

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	STATEMENT OF ISSUES	2
III.	STATEMENT OF CASE	3
IV.	ARGUMENT	5
A.	The Supreme Court’s Decisions in <i>SPEEA v. Boeing</i> and <i>Wingert v. Yellow Freight Systems</i> Establish the Class’ Cause of Action.....	5
1.	<i>SPEEA</i> Establishes a Claim Under RCW 49.52.	5
2.	<i>Wingert</i> Clarifies <i>SPEEA</i>	9
3.	<i>SPEEA</i> and <i>Wingert</i> Foreclose the Ferry System’s Opposition to the Class’ Cause of Action.....	11
B.	Watch Change is Work that Requires the Payment of Wages.....	14
1.	Washington Wage Statutes are an Integrated and Comprehensive Statutory Scheme.	14
2.	“Work” and “Wages” Defined.....	18
3.	Watch Change Time is “Work” for Which “Wages” Are Owed.	20
C.	Ferry System’s Failure to Pay Any Compensation Whatever for Work it Required Was Willful.	23
D.	Class Members are Owed 15 Minutes of Overtime Pay for Each Watch Change Completed.....	28
E.	The Ferry System’s Defenses to its Obligation to Pay Wages Earned are Without Merit.	31

1.	The Marine Employment Commission has no authority and no exclusive jurisdiction to decide statutory wage claims.....	31
2.	Class Members’ Collective Bargaining Agreement Does Not Provide Exclusive Remedies for Every Employment Related Dispute.	35
3.	Washington Law Does Not Recognize a <i>De Minimis</i> Defense.	38
a.	De minimis is not recognized in Washington.	39
b.	Even if federal law were to apply, the prerequisites for applying de minimis doctrine are not met.....	42
F.	The Class Is Entitled to Attorney’s Fees on Appeal.....	46
V.	CONCLUSION.....	46

TABLE OF AUTHORITIES

Cases

<i>Anderson v. DSHS</i> , 115 Wn. App. 452, 457, 63 P.3d 134 (2003), Rev. Denied, 149 Wn.2d 1036, 75 P.3d 968 (2003).....	39
<i>Arroyo v. Wn. State Ferries</i> , MEC Case 9-96 (1997).....	31
<i>Bennett v. Hardy</i> , 113 Wn.2d 912, 920, 784 P.2d 507 (1990).....	14
<i>Brusstar v. Southeastern Pa. Transp. Auth.</i> , 29 WH Cases 152, 155-56 (E.D. Pa. 1988).....	45
<i>Byrne v. Courtesy Ford, Inc.</i> , 108 Wn. App. 683, 688-89 (2001), 32 P.3d 307, Rev. Denied, 146 Wn.2d 1019 51 P.3d 87 (2002)	17
<i>Chelan County Deputy Sheriffs Ass'n v. Chelan County</i> , 109 Wn.2d 282, 745 P.2d 1 (1987).....	34
<i>Dept. of Transportation v. Islandboatmen's Union</i> , 130 Wn. App. 472, 123 P.3d 137 (2005).....	32
<i>Dice v. City of Montesano</i> , 131 Wn. App. 675, 128 P.3d 1253 (2006).....	16, 24, 25, 27
<i>Dole v. Enduro Plumbing</i> , 30 WH Cases 196, 200-201 (C.D. Cal. 1990), 1990 U.S. Dist. Lexis 20135	44
<i>Drinkwitz v. Alliant Techsystems, Inc.</i> , 140 Wn.2d 291, 298-99, 996 P.3d 582 (2000)	41
<i>Ebling v. Gove's Cove, Inc.</i> , 34 Wn. App. 495, 663 P.2d 132 (1983), Rev. Denied, 100 Wn.2d 1005 (1983)	16
<i>Hayes v. Trulock</i> , 51 Wn. App. 795, 806, 755 P.2d 132 (1988), Rev. Denied 111 Wn.2d 1015 (1988)	16
<i>IBP, Inc. v. Alvarez</i> , 158 L.Ed. 709 (2003), 541 U.S. 1028, 124 S.Ct. 2114.....	28

<i>Int'l Assoc. of Fire Fighters Local 46 v. City of Everett</i> , 146 Wn.2d 29, 42 P.3d 1265 (2002).....	16
<i>Kerr v. Department of Game</i> , 14 Wn. App. 427, 542 P.2d 467 (1975), Rev. Denied 86 Wn.2d 1013 (1976)	31, 32
<i>Labor and Industries v. Overnite Transportation, Inc.</i> , 67 Wn. App. 24, 34, 834 P.2d 638 (1992), Rev. Denied 120 Wn.2d 1030, 847 P.2d 481 (1993).....	23, 24, 25, 27
<i>Lindow v. United States</i> , 738 F.2d 1057 (9 th Cir. 1984)	42, 43, 44
<i>Mireles v. Frio Foods</i> , 899 F.2d 1407, 1414 (5 th Cir. 1990).....	44
<i>Naches Valley School Dist. v. Cruzen</i> , 54 Wn. App. 388, 398-99	16
<i>Sanders v. John Morrell & Co.</i> , 1 WH Cases 2d 885, 886, 1992 U.S. Dist. Lexis 21716 (N.D. Iowa Oct. 1992).....	44
<i>Schilling v. Radio Holdings, Inc.</i> , 136 Wn.2d 152, 961 P.2d 371 (1998).....	7, 14, 15, 23, 27, 29
<i>Seattle Professional Engineers Association v. Boeing</i> , 139 Wn.2d 824, 991 P.2d 1126, 1 P.3d 578, Recon. Denied 2000 Wash. Lexis 284 (2000)	1, 2, 5-14, 20, 22, 23, 25-30, 41
<i>State v. Carter</i> , 18 Wn.2d 590, 621, 140 P.2d 298 (1943)	27
<i>United Food & Commercial Workers Local 1001 v. Mutual Benefit Life Ins. Co.</i> , 84 Wn. App. 47, 51-52, 925 P.2d 212 (1996), Rev. Denied 133 Wn.2d 1021, 950 P.2d 478 (1997).....	15
<i>Wingert v. Yellow Freight Systems</i> , 146 Wn.2d 841, 50 P.3d 256 (2002).....	2, 5, 9-14, 19 25, 33, 34, 39, 41

<i>Wise v. City of Chelan</i> , 2006 Wn. App. 1091, No. 23954-3-III (May 30, 2006).....	16
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Statutes

RCW 43.22.270	18
RCW 49.12	14
RCW 49.12.005(3).....	37
RCW 49.12.270	37
RCW 49.12.450	37
RCW 49.46	7, 14-18
RCW 49.46.010	15, 18
RCW 49.46.010(2).....	16, 18
RCW 49.46.010(5)(m).....	35
RCW 49.46.120	39
RCW 49.48	7, 14, 16, 17
RCW 49.48.010	37
RCW 49.48.030	16, 46
RCW 49.48.120	38
RCW 49.52	1, 2, 5, 7, 9-19, 22, 23, 27, 29, 30, 33, 35, 41
RCW 49.52.050	10, 11, 38
RCW 49.52.050(2).....	10, 19

RCW 49.52.070	8, 30, 46
RCW 49.60	37
RCW 49.60.040(1).....	36
WAC 296-126.....	19
WAC 296-126-002.....	12, 18
WAC 296-126-002(8).....	18, 31, 39
WAC 296-126-002(4).....	18
WAC 296-126-008.....	39
WAC 296-126-092.....	10, 12, 19
<u>Other</u>	
SSB 3108 (C15L83).....	33

I. INTRODUCTION

The Washington State Ferry System (“Ferry System”) requires class members to do a “watch change” when engine room crews do their change over. Even though “watch change” is a mandatory work assignment, the Ferry System pays class members no compensation whatsoever for this time. The Ferry System continued this practice even after *SPEEA v. Boeing*, 139 Wn.2d 824, 991 P.2d 1126, 1 P.3d 578, Recon. Denied 2000 Wash. Lexis 284 (2000), held that even for employees not covered by the Washington Minimum Wage Act, Ch. 49.46 RCW (“MWA”), an employer may not require work for which it pays no compensation whatsoever. The Ferry System made no effort to comply with *SPEEA*. Indeed, the Ferry System’s lead labor relations manager testified that he was not even aware of the *SPEEA* decision.

