

PENSION RIGHTS CENTER

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VIA FACSIMILE AND CERTIFIED MAIL

September 16, 2003

Administrative Committee for the Widget Industries Inc. Retirement Plan
Attention: Bill Sargent
Mail Stop 49L-01
P.O. Box 655907
Lawless, TX 12345

W.J. Gerhardt
(or acting Plan Administrator of Widget Industries, Inc. Retirement Plan)
Widget Industries, Inc.
4321 West Boulevard
Lawless, TX 12345

Dear Plan Administrator and/or Administrative Committee:

Pursuant to Section 503 of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”), and Department of Labor regulations enacted thereunder, our client, James Spence, Jr. (SSN: 459-62-5895) hereby appeals a denial of benefits (“denial”) under the Widget Industries, Inc. Retirement Plan (the “Plan”). The denial, a refusal to re-calculate his monthly retirement benefit from the Plan, was communicated in a letter from Bill F. Sargent, Director of Human Resources and Administration, dated November 7, 2002. Mr. Spence now timely appeals the plan’s failure to include all appropriate compensation in the calculation of his benefit.

Mr. Spence thanks the Plan for its courteous assistance in providing necessary documents and granting extensions for filing this appeal.

I. Factual Background.

James W. Spence, Jr. began working for the corporate predecessor of Widget Industries, Inc. (“the Company”) in February of 1965, shortly after his 23rd birthday. Mr. Spence worked diligently for the Company for over three decades, working whichever shift the Company asked him to work. Throughout this career, Mr. Spence – also at the request of the Company – consistently worked considerable hours in addition to the normally scheduled workweek. In addition to extended work hours through the week, Mr. Spence was also required to work on weekends and many holidays. While compensated for the majority of this time, Mr. Spence also

worked in excess of 60 hours per workweek on countless occasions throughout his tenure with the company. Per Company policy, hours worked beyond 60 in a seven-day period were uncompensated.¹

On November 28, 2000, Company CEO Gordon L. Williams announced the “Quick Start” retirement incentive to Company employees in a letter. One month later, Mr. Spence met with Company representatives Betty Daniels and Jill Vasquez to discuss the amount of pension benefit he would be entitled to if he chose to retire under the Plan’s “Quickstart Voluntary Retirement” provisions. The estimate for Mr. Spence’s benefit at that time was \$3,563.11 per month (until reduction at age 62 to \$2290.51 per month). This estimate did not incorporate shift bonuses or the overtime that Mr. Spence worked in its salary computation, and the Company representatives acknowledged that it was not accurate. Mr. Spence asked how the estimate was arrived at so that he could make his own calculation. The Company representatives he met with claimed not to know precisely how the estimate was arrived at, but assured Mr. Spence that the estimate would be corrected in a “true-up” in mid-2001. Mr. Spence refused to sign his retirement papers until he knew exactly how much his pension would be.

The identical estimate was presented to James and his wife Wilma during a meeting with Ms. Vasquez in January 2001. Despite the fact that Ms. Vasquez agreed (as in the prior meeting) that the figures were inaccurate, she insisted that Mr. and Mrs. Spence would be happy with the results when Mr. Spence’s benefit was finally computed later that year, and that they could “trust” the Company. Ms. Vasquez dissuaded the Spences from looking at the underlying calculations or examining the information these calculations were based on, and told them that they had to sign retirement papers *that day*. In reliance on Ms. Vasquez’s assurances of eventually correct benefits and statements that the opportunity for the early retirement package was about to be lost, Mr. Spence signed retirement papers at that meeting. Mr. Spence retired from the Company as of February 1, 2001.

In May of 2001, Mr. Spence received a letter from the Company informing him that the benefit estimate he had been shown earlier was correct (\$3,563.11 per month to age 62 and \$2290.51 per month thereafter). As the month progressed, Mr. Spence contacted Mr. B.J. Fernwood, Team Leader of Plan Administration, who also agreed that there were mistakes in the calculations. First in May, and then again in July, Mr. Fernwood recalculated Mr. Spence’s benefit, upon realizing mistakes in the rate of pay to be used and the amount of overtime to be included. Ultimately, in a letter dated July 26, 2001, Mr. Fernwood informed Mr. Spence that his monthly benefit should actually be \$4,228.47 per month until reduction at age 62 to \$2,955.87, and that this correction would be retroactive to his annuity start date.

