The three individuals on whom Seneca Re-Ad relied to show that it was the Employees' disabilities that led to their lower productive capacity (Laurie Fretz, Rodney Biggert, and Mark Knuckles) simply do not have the requisite expertise to make the determination Seneca Re-Ad relied on them to make. Knuckles' opinion in particular was not only not based on any knowledge of the Employees' condition, it was not even specific to the very different kinds of disabilities each of the three employees had.[41] Although he may be an expert "generally on compliance with" the subminimum wage for disabled workers, he is not an expert on Asperger's Syndrome, or mental disabilities, or blindness.

Moreover, Fretz and Biggert both work for Seneca Re-Ad and are thus susceptible to potential bias. Whether they were in fact biased is not the issue; rather, it is the potential for bias that matters, and the potential is strong when their employer has every financial incentive to find that an employee's disability is linked to the "work to be performed." On the other hand, the mere fact that an employer paid an expert—as Seneca Re-Ad did with Knuckles here—would not necessarily make an expert's opinion suspect, nor would the mere fact that the expert only observed the employees for a limited period of time. Someone with the appropriate medical expertise to diagnose a particular individual's disability, discuss the disability's conditions, and explain the ways in which that condition in that individual connects with impaired functioning for specific tasks might be enough, even without extensive observation of the individual. Here, however, Knuckles simply does not have the requisite expertise, and, as the ALJ noted, he was not hired until after the Employees filed their petition in this case,[42] years after the Employees began working at a subminimum wage rate.

Second, evidence that a disabled employee performs a task at a slower rate (i.e., is less productive at that task) than someone without disabilities is insufficient to establish the link, particularly here where, as the ALJ found as a fact, "[t]here is nothing about the work itself

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[41] *Cf.* D. & O. at 33 ("Nor does Mr. Knuckles have medical, psychological or other specialized training which would permit him to draw meaningful conclusions about how Mr. Magers' visual impairment actually affects his workplace performance, or how Ms. Steward's intellectual disability actually limits her when she is performing work, or how Mr. Felton's disability allows him to possess a driver's license, but does not permit him to place pieces of flooring on a metal spindle as quickly as someone else.").

[42] *See* D. & O. at 33.

which would inherently favor production rates by a non-disabled person over the production rate of any individual with one of more disabilities."[43] In arguing that it has established the link, Seneca Re-Ad asks, "What objective work related process or measurement can be evidence or otherwise show the nexus of how the disability impairs performance on a job apart from measuring the individual's performance on the job and comparing it to the performance of a person without disabilities?"[44] Seneca Re-Ad further argues, "it is certainly not circular to say that the actual measured performance of Petitioners compared to the performance of a person without a disability is evidence that the productive capacity of Petitioners is impaired by their disabilities."[45]

Seneca Re-Ad is wrong. The core problem with Seneca Re-Ad's argument is that measuring performance of a disabled individual and comparing it with a person without disabilities may tell us *that* the disabled individual is less productive than a person without disabilities, but it doesn't tell us *why* the disabled individual is less productive; it doesn't tell us that the disabled individual's disability is the reason for the lower productivity, and the regulations are crystal clear throughout that this is a condition precedent to paying someone less than the minimum wage for any given job. Employees in virtually every workplace vary in how productive they are at workplace tasks: some employees are better than others at various tasks, whether because of differences in ability, effort, or something else. Just because a disabled person is less productive at a task does not necessarily mean that that person is "impaired . . . for the work to be performed."[46]

Of course, in some circumstances, there may be an obvious reason why a particular condition reduces an individual's productive capacity. But, for Magers, Steward, and Felton, we agree with the ALJ that there is nothing inherent in the Creform assembly line or any of the other

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43 D. & O. at 34-35.

44 Respondent's Reply Brief to Brief of Petitioners and Amicus Brief of Wage and Hour Administrator (Respondent's Reply Brief) at 4-5.

45 Memorandum in Support of Request for Review at 12; *see also id.* at 23 ("Certainly, earning minimum wage less than 14% of the time is a sign that Petitioners' disabilities 'consistently' suppress their ability to earn the minimum wage."); Respondent's Reply Brief at 5 ("If the employee's productivity is less than [the] production standard established, this demonstrates that the employee's disability impairs his productivity for the Creform assembly line.").

46 The ALJ required the "diagnosed impairment" (i.e., the disability) to "*consistently* suppress" the individual's productive or earning capacity, D. & O. at 25 (emphasis added), and we agree that the disability's effect on productivity must be consistent. Whether disabled or not, every human being's rate of productivity also varies over time. A quick look at the marathon times of the world's top runners or any weekend warrior will show enormous variation based on any number of factors. But, we emphasize that by itself, a showing that a disabled person is consistently less productive is not the same as showing that the person's disability is the cause of the lower productivity.

jobs that Magers, Steward, and Felton were hired to perform at the Fostoria plant that would make someone with blindness, an intellectual disability, or Asperger's Syndrome necessarily less productive at those tasks. This is particularly the case here, where Seneca Re-Ad claims that three very different kinds of disabilities—legal blindness, a mental disability, and Asperger's Syndrome—all reduce productive capacity for the same type of work.

Whether the ALJ's speculations about the reasons for the Employees' lower productivity were supported by record evidence is irrelevant, since it is Seneca Re-Ad's burden to establish the link, and it failed to do so here. We do not need to agree with any of the ALJ's speculations as to the reasons the Employees' productivity levels might have been lower.[47] Seneca Re-Ad argues that the ALJ wrongly credited his own brief observations over those of Fretz and Biggert, who had known and observed the employees for years, and Knuckles, who has "30 years of experience in sheltered workshop settings and understands disabilities and how they affect productivity."[48] Seneca Re-Ad also argues that there was no evidence in the record to support the ALJ's speculations.[49] But the accuracy of the ALJ's observations and/or speculations is irrelevant here. The burden to show the connection is Seneca Re-Ad's, and it failed to meet that burden. It was enough for the ALJ to say, as he rightly did, "On the record now before me, it would be pure speculation to conclude that the Petitioners don't meet the production standards solely or primarily because of their respective disabilities."[50]