The trial court correctly followed *SPEEA* and found that when the Ferry System required work for which it paid no compensation whatsoever, it violated RCW 49.52. Because the Ferry System’s payroll practice is to compensate class members who work between 1 and 15 minutes of overtime with 15 minutes of overtime pay, the trial court awarded class members 15 minutes of overtime pay for each uncompensated watch change performed. This is the amount class members would have received if the Ferry System had not improperly

denied that watch change is work which requires payment of wages. The trial court's decision directly follows Washington Supreme Court precedent. It should be affirmed.

II. STATEMENT OF ISSUES

1. If an employer requires work for which it pays no compensation whatsoever, do employees have a cause of action under RCW 49.52 to recover wages for work performed?

2. Given the holding in *Wingert v. Yellow Freight Systems*, 146 Wn.2d 841, 50 P.3d 256 (2002), that Department of Labor and Industries regulations constitute a "statute, ordinance or contract" for purposes of RCW 49.52, do DLI regulations defining what constitutes work define when wages are owed under RCW 49.52?

3. If an employer requires work for which it pays no compensation whatsoever, and makes no effort to comply with the Supreme Court's decision in *SPEEA*, is the employer's failure to pay wages willful?

4. Where an employer's payroll practice is to compensate employees who work between 1 and 15 minutes of overtime with 15 minutes of overtime pay, are class members owed 15 minutes of pay for each uncompensated watch change performed regardless of how long any watch change actually takes to complete?

III. STATEMENT OF CASE

The Ferry System states that the “facts are undisputed.” Appellant’s Brief at pg. 3. The Ferry System then goes on to include substantial argument in its statement of the case. The argument is disputed; the material facts are not. Therefore, for the Court’s convenience, respondent identifies the material facts which the Ferry System has never challenged or contested:¹

- The class includes licensed and unlicensed employees of the Washington State Ferry System who work in the engine room.
- Class members work shifts (called watches) that have no overlap. One watch begins the instant the preceding watch ends. Most watches are 12 hours long.
- The Ferry System requires class members to perform a watch change when one watch ends and the other begins. Watch change is performed for the Ferry System’s benefit and is performed in the engine room on a Washington State ferry. The Ferry System has a written policy requiring that watch change be completed.

¹ Citations to the Clerk’s Papers for these facts are made at the appropriate points in the body of the brief.

- Watch change is an essential part of the State Ferry's safety program.
- Watch change involves a process by which the on-coming engine room crew takes over the operation of the vessel. In the watch change process, the crews exchange information necessary for the safe operation of a vessel, including any maintenance issues which have arisen, any operational concerns, operational changes or other matters important to the safe and effective operation of the vessel.
- 24 separate watch changes were videotaped over a three day period. The observations included all classes of ferries in the Ferry System and virtually all of the ferry runs. The average work time required in the watch change process was 11.14 minutes per watch change. Even the Ferry System's anecdotal witnesses conceded that watch change takes 2 to 6 minutes to complete.
- Both on-coming and off-going employees must be present for the watch change to occur. Class members on both watches are doing the same activities during watch change. Only class members on one watch are paid for watch change time. Class members on the other watch are

required to perform these work activities but receive no compensation whatsoever for their time.

- Class members are not covered by the MWA. Class members are covered by a Collective Bargaining Agreement (“CBA”). The CBA does not address watch change. The CBA does not address whether watch change constitutes work time for which wages are owed.
- The Ferry System’s payroll practice is to compensate employees who work between 1 minute and 15 minutes with 15 minutes of overtime pay. The Ferry System will pay for as little as 1 minute of overtime work, so long as the overtime falls within a category recognized in the CBA. The Ferry System does not pay for watch change because it is not addressed in the CBA.

IV. ARGUMENT

A. **The Supreme Court’s Decisions in *SPEEA v. Boeing* and *Wingert v. Yellow Freight Systems* Establish the Class’ Cause of Action.**

1. ***SPEEA* Establishes a Claim Under RCW 49.52.**

In *Seattle Professional Engineers Association v. Boeing*, 139 Wn.2d 824, 991 P.2d 1126, Recon. Denied 2000 Wash. Lexis 284 (2000) (“*SPEEA*”), the Washington Supreme Court recognized the cause of action class members allege here. Because *SPEEA* (as amplified in *Wingert*)

decides the main issues on appeal, respondents discuss the *SPEEA* decision in detail below.

For many years Boeing required new employees to attend, without pay, a “pre-employment” orientation session. New employees would perform such tasks as completing payroll forms, selecting employee benefit options, signing tax forms and executing documents assigning any interest in new inventions to Boeing. New employees would also hear union presentations and be photographed for security badges. These sessions lasted up to a day. Boeing told each new employee that he or she would not be paid for these “pre-employment” activities. These “pre-employment activities” were not addressed in *SPEEA*’s labor contract with Boeing. *Id.* 833-834.

SPEEA was the union representing many of Boeing’s professional and technical employees. Many of these Boeing employees were exempt from the MWA, as class members are here. Nevertheless, in 1992, *SPEEA* filed a complaint with the Washington Department of Labor and Industries (“DLI”) alleging the pre-employment activities described above constituted compensable work time. DLI agreed. Thereafter, *SPEEA* filed suit in Superior Court. The trial court granted summary judgment to *SPEEA*, holding that the new employees’ attendance at the orientation sessions constituted work for which the employees were entitled to compensation. On appeal, Boeing conceded the mandatory employment

orientation sessions constituted work. The Supreme Court framed the issue as follows: “In light of Boeing’s concession that its mandatory pre-employ sessions constitute work, the principle issue in this case is the remedy available under Washington law to the employees for Boeing’s refusal to pay them for their work.” *SPEEA* at 829.

The unanimous Supreme Court started its analysis by reviewing Washington’s statutory wage-hour remedies for employees wrongfully deprived of proper wages. (“[I]t is useful to again review Washington’s statutory wage-hour remedies for employees.” *Id.*) The Court began its review with its previous holding in *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 961 P.2d 371 (1998): “The legislature has evidenced a strong policy in favor of payment of wages due employees by enacting a comprehensive scheme to ensure payment of wages including the statutes at issue here which provide both criminal and civil penalties for the willful failure of an employer to pay wages.” *SPEEA* at 830 quoting *Schilling* at 157-58. The comprehensive statutory scheme identified by the Supreme Court consisted of Chapters RCW 49.46, 49.48 and 49.52.

