STATE OF CALIFORNIA
GEORGE DEUKMEJIAN, Governor

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
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1988.08.29

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IN REPLY REFER TO:

Legal Section

August 29, 1988

Richard J. Simmons
Musick, Peeler & Garrett
One Wilshire Blvd.
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Re: Opinion Request

Dear Mr. Simmons:

I have been asked to respond to your letter of August 8, 1988, to former Chief Deputy Labor Commissioner, Albert J. Reyff, requesting a response to your letter of April 5, 1988, regarding "Overtime Exemption for Commissioned Employees Under Wage Order 4-80".

Let me first point out that your description of the letters dated July 26, 1984, and October 6, 1986, which you received in answer to inquiries you made as "rulings" is not quite accurate. While I know that the term "ruling" has been used rather loosely in refering to these types of letters, these were not "rulings", but informational opinion letters which certainly have no binding effect on the courts. There is no provision in the law which would allow the Division to issue "rulings". However, in furtherance of the mandate of the Legislature contained in Labor Code §94, the Division has historically attempted to respond to inquiries, whether written or verbal, with "all needed information".

I have reviewed your letter of April 5, 1988, wherein you describe your clients' compensation system as a "flat percentage commission on each procedure that they perform." While you do not describe the "procedure" I assume that it does not entail sales, but rather, performance of a service.

As you can imagine, issuance of the decision in Keyes Motors, Inc. v. DLSE (1987) 197 Cal.App.3d 557, has resulted in a review of existing opinion letters and policy guidelines to insure that they are consistent with Keyes Motors and, accordingly, I must inform you that your client should no longer be guided by the 1984 and 1986 opinion letters.

As you correctly point out, the recent case of Keyes Motors, Inc. v. DLSE upheld a determination by the Division that automobile mechanics were not commissioned employees. Further, you are correct when you state that the Division cited and relied upon the interpretation of the word "commissions" found in Labor Code §204.1. However, I find your assertion that the definition of commissions found in §204.1 is "exclusively for purposes of the automobile industry" to be erroneous.

Neither the Division nor the Court proposed limiting the application of the definition of the word "commissions" found in Labor Code §204.1 to the "automobile industry." The Court, as a matter of fact, cited the definition contained in Webster's Third New International Dictionary which Keyes relied upon which defines "commissions" as "a percentage of the money received in a transaction." The Court then asked how Keyes' mechanics were engaged in "transactions" by repairing automobiles? Clearly, the Court reached the determination that performing a "procedure" such as repairing an automobile or performing a dialysis procedure were not "transactions" and would not meet the dictionary definition, let alone the only available Labor Code definition, of "commissions".

Let me specifically address the appropriateness of calling the wages paid to your clients' nurses "commissions". You state in your letter of September 23, 1986, that "the company has entered into an agreement with its employees to pay them a fixed percentage of the fee the company charges the hospital for the [dialysis] procedure." The letter goes on to state that your client wished to implement a new procedure which would provide that each employee was to share in the total fees received by the company for dialysis procedures in proportion to the percentage of the company's charges which were attributable to their efforts.

The compensation system you describe in your letter as outlined above is not a commission wage. As you will note, Labor Code §200 defines wages as all amounts for labor performed "by the standard of time, task, piece, commission basis, or other method of calculation." The Legislature recognized that there is a difference between wages based on "task" or "piece" and that based upon "commission". Under the method you describe, the standard used to ascertain the wages due is either based upon "task"; much like a "piece" rate. For each dialysis procedure (task) completed, the employee is entitled to a twenty-five percent share in the total amount of money received by the employer.

The same system is used to compensate many different types of workers. For every operation of a particular type, the employee is entitled to recover so much money. The only change you have added to the typical compensation system based upon the task performed is that the nurse can not know at the time of performing a dialysis procedure what they are being paid for that procedure. One has to wait until the end of the pay period to find out what the total charges made by the employer were during the pay period to determine what each of the procedures performed during that pay period will be. Nonetheless, the rate is based on the number of procedures performed by the individual; not on the number of procedures which the nurse sold.

A logical extension of the program set out in your letter of September 23, 1986, could be used to deprive many employees of the protections offered by the overtime requirements contained in the IWC Orders simply by denominating the remuneration a commission because it is based upon a percentage of the amount charged by the employer.

Though your letter of April 5, 1988, attempts to distinguish the facts in the Keyes Motors case from the facts set out in your letter of September 23, 1986, I don't really believe you can make a distinction. As the Court in Keyes held, one must be involved in "sales" in order for the compensation scheme to be deemed to constitute "commission wages". Put simply, the nurse performs labor, not sales.

In view of the fact that this specific issue was raised and answered in the Keyes Motors case, the Division could not do as you request in your letter of April 5, 1988, and confirm the opinion contained in the previous letters which were both written before the Keyes Motor decision. The Keyes Motor Court, we believe, has definitively ruled on the subject so as to preclude any extension of "commission wages" beyond those received for sales.

There is one other matter that I should touch on. Your previous letters and the responses all assumed that Order 4-80 was the appropriate Order instead of Order 5-80. While there is certainly a great deal of ambiguity and confusion between the definitional sections in the two Orders, I wonder if that confusion has been alleviated by the language contained in Order 5-80, Section 3(K) adopted pursuant to the petition filed by the California Hospital Association. As you know, the special schedules are available under 3(K) to any:

> "...employer engaged in the operation of a licensed hospital or providing personnel for the operation of a licensed hospital."

It would seem that this clarifying definitional language evidences the IWC's intent to cover a service provider such as your client under Order 5-80. However, since we do not know all the facts about your client we cannot provide a more definitive opinion. In any case, such a determination is not that important because of the Keyes Motors decision which precludes your clients from taking advantage of the special overtime rates for commissioned employees who are not directly engaged in sales.

If you have any further questions, please feel free to contact the undersigned.

Yours truly,

H. Thomas Cadell, Jr.

H. THOMAS CADELL, JR.
Chief Counsel

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