C. *Seneca Re-Ad's argument wrongly conflates the requirement that an individual be "impaired by a physical or mental disability . . . for the work to be performed" with the requirement that a "worker with a disability" be paid the proper "commensurate wage."*

The requirement that an individual be "impaired by a physical or mental disability . . . for the work to be performed" is distinct from the requirement that a disabled worker be paid the proper "commensurate wage." The former is part of the definition of a "worker with a disability" and is thus a condition precedent to paying a worker less than the minimum wage at

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[47] *See* D. & O. at 35 ("It is just as likely they don't meet the production standards because they are bored with a highly repetitive task they have performed on a hundred prior occasions, or because they lack a substantial economic impetus to perform at a higher level, or because they self-identify as individuals whose performance should be lower than their non-disabled supervisors."); *see also* Petitioners' Reply to Request for Review by Secretary of Labor of Respondent Seneca Re-Ad Industries, Inc. at 8 ("[M]any factors other than disability such as workplace assignment, management, and lack of reasonable accommodations could impair productivity.").

[48] Respondent's Reply Brief at 16.

[49] Respondent's Reply Brief at 11 ("Petitioners cite no evidence in the record of any other factors that impaired their performance in any job.").

[50] D. & O. at 35.

all; in contrast, the latter is a method for calculating the proper wage rate, but is only relevant for those individuals who satisfy the regulatory definition of a "worker with a disability."

Seneca Re-Ad relies on the criteria set forth in 29 C.F.R. § 525.12(j), but those criteria are for calculating the commensurate wage, not for determining whether an employee is even "disabled . . . for the work to be performed." Seneca Re-Ad's reliance on 29 C.F.R. § 525.12(j) is based on a misreading of the text and structure of the Disability Certificate regulations. Seneca Re-Ad says that it "does not contest the premise that, to be paid a special minimum wage, employees must be disabled for the work to be performed,"[51] but argues that there is no "nexus" requirement. Seneca Re-Ad argues that 29 C.F.R. § 525.12(j) is the section that sets forth the relevant—and only—criteria for determining whether an employee is "impaired by a physical or mental disability . . . for the work to be performed." But Seneca Re-Ad's argument conflates two separate questions: (1) Is an employee even a "worker with a disability" within the meaning of the regulations at all? (i.e., is the worker disabled "for the work to be performed"?) and (2) If the employee is a "worker with a disability," what is that employee's proper wage rate? (i.e., how should the employer calculate the "commensurate" wage for a "worker with a disability"?).

Seneca Re-Ad's misreading becomes clear when the provision it cites, 29 C.F.R. § 525.12, is compared with an earlier section of the regulation, 29 C.F.R. § 525.9. 29 C.F.R. § 525.9 is entitled "Criteria for employment of workers with disabilities under certificates at special minimum wage rates" and is the section used to determine *whether* an individual can even be employed under a Subminimum Wage Disability Certificate; in contrast, 29 C.F.R. § 525.12 sets forth the "terms and conditions"[52] for those who "are in fact disabled for the work they are to perform."[53]

29 C.F.R. § 525.9 sets forth how "to determine that special minimum wage rates are necessary"[54] under the Disabled Workers Exception Provision, and it specifically requires consideration of "[t]he nature and extent of the disabilities . . . *as these disabilities relate to the individuals' productivity*."[55] Clearly, consideration of how an individual's disabilities "relate to" that individual's productivity implies that the disabilities must in fact "relate to" that individual's productivity. Since they must "relate to" productivity, there must be a nexus between the two.

In contrast, 29 C.F.R. § 525.12(j), which comes three sections later in the regulations, only applies to "workers with disabilities" and, as we explained above, a "worker with a

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[51] Respondent's Reply Brief at 2.

[52] 29 C.F.R. § 525.12.

[53] 29 C.F.R. § 525.12(b).

[54] 29 C.F.R. § 525.9(a).

[55] *Id.* § 525.9(a)(1).

disability" is not simply a worker who has a disability, but is instead defined as one who has a disability "for the work to be performed."[56] So, 29 C.F.R. § 525.12(j) simply does not speak to the question of whether the Employees' disabilities impair their productivity.

D. *Seneca Re-Ad's argument that the "'nexus' requirement has no basis in statute or regulation,"[57] while based on a misreading of the text and structure of both the Act and the Department's implementing regulations, does point to a need for more regulatory guidance.*

Seneca Re-Ad argues that neither the regulations nor the Department of Labor Wage and Hour Division's Field Operations Handbook explicitly lays out precisely how an employer can show that a disabled worker is "impaired by a . . . disability . . . for the work to be performed."[58] Seneca Re-Ad points out as well that the Department's Field Operations Handbook[59] tells Wage and Hour Investigators to make the determination of whether an individual is a "worker with a disability" within the meaning of the regulations "by observing the workers and spot checking the disability records requested during the initial conference."[60]

Although Seneca Re-Ad's underlying premise—that the regulation and the non-binding Field Operations Handbook lack detail on how an employer is to establish that a worker is "impaired . . . for the work to be performed"—is correct, this doesn't help Seneca Re-Ad here. The problem with Seneca Re-Ad's argument is that its theory of the "impaired for the work to be

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[56] *See supra* Section 2.A.ii.

[57] Respondent's Reply Brief at 1.

[58] Memorandum in Support of Request for Review at 3 ("Judge Bell ignored the regulations and the Field Operations Handbook and invented a new test not found in the law."); Respondent's Reply Brief at 11 at 3 ("Neither the Petitioners nor the Administrator have suggested any method to determine the 'nexus' between the employee's disability and impairment for the work being performed because of that disability."); *id.* at 4 n.1 ("One would suspect that if the Administrator truly required employers to obtain medical or psychological evidence that the disability impairs an employee's productivity in a certain job, such requirement would be in a regulation"); Memorandum in Support of Request for Review at 25 n.8 ("Judge Bell required medical, psychological or other evidence in the record to show Petitioners' disabilities impair their productivity. First, no medical or psychological evidence is required by § 214(c), the Part 525 regulations, or the FOH. In fact, both § 525.12(j) and FOH § 64j00 lead to a different conclusion: if the individual is not able to perform to the level of the standards setter, then he is disabled for the job.").