A central issue in *SPEEA* was whether employees exempt under the MWA had a cause of action to recover for Boeing’s refusal to pay any compensation whatsoever for the required pre-employment work. Boeing argued (like the Ferry System does here) that there was no basis for a claim for unpaid wages on behalf of employees exempt from the MWA.

The *SPEEA* Court rejected this argument. Instead the *SPEEA* Court explained that “in circumstances where an employer paid no compensation whatsoever to an employee, the employee [who is exempt under the Washington Minimum Wage Act] ... could recover under Chapter 49.52, whose remedies are not as limited as those of the WMWA.” *Id.* at 831 (emphasis added).

All of Ferry System’s primary arguments here – that the employees are MWA exempt, are governed by a CBA that does not provide for payment and that a statutory claim must be grieved would be equally applicable to the exempt employees in *SPEEA*. In both cases, there are employees exempt from the MWA and covered by a CBA but who were required by the employer to perform work for which no compensation whatsoever was paid. The Supreme Court unanimously concluded that these “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.” *Id.* at 839-40.

The Ferry System would very much like to convince this Court that the clear holding of the *SPEEA* Court’s “review of Washington statutory wage-hour remedies for employees” (*Id.* at 830) was “mere dicta.” Appellant Brief at 39. That argument is just so much puffery and wishful thinking. A unanimous *SPEEA* Court plainly did not spend two pages explaining how the “series of statutory remedies for employees

wrongfully deprived of proper wages” worked merely to create “dicta.” *SPEEA* at 830. Instead, the *SPEEA* Court was clearly giving guidance to trial courts, appellate courts, practitioners, employers and employees about Washington’s “series of statutory [wage] remedies.” The upshot of this guidance is that even for MWA exempt employees, an employer acts illegally if it pays “no compensation whatsoever” for required work tasks.

RCW 49.52 entitles employees to recover the full value of the wages which by statute, ordinance or contract the employee is entitled to receive. *SPEEA* holds that employees exempt under the WMWA have a cause of action under this statute. *SPEEA* did not articulate what the “statute or contract” was, because that claim was not fully developed. Nevertheless, since the *SPEEA* Court recognized an action under RCW 49.52, 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.

2. *Wingert Clarifies SPEEA.*

Analytically, the next issue relates to the above language in RCW 49.52 requiring a “statute, ordinance or contract” specifying when wages are earned and due.

In *Wingert v. Yellow Freight Systems*, 146 Wn.2d 841 (2002), the Supreme Court answered the question implicitly left open in *SPEEA* by

holding that DLI regulations defining when wages are earned and due satisfy the “statute, ordinance or contract” required to recover under RCW 49.52. In *Wingert*, employees asserted a claim under RCW 49.52 to recover additional compensation for working through required rest periods. *Wingert* held:

The employees assert that they are entitled to recover monetary damages for violations of WAC 296-16-092 pursuant to RCW 49.52.070.

RCW 49.52.050 makes it a misdemeanor for an employer to “[w]ilfully and with intent to deprive the employee of any part of his wages, ... pay any employee a lower wage than the wage such employer is obligated to pay such employee by any statute, ordinance, or contract.” RCW 49.52.050(2). Although WAC 296-126-092 is a regulation and not a statute, RCW 49.52.050(2) is applicable in this case because “properly promulgated, substantive agency regulations have the “force and effect of law.”

Id. At 848.

SPEEA and *Wingert* together establish the class’ cause of action. *SPEEA* holds that employees exempt under the MWA have a claim under RCW 49.52 to recover unpaid wages when their employer requires work but pays no compensation whatsoever for that work. *Wingert* holds that because WAC 296-126-092 has the “force and effect of law” it satisfies the “statute, ordinance or contact” language in RCW 49.52.050. Together,

SPEEA and *Wingert* combine RCW 49.52 and DLI's regulations to establish when wages are earned and due. They jointly are the mechanism for an employee (even those MWA exempt) to recover when an employer requires work, but pays no compensation whatsoever.

3. *SPEEA* and *Wingert* Foreclose the Ferry System's Opposition to the Class' Cause of Action.

All of the Ferry System's objections to the class' cause of action are answered by *SPEEA* or *Wingert*. First, the Ferry System argues that the CBA somehow extinguishes the class' statutory claim. Yet, the employees in *SPEEA* were also covered by a CBA and the Supreme Court found the CBA presented no obstacle to the statutory wage claim. In *Wingert*, the Supreme Court squarely rejected the argument that a CBA preempted or precluded a statutory wage claim. *Wingert*, 146 Wn.2d at 851-52.

RCW 49.52.050 on its face applies to public employers. *SPEEA* recognizes RCW 49.52 as one part of a series of wage recovery statutes. A CBA cannot waive or limit a statutory claim. Union members have the same statutory rights as all other employees.

Next, the Ferry System argues that RCW 49.52 does not create a right to recover wages but is only a tool to enforce rights found elsewhere and that class members have no substantive right to compensation for

required watch change work. *SPEEA* and *Wingert* foreclose this argument completely.

SPEEA prohibits an employer from paying no compensation whatsoever when it require employees to work. The *SPEEA* Court interpreted RCW 49.52 to establish a right to recover wages for work an employer requires. After *SPEEA*, *Wingert* established that DLI regulations are the source establishing when wages are earned and owed. DLI regulations, whether they require rest period or explain what is work, mandate what tasks an employer must pay for as “work.” 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.

The Ferry System argues that the meal period regulation (WAC 292-126-092) is “substantive” while the definitions of work (WAC 296-126-002) are definitional and that this somehow takes “definitional” regulations from under the *Wingert* holding. This is nonsense. The distinction in *Wingert* is between regulations specifying what an employer must pay for (called “substantive” in *Wingert*) and procedural regulations relating to DLI’s internal process.

The Ferry System’s arguments would lead to the absurd result that the unanimous *SPEEA* Court created a cause of action that could never be used. The only source to define what is “work” for which wages must be paid is DLI regulations. No statute defines the term wages, or specifies

what is “work” for which an employer must pay its employees. The CBA in *SPEEA* did not address the required pre-employment orientation work, so the CBA was not the source of the cause of action recognized in *SPEEA*. When the *SPEEA* Court recognized RCW 49.52 as the method to recover when an employer requires work for which it pays no compensation, the Court envisioned that what is “work” triggering an obligation to pay wages under RCW 49.52 must be decided in some way. *Wingert* then explained that DLI regulations defining what was “work” are the source of the wages for which RCW 49.52 creates an obligation to pay.

Stated another way, if DLI regulations do not define “work” for which RCW 49.52 creates an obligation to pay, then *SPEEA* creates a cause of action without a remedy. In this scenario, any employer could require any type of work not addressed in a contract and pay no compensation whatsoever, because there would be no “statute, ordinance or contract” defining the task as work. As noted above, the only definition of what is work is contained in DLI regulations. To adopt the Ferry System’s tortured argument, this Court would have to find that although *SPEEA* holds that there is a cause of action under 49.52 to recover wages for required pre-employment orientation, that cause of action would always fail because there is no source to define what work is. The unanimous Supreme Court in *SPEEA* plainly could not have intended to

create a right without a remedy. *See, Wingert*, 146 Wn.2d at 849-51 (recognizing implied cause of action under RCW 49.12); *Bennett v. Hardy*, 113 Wn.2d 912, 920, 784 P.2d 507 (1990) (court also recognized an implied cause of action under a statute which provides protection to a specified class of persons but creates no remedy).

