

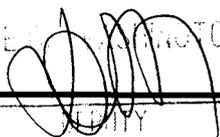
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STATE OF WASHINGTON

NO. 34352-5-II

BY



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COURT OF APPEALS FOR DIVISION II  
STATE OF WASHINGTON

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STATE OF WASHINGTON, DEPARTMENT OF TRANSPORTATION,

Appellant,

v.

DAVIS, et al.,

Respondents.

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REPLY BRIEF OF APPELLANT

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## I. INTRODUCTION

Plaintiffs' argument is essentially that the Washington Minimum Wage Act (MWA) should apply to them even though the legislature expressly excluded them from the MWA. By grafting MWA concepts onto the wage recovery statute, RCW 49.52, plaintiffs attempt to convert RCW 49.52 from a procedural mechanism - from a remedy for a right found elsewhere in statute, ordinance or contract - to a substantive source of a right to wages in and of itself, thereby subverting the parties' collective bargaining agreement and the legislature's obvious intent in exempting plaintiffs from the MWA to defer to the statutory scheme in RCW 47.64.

## II. ARGUMENT

### A. **The Court Must Give Effect To The MWA Exemption And To The Legislative Mandate To Collectively Bargain Wages And Hours.**

Plaintiffs are not covered by the MWA. RCW 49.46.010(5)(m). Thus, there is no statutory requirement that they be paid any compensation whatsoever for any work they may perform for Washington State Ferries (WSF). Instead of the protections of the MWA, plaintiffs are protected by RCW 47.64. RCW 47.64 governs the employment relationship of WSF and its employees, and it is to this statute that the Court must look with respect to questions about wages, hours, or working conditions. By

explicitly exempting plaintiffs from the MWA, the legislature was deferring to a separate statutory scheme that regulates the plaintiffs' employment.

RCW 47.64 requires WSF and the employee organizations to bargain wages, hours of work, working conditions, insurance, health care benefits, and other matters mutually agreed upon. RCW 47.64.120. The legislature created an administrative body, the Marine Employees' Commission (MEC), to oversee the employment relationship and the bargaining process. RCW 47.64.280.

The exemption from the MWA plus the legislative mandate to collectively bargain wages and hours of work means that the collective bargaining process controls wages and hours of work. The parties define what work is and what work is compensable, as well as the amount of compensation. Any activity undertaken by plaintiffs by industry custom and practice that is not defined as compensable work in the collective bargaining agreement is, consequently, not compensable. Plaintiffs conduct a watch turnover according to maritime industry custom and practice. By custom and practice, watch turnover is not compensable. The parties have not, in the collective bargaining process, modified this industry custom and practice by defining it as compensable work and agreeing to a certain amount of compensation for it. Accordingly, watch

turnover is not compensable work. This Court should not allow plaintiffs to do an end run around the MWA exemption and RCW 47.64 by superimposing MWA concepts onto the parties' negotiated employment relationship.

**B. Because Plaintiffs Are Exempt From The MWA, The Critical Inquiry Regarding What Constitutes Compensable Work Must Be Answered By Reference To The Parties' Collective Bargaining Agreement, Not By Reference To Department Of Labor And Industries Regulations.**

Plaintiffs argue that watch turnover is "work" and is therefore compensable. However, whether watch turnover is work is not the relevant inquiry. The question for the Court is whether it is compensable work.

That such activity is "work" as a threshold matter does not mean without more that the activity is necessarily compensable.

*Alvarez v. IBP, Inc.*, 339 F.3d 894, 902 (9th Cir. 2003), *aff'd*, *IBP, Inc. v. Alvarez*, 126 S. Ct. 514, 163 L. Ed. 2d 288 (2005). In light of the MWA exemption and RCW 47.64, the question of what is compensable work is answered by reference to the parties' negotiated agreement. How have the parties defined the work and the compensation for it? Thus, while from a layperson's perspective, watch turnover may be "work," legally it is only compensable if the parties have agreed that it is compensable. The parties have agreed that it is not compensable because they have not disturbed the

longstanding industry custom and practice of noncompensability by defining it in the collective bargaining agreement as work for which compensation is paid.