Thirteen months later, in August of 2002, Mr. and Mrs. Spence were contacted by the Company’s benefits department and told that their benefit had been improperly calculated; that the actual monthly benefit should be \$3,619.35 to age 62 and \$2,346.75 thereafter, and that the Spences had been overpaid by \$11,573.28. The communication informed them of a proposed

¹ See Widget Industries, Inc. Policy No. H0-013 “Overtime for Employees Directed to Work Extended Work Weeks” (page 3, “EWW Compensation, continued”).

“correction” to their monthly benefit from that point forward, reducing the monthly amount to the “correct” pension figure, then further decreasing the monthly amount by \$609.12 in an effort to reclaim the alleged overpayment.

Mr. Spence sought subsequent meetings and communications with Company benefits specialists and other human resources management and staff in an attempt to fully understand what had happened to the benefits he had been assured were accurate, only to receive vague, general explanations in return. Perhaps sensing the distress that no less than five benefit estimates or calculations had caused Mr. Spence, or perhaps in recognition of his nearly thirty years of tireless service to the Company, the Plan ultimately “forgave” the alleged overpayment. However, because no clear explanation of his many retirement calculations was ever presented to him, and also due to the continued discrepancy between the Plan’s amount of compensation used in his pension calculation and his own pay records, Mr. Spence continued to contact Company representatives and protest his benefit amount.

II. Administrative/Procedural Summary.

As noted above, Mr. Spence tentatively agreed to a monthly salaried retirement benefit of \$3,563.11 (electing a 100% contingent annuitant and level income option) in documents dated January 3, 2001. Mr. Spence was notified of the results of the company’s first “true up” in a letter from Judy Stewart, Quick Start Project Team Leader dated May 18, 2001. Mr. Spence’s subsequent phone calls resulted in upward revisions of his monthly benefit by Mr. Fernwood dated May 29, 2001 and July 26, 2001 respectively.

Mr. Spence was contacted by the Company on August 10, 2001 and met with plan representatives Douglas Riley and Janet Livengood on August 20, 2001, when Mr. Spence made direct requests for information to calculate his benefit. In a letter dated September 10, 2001, Charlotte Gray, Benefits Team Leader restated the information conveyed during the prior communications and apprised Mr. Spence of his right to appeal the Plan’s calculation. Mr. Spence exercised this right of formal appeal in a letter to Bill Seargent dated September 13, 2002.

On November 7, 2002, Mr. Seargent tendered the Plan’s denial of Mr. Spence’s request for recalculation. The letter stated that proper application of the Plan’s terms resulted in the “corrected” monthly benefit of \$3,619.35 (until age 62). The letter then forgave the \$11,573.28 overpayment made as a result of the Plan’s calculation error and abandoned attempts to recoup its overpayment through benefit deduction. The letter also apprised Mr. Spence of his opportunity to appeal the denial.

In a letter dated December 18, 2002, Mr. Seargent, on behalf of the Plan, granted a 60-day extension to the appeal deadline in light of Mr. Spence’s increasing chest pains, which ultimately required bypass surgery. James needed additional recovery time and in response to the Spences written request Mr. Seargent, on behalf of the Plan, granted an additional six-month extension by letter dated March 4, 2003. On August 28th, attorney Stephen Macintosh, on behalf of the Plan,

granted a two-week extension to the appeal deadline to allow counsel to review recently provided Plan documents.

III. Discussion.

A. The Plan's calculation of Mr. Spence's pension, by failing to consider all appropriate "Other Includable Pay," constitutes a wrongful denial of benefits.

The Plan has calculated Mr. Spence's pension benefit in such a manner as to exclude that portion of Extended Workweek compensation that falls on a paid holiday. The Plan justifies this practice by labeling this excluded time as "Holiday Straight Time." However, a plain and common sense reading of the unambiguous language of the Plan requires that this form of compensation be included in "Other Includable Pay" as part of Mr. Spence's "Rate of Annual Salary" for Plan Years 1997, 1998, and 2000.

Section 8.04 explains the manner in which Rate of Annual Salary is determined for purposes of calculating participants' pension benefits. Specifically, § 8.04 (a) provides that the Rate of Annual Salary is comprised of a participant's Annual Base Rate of Pay as of December 31² plus Other Includable Pay. The terms Annual Base Rate of Pay and Other Includable Pay are defined in Exhibit B of the Plan by separate listings of those types of compensation included in each, and one list of compensation types specifically excluded from both definitions. For purposes of this Appeal, we need only note that "Holiday" pay is specifically included in the definition of Annual Base Rate of Pay; that Extended Workweek is specifically included in the definition of Other Includable Pay; and that the term "Holiday Straight Time Pay" is not among the list of those compensation types specifically excluded from either Annual Base Rate of Pay or Other Includable Pay, nor is that term present *anywhere* in the plan document. In other words, the plan document disallows the exclusion of any kind of compensation from Other Includable Pay not listed elsewhere in Exhibit B.