B. Watch Change is Work that Requires the Payment of Wages.

1. Washington Wage Statutes are an Integrated and Comprehensive Statutory Scheme.

SPEEA mandates that when an employer requires “work” of an MWA exempt employee, it must pay some compensation. An employer may determine what that compensation will be, because minimum wage requirements do not apply. What an employer may not do is require work for which it pays no compensation at all.

In *SPEEA*, Boeing conceded that its “mandatory pre-employment orientation sessions constituted work.” *SPEEA* at 829. Without a legal or factual basis to do so, the Ferry System apparently denies that watch change activities are work tasks. Nonetheless, the class members demonstrate below that watch change constitutes “work” for which some compensation must be paid.

The analysis begins by again recognizing that RCW 49.46, 49.48 and 49.52 are all part of a comprehensive set of wage recovery statutes designed to ensure payment of wages. *Schilling v. Radio Holdings, Inc.*,

136 Wn.2d 152, 157 (1998) (“The Legislature has evidenced a strong policy in favor of payment of wages due employees by enacting a comprehensive scheme to ensure payment of wages, including the statutes at issue here, which provide both criminal and civil penalties for the willful failure of an employer to pay wages.”) (emphasis added). This comprehensive scheme “must be liberally construed to advance the Legislature’s intent to protect employee wages and assure payment.” *Id.*

As noted above, RCW 49.52 does not contain a separate definitional section. Instead, the terms “wage,” “employ,” and “employer” are all defined in RCW 49.46.010 and explained in DLI regulations. In *United Food & Commercial Workers Local 1001 v. Mutual Benefit Life Ins. Co.*, 84 Wn. App. 47, 51-52, 925 P.2d 212 (1996), Rev. Denied 133 Wn.2d 1021, 950 P.2d 478 (1997), the Court held that the definitions in RCW 49.46 applied throughout the comprehensive statutory scheme described above.² The *UFCW* Court found that “[t]o establish their statutory claim, individual respondents must show that Ernst did not pay them their regular wage, or overtime when applicable, for all the time they were ‘employed.’ Under the wage and hour statutes, ‘to employ’ includes ‘to permit to work.’” *Id.* at 52. A statutory wage recovery claim could arise under any of the three wage statutes. *UFCW*,

² *Schilling* cites *UFCW* as recognizing that RCW 49.46, 49.48 and 49.52 are part of an integrated statutory wage recovery scheme. *Schilling*, 136 Wn.2d at 157.

therefore, comes to the conclusion that the terms “wage” and “employ” have the same meaning throughout RCW 49.46, 49.48 and 49.52.

In *Dice v. City of Montesano*, 131 Wn. App. 675, 128 P.3d 1253 (2006), this Court used MWA principles to define the term “wage” in RCW 49.48.030, another statute that is part of the comprehensive wage recovery scheme. The Court noted that RCW 49.48 “ ... does not itself define wages, but Washington case law has applied the definition from RCW 49.46.010(2).” *Id.* at 689. A “wage” therefore is “any type of compensation due by reason of employment.” *Id.* See, also, *Wise v. City of Chelan*, 2006 Wn. App. 1091, No. 23954-3-III (May 30, 2006) (“wage” means any type of compensation owed by reason of services provided).

This line of cases began with *Hayes v. Trulock*, 51 Wn. App. 795, 806, 755 P.2d 132 (1988), Rev. Denied 111 Wn.2d 1015 (1988), in which the Court specifically applied the definition of “wage” in RCW 49.46.010(2) to define “wages” under RCW 49.48.030. The Court noted that the definition of “wage” in RCW 49.46.010(2) was broad and held that “this broad definition include[s] back pay and front pay awards, especially since RCW 49.48.030 has always been interpreted as a remedial statute.”³

³ Washington Courts have always applied a broad definition of the term “wages” under both RCW 49.48 and 49.52. *E.g. Naches Valley School Dist. v. Cruzen*, 54 Wn. App. 388, 398-99 (sick leave cash out is a “wage” under RCW 49.48.030); *Hayes v. Trulock*, 51 Wn. App. 795, 806 (1988) (back pay award is a “wage” under RCW 49.48); *Ebling v. Gove’s Cove, Inc.*, 34 Wn. App. 495, 663 P.2d 132 (1983), Rev. Denied, 100 Wn.2d 1005 (1983) (commissions are “wages” under RCW 49.52); *Int’l Assoc. of Fire Fighters Local*

In *Byrne v. Courtesy Ford, Inc.*, 108 Wn. App. 683, 688-89 (2001), 32 P.3d 307, Rev. Denied, 146 Wn.2d 1019 51 P.3d 87 (2002), this Court considered whether the definition of “wages” in RCW 49.46 also defined that term under RCW 49.52. In *Byrne*, the employee argued that there should be a broader definition of “wages” under RCW 49.52 than under RCW 49.46. The Court found this argument “persuasive to a point.” *Id.* at 688. The Court agreed that wages should be defined at least as broadly under RCW 49.52 as under RCW 49.46 in order to advance the Legislature’s expressed intention to protect employee wages and ensure payment. Although the Court did not precisely define the term “wages” under RCW 49.52, the opinion does demonstrate that the term “wages” under RCW 49.52 must be construed at least as broadly as the term is defined under RCW 49.46.

The foregoing establishes that the statutory definition of, and case law interpreting, “wages” and “employ” under RCW 49.46 apply throughout Washington’s comprehensive set of wage statutes, including RCW 49.48 and 49.52. There is no rational basis to apply any other definition of “wage” in RCW 49.48 or 49.52, there is no authority for such a conclusion and no reason to believe that the Legislature intended such a

46 v. City of Everett, 146 Wn.2d 29, 42 P.3d 1265 (2002) (award under collective bargaining agreement was a “wage” under RCW 49.48.030).

bizarre result. If anything, the definition of “wages” under RCW 49.52 has to be broader than under RCW 49.46.

Accordingly, the next issue turns on the definition of “wages” and “employ” under RCW 49.46 and the implementing DLI regulations to determine whether watch change is “work” for which an employer may with impunity refuse to pay “no compensation whatsoever.”

2. “Work” and “Wages” Defined.

RCW 49.46.010(2) defines wage to mean “compensation due an employee by reason of employment.” RCW 49.46.010 defines employment as “including situations where an employer permits an employee to work.”

These terms are refined by the Department of Labor and Industries (“DLI”) in WAC 296-126-002. RCW 43.22.270 gives the Director of Labor and Industries broad power to adopt regulations regarding the administration and enforcement of all laws respecting employment and wages of employees. Pursuant to this statutory mandate, DLI defines “employ” as meaning “to engage, suffer or permit to work.” WAC 296-126-002(4). The term “hours worked” is defined as “all hours during which the employee is authorized or required by the employer to be on duty on the employer’s premises or at a prescribed work place.” WAC 296-126-002(8).

As noted above in *Wingert, supra*, the Supreme Court considered the effect of DLI's regulations on a claim based on RCW 49.52. *Wingert* held that "although WAC 296-126-092 is a regulation and not a statute, RCW 49.52.050(2) is applicable in this case because properly promulgated, substantive agency regulations have the force and effect of law." *Id.* at 848 (internal citations and quotations omitted). In this passage, the Supreme Court recognized that the regulations in WAC 296-126 explain what is "work" for which an employer must pay "wages" under RCW 49.52.