Regulations adopted by the Department of Labor and Industries (DLI) are irrelevant. To the extent DLI regulations interpret the MWA, they are inapplicable to MWA-exempt employees. To the extent DLI regulations interpret the Industrial Welfare Act (IWA), they are inapplicable because they conflict with RCW 47.64. *See* RCW 49.12.005(3); WAC 296-126-001.<sup>1</sup>

**C. Plaintiffs Take The State Supreme Court’s Decisions In *SPEEA* And *Wingert* Out Of Context, But, Read Properly, These Decisions Do Not Support Their Claim.**

**1. Introduction.**

Plaintiffs argue essentially that the state Supreme Court in *Seattle Professional Engineering Employees Ass’n (SPEEA) v. Boeing*, 139 Wn.2d 824, 991 P.2d 1126 (2000), and *Wingert v. Yellow Freight Systems*, 146 Wn.2d 841, 50 P.3d 256 (2002), overrode the legislature’s

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<sup>1</sup> Plaintiffs claim the only source to define work is Department of Labor and Industries (DLI) regulations. However, they cite no authority for this proposition. The fact is that no DLI regulations actually define work.

Plaintiffs also rely on DLI Administrative Policy ES.C.2. DLI’s administrative policies are not adopted according to rulemaking procedures. Thus, they are advisory statements that have no legal or regulatory effect. *Washington Education Ass’n v. Washington State Public Disclosure Comm’n*, 150 Wn.2d 612, 619, 80 P.3d 608 (2003). “We have been vigilant in insisting that administrative agencies treat policies of general applicability as rules and comply with necessary APA procedures.” *McGee Guest Home, Inc. v. Dep’t of Social and Health Services*, 142 Wn.2d 316, 322, 12 P.3d 144 (2000).

intent in exempting them from the MWA and in adopting RCW 47.64 to govern their employment. Plaintiffs' procrustean contortion of *SPEEA* and *Wingert* to fit their theory is disingenuous at best.

**2. *SPEEA* is factually unique and, therefore, limited in scope and application.**

The plaintiffs in *SPEEA* attended pre-employment orientation sessions prior to their actual start date of employment. Boeing conceded that no compensation was provided to the employees for this time. The Court held that they were entitled to be paid the statutory minimum wage for this time.

In contrast, the Court also decided the case of *Inniss v. Tandy Corp.*, 141 Wn.2d 517, 7 P.3d 807 (2000), the same year. In *Inniss*, the Court approved the use of a fluctuating workweek method for purposes of determining an employee's regular rate of pay under the MWA. *Inniss* relied on federal regulations under the Fair Labor Standards Act (FLSA), particularly 29 C.F.R. 778.114. Under federal regulations, where an employee is paid a fixed salary for all hours of work in a pay period, the regular hourly rate derived from that fixed salary will fluctuate depending upon the number of hours worked. This is permitted by FLSA as long as the hourly rate does not fall below the statutory minimum wage for every hour worked. Thus, under *Inniss*, for employees compensated on a basis

other than a true hourly basis, the MWA is only violated if the amount of salary divided by the total number of hours worked is less than the statutory minimum wage.<sup>2</sup>

In *SPEEA*, therefore, the MWA-covered employees must have been compensated on an hourly basis, and not on a weekly, bimonthly, or other basis. Otherwise, just as in *Inniss*, the Court would have factored in the hours for the orientation into the total hours worked in the pay period and calculated the hourly rate by dividing the salary by the hours. Only if, by factoring in the additional hours, the hourly rate fell below the statutory minimum wage for that pay period would Boeing have been in violation of the MWA.

The *SPEEA* Court was attempting to remedy a unique factual situation and should be limited to its particular facts. As demonstrated by *Inniss*, a slightly different factual situation would have led to a different outcome. *SPEEA*, therefore, should not be read as establishing some broad principle of general applicability.

