

## **Carrying a Briefcase While Commuting: Not “Hours Worked” Under the FLSA**

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Has toting a heavy briefcase overflowing with files ever felt like work? A group of employees of the City of New York asserted that it was, and they asked the court to consider whether the Fair Labor Standards Act (“FLSA”) entitled them to be paid for their commuting time to and from work because they carried work files in a briefcase during their trip. In Singh v. The City of New York, 2008 WL 1885327 (2d Cir., April 29, 2008), the court considered whether city fire alarm inspectors must be compensated under the FLSA for all or part of their commuting time because they were required by their employer to carry and keep safe necessary inspection documents during their commutes.

As field inspectors, Plaintiffs performed fire alarm inspections in the field from 9:00 a.m. to 4:30 p.m., Monday through Thursday, taking a half-hour lunch break daily. Each day began at the employees’ first inspection site and ended when they signed out at the end of the day at the closest firehouse. On Fridays, the inspectors generally reported to headquarters in order to return completed inspection files for the past week and pick up new inspection files for the upcoming week’s inspections. To increase efficiency and maximize revenue generating hours, the field inspectors were not permitted to store files at headquarters or to start or end their workday at headquarters. Rather they were required to report to their first inspection site each day and transport inspection documents in a briefcase provided by the employer. Plaintiffs estimated that the briefcases weighed approximately 15 – 20 pounds. Inspectors who failed to keep the inspection files safe during the week were subject to discipline.

Plaintiffs claimed that carrying and safeguarding the inspection files slowed their commutes and caused them to miss buses or trains. Plaintiffs testified that they built additional time into their daily commutes in order to accommodate the delays caused by carrying the briefcase. One claimant testified that his daily commute was increased by almost an hour because he would board a train going in the opposite direction from where he was headed in order to re-board a train going in the right direction that would be less crowded and provide more room for his briefcase. Plaintiffs also claimed that they were unable to attend social events after work hours because they had to return home first in order to secure the safety of the inspection files. Plaintiffs did not assert that they were assigned any other employment-related duties during their commutes.

The Portal-to-Portal Act, which amended the FLSA, excludes ordinary commuting time, or time spent “traveling to and from the actual place of performance of the principal activity” of employment, from compensation. 29 U.S.C. § 254(a). While an employee need not be compensated “for or on account of” commuting to work, any work performed during a commute that is “integral and indispensable” to a principal activity is compensable. IBP, Inc. v. Alvarez, 546 U.S. 21, 37 (2005). In Singh, the plaintiffs needed to demonstrate that carrying the briefcase during a commute amounted to work under the FLSA and was an integral and indispensable part of their inspecting duties.

The Court assumed, without deciding, that carrying the files was an “integral and indispensable” part of the plaintiff’s inspection duties. However, it determined that any “work performed” was “de minimis” and thus the employer was not required to pay its employees for “only a few seconds or minutes of work beyond the scheduled working hours.” Id. at 6. The court also found that the time and effort spent carrying and safeguarding the files was not substantial enough to entitle the employees to payment.

The Court also applied the “predominant benefit” test in reaching its conclusion, but pointed out that their analysis was quite similar to a “de minimis” test. Under either test, the Court opined that “when an employee is minimally restricted by an employer during a commute, such that his or her use of commuting time is materially unaltered, the commuting time will generally not be compensable under the FLSA.” Id. at 6. The Court found that carrying the briefcase presented only a minimal burden on the inspectors’ commutes, and largely, they were free to use their commuting time as they saw fit by “reading, listening to music, eating, running errands, or whatever else the plaintiffs chose do” regardless of the fact that they had the briefcase. Therefore, “the mere carrying of a briefcase without any other active employment-related responsibilities does not transform the plaintiffs’ entire commute into work,” which would entitle the employee to overtime compensation under the FLSA. Id.

While the United States Court of Appeals for the Second Circuit held that commuting time was not compensable under either the “predominant benefit” or “de minimis” tests, the Court acknowledged that there are situations where employer policies could restrict an employee’s ability to use the time freely and cautioned that “the City [pushed] the limits on the burdens it may impose on its employees during a commute.” Id. Therefore, employers must be aware of the effects of their policies on employee commutes in order to prevent otherwise non-compensable time from creating overtime liability.