No. 90873-7

IN THE
SUPREME COURT OF THE STATE OF WASHINGTON

Court of Appeals No. 71060-5-1

STEPHEN MYNATT AND ANITA ELAINE MYNATT,
ON THEIR OWN BEHALF AND ON BEHALF OF
ALL OTHERS SIMILARLY SITUATED,

Appellants/Cross-Respondents,

v.

GORDON TRUCKING, INC.,
A WASHINGTON CORPORATION,

Respondent/Cross-Appellant.

ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

The evidence in the trial court was uniform. Since 1998, Gordon Trucking, Inc. ("GTI") has used a piece-rate pay plan that included a 20 percent factor for overtime from the first mile. After this Court's decision in *Bostain*,[1] GTI submitted its pay plan to the Washington Department of Labor and Industries (L&I) requesting a determination that the plan contained the reasonable equivalent of overtime. L&I issued its determination that the pay plan contained the reasonable equivalent of overtime.

That determination was based in part on L&I's review of amounts Petitioners were paid. L&I's analysis demonstrated that Petitioners were paid at least one and one-half times their regular rate of pay for every hour over 40. Petitioners did not produce any basis on which to demonstrate that this determination was "willful and unreasoning, and take without regard to attending facts or circumstances." *Schneider v. Snyder's Foods, Inc.*, 116 Wn. App. 706, 716, 66 P.2d 640, *rev. denied*, 150 Wn.2d 1012 (2003).

The Petition for Review offers nothing to the contrary. The Petition should be denied.

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[1] *Bostain v. Food Exp., Inc.*, 159 Wn.2d 700, 153 P.3d 846 (2007).

STATEMENT OF THE CASE

In a memo, effective January 1998, GTI explained that its compensation plan for "mileage runs" contained a 20% factor for overtime. Clerk's Papers ("CP") at 152. Specifically, the memo stated, the "combination of mileage pay and accessorial pay rates include a 20% factor for anticipated overtime up to a workweek of 65 hours." *Id.* The memo was entitled, "Description of Driver Compensation for work performed within the state of Washington." *Id.* GTI's Director of Payroll, Susan Geving, submitted an affidavit confirming that, since at least 1994, GTI has not differentiated between mileage-based work performed within Washington State and interstate work. CP at 2397. GTI's COO, Steve Gordon, confirmed the same in his deposition. When asked why he believed GTI paid all of its drivers, including those who worked outside of Washington, the reasonable equivalent of overtime, he responded, "Because our drivers are generally paid the same all across the network." CP at 2389. Petitioners conceded, by failing to adduce any evidence to the contrary, that they were paid the same for their interstate and intrastate work.

On January 16, 2009, GTI submitted a request for a determination that its pay plans, including the PLUSS Plan under which the Petitioners were paid, compensated Washington-based drivers the reasonable equivalent of overtime. CP 146-313. GTI made the request pursuant to WAC 296-128-012(3) and L&I's Administrative Policy ES.A.8.3, which was amended after this Court clarified in *Bostain*, that State overtime laws

applied to Washington based truck drivers traveling in both intrastate and interstate commerce. GTI's submission included data on 30 randomly selected Washington-based drivers, including, serendipitously, Petitioners. CP at 146-384; 1932-1934.

In accordance with L&I's E.S.A. 8.3, GTI used the rates it paid "local drivers who are paid hourly under traditional overtime," with the same experience as Petitioners as a basis for comparing their compensation under the PLUSS Plan to their hourly counterparts. GTI advised L&I that it paid hourly drivers with the equivalent level of experience as Anita and Steven Mynatt rates of $13.75 and $14.25, respectively. CP at 254. By comparison, the GTI PLUSS Plan paid the Mynatts an effective regular rate of between $20.41 and $26.55 per hour for the first 40 hours of work. CP at 1249-1250. The data also demonstrated that the PLUSS Plan paid the Mynatts at least 1.5 their regular rate for every week in the 26-week sample in which they worked more than 40 hours. *Id.* Petitioners introduced no evidence to contradict this data.

L&I determined that the pay plan under which Petitioners were paid contained the reasonable equivalent of overtime. CP 142-145. While not preclusive of Petitioners' claims, Washington has recognized that L&I has the "specialized expertise" to determine "whether a compensation scheme constitutes the reasonable equivalent of statutory overtime." *Schneider,* 116 Wn. App. At 716-17. As a result, Washington courts will only overturn an L&I determination if it was unsupported by the evidence and

an implausible interpretation of the statute. *Id.* at 716. "Where there is room for two opinions, action is not arbitrary and capricious even though one may believe an erroneous conclusion has been reached." *Id.* at 717 (citations omitted).

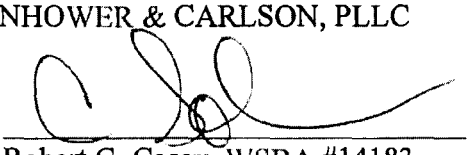
The trial court concluded that there was no basis on which to overturn L&I's determination, that Petitioners had not raised a genuine issue of material fact regarding whether they were paid the reasonable equivalent of overtime and granted GTI summary judgment on Petitioners' overtime and derivative claims. CP 3549-3552. The court of appeals agreed and found no error.

CONCLUSION

The decisions of the trial court and court of appeals were correct. Petitioners have advanced no basis on which to conclude that L&I's determination that they received the reasonable equivalent of overtime was arbitrary and capricious. Petitioners have also failed to proffer any evidence that would create a genuine issue of material fact regarding whether they were paid the reasonable equivalent of overtime. This Court should decline Petitioners' request for review.

RESPECTFULLY SUBMITTED this 4th day of November, 2014.

EISENHOWER & CARLSON, PLLC

By: 

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DECLARATION OF SERVICE

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DATED this 4th day of November, 2014.

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Case Name: Mynatt v. Gordon Trucking, Inc.

Case No.: 90873-7

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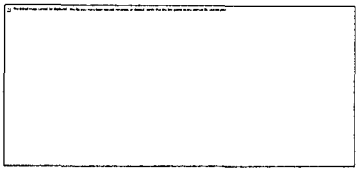

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