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<sup>2</sup> See also DLI Administrative Policy ES.A.3 (in order to determine whether an employee has been paid the statutory minimum hourly wage when the employee is compensated on other than an hourly basis, the employee's total earnings are divided the total number of hours worked for that period, and the earnings must equal minimum wage for each hour worked.)

3. **The discussion in *SPEEA* about RCW 49.52 related to why the MWA-covered employees' remedy was limited to the statutory minimum wage.**

The Court in *SPEEA* noted, as have Washington courts in numerous cases, that RCW 49.46, RCW 49.48 and RCW 49.52 make up a comprehensive statutory scheme. That fact does not mean that, with respect to MWA-exempt employees, the MWA therefore trumps any other source of wages or supersedes the collective bargaining agreement as to the definition of work, hours, and wages. These statutes are a comprehensive scheme to ensure the payment of wages due to employees, but the source of the wages owed is still a statute, ordinance, or contract.

The import of this statutory scheme is that in circumstances where an employer paid no compensation whatsoever to an employee, the employee, **if not otherwise exempt under the WMWA**, could recover wages representing the difference between the statutory minimum wage and what was actually paid. RCW 49.46.090(1). In addition, the employees could recover under chapter 49.52 RCW, whose remedies are not as limited as those of the WMWA.

*SPEEA*, 139 Wn.2d at 831.<sup>3</sup>

The Court's point was that if the MWA-covered employees wanted to recover their regular rate of pay rather than just the minimum wage,

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<sup>3</sup> Plaintiffs conveniently misquote this passage on page eight of their brief by replacing the above-emphasized phrase with the bracketed phrase "[who is exempt under the Washington Minimum Wage Act]" and then use an ellipsis to collapse that sentence with the following sentence to create the false impression that the Court specifically held that MWA-exempt employees could recover under RCW 49.52.

they needed to proceed under RCW 49.52, not RCW 49.46. A very simple, non-controversial point. The Court concluded:

In particular, we find the employees, not otherwise exempt from the WMWA, stated claims under the WMWA, chapter 49.46 RCW, limited to the statutory minimum wage. We note, however, the employees had a viable, if unexplored, remedy for Boeing's failure to pay wages at the appropriate contractual rate for the mandatory pre-employment orientation sessions in RCW 49.52.070.

*SPEEA*, 139 Wn.2d at 839-40. Employees who had a “viable, if unexplored, remedy” in RCW 49.52 were the employees referenced in the preceding sentence, *i.e.*, those not otherwise exempt from MWA.

**4. The *SPEEA* Court's discussion of MWA-exempt employees was in the context of denying equitable relief.**

The Court's actual reference to a cause of action under RCW 49.52 for MWA-exempt employees is in the context of its discussion on the claim for equitable relief. The Court merely found that there is a legal proceeding available for MWA-exempt employees to recover wages due and that is under RCW 49.52 because it covers contract as well as statutory rights to wages. *SPEEA*, 139 Wn.2d at 839. Therefore, the *SPEEA* plaintiffs had no claim in equity. That limited discussion does not mean that the MWA-exempt employees would have been able to prove a claim under RCW 49.52. They still would have had to prove wages due

pursuant to a contract or statute other than MWA.<sup>4</sup> Therefore, this is not relevant to the instant case because the MWA-exempt employees in *SPEEA* did not bring a cause of action under RCW 49.52. Therefore, to the extent the Court opined that MWA-exempt employees have a cause of action under RCW 49.52, it is inconsequential for this case.

**5. MWA-exempt employees enforce contract rights, not statutory rights, using RCW 49.52.**

MWA-exempt employees have a cause of action under RCW 49.52 if their employer has withheld wages due under a contract. Plaintiffs' assertion that the Court "had to have concluded that a 'statute or contract' entitled the Boeing employees exempt under the WMWA to be paid for all hours worked, even though the CBA in question did not address the required orientation work" is specious. Brief of Respondent at 9. In the *SPEEA* case, it is clear there was no statute or contract entitling the MWA-exempt employees to be paid for the pre-employment orientation. The Court went on at length about the contract and that it did not cover the orientation.