DLI has also defined what type of preliminary activities constitute "work" for which employees earn "wages." In Administrative Policy ES.C.2, DLI requires that "hours worked" include the following preparatory and concluding activities:

Preparatory and concluding activities are those activities that are considered integral or necessary to the performance of the job. Those duties performed in readiness and/or completion of the job shall be considered hours worked. When an employee does not have control over when and where such activities can be made, such activities shall be considered as hours worked.

Taken together, the foregoing establish three prerequisites to determine whether an employee's performance of a given task is "work"

that earns “wages” for which an employee must be paid some compensation following *SPEEA*:

1. The task is required or permitted by the employer;
2. The task occurs on the employer’s premises or at a prescribed work place; and
3. If a task is a preparatory activity, the task is either (a) integral or necessary to the job or (b) performed in readiness of the job.

3. Watch Change Time is “Work” for Which “Wages” Are Owed.

Paul Brodeur, produced by the Ferry System as its CR 30(b)(6) witness, testified as follows (Exhibit A to the Declaration of Lewis L. Ellsworth, Clerk’s Paper’s 216-305):

- Watch change tasks are required by the Ferry System.

There is no dispute about this. The direction to complete a watch change has been a written requirement since at least 1981. The requirement to complete a watch change applies uniformly to all engine room employees. Engine room employees may not leave their work area until the watch change procedure is complete. Watch change is a mandatory part of the ferry system’s safety management system.

- Watch change occurs on the Ferry System's premises and at a prescribed work place. Similarly, there is no dispute that watch change occurs on the Ferry System's premises and at a prescribed work place. The Ferry System admits that the engine room is the principle place of work for the licensed and unlicensed engine room employees. The Ferry System expects that the watch change will occur in the engine room. Engine room employees may not leave their work site until they are properly relieved and have completed the watch change procedure. There is no dispute that watch change occurs on the Ferry System's premises at a work place prescribed by the Ferry System.
- Watch change is integral and necessary to the job. Engine room employees have a responsibility to maintain their ferry in a proper and safe operating condition. Watch change is a work activity that the oncoming engine room employees must do to be able to take the ferry over from the off-going crew. Watch change is a required safety task. Watch change is similar to the preflight checklist a pilot would go through. It is designed to ensure that all engine systems are operating properly and safely. Exchanging

information during watch change is part of the engine room employees' job duty. The Ferry System admits that the watch change process is integral and necessary to the engine room employees' job.

- Watch change is performed in readiness of the job. Similarly, there is no dispute that watch change is performed in readiness of the oncoming engine room employees' assuming responsibility for the safe operation of the vessel. Engine room employees are required to obtain information from the departing crew to take over the ferry. Watch change is a mandatory requirement of the Ferry System's safety management system. Engine room employees would not be properly prepared to perform their job in a safe and effective manner unless they completed the watch change procedure.

These facts admitted by the Ferry System establish that watch change is work time in accordance with the standards set forth above. RCW 49.52 as interpreted by *SPEEA* prohibits an employer from requiring work for which it pays no compensation whatsoever. But that is precisely what the Ferry System has done here. It requires "work" (watch

change) for which it pays no compensation whatsoever. RCW 49.52 provides class members a right to recover wages for required work.

C. Ferry System's Failure to Pay Any Compensation Whatsoever for Work it Required Was Willful.

Having determined that watch change is "work" for which the Ferry System paid no compensation whatsoever, it follows that the next issue is whether that failure following *SPEEA* was willful.

A failure to pay wages owed is willful if the employer's refusal to pay wages is volitional, meaning it is the result of a knowing or intentional act. *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 159 (1998). To avoid a finding of willfulness, the Ferry System must show that one of two affirmative defenses applies. The first defense is met if the employer intended to pay the proper wages but through some act of an advertence failed to do so. That defense is not relevant here. The Ferry System admits that it never intended to pay for watch change time and, in fact, did not do so.

The second defense arises if there is a bona fide dispute between the employer and the employee regarding payment of wages. *Id.* at 161. This defense is a "narrow exception to the statute" requiring double damages for wages willfully not paid. *Labor and Industries v. Overnite Transportation, Inc.*, 67 Wn. App. 24, 34, 834 P.2d 638 (1992), Rev. Denied 120 Wn.2d 1030, 847 P.2d 481 (1993).

The scope of the bona fide dispute defense based on a dispute as to the law was addressed in *Overnite Transportation*. Overnite Transportation failed to pay wages arguing that principles of federal law preempted its state law obligation to pay the wages at issue and therefore it had no legal obligation to pay such wages. The Court found this legal defense did not create a bona fide dispute sufficient to defeat a finding of willfulness. The Court concluded:

Overnite failed to cite to any authority which applied the *Levinson* holding to the issue of concurrent jurisdiction between the federal government and the states. In our view, Overnite's allegation that *Pettis* was wrongly decided, absent meritorious argument to that effect and absent citation to authority which supports its view, does not amount to a bona fide dispute which justifies invoking the narrow exception to the statute providing for double damages.

Id. at 36.

In *Dice, supra*, this Court provided further guidance on what constitutes a willful withholding of wages. The employee in *Dice* had an employment contract providing for severance in case of termination. The employer ended the employment relationship, but claimed that its actions were a "non-renewal" and not a termination. The trial court found the separation a "termination" which triggered severance pay.

The trial court, however, found that the employer did not act willfully because there was a bona fide dispute as to the interpretation of the contract. This Court reversed that decision and found the withholding of wages willful as a matter of law holding that “where the facts are undisputed and reasonable minds could not differ, we may determine the [willfulness] issue as a matter of law.” *Dice*, 131 Wn. App. 687-88. Neither party here disputes the material facts. In *Dice*, “[W]hen the City ignored the unambiguous language that it had drafted, we hold that it acted willfully.” *Id.* at 688. That sentence could be re-written to say that when the Ferry System ignored the Supreme Court’s holding in *SPEEA*, it acted willfully.

As in *Overnite*, the Ferry System’s willfulness defense is based on its [incorrect] interpretation of the law. The Ferry System cannot cite authority or make a meritorious argument that it can pay nothing for this required work. The Ferry System offers no factual defense and indeed does not contest the material facts. The Ferry System did exactly what *SPEEA* states that an employer may not do. In the words of *Dice*, when the Ferry System ignored the unambiguous language in *SPEEA* it acted willfully. In the words of *Overnite*, the Ferry System’s position that *SPEEA* and *Wingert* are wrong, absent meritorious agreement and citation of authority to the contrary do not create a bona fide dispute which insulates the Ferry System from the consequences of its decisions.

The Ferry System offers two legal theories to support its refusal to pay for watch change time, both of which are contrary to recent Washington Supreme Court decisions. First, the Ferry System argues that state wage and hour laws do not apply to class members. This position is articulated in the deposition of Michael Manning, the Ferry System's Labor Relations Manager. Manning's deposition is attached as Exhibit C to the Declaration of Warren Martin (Clerk's Papers 520-606).