The Summary Plan Description cannot be read to contradict the plain meaning of the Plan as described above, as it is virtually silent on the definition of what constitutes Rate of Annual Salary for purposes of pension calculation.^{3 4} If the benefit calculation per the terms of the Plan

² While a close examination of the underlying pension calculation worksheets seem to clarify that Annual Base Rate of Pay as of December 31 means that the Plan looks at the last 40 hours of compensated time in the calendar year, multiplied by 52; and while it appears that this approach to annual compensation tends to benefit those employees who end the year with a higher salary than they began the year with, the average participant in the plan would not be able to glean this calculation methodology from a plain English reading of the plan document. *See* 29 C.F.R. §2520.102-2(a).

³ Further, the term is not even present in the Summary Plan document, which offers only that Final Annual Compensation is used as a multiplier in the pension formula, defining final Average Compensation as an average of the participant's highest three years of compensation of the last 10. Clearly, the average plan participant would not be able to calculate their benefits by examining any combination of the documents to which they have a statutory right to examine. *Id.*

⁴ The Conference Report on ERISA states that a "written plan instrument is to be required in order that every employee may, on examining the plan documents, determine exactly what his rights and obligations are under the plan."

requires the elimination of Extended Workweek time worked on a holiday and otherwise compensated by Holiday Pay, this would have had to be stated with clarity in the Summary Plan Description. Department of Labor regulations provide that “[a]ny description of exceptions, limitations, reductions, and other restrictions of plan benefits shall not be minimized, rendered obscure, or otherwise made to appear unimportant.”⁵

Neither may Widget policies be read to contradict the plain meaning of the Plan with regard to the required inclusion of all Extended Workweek time as part of Other Includable Pay within the pension calculation. The rate of compensation for Extended Workweek time on a paid holiday is referenced in the current Widget Employee Handbook at page 26. It states, “Salaried exempt employees required to work on a holiday will receive straight-time pay for the hours worked, plus holiday pay.” That straight-time worked on a holiday as referenced here relates only to the rate, and not the “nature” of the time is also reinforced by corporate Policy HO-013, where it is clarified that the straight time rate is paid for time worked on paid holidays immediately following the section clarifying the various compensation rates available to salaried exempt employees working Extended Workweek hours for non-holiday time.⁶ Mr. Spence’s Extended Workweek rate of compensation was, in fact, his straight time rate (due to the level of his base salary). While these statements of policy read together might suggest that in certain circumstances, Extended Workweek time worked on a paid holiday might be compensated at a rate different than other Extended Workweek time, it cannot be read to mean that time worked on a holiday is not Extended Workweek time. In fact, Widget policy actually confirms that time worked on midweek paid holidays is work above and beyond the time worked in a normal workweek. Per Widget policy, paid holidays are considered part of a normal, 40-hour workweek.⁷ Thus, the straight time pay received for the actual work on a paid vacation day is over and above time in a normal workweek, and is therefore Extended Workweek time. None of these statements of policy suggest that Extended Workweek time worked on a holiday should not be included in Other Includable Pay as part of the pension calculation under the Plan. Indeed, they confirm that what the Plan has artificially labeled “Holiday Straight Time” is in fact Extended Workweek time.⁸

Mr. Spence’s own experienced understanding of Company practices further substantiates that time worked on a midweek paid holiday, regardless of the rate at which that time was compensated, was in practice and in fact Extended Workweek time, and should be included in the calculation of pension benefits under the Plan. James confirms that salaried exempt employees had to receive pre-approval to work on a midweek paid holiday, just like they did for all Extended Workweek time; that staff and managerial employees referred to time worked on a midweek paid holiday, time above eight hours in a day and time on weekends in excess of 40 in a workweek as Extended Workweek; and that just like time worked on a midweek paid holiday,

⁵ 29 C.F.R. §2520.102-2(b)

⁶ Widget Industries, Inc. Policy No. HO-O13 “Overtime for Employees Directed to Work Extended Workweeks.” That policy’s declared purpose is to “detail[] the procedure for compensating exempt salaried employees who are scheduled and approved to work extended work weeks within the Company.”

⁷ See Widget Industries, Inc. Policy No. HO-O13 “Overtime for Employees Directed to Work Extended Workweeks.” (“Computation and Payment” subheading regarding absences lists paid holiday as ordinary time worked in computing a 40 hour normal workweek).