To require Boeing to pay the employees for an activity it did not intend to compensate for would rewrite the contract.

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<sup>4</sup> It is hardly speculation to conclude that such a claim would have failed because the MWA-exempt employees in *SPEEA* were exempt as salaried professionals. Therefore, their salary constituted payment for all time worked in the workweek regardless of the number of hours actually worked. The MWA-exempt employees were in fact paid for the pre-employment training session if they started employment during the same workweek. Their salary for that workweek would have been all-inclusive.

“Courts are not at liberty, under the guise of reformation, to rewrite the parties’ agreement and ‘foist upon the parties a contract they never made.’” [Citations omitted.]

*SPEEA*, 139 Wn.2d at 833. Thus, there was no contract or statute obligating Boeing to pay MWA-exempt employees additional compensation for the pre-employment orientation. As the Court actually found, there was nothing “illegal” about Boeing paying its MWA-exempt employees only what it agreed to pay. Similarly, there is nothing illegal here about WSF paying its MWA-exempt employees what it agreed to pay under the collective bargaining agreement.

**6. *Wingert* cannot be extended to abrogate the collective bargaining agreement of MWA-exempt employees.**

Plaintiffs state that if an employer is legally required to pay an employee for working, but does not do so, *SPEEA* states that RCW 49.52 provides the remedy. Brief of Respondent at 12. This is true - as long as there is a legal requirement imposed on the employer. In this case, the only legal requirement is the collective bargaining agreement. However, Plaintiffs argue that *Wingert* clarified *SPEEA* and extended the legal sources of wages beyond statute, ordinance and contract to DLI regulations, even for MWA-exempt employees.

*Wingert* involved employees covered by the MWA, so the DLI regulations applied to them. As discussed in the Department of

Transportation's (DOT) opening brief, the DLI regulations do not apply here. *Wingert* does not apply where the employees are not covered by the MWA but covered by a specific statute that requires the parties to bargain wages and hours of work. The critical distinction between *Wingert* and this case is the MWA exemption and the requirements of RCW 47.64.

Further, plaintiffs argue that the substantive regulations the *Wingert* Court found satisfy RCW 49.52 are regulations that specify what an employer must pay for. Brief of Respondent at 12. Very few DLI regulations actually specify what employers must pay for. But, if that is the distinction plaintiffs want to make, then the definition of "hours worked" does not meet their definition of substantive. There is nothing in the definition of "hours worked" itself that specifies an obligation of an employer to pay anything. It merely defines a phrase that is used in many different contexts throughout the regulations.

**7. Courts look to the employment agreement to determine whether "wages" have been earned for purposes of RCW 49.52 or RCW 49.48, not DLI regulations.**

The existence of a collective bargaining agreement presents no obstacle to a statutory wage claim when the employees are covered by MWA. However, there is no statutory wage claim if the employees are not covered by MWA. Union members of course have the same statutory rights as other employees. If the employees are covered by the MWA,

that creates the floor below which the collective bargaining agreement cannot go. But, if the employees are not covered by MWA, and have a contract, the contract is the source of the wages. That is why RCW 49.52.050 references contract in addition to statute and ordinance.

In cases where the MWA was not an issue, courts have always looked to the contract. In *Naches Valley School District No. JT3 v. Cruzen*, 54 Wn. App. 388, 775 P.2d 960 (1989), the court held that the right provided in the collective bargaining agreement to cash out sick leave represented wages for purposes of recovery of attorneys' fees under RCW 49.48.030. The source of the wages was the collective bargaining agreement. The answer was the opposite, however, in *Teamsters, Local 117 v. Northwest Beverages, Inc.*, 95 Wn. App. 767, 976 P.2d 1262 (1999). The court held that the accrued sick leave does not constitute wages under RCW 49.48.010 unless it is defined as wages by another source. *Teamsters*, 95 Wn. App. at 768. The court distinguished *Cruzen* on the grounds that the right to cash out accrued sick leave in *Cruzen* was provided for in the collective bargaining agreement. The Teamsters' collective bargaining agreement did not contain a cashout provision. Therefore, accrued sick leave was not wages under RCW 49.48. *Teamsters*, 95 Wn. App. at 769.