[59] As we recently explained, the Wage and Hour Division's Field Operations Handbook does not have the force of law. *See* Order Denying Efficieny3's Motion to Reconsider, *Administrator v. Efficiency3 Corp.*, ARB No. 15-005, slip op. at 3-4 (Oct. 12, 2016).

[60] Wage and Hour Division (WHD) Field Operations Handbook (FOH) § 64g00(a), available at https://www.dol.gov/whd/FOH/FOH_Ch64.pdf (last visited January 6, 2017).

performed" requirement—that it can be established simply by showing that a disabled worker has a lower productive capacity at a job than the average nondisabled worker—effectively conflates the requirement that a worker be "impaired by a disability for the work to be performed" with the calculation of the commensurate wage.[61]

Still, we think it would behoove the Wage and Hour Administrator to provide some regulatory guidance in this area, rather than have the precise contours of this requirement be developed by this Board and ALJs in the context of an individual petition process that (as best we can tell) has been used only twice in the past three decades. We understand of course that the Administrator has limited resources and must have the discretion to allocate those resources as he best sees fit, but this is a program that apparently involved, at least at one point in the recent past, approximately 6,000 employers and a quarter million employees.[62] The program has existed in various guises since 1938, and, in its current incarnation, for thirty years. Moreover, the program has been the subject of serious abuse.[63] Plus, this is all arguably happening with the Department's at least tacit approval, since it is the Department that issues employers their Subminimum Wage Disability Certificates. To be sure, the possession of a Subminimum Wage Disability Certificate does not itself "constitute a statement of compliance by the Department of Labor."[64] But an employer cannot pay a disabled worker less than the minimum wage unless the Department first issues it a Certificate. And it bears repeating, employees working under a Subminimum Wage Disability Certificate are paid *less than the federal minimum wage* (and in an era in which the federal minimum wage itself has lost more than 30% of its purchasing power since 1968[65]).

Yet, the statute and regulations provide no details about how employers are to go about determining whether a given individual is a "worker with a disability" within the meaning of the regulations (i.e., disabled "for the work to be performed"), while providing excruciating detail

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61 *See supra* Section 2.C.

62 William G. Whittaker, *Treatment of Workers with Disabilities Under Section 14(c) of the Fair Labor Standards Act*, Congressional Research Service Report, at CRS-2 (Feb. 2005), online at http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1211&context=key_workplace.

63 *See generally* DAN BARRY, THE BOYS IN THE BUNKHOUSE: SERVITUDE AND SALVATION IN THE HEARTLAND (2016); *Solis v. Hill Country Farms, Inc.*, 808 F. Supp. 2d 1105 (S.D. Iowa 2011), *aff'd* 469 Fed.Appx. 498 (8th Cir. 2012); *see also* Dan Barry, *The Boys in the Bunkhouse*, N.Y. TIMES, Mar. 9, 2014, at A1, available online at http://www.nytimes.com/interactive/2014/03/09/us/the-boys-in-the-bunkhouse.html.

64 *See* Petitioners' Exh. 4 (Form WH-228 (Rev. Jan. 2002), Certificate Authorizing Special Minimum Wage Rates Under Section 14(c) of the Fair Labor Standards Act).

65 Minimum Wage - U.S. Department of Labor - Chart1, available online at https://www.dol.gov/featured/minimum-wage/chart1 (last visited on Jan. 6, 2017).

about the methods for calculating the commensurate wage once an individual is found to be a "worker with a disability." Surely the method for determining whether a disabled employee may be paid less than the minimum wage at all is worth some more detailed regulatory guidance. If employers don't know how to determine whether an employee is disabled "for the work to be performed," it may well be that numerous employers are violating the statute and regulations (perhaps inadvertently) by employing disabled individuals who are not disabled "for the work to be performed."

In short, Seneca Re-Ad's argument, while immaterial for the question of whether it has satisfied the clear statutory and regulatory requirement, appears to point to the need for further assistance for employers who may be trying in good faith to comply with the requirement.

We repeat, however, that this lack of detail in the regulation (or even in the Field Operations Handbook) in no way obviates the requirement that an employer demonstrate that a person is disabled "for the work to be performed" (i.e., that the person is a "worker with a disability" within the meaning of the regulations) before it can pay that person less than the minimum wage pursuant to a Subminimum Wage Disability Certificate. Here, Seneca Re-Ad failed to meet its burden to show that it satisfied that requirement.

3. We need not determine whether Seneca Re-Ad properly calculated the commensurate wage because it had no right to pay the Employees less than the minimum wage.

Because we conclude that Seneca Re-Ad failed to demonstrate that Magers, Steward, or Felton is a "worker with a disability" within the meaning of the regulations, we need not address the appropriateness of Seneca Re-Ad's calculation of the commensurate wage: even if everything about Seneca Re-Ad's calculation of the commensurate wage were correct, all it would show is that the Employees were less productive than some nondisabled individuals, and that would be insufficient to show that they were eligible for a subminimum wage. We make no determination about the appropriateness of Seneca Re-Ad's calculation of the prevailing wage or whether Seneca Re-Ad's "work measurements" or "time studies" were properly done. We reiterate, though, that the burden to show the proper commensurate wage would be Seneca Re-Ad's. We thus issue no exceptions to the ALJ's conclusion on this question.[66]

4. Remedies

To address the remedies to which Magers, Steward, and Felton are entitled requires an analysis of provisions in both the 1938 Fair Labor Standards Act (as amended)[67] and the 1947 Portal to Portal Act (as amended)[68]. Each of the issues we address below requires consideration

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66 *See* D. & O. at 37-40.

67 29 U.S.C. Chapter 8 (§§ 201-219).

68 29 U.S.C. Chapter 9 (§§ 251-262).

of a fundamental distinction both statutes make, a distinction between the *liability* imposed on an employer, on the one hand, and the role of a "*court*" in an "*action*" brought to recover that liability, on the other. As we explain in more detail below, any language in the two statutes that explicitly references a "court" and/or an "action" in court does not apply in this administrative proceeding. On the other hand, language that establishes an employer's liability does apply and can be the basis of an award in this administrative proceeding, since an employer's liability for violation of a statute (and accompanying regulations) exists independent of the forum in which an employee seeks remedies.