⁸ Indeed, the first time James Spence experienced the term “Holiday Straight Time” was in post-retirement writings from the Plan, none of which actually defined the term, but merely used it as a label.

and time above eight hours in a day and time on weekends in excess of 40 in a workweek were requested using the same Extended Workweek form.⁹

Finally, even after multiple requests, the Plan has been unable to provide any documentation that supports an interpretation of the Plan that carves Holiday Straight Time – a term that is not present in the plan document, the Summary Plan Description, the Widget Employee Handbook, or the Widget policy on “Overtime for Employees Directed to Work Extended Work Weeks” – out of the clear definition of Other Includable Pay.

Were it the intent of the Plan to eliminate the conceptual “Holiday Straight Time” from the definition of Other Includable Pay, several options would be available. The plan could be amended to specifically define the term Extended Workweek as not inclusive of time worked on midweek paid holidays. Perhaps more importantly, the Plan and other plan-related documents (such as the employee handbook and SPD) could be amended to include the term “Holiday Straight Time,” its definition and its potential reduction effect on the calculation of pension benefits. A simple Plan amendment of this nature would be to ensure that the term “Holiday Straight Time” appears among those items listed in Plan Exhibit B, as specifically excluded from the definitions of Annual Base Rate of Pay and Other Includable Pay.

As the Plan is currently written, an interpretation of Other Includable Pay that does not include all forms of Extended Workweek, including that which is worked on midweek paid holidays, is simply incompatible with the Plan’s patently clear terms. While ERISA provides plan administrators with wide discretionary latitude to interpret their own plan documents, that discretion is not completely unfettered. Indeed, an interpretation that is in contradiction to unambiguous plan language constitutes an arbitrary and capricious abuse of that discretion.¹⁰ As discussed above, the Plan’s present interpretation of Other Includable Pay exceeds the administrator’s discretionary power and, in the case of James Spence, constitutes a wrongful benefit denial.

B. A. Defining compensable time worked on mid-week paid holidays as something other than Extended Workweek time fails to consider all appropriate “Other Includable Pay” in the accurate calculation of pension benefits, is in contravention of the Plan’s clear terms and constitutes a breach of fiduciary duty.

ERISA § 404(a)(1)(D) requires that plan fiduciaries act in accordance with plan documents, insofar as they are in compliance with governing law. As discussed above, failure to include time worked on midweek paid holidays as Extended Workweek time within the larger category of Other Includable Pay is a contradiction of the Plan’s unambiguous language. Such a failure to comply with the clearly written terms of the Plan constitutes a breach of fiduciary duty.

⁹ See Declaration of James W. Spence, Jr.

¹⁰ “[I]f an administrator interprets an ERISA plan in a manner that directly contradicts the plain meaning of the plan language, the administrator has abused his discretion even if there is neither evidence of bad faith nor of a violation of any relevant administrative regulations.” Gosselink v. AT&T, Inc., 272 F. 2d 722, 727 (5th Cir., 2001).

IV – Remedy.

The Plan *must* include the following additional amounts of “Other Includible Pay” (formerly defined by the Plan as “Holiday Straight Time”) in each of the following Plan Years:¹¹

1997: \$1,148.98	This amount includes 12/96 payments made in 1/97 because Plan § 8.04 states that the Rate of Annual Salary includes all Other Includible Pay “paid <i>during</i> the year for which ‘Rate of Annual Salary’ is being determined.”
1998: \$442.09	This amount includes 12/97 payments made in 1/98 for the reasons stated above.
2000: \$252.40	

The inclusion of the above Extended Workweek figures in Other Includable Pay yields the following Rates of Annual Salary:

1997: \$83,149.38
1998: \$83,346.63
2000: \$84,173.30

These years are averaged into a *corrected* Final Average Salary of \$83,556.44, which results in a revised monthly benefit of \$3,643.29, or an increase of \$23.94 to Mr. Spence’s present monthly pension benefit. Our calculations of these amounts match the Plan’s projected figures included in the spreadsheet found in the Plan’s August 28th mailing.

For the reasons stated above, we respectfully submit that the Plan must increase Mr. Spence’s monthly pension benefit by \$23.94.

Sincerely,

John Hotz
Deputy Director

cc: Mr. James Spence

¹¹ The amount of Mr. Spence’s “Holiday Straight Time Pay” during Mr. Spence’s three highest pertinent Plan Years was documented in a letter from Bill Seargent to Mr. Spence dated November 7, 2002. This “additional pay” was also confirmed in a spreadsheet included in the Plan mailing of August 28, 2003, to demonstrate the difference between Mr. Spence’s current pension calculation, and the amount that James would be due if “Holiday Straight Time were included in the calculation.