In *Ebling v. Gove's Cove, Inc.*, 34 Wn. App. 495, 663 P.2d 132 (1983), a former employee brought an action under RCW 49.52 for recovery of commissions withheld or for the reasonable value of services for which he was not compensated. Because there was a contract that gave rise to a substantive right to a certain commission rate, the employee was entitled to recover wages under RCW 49.52.

In *Byrne v. Courtesy Ford, Inc.*, 108 Wn. App. 683, 32 P.3d 307 (2001), the plaintiff was a manager of a car dealership. He had a written contract under which he received commissions and bonuses from car and insurance sales. The plaintiff attended a car auction on the dealership's behalf, entered a drawing, and won a television set. The plaintiff was terminated when he refused his employer's demand to turn over the television set. He brought an action for wrongful termination and retaliation in violation of RCW 49.48 and RCW 49.52. The question for purposes of determining whether there was a violation of RCW 49.48 or RCW 49.52 was whether the television set constituted wages. The court determined that the television set could not be a wage because it was not a wage under his employment agreement. The television set was not a wage because there was no express or implied contract defining it as a wage.

In *Brown v. Suburban Obstetrics and Gynecology, P.S.*, 35 Wn. App. 880, 670 P.2d 1077 (1983), the plaintiff sued for wages withheld.

The plaintiff had a written employment contract that provided him with a percentage of gross receipts each year rather than a set salary. Upon his termination from employment, the employer failed to pay him the total amount. The court determined that the amounts due under the written employment contract were salary or wages owed.

No court addressing the recovery of wages under RCW 49.52 or RCW 49.48 for MWA-exempt employees has bypassed the contract and simply made up what the employer owes based on the DLI regulation defining “hours worked” or any other DLI regulation. Plaintiffs admit that the employer may determine what compensation will be for work. Brief of Respondent at 14. The parties have done that in this case through extensive bargaining. The Court should respect the employees’ ability to bargain in their own best interest through their labor organization and honor the agreement reached on wages and hours of work.

#### **8. Conclusion.**

The *SPEEA* Court did not create a cause of action under RCW 49.52 for MWA-exempt employees that did away with the need to prove that wages are owed under a statute, ordinance, or contract. Without the MWA, there is no statute or ordinance that would obligate WSF to pay Plaintiffs wages. Plaintiffs, and the Court, must look to the collective

bargaining agreement to determine whether there are wages owed for purposes of RCW 49.52.

**D. By Following Its Negotiated Agreement, DOT Cannot Have Willfully Withheld Wages Owed Because The Employees Are Exempt From The MWA And Neither *SPEEA* Nor *Wingert* Established A Clear Right To Additional Compensation For Watch Turnover.**

Where there is no obligation to pay wages, there is no willfulness issue. To the extent one assumes there is an obligation to pay Plaintiffs additional compensation for watch turnover, WSF's failure to pay could not be willful because *SPEEA* did not clearly establish a right to such additional compensation for watch turnover. Even plaintiffs state that it is *SPEEA* and *Wingert* "taken together" that establishes a cause of action in this case.

Even if *SPEEA* and *Wingert* are taken together, there is still no clear right because *Wingert* was based on MWA and IWA regulations which, as explained in the opening brief as well in the briefing to the superior court, do not apply to WSF. There is nothing in the Court's decision in *Wingert* that should have led WSF to believe that it had any obligation to pay compensation beyond what is required under the collective bargaining agreement.

This case is clearly distinguishable from *Dep't of Labor & Industries v. Overnite Transportation, Inc.*, 67 Wn. App 24, 834 P.2d 638

(1992). It simply cannot be said that *SPEEA* and *Wingert* settled this issue with respect to MWA-exempt employees such that there is no reasonable dispute over WSF's obligation to pay additional compensation for watch turnover.