Based on this distinction, we conclude that

(1) the Portal to Portal Act's statute of limitations does not apply in this administrative proceeding because it only applies to "action[s]" in court;

(2) Seneca Re-Ad is liable to Magers, Steward, and Felton in the amount of the difference between the amount they were paid and the federal minimum wage, plus an equal amount in liquidated damages; and

(3) Magers, Steward, and Felton are not entitled to attorneys' fees or costs in this administrative proceeding because the relevant provision only authorizes a "Federal or State court of competent jurisdiction" to award such fees and costs.

A. *The Portal to Portal Act's statute of limitations does not apply in this administrative proceeding.*[69]

The Portal to Portal Act of 1947, as amended, provides for a statute of limitations for certain "actions" brought under, among other laws, the Fair Labor Standards Act. The relevant language provides that "any *action* . . . to enforce any cause of action for unpaid minimum wages[. . . or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, . . . shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued."[70] The Portal to Portal Act's statute of limitations thus applies only to "action[s]."

The United States Supreme Court has explicitly held that the word "action" in the Portal to Portal Act refers only to judicial and not administrative proceedings.[71] Although the Court

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[69] While we formally issue an exception to that portion of the ALJ's Decision and Order (pp. 41-45), we agree with his conclusion that the statute of limitations does not apply.

[70] Portal to Portal Act, ch. 52, § 6, 61 Stat. 84, 87-88 (1947) (codified at 29 U.S.C. § 255) (emphasis added).

[71] *Unexcelled Chem. Corp. v. United States*, 345 U.S. 59, 66 (1953) ("Section 7 of the Portal-to-Portal Act provides that 'an action is commenced for the purposes of section 6 * * * on the date when the complaint is filed'. It is argued that the issuance of a formal complaint in the administrative

was interpreting the word "action" in Section 7 of the Portal to Portal Act, rather than Section 6, which we interpret here, the presumption of consistent usage is strong when the same word is used in the same statute passed at the same time.[72] Moreover, those courts that have interpreted the term "action" under Section 6 have held that Section 6 "does not apply to administrative actions."[73] This is completely consistent with the use of the term "action" elsewhere in the law.[74] When Congress wants to include administrative proceedings within the constraints of a statute of limitations, it knows how to do so by using a term like "proceeding," rather than "action."[75]

It might appear anomalous to have a statute of limitations not apply in circumstances in which the claim amounts, in effect, to the same claim as one brought in court; however, Congress purposely established a completely separate administrative process for challenges to the subminimum wage for disabled workers and did so without imposing a statute of limitations. The Administrator argues that, because the Employees are in effect recovering for a failure to pay the minimum wage, it would be unreasonable not to have the same statute of limitations as

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proceedings (the customary procedure in Walsh-Healey cases) is the commencement of an action in the statutory sense. Congress, however, when it wrote s 7 was addressing itself to law suits in the conventional sense. Commencement of an action by the filing of a complaint has too familiar a history and the purpose of ss 6 and 7 was too obvious for us to assume that Congress did not mean to use the words in their ordinary sense.").

[72] *See Palmer v. Canadian Nat'l Ry./Ill. Cent. R.R. Co.*, ARB No. 16-035, ALJ No. 2014-FRS-154, slip op. at 24, 29 (ARB Sept. 30, 2016, reissued Jan 4, 2017); *see also Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) ("[T]he normal rule of statutory construction [is] that identical words used in different parts of the same act are intended to have the same meaning" (internal quotation marks and citations omitted).); *Merrill Lynch, Pierce, Fenner & Smith v. Dabit*, 547 U.S. 71, 86 (2006) ("Generally, identical words used in different parts of the same statute are presumed to have the same meaning" (citation and internal alterations and quotation marks omitted).).

[73] *Glazer Const. Co., Inc. v. United States*, 52 Fed. Cl. 513, 531 (Ct. Cl. 2002); *see also Glenn Elec. Co. v. Donovan*, 755 F.2d 1028, 1034 n.7 (3d Cir. 1985); *Ball, Ball & Brosamer, Inc. v. Martin*, 800 F. Supp. 967, 975 (D.D.C. 1992), vacated on other grounds, 24 F.3d 1447 (D.C. Cir. 1994).

[74] *See*, *e.g.*, *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 91-92 (2006).

[75] The year after the Portal to Portal Act, Congress did just that. *See* An Act to revise, codify, and enact into law title 28 of the United States Code entitled 'Judicial Code and Judiciary,' Pub. L. No. 80-773, § 2462, ch. 646, 62 Stat. 879, 974 (June 25, 1948) (codifying 28 U.S.C. § 2462) ("Except as otherwise provided by Act of Congress, an action, suit *or proceeding* for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon." (emphasis added)).

they would have had if they had brought this same claim in court.[76] Recovery beyond the two-year (or, if the violation is willful, three-year) statute of limitations seems to undermine the whole point of the limitations period, which was designed to provide employers with greater certainty about the extent of their liability for past violations of the Fair Labor Standards Act.

But the entire subminimum wage disability petition process is distinct from a court case and was explicitly designed to be so. In the 1986 FLSA amendments establishing the petition process, Congress quite clearly created an *alternative to* an "action" in court, and an alternative just for employees who were being paid less than the minimum wage pursuant to a Subminimum Wage Disability Certificate.[77] By choosing to create this alternative process, outside the judicial system and in an administrative agency, Congress thus explicitly chose a process different from an "action." Not being subject to the Portal to Portal Act's statute of limitations is just one of many differences. For example, the more accelerated time frame for this administrative proceeding,[78] the limitations on the legal questions that can be addressed,[79] and the different procedures from a court[80] are all ways in which this proceeding differs from a court case. By

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[76] In arguing that the statute of limitations should apply, the Administrator also points to an off-handed reference in the regulatory history of the Disabled Workers Exception regulations, and the fact that in the one previous Disabled Workers Exception petition brought to the Secretary 26 years ago, the Secretary implicitly appeared to have treated the Portal to Portal Act's statute of limitations as applicable. *See* U.S. Dep't of Labor, Wage & Hour Div., Employment of Workers with Disabilities Under Special Certificates, 54 Fed. Reg. 32,920; 32,926 (Aug. 10, 1989); *In re Depp*, No. 1991-FLS-001, 1992 WL 752725, at *2. However, in neither situation was the question actually analyzed, let alone carefully: neither the regulatory history nor the Secretary addressed the distinction, which the ALJ rightly recognized, between an "action" and an administrative proceeding, and neither seems to have been aware of the Supreme Court's *Unexcelled Chemical* decision, which speaks to that distinction in the specific context of the Portal to Portal Act.

