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SUPREME COURT OF THE STATE OF WASHINGTON

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

Case No. 12-2-02275

JOHN JENSEN, a single person,
Appellant/Plaintiff,

v.

LINCOLN COUNTY, a political subdivision of
the State of Washington,

Respondents/Defendants.

RESPONDENT/DEFENDANT LINCOLN COUNTY'S ANSWER TO JOHN JENSEN'S PETITION FOR REVIEW

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ORIGINAL

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I. INTRODUCTION

The Court of Appeals correctly applied Washington law and upheld the trial court's conclusion that Petitioner John Jensen's time spent commuting in a vehicle made available by Lincoln County pursuant to a collective bargaining agreement from a county shop to a work-site does not constitute compensable work time. Noting that Mr. Jensen was not required to travel in the county-provided vehicle, and that his voluntary travel in the vehicle provided no benefit to Lincoln County, the Court of Appeals correctly held that Mr. Jensen was not "on duty" or in his "prescribed place of work" while traveling to job sites. The Court of Appeals' decision in that regard is entirely consistent with this Court's holding in *Stevens v. Brink's Home Sec., Inc.*, 162 Wash. 2d 42, 169 P.3d 473 (2007) and Division II's holding *Anderson v. Dept. of Social and Health Servs.*, 115 Wn.App. 452, 63 P.3d 134 (2003). Since the unpublished Court of Appeals' opinion in this matter is not in conflict with existing precedent and does not involve any unresolved issue of substantial public importance, discretionary review should not be granted.

II. ISSUES PRESENTED FOR REVIEW

Lincoln County acknowledges the issues that Mr. Jensen has presented for review, but believes they are more appropriately formulated as follows:

1. Since Mr. Jensen's use of the county-provided vehicle is wholly optional, is his situation distinguishable from the employees in *Stevens v. Brink's Home Security, Inc.*, making discretionary review under RAP 13.4(b)(1) inappropriate?
2. Since Mr. Jensen's optional use of the county-provided vehicle provides no benefit to Lincoln County, is his situation distinguishable from the employees in *Stevens v. Brink's Home Security, Inc.*, making discretionary review under RAP 13.4(b)(1) inappropriate?
3. Since Mr. Jensen is not required to travel to any job site in the county-provided vehicle, and since Mr. Jensen's use of the county-provided vehicle provides no benefit to Lincoln County, should Mr. Jensen be considered "on duty" at Lincoln County's "prescribed place of work" when he voluntarily chooses to travel to the worksite in the county-provided vehicle?

4. Since this Court has already answered the question of law applied by the Court of Appeals in this case, is discretionary review under RAP 13.4(b)(4) inappropriate?

III. STATEMENT OF THE CASE

A. Factual Background

Petitioner John Jensen is employed on a Lincoln County rock-crushing crew. CP 49. The rock-crushing crew utilizes a portable crusher, which has been set up at a variety of locations during Mr. Jensen's employment with Lincoln County. CP 192. Mr. Jensen is also part of the Local #1254 and Washington State Council of County and City Employees of the American Federation of State, County and Municipal Employees, AFL-CIO ("Local 1254"). CP 177. The AFL-CIO entered into a collective bargaining agreement (CBA) with Lincoln County on behalf of Mr. Jensen and other union members. CP 178. The pay schedule attached to the CBA specifies that "Crusher" classification and "Crusher Foreman" classification will entitle employees to an additional $150.00 per month for "travel allowance." CP 148. The CBA provided that the County would furnish transportation to and from the work site. CP 134. The requirement that Lincoln County furnish transportation to and from the work site was negotiated by the union so that crushing crew members did not have to park

their vehicles next to the crushing plant, where the vehicles would collect dust and debris all day long. CP 109. There is no requirement in the CBA or elsewhere that any crushing crew member utilize the county-provided transportation. Appendix A to Appellant's Brief at 2.