If there is willfulness, under Plaintiffs' own analysis, any willfulness cannot have started with *SPEEA*, but only once *Wingert* "clarified" *SPEEA*. Even then, the IWA, and therefore the regulations thereunder, were not made applicable to public employers until the legislature amended the definition of employer in RCW 49.12.005(3) in 2003. Moreover, even under the amended definition of employer, public employers subject to other statutes that conflict are still exempt from the provisions of the IWA. RCW 49.12.005(3)(b).

**E. Even If There Is Liability, The Measure Of Damages Cannot Be Fifteen Minutes At The Overtime Rate Stated In The Collective Bargaining Agreement, Because There Is No Requirement That WSF Pay The Negotiated Overtime Rate For Any Activity To Which It Has Not Agreed.**

Plaintiffs argue that they should receive additional compensation in the form of fifteen minutes at their overtime rate.<sup>5</sup> Essentially, plaintiffs want it both ways; they want the collective bargaining agreement to control the amount of compensation, but not the right to compensation.

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<sup>5</sup> Plaintiffs inexplicably claim that compensable watch turnover includes walking on and off the vessel, citing *IBP, Inc. v. Alvarez*, 126 S. Ct. 514 (2005). The *IBP* case was decided under FLSA, which is not relevant to the case at bar. This is another indication of plaintiffs' attempt to apply statutes that explicitly do not apply.

Their position is illogical. Because plaintiffs are exempt from the MWA, which is the only statutory source of overtime, there is no obligation on the part of WSF to pay plaintiffs at a rate above their base rate for any activity unless WSF agrees to it. WSF has agreed to pay a negotiated overtime rate for certain negotiated activities or situations. There is no authority to require WSF to pay its employees an overtime rate for any activity for which it has not agreed to pay overtime. If there is additional compensation owing in this case, it is most certainly not at an overtime rate.

Plaintiffs refer to WSF's payroll practice of rounding overtime up to fifteen minutes. But that "practice" is a contractual requirement, not a unilateral employer payroll practice. Thus, the time gets rounded up only if it meets the criteria in the collective bargaining agreement. Even if watch turnover is compensable for some reason, it does not meet the criteria under the contract for overtime.

If the Court determines that the collective bargaining agreement requires payment for watch turnover at fifteen minutes at the overtime rate, then the Court is interpreting and applying the terms of the agreement. The Court cannot interpret the parties' collective bargaining agreement because that must be done in the first instance by the MEC. If the contract is going to be deemed controlling on the question of what

compensation is due, the question as to whether watch turnover is compensable at a straight time rate or overtime rate is a dispute over the terms of the agreement. Therefore, this must be determined through the grievance process in the agreement.

**F. The Court Should Recognize The De Minimis Doctrine As A Matter Of Law And Common Sense.**

**1. The de minimis doctrine exists as a practical matter.**

If the Court should determine that watch turnover is compensable work, notwithstanding that plaintiffs are exempt from the MWA and negotiate their hours of work, the Court should follow federal precedent and recognize the de minimis doctrine in Washington.<sup>6</sup> The de minimis doctrine is not inconsistent with the concept of payment for all hours worked.<sup>7</sup> The Ninth Circuit in the *IBP* case noted that it is axiomatic that under FLSA employers must pay employees for all “hours worked.” *IBP*, 339 F.3d at 902. The Ninth Circuit then went on to identify that all of the activities at issue were work, but nonetheless not compensable if they were de minimis. Thus, the Court found that activities that do not take a

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<sup>6</sup> Plaintiffs claim that the de minimis doctrine arises from the Portal-to-Portal Act, which amended FLSA. However, de minimis predates Portal-to-Portal and is a judicially created doctrine, not congressional. *See Anderson v. Mt. Clemens Pottery*, 328 U.S. 680, 692, 66 S. Ct. 1187, 90 L. Ed. 2d 1515 (1946). Thus, it is irrelevant whether the legislature has incorporated Portal-to-Portal into Washington’s wage statutes.