[77] The petition process was viewed as crucial to the 1986 FLSA Amendments. Prior to 1986, the law contained a subminimum wage "floor": under that provision, even disabled workers employed under Subminimum Wage Disability Certificates could not be paid less than 50% of the minimum wage. In 1986, employers were given "greater flexibility" in the form of authority to pay disabled workers less than 50% of the minimum wage if appropriate, but the disabled workers were in turn provided with the petition process to challenge their wage rates. The petition process was thus viewed as a "due process protection" and an "essential element in the compromise." *Fair Labor Standards Act of 1938 Amendments Relating to Payment of Wages to Handicapped Workers*, 132 CONG. REC. H8825-01 (Oct. 1, 1986) (statement of Rep. Murphy).

[78] *See* 29 U.S.C. § 214(c)(5)(B), (E), (F); 29 C.F.R. § 525.22(b), (c), (e), (f), (g).

[79] For example, as we explain below, the ALJ did not have authority to award damages based on what amounted to a claim that Seneca Re-Ad violated *Ohio*'s minimum wage. *See infra* Section 4.B.v.

[80] *Compare* 29 C.F.R. Part 18 *with* Fed.R.Civ.Pro.

themselves, these differences would not of course justify not applying the statute of limitations if it applied, but they do suffice to help make sense of why a straightforward reading of the word "action" in the statute, a reading consistent with the Supreme Court's interpretation of that word elsewhere in the same statute, is not as anomalous as it might seem on first blush.

B. *<u>Magers, Steward, and Felton are entitled to the difference between the amount they were paid and the federal minimum wage, as well as liquidated damages in an equal amount.</u>*

i. Seneca Re-Ad's liability to Magers, Steward, and Felton is twice the difference between the amount the Employees were paid and the federal minimum wage.

The FLSA contains a specific provision addressing penalties, Section 16, which includes a subsection covering damages, section 16(b). We will refer to section 16(b) as the FLSA's Damages Provision. In its very first sentence, it provides that an employer who fails to pay the minimum wage when required to do so is liable "in the amount of [an employee's] unpaid minimum wages" plus "an additional equal amount as liquidated damages."[81]

Seneca Re-Ad failed to pay Magers, Steward, and Felton the federal minimum wage when it was required to do so under the FLSA's Minimum Wage Provision. Therefore, Seneca Re-Ad must pay Magers, Steward, and Felton "in the amount of their unpaid minimum wages . . . and in an additional equal amount as liquidated damages"—that is, twice the difference between the amount the Employees were paid and the federal minimum wage.

ii. The fact that Seneca Re-Ad had a Subminimum Wage Disability Certificate does not preclude a finding that it violated the FLSA's Minimum Wage Provision.

Seneca Re-Ad argues that, even if it did violate its Disabled Workers Exception Provision obligations, it did not violate the Act's Minimum Wage Provision, because it paid the Employees pursuant to a Disability Certificate. It notes that Section 13 of the FLSA provides that the "minimum wage . . . requirement[] . . . shall not apply with respect to . . . any employee to the extent that such employee is exempted by regulations, order, or certificate of the Secretary issued under [, among other provisions, the Disabled Workers Exception Provision]."[82]

But Section 13 doesn't help Seneca Re-Ad here, because it only says that the minimum wage requirement doesn't apply "to the extent that such employee is exempted" by a

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[81] 29 U.S.C. § 216(b) ("Any employer who violates the provisions of section 206 . . . of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wage . . . and in an additional equal amount as liquidated damages.").

[82] 29 U.S.C. § 213(a)(7).

Subminimum Wage Disability Certificate. Here, the ALJ found, and we affirm, that Magers, Steward, and Felton are *not* "exempted by regulations, order, or certificate of the Secretary," because they were not "worker[s] with a disability," within the meaning of the regulations, for the jobs for which they were employed.

Moreover, just because Seneca Re-Ad failed to comply with the Disabled Workers Exception Provision does not mean that it didn't *also* violate the Minimum Wage Provision. Seneca Re-Ad's argument might have some purchase if it simply calculated the commensurate wage improperly but was still entitled to pay the Employees less than the minimum wage (e.g., if it paid the Employees $2/hour when it should have paid them $5/hour). On that question, we make no determination. Here, though, because we determine that Seneca Re-Ad failed to show that Magers, Steward, and Felton were even "worker[s] with a disability" within the meaning of the regulations and because Seneca Re-Ad was thus obligated to pay them at least the minimum wage, Seneca Re-Ad clearly violated the Minimum Wage Provision.

iii. Seneca Re-Ad's argument that the Employees are not entitled to liquidated damages is based on a misreading of the Damages Provision.

Seneca Re-Ad argues that because the Damages Provision contains references to a "Federal or State court of competent jurisdiction," an "action," and "[t]he court," the ALJ did not have authority to award liquidated damages in this administrative proceeding. Seneca Re-Ad points to two sentences in the Damages Provision. One is the third sentence in the Damages Provision, and it establishes the right to bring an action in court. It reads, in relevant part, "An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer . . . in any Federal or State court of competent jurisdiction . . . ." The other is the fifth sentence in the Damages Provision, and it provides for attorneys' fees and costs in court. It reads, "The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." Seneca Re-Ad argues that because of these references to an "action," "[t]he court," and a "Federal or State court of competent jurisdiction," this means that the Employees can only recover liquidated damages in court, not in this administrative proceeding.