In his deposition, Mr. Jensen testified that it was his practice to ride in the county-owned vehicle to the job site. CP 173-74. Mr. Jensen would drive his own vehicle to the county shop in the morning, whereupon he would visit with the mechanics until the other members of the crusher crew would arrive. CP 175. Once the entire crew was present, he and the other crew members would take the county-owned vehicle to the job site. CP 174.The crew member who would drive was "whoever got behind the wheel." CP 174. During the drive to the mobile crushing sites, Mr. Jensen engaged in personal activities and was not required to perform any work. CP 175. Lincoln County did not impose any rules as to allowed activities in the county-owned vehicle except for prohibiting alcohol consumption and towing personal property with the vehicle. CP 175.

Mr. Jensen acknowledged that other individuals on the crusher crew would drive their personal vehicles to and from the mobile crusher sites. CP 172-74. Mr. Jensen also admitted that no individual from either Lincoln County or the AFL-CIO told him the CBA required him to pick up the county-owned vehicle and drive it to the job sites. CP 178. Additionally, no

individual has ever told him he was required to travel to the mobile crushing sites in the county-owned vehicle, nor has any individual informed Mr. Jensen he was not allowed to drive his personal vehicle to a job site. CP 176-77. Indeed, and perhaps most importantly, Mr. Jensen testified that he drove his own personal vehicle to job sites in the past. CP 171. Essentially, the county-owned vehicle was available for the crusher crew for convenience, but none of the crew members were required to drive the vehicle to the mobile crushing sites.

B. Procedural Background

Mr. Jensen first filed a Complaint for Damages on June 12, 2012, alleging that Lincoln County had failed to compensate Mr. Jensen and others for work in excess of 40 hours a week in violation of RCW 49.46 *et seq*. CP 3-8. Lincoln County filed an Answer and Affirmative Defenses on July 11, 2012. CP 29-33. In February of 2013, Mr. Jensen filed a motion seeking leave to amend his complaint. CP 78. On March 14, 2013, the trial court granted Mr. Jensen's motion. CP 92-93. Mr. Jensen then filed an Amended Complaint that asserted claims against Lincoln County on his own behalf. CP 101.

Subsequently, Mr. Jensen and Lincoln County both filed motions seeking summary judgment. CP 243; CP 179. In a memorandum supporting its motion, Lincoln County asserted that Mr. Jensen was not entitled to

wages for the time he spends traveling to and from the rock-crushing sites because he was not "on duty" or at his "prescribed work place" during the commute. CP 149. Mr. Jensen asserted that he was entitled to compensation for time spent in the county-owned vehicle as a matter of law, and requested that the trial court issue an order finding Lincoln County liable for violations of the Washington Minimum Wage Act. CP 221.

Finding that no material issues of fact existed, the trial court granted summary judgment for Lincoln County and denied Mr. Jensen's motion. CP 292-93. Mr. Jensen's claims against Lincoln County were dismissed with prejudice. CP 293. Mr. Jensen then filed a Notice of Appeal on May 14, 2014. CP 296.

On appeal, Division III of the Court of Appeals upheld the trial court's order. Appendix A to Appellant's Brief at 1. On June 17, 2014, the Court of Appeals issued an opinion concluding that Mr. Jensen was not "on duty" during his daily commute, and that the county-provided SUV was not part of Mr. Jensen's "prescribed place of work." Appendix to Appellant's Brief A at 1, 7. Thus, the Court of Appeals held that the time that Mr. Jensen spent commuting was not within the definition of "hours worked." Mr. Jensen now petitions this Court for review of the Court of Appeals' decision.

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

This Court should deny review because the Court of Appeals decision is not in conflict with existing law, and existing law on the subject adequately addresses the public's needs.

A. The Court of Appeals Ruling Does Not Conflict With Any Opinion of This Court.

Mr. Jensen argues that this Court should accept discretionary review in this matter under RAP 13.4(b)(1), which provides:

> A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court.

RAP 13.4(b)(1). Mr. Jensen contends that the Court of Appeals' decision is in conflict with this Court's holding in *Stevens v. Brink's Home Sec., Inc.* However, Mr. Jensen's argument in that regard is based upon a faulty factual premises and upon a misapplication of *Stevens v. Brink's Home Sec., Inc.*

In attempting to establish that he was "on duty" at Lincoln County's "prescribed work place" when he chose to travel to work sites via the county-provided vehicle, Mr. Jensen incorrectly asserts that he was "required" to "commute to the County shop prior to each shift." Appellant's

Brief, pg. 4.[1] Contrary to Mr. Jensen's assertion in that regard, the record establishes that Mr. Jensen's use of the county-owned vehicle was not mandatory, and that Mr. Jensen had the unfettered option to drive to the work site in his own vehicle, an option that he in fact chose on occasion. The underlying and dependent premise of Mr. Jensen's position is therefore faulty.