Manning testified that he (and the payroll department) were the persons in the ferry system responsible to ensure that pay practices complied with wage and hour laws. Manning Dep. 8:11-14. Manning testified that state wage and hour laws do not apply to any employee who works on a ferry boat. *Id.* 12:1-4. Thus, although Manning conceded that an information exchange would normally be work time under wage and hour law (*Id.* 17:6-10), Manning testified that the Ferry System does not pay for this time because his interpretation is that state wage and hour laws do not apply to class members. *Id.* 18:13-15; 12:1-4.

Manning further testified that his view as described above was not based on anything he read. *Id.* 21:16-19. Manning testified that he never heard of the Supreme Court decision in *SPEEA*. *Id.* 18:24 – 19:4. Thus, the person responsible to ensure that the Ferry System complies with wage and hour laws has not even heard of the controlling Supreme Court decision and has made absolutely no effort to comply with it.

The Ferry System's incorrect legal position does not create a bona fide dispute defense under *Dice* and *Overnite Transportation*. Manning's testimony (and the Ferry System's reason for not paying for watch change) cites the view that *SPEEA* is wrongly decided. The Ferry System can cite no authority for that proposition. Its position is directly contrary to Supreme Court precedent. The Ferry System offers even less than what *Overnite Transportation* found was insufficient as a matter of law to defeat willfulness.

Second, the Ferry System characterizes RCW 49.52 as "a criminal act" and suggests that some sort of *mens rea* is required to find willfulness. Appellant Brief at 45. This is not how the Supreme Court interprets RCW 49.52. In *Schilling*, the Court recognized that RCW 49.52 is "... primarily a protective measure, rather than a strict concept practice statute." *Schilling*, 136 Wn.2d at 159 quoting *State v. Carter*, 18 Wn.2d 590, 621, 140 P.2d 298 (1943). Therefore, "willfulness means merely that the person knows what he is doing, intends to do what he is doing and is a free agent." *Id.* at 159-60 (internal quotations and citations omitted). The Ferry System's suggestion that some sort of criminal *mens rea* is required to find a willful withholding of wages is simply wrong.

D. Class Members are Owed 15 Minutes of Overtime Pay for Each Watch Change Completed.

Having demonstrated that watch time is work for which the Ferry System illegally and willfully paid no compensation whatsoever for mandatory work activities, the issue is now what class members are owed for watch change time. Once again, *SPEEA* provides the answer.

It is undisputed that under the Ferry System's payroll practice, if a class member works between 1 and 15 minutes of overtime, that class member is paid for 15 minutes at his or her applicable overtime rate.⁴ It is also undisputed that watch change takes more than one minute to complete.⁵ Under the Ferry System's payroll practices, it is undisputed that class members are entitled to 15 minutes of overtime pay.⁶

⁴ Many ferry system officials confirm this conclusion. He testified that "... if you [a class member] work one minute over up 15, you get 15 [minutes of overtime pay]." Manning Dep. 22:16-18. Post Engineer Tim Browning testified that class members "are paid one quarter hour for all overtime ... for any overtime past their scheduled shift from one minute up to and including 15 minutes." Deposition of Timothy J. Browning: 28:20 - 29:4. Acting Director of Maintenance and Preservation, John Christensen, agreed that "if an employee works one minute of overtime up to 15 minutes of overtime, they're compensated for 15 minutes [of overtime pay]." Deposition of John Christensen: 13:13 - 16:18. All witnesses agree that if a class member works between one and 15 minutes of overtime, he or she receives 15 minutes of overtime pay. The depositions of Christensen and Browning are attached as Exhibit C to the Declaration of Warren Martin (Clerk's Papers 520-606).

⁵ Plaintiffs observed 24 watch changes over a three day period. Watch change includes four components: (1) walking to the engine room, (2) an information exchange, (3) waiting on board until the deck crew determines that it is safe to leave the vessel; and (4) walking off the boat. Plaintiffs' expert calculated the average observed watch change time at 11.14 minutes. Declaration of Warren E. Martin ("Martin Dec."), Ex. A (Clerk's Papers 520-606). The walking and waiting to exit the vessel safely time is also compensable under *IBP, Inc. v. Alvarez*, 158 L.Ed. 709 (2003), 541 U.S. 1028, 124 S.Ct. 2114. One need not decide precisely how long watch change takes because under the Ferry System's payroll practices, if watch change requires even 1 minute of overtime work, then an employee would receive 15 minutes of overtime pay.

⁶ Class members waived any claim for watch changes in excess of 15 minutes to resolve the case on summary judgment.

In *SPEEA*, the Supreme Court made it clear that compensation under RCW 49.52 is at the employee's regular rate of pay, as measured by the employer's payroll practices. The *SPEEA* Court held:

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. If the employer's refusal to pay was willful, there are no exemptions in chapter 49.52 RCW, as under the WMWA, based on the category of employee. Moreover, the employee's recovery is at the employee's regular rate of pay. *Schilling*, 136 Wn.2d at 159 (purpose of chapter 49.52 RCW "is to see that the employee shall realize the full amount of the wages which by statute, ordinance, or contract he is entitled to receive from his employer[.]" (emphasis added, citation omitted)).

Id. at 831.

For unionized employees, the "regular rate" is their contract rate. The "regular rate" is the rate an employee would have earned had the employer properly recognized the task in question as work. *SPEEA* concludes that:

[T]he employees had a viable, if unexplored, remedy for Boeing's failure to pay wages at the appropriate contractual rate for the mandatory preemployment orientation sessions in RCW 49.52.070.

SPEEA at 840 (emphasis added).

The measure of wages owed in a claim under RCW 49.52 is what the employee would have received under the employer's payroll practices had the employer properly paid for the time worked. This is the employee's "regular rate of pay," because it is what the employee would have earned had the employer complied with the law. As *SPEEA* makes clear, where payroll practices are in a union contract, RCW 49.52 creates a remedy to recover for required off the clock work "at the appropriate contractual rate." *SPEEA*, 139 Wn.2d at 840. If the Ferry System had categorized watch change as work time, as it was legally obligated to do, each class member would have received 15 minutes of pay at his or her overtime rate for each off the clock watch change performed, regardless of whether such watch change took 3 minutes, 9 minutes or 14 minutes to complete.

Class members concede that there is a question of fact as to how long each watch change takes to complete. The Ferry System's payroll practices, however, make this factual dispute immaterial. Under the Ferry System's payroll practice, an employee who works even one minute of overtime is entitled to 15 minutes of pay. The Court should not reward the

Ferry System for its refusal to comply with the law by allowing it to create a new payroll practice in order to pay less for watch change than it does for other required overtime work.