<sup>7</sup> Plaintiffs criticize DOT for using MWA principles in its de minimis argument (Brief of Respondent at 41, fn. 9), but fail to acknowledge that de minimis need only be addressed if the Court accepts plaintiffs’ position that the DLI regulation on hours of work means that watch turnover is compensable work even if the parties have not defined it as such in the collective bargaining agreement.

substantial amount of time need not be compensated as a matter of logic and law. *IBP*, 339 F.3d at 904. “[W]e do believe that neither FLSA policy nor ‘the actualities’ of plaintiffs’ working conditions justify compensation for the time spent performing these tasks.” *IBP*, 339 F.3d at 904.

De minimis work time exists as a practical matter. *See* CP 906-909. Plaintiffs make much of the testimony of Richard Ervin of DLI. While he testified in another case that DLI had no written policy on de minimis work time, after his deposition Mr. Ervin effectively amended his testimony by sending the parties a document demonstrating that DLI does in fact recognize noncompensable de minimis time. *Id.* Moreover, witnesses are not permitted to testify as to legal conclusions. ER 704 cmt.; *Tortes v. King County*, 119 Wn. App. 1, 12, 84 P.3d 252 (2003), *review denied*, 151 Wn.2d 1010 (2004). Determining the law is for the court. Whether de minimis work time is going to be recognized in Washington law is not for Mr. Ervin to say.

2. **If watch turnover is compensable work time, but subject to the de minimis doctrine, the Court can find that the approximately five minutes this takes is de minimis as a matter of law.**

The time involved here is de minimis under the standard set in *Lindow v. United States*, 738 F.2d 1057 (9th Cir. 1984). DOT accepted

for purposes of summary judgment below that watch turnover takes an average of 5.3 minutes.<sup>8</sup> This clearly falls within the ten minute threshold established by the Ninth Circuit.

The activity and the time are impossible to administer and determine because no one else is present in the engine room during watch turnover to monitor the activity and ensure that the employees engage only in work-related discussion. The time spent is irregular because it varies from vessel to vessel and employee to employee. There is no reliable way to measure the actual time spent apart from social interaction.

**G. The MEC Is The Correct Forum For A Dispute Over Wages.**

RCW 49.52.050, read properly, would make this a contract case. If plaintiffs feel that they are owed wages, the collective bargaining agreement would be the only source for any wages. Thus, recovering wages requires interpretation of the collective bargaining agreement. RCW 47.64 and the collective bargaining agreement require that such a claim be brought through the grievance process outlined in the agreement.

Plaintiffs claim that there is simply no evidence that the legislature intended to make collective bargaining the sole and exclusive forum for ferry system employees. However, RCW 47.64 is ample evidence of

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<sup>8</sup> Alternatively, the Court could find that this presents an issue of fact for a jury. If this is an issue for jury, DOT will present evidence that, when engine room personnel are not being filmed, the process routinely takes less than five minutes.

legislative intent. The Court must carry out the legislature's intent and give meaning to RCW 47.64.

### III. CONCLUSION

DOT respectfully requests that the Court reverse the judgment of the superior court and find that plaintiffs are not entitled to any additional compensation for watch turnover.

RESPECTFULLY SUBMITTED this 14<sup>th</sup> day of August, 2006.

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NO. 34352-5-II

**COURT OF APPEALS FOR DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON,  
DEPARTMENT OF  
TRANSPORTATION,

Appellant,

v.

BEN DAVIS, FLOYD FULMER,  
ROY HYETT, DICK OLSON, et  
al.,

Respondents.

CERTIFICATE OF  
SERVICE

I certify that I served a copy of Appellant's Reply Brief  
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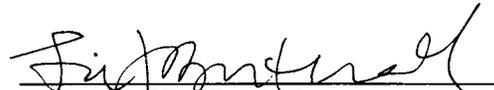
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I certify under penalty of perjury under the laws of the  
State of Washington that the foregoing is true and correct.

Dated this 14<sup>th</sup> day of August, 2006 at Olympia,

WA.

  
TIA J BERTRAND