Relying upon this faulty premise, Mr. Jensen argues that pursuant to *Stevens v. Brink's Home Security, Inc.*, each time an employee travels to an employer's office and drives an employer vehicle the employee is performing "work" as contemplated in WAC 296-126-002(8). However, this reading of *Stevens v. Brink's Home Sec., Inc.* is overbroad. This Court noted in *Stevens v. Brink's Home Sec., Inc.* that since the Legislature has not defined hours worked or addressed the compensability of travel time, it "must examine the undisputed facts and assess whether technicians are 'on duty' at the 'employer's premises' or 'prescribed work place' within the meaning of WAC 296-126-002(8)." *Stevens,* 162 Wn.2d at 47.

Accordingly, this Court concluded in *Stevens v. Brink's Home Sec., Inc.* that the Brink's Home Security employees were "on duty" when

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[1] *See also*, Appellant's Brief, pg. 10, arguing that the Court of Appeals "ignored Stevens' guidance on how claims of employees who must go to the employer's place of work and drive the employer's vehicle to a jobsite should be treated."

driving employer-provided vehicles because the drivers took the vehicles home every day, they received assignments from home, were always on call when driving and because Brink's had detailed policies limiting the use of the vehicles. *Stevens,* 162 Wn. 2d at 45-49. Additionally, this Court held that the vehicles constituted the employee's "prescribed work place" because driving the vehicles was an integral part of the employer's business. *Id.* at 49.

Here, the facts are not analogous. As noted above, Mr. Jensen's arguments are premised upon the assertion that the County requires employees to commute to the shop prior to each shift or that members must travel to the shop prior to shifts. *See,* Appellant's Petition at 3, 4. However, the facts simply do not support the conclusion that traveling in the county-provided vehicle was a requirement of the job. Some crew members continue to drive their personal vehicles to the crusher site. Appendix A to Appellant's Brief at 2. Driving the vehicle is not a requirement of employment, and the fact that the County is contractually obligated to provide the vehicle does not translate into any requirement that any employee ride in that vehicle. To the contrary, some crew members still drive their personal vehicles to the crusher site, and Mr. Jensen himself has on occasion elected to drive his own vehicle to a jobsite. Appendix to Appellant's Brief A at 2. The Court of Appeals' opinion also notes that there

are not "any policies or rules requiring the crew to use the SUV or meet at the shop in the morning." Appendix A to Appellant's Brief at 2. The facts simply do not support the conclusion that driving the vehicle was a job requirement. As such, it cannot be considered to be an integral part of Mr. Jensen's work. Rather, as the Court of Appeals correctly noted, the use of the vehicle benefits the employees – not Lincoln County. Appendix A to Appellant's Brief at 6.

As a result, the present case is not analogous to the "technician pick[ing] up a company truck at the office" in order to travel between jobs, as discussed in Justice Madsen's concurrence in *Stevens v. Brink's Home Sec., Inc.*, In *Stevens v. Brink's Home Sec., Inc.*, the technicians spent a substantial amount of time "driving in company trucks from job assignments to job assignments throughout the day." *Id.* In contrast, while Mr. Jensen did occasionally pick up tools at the shop, he was not required to do so. In addition, the Lincoln County crew works at a designated job site all day. Appendix A to Appellant's Brief at 1, 2. Unlike in *Stevens v. Brink's Home Sec., Inc.*, where the drive time benefits the employer because the employees are traveling between jobs, the county-provided vehicle in this case is provided to benefit the employees. Appendix A to Appellant's Brief at 6. Mr. Jensen's real dispute is regarding the facts, not the interpretation of the law.