But Seneca Re-Ad's references to other portions of the Damages Provision do not help it here. If anything, those other references undermine, rather than support, its argument.

First, the sentence authorizing the bringing of a civil action is distinct from the sentence establishing liability for unpaid minimum wages and liquidated damages, and, just as importantly, comes *after* that sentence. The sentence establishing liability for unpaid minimum wages and liquidated damages for the Minimum Wage Provision is the very first sentence of the Damages Provision. Only then, in the third sentence, does the Damages Provision authorize the civil action "to recover the liability prescribed in" the first sentence. The first sentence, which establishes the liability, makes no reference at all to a civil action or to a court: it says simply, "Any employer who violates the [Minimum Wage Provision] . . . shall be liable to the employee or employees affected in the amount of their unpaid minimum wages . . . and in an additional equal amount as liquidated damages." In other words, the Damages Provision *first* establishes

liability and *then* authorizes the bringing of a lawsuit to recover that liability. Thus, the liability established by the first sentence is not dependent on there being an "action" or on that liability being sought "in any Federal or State court of competent jurisdiction." Rather, the liability exists independent of—indeed, logically precedes—the right to bring a civil action. The Disabled Workers Exception Provision's petition procedure that the Employees are using here is thus simply another process through which an employee can seek recovery of the employer's liability.

Similarly, the sentence providing for attorneys' fees and costs is also distinct from, and has nothing to do with, the sentence establishing liability for unpaid minimum wages and liquidated damages. That sentence, which addresses a completely different issue—the authority to award attorneys' fees—does not bear on the extent of the employer's *liability* for violating its minimum-wage obligations. While the sentence addressing attorneys' fees does refer to "[t]he court" and an "action," there is no reference to either a "court" or an "action" in the sentence establishing the liability of the employer for liquidated damages.

If anything, the multiple references to "court," "action," etc. later in the Damages Provision and the absence of any such references in the sentence establishing the employer's liability for liquidated damages strengthens our conclusion that the employer's liability for liquidated damages exists independent of the forum in which an employee seeks to recover that liability.[83]

One other fundamental problem with Seneca Re-Ad's argument is that the authority for liquidated damages is in the very same sentence as the authority to award "the amount of [the employees'] unpaid minimum wages." The award of liquidated damages is thus directly tied to an award of the unpaid minimum wages themselves. Thus, if Seneca Re-Ad's reading of the statute were correct—that only a *court* could award liquidated damages—then it would have to be too that only a court could award "the amount of . . . unpaid minimum wages." If that were correct, the Secretary would be without authority to award any damages at all in this Disabled Workers Exception petition process. Seneca Re-Ad certainly does not make any argument of that sort, and, in any event, that strikes us as too absurd to be a plausible reading of the FLSA's Damages Provision.

iv. The Portal to Portal Act's authority to reduce or disallow liquidated damages extends only to courts, and the ALJ was thus required to award liquidated damages in the full amount of the unpaid minimum wages.

The ALJ concluded that "[a]n award of liquidated damages is not automatic," citing Section 11 of the Portal to Portal Act.[84] He then interpreted Section 11 of the Portal to Portal

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[83] *See Palmer*, ARB No. 16-035, slip op. at 21 & n.87; *see also*, *e.g.*, *Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion" (citation and internal alterations omitted).).

[84] D. & O. at 48 (citing 29 U.S.C. § 260).

Act to permit him not to award liquidated damages if Seneca Re-Ad could prove that "it acted subjectively and objectively in good faith."[85] The ALJ then concluded that Seneca Re-Ad had not acted in good faith and so awarded liquidated damages in the full amount of the Employees' unpaid minimum wages.[86]

Seneca Re-Ad challenges that determination, arguing that, even if it did violate the FLSA's Minimum Wage Provision, it acted in good faith and thus should not have to pay liquidated damages.

We need not address the question of Seneca Re-Ad's good faith, because Section 11 of the Portal to Portal Act does not apply in this administrative proceeding. It states, "In any *action* . . . to recover unpaid minimum wages[] . . . or liquidated damages, under the [FLSA], if the employer shows to the satisfaction of *the court* that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, *the court* may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in [the FLSA's Damages Provision]."[87] Thus, the statute only provides a "court" in an "action" the authority to reduce or disallow liquidated damages. Given the consistent jurisprudence interpreting the word "action" in the Portal to Portal Act as not encompassing administrative proceedings, including from the Supreme Court of the United States, and the presumption of consistent usage,[88] the terms "court" and "action" in Section 11 of the Portal to Portal Act do not encompass administrative proceedings.

Again, we understand this result might seem anomalous at first blush, but it is a natural result of the distinction the FLSA and Portal to Portal Act make between, on the one hand, the employer's "liability" (which, as the FLSA's Damages Provision makes clear, includes liquidated damages) and, on the other hand, the two statutes' language giving the *courts* authority to provide and/or adjust particular remedies.[89]

v. Damages should be based on the federal minimum wage, not Ohio's.

The ALJ assumed that the Ohio minimum wage applied, and he calculated both the unpaid minimum wages and the liquidated damages based on the Ohio minimum wage rate.

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85 D. & O. at 48.

86 *See* D. & O. at 49-53.

87 29 U.S.C. § 260 (emphases added).

88 *See supra* text accompanying notes 71 to 75.

89 *See supra* paragraph accompanying notes 67 and 68.

Because this proceeding is brought pursuant to the federal Fair Labor Standards Act, however, the Ohio minimum wage is not the correct wage rate on which to base the Employees' award in this proceeding.

First, we are interpreting the federal Fair Labor Standards Act, not Ohio law.[90] This proceeding is before the federal Department of Labor and based on a violation of the federal Fair Labor Standards Act. The Employees do not even claim—and thus have not shown—that Seneca Re-Ad violated the Ohio minimum wage law.[91] In particular, Ohio law appears to have exceptions, including one for disabled workers.[92] Thus, even if it seems clear that Ohio does in fact have a higher minimum wage,[93] we do not know whether the Employees here would be entitled to it. Nothing in the FLSA's petition process authorizes us to interpret and apply the law at the complex intersection of the Ohio Constitution, statutes, and regulations that would be necessary to determine conclusively whether Seneca Re-Ad violated Ohio law. In any event, the Employees did not ask either the ALJ or us to do so. Thus, the only question is the proper measure of damages under the federal Fair Labor Standards Act in circumstances like this, where the state has a higher minimum wage.