E. The Ferry System's Defenses to its Obligation to Pay Wages Earned are Without Merit.

1. The Marine Employment Commission has no authority and no exclusive jurisdiction to decide statutory wage claims.

The MEC has no authority to decide a statutory wage claim. The MEC is not a Court of general jurisdiction. The MEC has no "special competence" to interpret a statute or decide what is "hours worked" under WAC 296-126-002(8). The MEC recognizes that it lacks authority over statutory claims. *Arroyo v. Wn. State Ferries*, MEC Case 9-96 (1997) attached to Ellsworth Dec as Ex. C (Clerk's Papers 216-305). In *Arroyo*, a ferry worker sought to arbitrate (or bring before the MEC) statutory claims under protections for "crime victims, survivors and witness as whistleblowers." *Id.* at 2. The MEC refused to hear these statutory claims stating it was "lodged before the wrong tribunal." *Id.* Superior Courts are where statutory claims are decided, not by the MEC. Respondents are aware of no authority holding that the MEC supplants a trial court's authority to decide a statutory wage claim. DOT certainly cites no such authority.⁷

⁷ As the Court noted in *Kerr v. Department of Game*, 14 Wn. App. 427, 542 P.2d 467 (1975), Rev. Denied 86 Wn.2d 1013 (1976), the doctrine of primary jurisdiction is

In *Dept. of Transportation v. Islandboatmen's Union*, 130 Wn. App. 472, 123 P.3d 137 (2005), this Court considered the scope of the MEC's statutory authority to decide a dispute. The Court first noted that "... the MEC is an administrative agency created by the Washington Legislature, and such an agency has only such power (i.e., jurisdiction) as the Washington Legislature chooses to grant." *Id.* at 475. The Court then reviewed the scope of the MEC statute and concluded:

[R]ead together as constituting one law, these statutes clearly show that the Washington Legislature has authorized the MEC to intercede in labor negotiations between WSF on the one hand and, on the other hand, ferry employees and a ferry employee organization. Just as clearly, however, these statutes do not show that the legislature has authorized the MEC to intercede in contract negotiations between WSF and a private concessionaire who by definition does not employ "ferry employees" within the meaning of RCW 47.64.011(5).

founded on notions of judicial restraint. It is not a true "jurisdictional" issue. In the proper circumstances, it may be appropriate for a Court to allow an administrative agency to make the initial decision. The facts in *Kerr* demonstrate when that doctrine is viable. In *Kerr*, the Department of Game adopted a rule that its employees could not apply for a controlled hunt permit. The Court observed that the parameters of that rule could possibly be resolved by collective bargaining because there was room for compromise. That is, perhaps only Department employees would be bound by the rule, but not relatives of the employee. In that instance the Court allowed the State Personnel Board to make the initial decision. *Kerr* also demonstrates the limits of the primary jurisdiction doctrine and why it does not apply here. The issue in dispute is whether ferry system employees have the right to be paid for all hours worked. That is not an issue that can be compromised. Hours worked must be paid. There is no sound policy reason for the Court not to decide the "hours" worked issue.

Id. at 479. Because the MEC lacked statutory authority to decide the dispute in *IBU*, this Court reversed the MEC decision with directions to dismiss the complaint.

The same principle applies here. There is nothing in RCW 47.64 that gives the MEC statutory authority to decide a claim under RCW 49.52. A statutory claim is different than a contract claim under a CBA. In *Wingert*, the Supreme Court recognized that the failure to pay wages earned “can constitute both a condition of labor violation and a contract claim.” *Wingert*, 146 Wn.2d at 849. The MEC would, at most, have the statutory authority to decide a contract claim. The MEC has no statutory authority to decide a statutory wage claim.

The history of the MEC enabling statute explains why the MEC is not empowered to decide statutory claims. Historically, from 1949 to 1981 ferry system employees could bargain terms of employment, including wages. In 1981 that right was taken away by statute which precipitated a short strike by ferry system workers. As a result, the 1983 legislature reinstated full bargaining rights to ferry workers in SSB 3108 and created the MEC.

The purposes underlying SSB 3108 are clear. Exhibit D to Declaration of Lewis L. Ellsworth (Clerk’s Papers 216-305). Although SSB 3108 restored ferry system employees ability to bargain over wages, they could not strike. In exchange they received interest arbitration. As

an overall umbrella the Legislature tied negotiations into the biannual budget cycle in order to retain overall authority over the ferry system budget. Significantly, nothing in the entire history of the ferry system in Washington, including the 1983 statute, evidences any intent to deny ferry workers the individual statutory rights enjoyed by every other worker in this state.

The fact that ferry system employees have full bargaining rights is no different than the fact that police and firefighters in many public jurisdictions throughout Washington have similar bargaining rights. There is no doubt that deputy sheriffs have a cause of action to recover unpaid "hours worked," even though they have the right to bargain and were covered by a CBA. *Chelan County Deputy Sheriffs Ass'n v. Chelan County*, 109 Wn.2d 282, 745 P.2d 1 (1987). Indeed, a large part of the state's own work force is unionized. The right of public sector employees to bargain collectively with respect to wages does not make their collective bargaining agreement the sole and exclusive remedy for statutory claims. No Court has ever held that a collective bargaining agreement had that effect. In fact, in *Wingert*, the Supreme Court clearly stated that unions could not abrogate employees' statutory rights for payment of wages owed.

Finally, the Ferry System argues that there is some inconsistency between allowing ferry workers to bargain terms and conditions of

employment (RCW 47.64) and prohibiting the Ferry System from requiring work for which it pays no compensation whatsoever. There is absolutely no inconsistency between these requirements. The wage statutes, including RCW 49.52, are a floor below which an employer and a CBA may not fall. As applicable to this case, RCW 49.52 means that the Ferry System cannot require work for which it pays nothing at all. RCW 47.64 allows the Ferry System to bargain about what it will pay, and RCW 49.46.010(5)(m) allows the Ferry System to negotiate a rate less than minimum wage. The Ferry System can easily comply with both RCW 47.64 and RCW 49.52, it simply chose not to do so. There is no inconsistency whatsoever in these requirements.

2. Class Members' Collective Bargaining Agreement Does Not Provide Exclusive Remedies for Every Employment Related Dispute.

As the Ferry System correctly states, the class members' CBA does not address whether watch relief is "hours worked." Declaration of Kara Larsen Exhibits A & B (Clerk's Papers 64-212). Section 23 of the CBA between class members' union and the Ferry System provides for the filing of grievances "in the event a controversy or dispute arises resulting from the application or interpretation of this agreement ...". Given that whether watch changes is "hours worked" is not covered by the collective bargaining agreement, class members cannot file a grievance to recover pay for such time because it would not involve the application or

interpretation of any provision of the agreement. If a grievance was filed, the Ferry System would obviously deny any such grievance as not being covered by the CBA. Indeed, Paul Brodeur testified in his deposition that the ferry system does not pay for watch change time because it is not covered by the collective bargaining agreement. Exhibit A to Declaration of Lewis L. Ellsworth, Brodeur Dep. 48:8 – 49:11; 30:3-24 (Clerk's Papers 216-305). Because the parties to this case agree that the CBA does not address the question in this lawsuit, an arbitrator would have no jurisdiction over any putative grievance.

Moreover, the Ferry System is simply incorrect when it argues that the "parties entire relationship is covered in the [labor] agreements." Appellant's Brief at 21. There is simply no evidence (and no legal authority) that the Washington legislature ever intended to make collective bargaining the sole and exclusive forum for ferry system employees to assert statutory claims.

For example, Chapter 49.60 RCW prohibits discrimination in employment. That statute applies to all state employees (RCW 49.60.040(1)). Although the class members' collective bargaining agreement contains a nondiscrimination clause (Section 2 Representation, paragraph (e)), the Ferry System cannot seriously contend that the only avenue for Ferry System employees to contest illegal discrimination would be to file a grievance under the collective bargaining agreement.

Unionized Ferry System employees, like every employee in the state of Washington, have the right to follow the procedures outlined in RCW 49.60 when confronted with unlawful discrimination.