While Mr. Jensen contends that the Court of Appeals' decision is directly in conflict with *Stevens v. Brink's Home Sec., Inc.*, the truth is that the ruling was not inconsistent with *Stevens v. Brink's Home Sec., Inc.* In the present case, Mr. Jensen was simply a normal commuter not performing any work on his way to or from any job site. Accordingly, the Court of Appeals correctly concluded that Mr. Jensen was neither "on duty" nor at a "prescribed work place" during his travel time to and from the mobile crushing sites. Contrary to Mr. Jensen's assertions, *Stevens v. Brink's Home Sec., Inc.* does not support the proposition that Mr. Jensen is entitled to compensation for time he voluntarily spent in a county-owned vehicle

As noted by the Court of Appeals, *Anderson v. Dept. of Social and Health Servs.,* is more on point. Appendix A to Appellant's Brief at 6. In that case, the plaintiffs were DSHS employees who worked at the Special Commitment Center on McNeil Island. *Id.* at 454. The Special Commitment Center was operated by DSHS while McNeil Island was operated by the Department of Corrections. *Id.* In order to reach McNeil Island, the plaintiffs had to commute by riding a DOC ferry boat from Steilacoom. *Id.* Essentially, the plaintiffs were utilizing their employer, the State of Washington's, vehicle to get to and from the job site. The plaintiffs' work shifts conformed to the DOC ferry schedule. *Id.* The ferry ride took approximately 20 minutes each way. *Id.* While riding in the ferry, the

"plaintiffs engage[d] in various personal activities, such as reading, conversing, knitting, playing cards, playing hand-held video games, listening to CD players and radios, and napping. They perform[ed] no work during the passage, but they assert they are subject to discipline." *Anderson,* 115 Wn.App. at 454. The Court of Appeals correctly determined that the facts in Mr. Jensen's case were more analogous to *Anderson v. Dept. of Social and Health Servs.* than to *Stevens v. Brink's Home Sec., Inc.*, and ruled accordingly. Appendix A to Appellant's Brief at 6, 7.

Contrary to Mr. Jensen's argument, the Court of Appeals' decision is not appropriate for review under RAP 13.4(b)(1), as it does not conflict with this Court's decision in *Stevens v. Brink's Home Sec., Inc.* Since the decision is not in conflict with *Stevens v. Brink's Home Sec., Inc.*, it is not suitable for review under RAP 13.4(b)(1).

B. The Petition Does Not Involve an Unresolved Issue of Substantial Public Interest.

Mr. Jensen also argues that review is appropriate under RAP 13.4(b)(4), which provides the following.

> A petition for review will be accepted by the Supreme Court only:
> . . .
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b)(4). Mr. Jensen proposes that *Matter of Det. of A.S.*, 91 Wash. App. 146, 155, 955 P.2d 836, 841 (1998), provides the test for when

there is a substantial public interest.[2] Under this test, the factors to be considered are "(i) whether the issue is of a public or private nature; (ii) whether an authoritative determination is desirable to provide future guidance to public officers; and (iii) whether the issue is likely to recur." *Matter of Det. of A.S.*, 91 Wash. App. 146, 155, 955 P.2d 836, 841 (1998). Mr. Jensen has not established that any of the factors are met.

As a preliminary matter, the plain language of the rule speaks of an issue of public interest that should be determined, meaning that it has not yet been determined. That is not the case in this matter. Lincoln County agrees that in the abstract, the issue of employee compensation is a topic of public interest. However, this case presents no issue of *unresolved* public interest. To the contrary, the issue Mr. Jensen asks this Court to review has already been addressed and resolved in *Stevens v. Brink's Home Sec., Inc.* and *Anderson v. Dept. of Social and Health Servs.* Mr. Jensen is simply not satisfied with the application of the law to his facts.

Additionally, while wages may be an issue of public interest, Mr. Jensen has not established how his particular case is a public issue. The

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[2] This test is typically used to decide "whether a matter, though moot, is of continuing and substantial public interest and thus reviewable." *Hart v. Dep't of Soc. & Health Servs.*, 111 Wash. 2d 445, 448, 759 P.2d 1206, 1208 (1988).

issue in his case has already been addressed by this Court and the Court of Appeals in two published opinions. It would not serve the public interest to review a petition on issues that have already been decided by this Court.