Under the Fair Labor Standards Act, the measure of damages is based on the federal minimum wage rate, not based on any potentially applicable state minimum wage rate. The first sentence in the FLSA's Damages Provision sets forth an employer's liability for violating the federal Minimum Wage Provision. It reads, in relevant part, "Any employer who violates the provisions of section 206 . . . of this title [which is section 6 of the FLSA, the Minimum Wage Provision] . . . shall be liable to the employee or employees affected in the amount of their *unpaid minimum wages* . . . and in an additional equal amount as liquidated damages."[94] The

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[90] One way to see why this distinction matters is to recognize that, if Seneca Re-Ad paid the Employees at the rate of, say, $7.50 per hour (which is above the federal minimum wage but below Ohio's), Seneca Re-Ad would not have even needed a Disability Certificate from the Department of Labor and the ALJ would not have had any authority to entertain the petition at all.

[91] *See Cosme Nieves v. Deshler*, 786 F.2d 445, 452 (1st Cir. 1986) (noting that the FLSA "does not guarantee plaintiffs, as employees covered by the FLSA, the benefit of more favorable [state] laws that do not of their own force apply . . . . In order to prevail [on a state law wage claim], plaintiffs . . . must . . . show that the more beneficial [state law] provisions actually apply to them.").

[92] *See* Ohio Rev. Code § 4111.06; Ohio Admin. Code Chapter 4101:9–1. Employment of Handicapped Individuals.

[93] That much does seem clear. *Compare* OHIO CONST. art. II § 34a; Ohio Rev. Code § 4111.02; State of Ohio, 2016 Minimum Wage poster, available online at http://www.com.ohio.gov/documents/dico_2016Minimumwageposter.pdf (noting that Ohio minimum wage is currently $8.10/hour), *with* 29 U.S.C. § 206(a)(1) (stating that federal minimum wage is currently $7.25/hour).

[94] 29 U.S.C. § 216(b) (emphasis added).

question, then, is, "What is the meaning of the term 'unpaid minimum wages' in the FLSA's Damages Provision?" In particular, does the term encompass wages that might be due because of a possible violation of the state minimum wage law? Or, does it instead refer only to those wages due under the federal minimum wage law itself?

The term "unpaid minimum wages" in the FLSA's Damages Provision refers to the "minimum wage" established in the federal FLSA's Minimum Wage Provision. It thus does not encompass a higher state minimum wage. The sentence establishing liability for "unpaid minimum wages" specifically cross references the FLSA's Minimum Wage Provision, i.e., "section 206 . . . of this title" (or section 6 of the Act).[95] The FLSA's Minimum Wage Provision then explicitly sets forth the "minimum wage," which is $7.25/hour.[96] Given the fact that the liability is explicitly based on section 6's minimum wage, the phrase "unpaid minimum wages" clearly refers to the term "minimum wage" in section 6 itself. There is nothing in the statute suggesting that the term "unpaid minimum wages" in the Damages Provision refers to a state minimum wage or that any of the penalties in the Damages Provision encompass state law.[97]

While the FLSA has a "savings clause" permitting states to have higher minimum wage rates, that does not mean that the measure of damages under the FLSA is based on a state's minimum wage. The FLSA's savings clause says that "[n]o provision of [the Fair Labor Standards Act] or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under [the Act]."[98] In other words, the FLSA's savings clause makes clear that compliance with the FLSA does not excuse an employer from any obligation it might have to comply with a state minimum wage law. But nothing in the FLSA's savings clause requires payment of the state minimum wage *as a matter of federal law*. As one federal appellate court has put it, the FLSA's savings clause "simply makes clear that the FLSA does not preempt any existing state law that establishes a higher minimum wage . . . . It does not purport to incorporate existing state law; and it certainly does not guarantee plaintiffs, as employees covered by the FLSA, the benefit of more favorable [state] laws that do not of their own force

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[95] 29 U.S.C. § 216(b) ("Any employer who violates *the provisions of section 206 . . . of this title* . . . shall be liable to the employee or employees affected in the amount of *their unpaid minimum wages* . . . and in an additional equal amount as liquidated damages" (emphasis added)).

[96] 29 U.S.C. § 206(a)(1)(C).

[97] Again, the easiest way to see why it makes sense for damages under the FLSA to be measured based on the federal minimum wage, rather than Ohio's, is to hypothesize an employer that pays $7.50 per hour (more than the federal minimum wage but less than Ohio's). *See supra* note 90. If damages were to be based on the state minimum wage rate, the employee would be entitled to some damages. But that makes no sense at all, since paying $7.50 per hour does not even violate the FLSA's Minimum Wage Provision.

[98] *See* 29 U.S.C. § 218(a) (emphasis added).

apply . . . . To prevail, plaintiffs cannot simply invoke [the FLSA's savings clause] but *must also show that the more beneficial [state] provisions actually apply to them*."[99] Or, as another federal appellate judge has put it in the specific context of the measure of damages under the FLSA, while the FLSA's savings clause "expressly defers to state wage laws affording employees greater protection, *it does not also adopt such higher wages as the measure of damages for FLSA violations*."[100] Rather, "the FLSA requires only that employers pay the minimum wage rates set by federal law."[101] The measure of damages for violations of the FLSA's Minimum Wage Provision is thus based on the federal minimum wage found in the FLSA itself, not any higher state or local minimum wage that might apply.[102]

In short, Seneca Re-Ad may well have violated Ohio's minimum-wage law but the ALJ had no authority to determine whether Seneca Re-Ad complied with Ohio law in this federal administrative proceeding.[103] Moreover, in awarding damages under the federal FLSA, the ALJ

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[99] *Cosme Nieves*, 786 F.2d at 452 (emphasis added); *see also Fuk Lin Pau v. Jian Le Chen*, 2015 WL 6386508 at *8 (D. Conn. 2015) (noting that a "careful reading of this section makes clear that while the FLSA explicitly disclaims preemption of state law, it does not *incorporate* state law" (emphasis in original)).