Along similar lines, Mr. Jensen has not demonstrated that there is any outstanding ambiguity in this situation, and as such there is no need for additional authoritative guidance from the Court on the issues that Mr. Jensen raises.

Mr. Jensen is correct that a court must evaluate the extent of an employer's control when evaluating if an employee is "on duty." In *Stevens v. Brink's Home Sec., Inc.*, this Court noted that "as in *Anderson*, we evaluate the extent to which [employer] restricts [employees] personal activities and controls [employees] time to determine whether [employees] are 'on duty.'" *Stevens* 162 Wash. 2d at 48. However, Mr. Jensen does not establish how review of this case would provide a bright line rule. To the contrary, Mr. Jensen's real disagreement appears to be where his case falls on the spectrum between *Anderson v. Dept. of Social and Health Servs.* and *Stevens v. Brink's Home Sec., Inc.* Mr. Jensen believes that his case is more in line with *Stevens v. Brink's Home Sec., Inc.* However, Mr. Jensen's argument in that regard is wrongfully premised upon the assertion that he was "required" to travel to the county shop and drive in the county-provided vehicle. The Court of Appeals correctly noted that Mr. Jensen's use of the

vehicle was optional/voluntary, which made his case more akin to *Anderson v. Dept. of Social and Health Servs.*

Mr. Jensen also fails to establish how accepting his petition for review would resolve any outstanding issues that may be the subject of litigation. Mr. Jensen argues that if this opinion is not reviewed, "more employees will be forced to drive their employers' vehicles from the office to the jobsite without pay." Appellant's Petition for Review at 14. This argument ignores the fact that the Court of Appeals' opinion considered the fact that "although the county provides the crew with an SUV, some crew members still drive their personal vehicles to the crusher site." Appendix A to Appellant's Brief at 2. The Court of Appeals' decision does not provide any basis for employers to force their employees to drive vehicles unpaid.

Additionally, this opinion is unpublished, and as such may not be cited as an authority. GR 14.1; *see also, Johnson v. Allstate Ins. Co.*, 126 Wash. App. 510, 519, 108 P.3d 1273, 1278 (2005) ("We long ago held that unpublished opinions are not part of Washington's common law. We do not consider unpublished opinions in the Court of Appeals, and they should not be considered in the trial court.")). While unpublished opinions may occasionally have persuasive value, this Court and Division II has already provided adequate guidance on this topic with prior published opinions in *Stevens v. Brink's Home Sec., Inc.* and *Anderson v. Dept. of Social and*

Health Servs. Since there is already guidance on this topic in published opinions, the unpublished opinion will likely have less persuasive value.

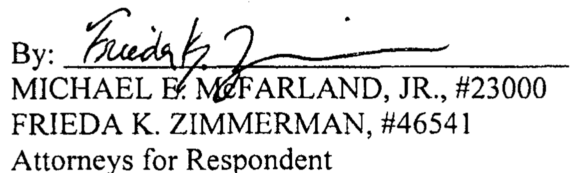
Further, "[i]n determining whether the opinion will be published in the Washington Appellate Reports, the panel will" consider "[w]hether a decision is of general public interest or importance." RAP 12.3. Since the opinion was not published, the panel likely did not consider the decision to be one of general public interest. Overall, this case does not present an issue of substantial public importance and review should be denied.

V. CONCLUSION

The decision of the Court of Appeals in this matter is based on a clear application of this Court's opinion in *Stevens v. Brink's Home Sec., Inc.* The Court should deny review.

RESPECTFULLY SUBMITTED this 2nd day of September, 2014.

EVANS, CRAVEN & LACKIE, P.S.



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I hereby certify that on the 2nd day of September, 2014, a true and correct copy of the foregoing document was served by the method indicated below to the following parties:

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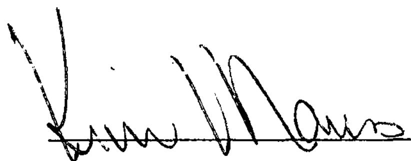

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Dear Mr. Carpenter:

Pursuant to your letter dated July 31, 2014, attached for filing is Lincoln County's Answer to Jensen's Petition for Review. Thank you.

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