[100] *Lanzetta v. Florio's Enters., Inc.*, 2011 WL 3209521, at *4 (S.D.N.Y. 2011) (Chin, J.) (internal quotation marks omitted) (emphasis added); *see also Fuk Lin Pau*, 2015 WL 6386508 at *8 (holding that the measure of damages under the FLSA is the federal minimum wage rate and rejecting the argument that the FLSA's savings clause provides otherwise); *Gurung v. Malhotra*, 851 F. Supp. 2d 583, 592 (S.D.N.Y. 2012) (same).

[101] *Gurung*, 851 F. Supp. 2d at 592; *see also Pineda-Herrera v. Da-Ar-Da, Inc.*, 2011 WL 2133825, at *5 (S.D.N.Y. 2011) (noting that "for non-overtime wages, the FLSA requires only that employers pay the minimum wage rates set by federal law.").

[102] This interpretation of the FLSA is also more consonant with the Department's regulations. 29 U.S.C. § 525.22(e) provides that, "[i]n the absence of evidence sufficient to support the conclusion that the proper wage should be less than the minimum wage, the ALJ shall order that the minimum wage be paid." The first use of the phrase "minimum wage" in that sentence (as in, if "the proper wage should be less than the minimum wage") almost certainly refers to the *federal* minimum wage; for if the evidence "support[ed] the conclusion that the proper wage should be" $7.50 per hour, it is almost certain that the sentence would not apply at all. Therefore, the second use of the phrase "minimum wage" likewise has to mean the *federal* minimum wage. The regulations are thus instructing the ALJ, in a case such as this where there is an "absence of evidence sufficient to support the conclusion that the proper wage should be less than the minimum wage," to "order that the [*federal*] minimum wage be paid."

[103] *Cf.* Delegation of Authority and Assignment of Responsibility to the Administrative Review Board, 77 Fed. Reg. 69,377, 69,378-80 (Nov. 16, 2012) (defining this Board's jurisdiction as limited to decisions arising under a list of specific federal statutes).

should have calculated the damages at the rate prescribed by "section 206 . . . of this title"[104]—namely, the FLSA's Minimum Wage Provision—since that is the provision Seneca Re-Ad violated. We remand the case to the ALJ to calculate damages based on the federal minimum wage of $7.25/hour.[105]

C. Magers, Steward, and Felton are not entitled to attorneys' fees or costs.

The ALJ awarded attorneys' fees to Magers, Steward, and Felton based on the authority he believed he had under the FLSA's Damages Provision.[106] That is the only authority on which Magers, Steward, and Felton rely on appeal.

However, the relevant language of the FLSA's Damages Provision makes clear that only a court, and not an ALJ in an administrative proceeding, has authority to award attorneys' fees and costs. The sentence in the Damages Provision providing for attorneys' fees states, "*the court* in *such action* shall, in addition to any judgment awarded to the *plaintiff or plaintiffs*, allow a reasonable attorney's fee to be paid by *the defendant*, and costs of the *action*."[107] That sentence follows the sentence that authorizes the bringing of an "action . . . in any Federal or State court of competent jurisdiction." It is thus clear, not only with the use of the terms "court," "action," "plaintiff(s)" and "defendant," but also with the phrase "in such action" cross-referencing a "Federal or State court of competent jurisdiction," that the authority to award attorneys' fees is limited to courts. Therefore, the ALJ did not have authority to award attorneys' fees or costs in this administrative proceeding.

This straightforward interpretation is consistent with the only specific authority we have found on the question, in the preamble to the Department's regulations implementing the Disabled Workers Exception Provision. As those regulations were being drafted, one commenter on the Notice of Proposed Rulemaking specifically recommended that the Department include "additional language providing for the award of attorney's fees." But in adopting the Final Rule, the Department rejected the suggestion, stating that it found "no statutory authority for such fees."[108]

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[104] 29 U.S.C. § 216(b).

[105] 29 U.S.C. § 206(a)(1)(C).

[106] Attorney Fees D. & O. at 7-8 (quoting 29 U.S.C. § 216(b)).

[107] 29 U.S.C. § 216(b).

[108] *See* U.S. Dep't of Labor, Wage & Hour Div., *Employment of Workers with Disabilities Under Special Certificates*, 54 Fed. Reg. 32,920; 32,927 (Aug. 10, 1989).

If this dispute were to go to court, the Employees may well be entitled to attorneys' fees for the work performed in this administrative proceeding[109]—on that question, we make no determination—but the statute clearly does not authorize either the ALJ or this Board (acting on the Secretary's behalf) to award them.

CONCLUSION

Seneca Re-Ad did not have the legal authority to pay Magers, Steward, or Felton less than the minimum wage, because it failed to show that they are impaired for the work they performed. Seneca Re-Ad is thus liable to Magers, Steward, and Felton in the amount of the difference between the amount they were paid and the federal minimum wage, plus an equal amount in liquidated damages. Because the ALJ's Decision calculated damages based on the Ohio minimum wage rather than the federal minimum wage, we issue an exception to the ALJ's calculation of damages and thus **REMAND** in **ARB Case No. 16-038** for the ALJ to recalculate damages in light of the federal minimum wage. Moreover, because the ALJ wrongly concluded that Magers, Steward, and Felton were entitled to attorneys' fees and costs, we issue an exception to that conclusion and **REVERSE** in **ARB Case No. 16-054**.

SO ORDERED.

ANUJ C. DESAI
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. COOPER BROWN
Administrative Appeals Judge

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[109] *See Soler v. G & U Inc.*, 658 F. Supp. 1093, 1097-98 (S.D.N.Y. 1987) (in case brought under the FLSA, awarding attorneys' fees for work done in a Department of Labor administrative proceeding); *cf. Moore v. District of Columbia*, 907 F.2d 165 (D.C. Cir. 1990) (en banc) (holding that the Handicapped Children's Protection Act authorizes an award of attorneys' fees to parents of handicapped individuals who prevail in administrative proceedings under the Education of the Handicapped Act).