The collective bargaining agreement does generally address the subject of “uniforms,” but the contract does not provide who will pay for those uniforms. RCW 49.12.450, which is applicable to the State as an employer (RCW 49.12.005(3)), requires it to pay for the uniforms. Violations of that section can be brought to DLI for redress. Again, the Ferry System cannot seriously contend that a collective bargaining agreement can supplant DLI’s express statutory jurisdiction to resolve compensation issues relating to uniforms.

A further example is § 27 of the collective bargaining agreement which addresses the use of sick leave. It does not, however, expressly provide that employees have the right to use accrued sick leave to care for their sick children. The right to use sick leave, however, is guaranteed by RCW 49.12.270. Because that issue is not addressed in the collective bargaining agreement, does the Ferry System seriously contend that right does not exist? Or if it does, does the Ferry System assert that only an arbitrator or MEC has enforcement authority?

Finally, taking the Ferry System’s argument to the extreme, even though RCW 49.48.010 makes it unlawful to divert employees’ wages, except under certain circumstances, if the Ferry System were to violate

that section, it could do so with impunity since diversion of wages is not covered by the collective bargaining agreement. The same would be true for RCW 49.48.120, which deals with payment of wages in the event of an employee's death as this subject is not addressed in the labor contract. Additionally, since the protections contained in RCW 49.52.050 are not contained in the collective bargaining agreement, the Ferry System could violate those statutory rights with impunity because, according to the Ferry System, they do not constitute "terms and conditions of employment."

Class members have the absolute right to pursue statutory non-negotiable wage claims against the Ferry System. The Superior Court is the appropriate place for those claims to be decided. The MEC lacks authority to decide statutory wage claims. An arbitrator cannot decide such claims because class members' claims do not even arguably involve the interpretation or application of any provision of the collective bargaining agreement. Only the Superior Court can provide appropriate relief to the Plaintiffs for their claims.

3. Washington Law Does Not Recognize a *De Minimis* Defense.

The Ferry System finally argues that the work time performed in watch change is *de minimis* and therefore not compensable. The reasons why a *de minimis* defense fails are set forth below.

a. De minimis is not recognized in Washington.

The de minimis doctrine is a federal minimum wage principle that excludes some otherwise compensable time from the definition of hours worked.⁸ This is contrary to Washington law which requires that all hours worked must be paid. WAC 296-126-008 provides:

(8) "Hours worked" shall be considered to mean all hours during which the employee is authorized or required by the employer to be on duty on the employer's premises or at a prescribed work place.

WAC 296-12-002(8) (emphasis added). This regulation has the force and effect of law. *Wingert v. Yellow Freight Systems*, 146 Wn.2d 841, 848 (2002); *see also* RCW 49.46.120. The word "all" in WAC 296-126-008 cannot be interpreted to mean "some." A de minimis defense is simply inconsistent with the state law definition of "hours worked."

Importantly, DLI defines "hours worked" to include all hours employees are "on duty." Unlike federal law, Washington law has no exclusions that make some "hours worked" not paid time. As Richard Ervin, the head of DLI's Employment Standards Division testified:

Q: In terms of the Department of Labor & Industries' policy, am I correct that the department has no written policy that

⁸ The *de minimis* concept arises from the federal Portal-to-Portal Act. Provisions of that Act allow employers to not pay for otherwise compensable work time. However, as the Court of Appeals in *Anderson v. DSHS*, 115 Wn. App. 452, 457, 63 P.3d 134 (2003), *Rev. Denied*, 149 Wn.2d 1036, 75 P.3d 968 (2003) found, there is no evidence that the Legislature incorporated the Portal to Portal Act into Washington's wage claim statutes.

there is a de minimis standard by which some work that would constitute hours of work need not be paid?

A: The department has no policy, you are correct.

Q: The department has no administrative policy or guideline that there is a certain threshold below which hours worked need not be paid?

A: That's correct.

Q: Would the department, under that circumstance, have an enforcement practice to say that in a wage claim case there would be some time, if it was worked, that would not have to be paid for?

A: My response is that the department believes all time worked must be paid.

Q: So there's no --- I'm sorry?

A: There is no de minimis policy that we have. But whether we would enforce or take enforcement action is a different question.

Q: So I'm clear, the policy of the department is that, if employees worked compensable hours, they must be paid for that?

A: That's correct.

Deposition of Richard Ervin, 14:1-9; 14:20-25; 15:1-8, (Martin Dec., Ex. C, Clerk's Papers 747-792).

Washington Courts are not bound by federal case law and do not follow federal cases when Washington law has differing language or purposes. *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 298-99, 996 P.3d 582 (2000). Washington has a “long and proud tradition of being a pioneer in the protection of employee rights.” *Id.* at 300. No reported Washington decision recognizes a *de minimis* defense under state law.

Independently, the federal *de minimis* defense in this case is inconsistent with *SPEEA*. *SPEEA* provides that an employer cannot require work for which it pays no compensation whatsoever. For the federal *de minimis* defense to be applicable under RCW 49.52, *SPEEA* must be revised to say that an employer may require some work for which it pays no compensation whatsoever, as long as it is not too much or too regular work. Given that the Ferry System will pay for even one minute of overtime work, *SPEEA* should not be revised to reward the Ferry System for its requiring compulsory, but unpaid, work.⁹

⁹ In arguing for a *de minimis* defense, the Ferry System itself borrows Minimum Wage Act principles to analyze a claim under RCW 49.52. This is paradoxical, given that the Ferry System’s main argument is that MWA principles may not be used to interpret RCW 49.52. In making the *de minimis* argument, the Ferry System implicitly concedes that the only source to fill in gaps in RCW 49.52 are principles under the MWA. If this is correct, as respondents here shown above, then it follows that MWA principles as recognized in *Wingert* and *SPEEA* also fill in the gaps in defining when a “wage” is owed under RCW 49.52.

b. Even if federal law were to apply, the prerequisites for applying de minimis doctrine are not met.

To garner the benefits of the federal de minimis defense, an employer must show four things: (1) the amount of daily work time is minimal; (2) the aggregate amount of the unpaid work time is small; (3) additional work occurs irregularly; and (4) administrative difficulty prevents recording the additional unpaid work for payroll purposes. *E.g., Lindow v. United States*, 738 F.2d 1057 (9th Cir. 1984). The Ferry System cannot meet any of those elements here.

As to the first element, the amount of work, the Ferry System has instituted a compensation practice that pays class members who work even one minute of overtime. The Ferry System thereby follows DLI guidelines (and state law) by paying for all hours worked and has never (prior to this case) applied a de minimis standard. It is difficult to understand how the Ferry System could argue that watch change time (which even it agrees requires 5.3 minutes each day) is de minimis when the Ferry System pays for even one minute of other types of overtime work. Respondents are unaware of any case that even suggests that if an employer pays for one minute of overtime work, it can disregard (and not pay for) over five minutes of another type of overtime work by calling the five minutes of work “de minimis.” Notably, the Ferry System cited no such authority.

Moreover, the Ferry System admits that watch change is an essential part of its safety program. It is required by the Coast Guard. The Ferry System mandates that the watch change occur face to face. Watch change is so important that the Ferry System developed a written policy specifying what class members must do. If a class member does not do a watch change, that person would face disciplinary action. One cannot say that completing this essential task is a minimal amount of work time.

The Ferry System has extracted this work for free for at least 25 years. When the labor was free, watch change was essential, important and mandatory. Now, when the Ferry System faces having to pay for the very time it requires, watch change somehow becomes “de minimis.” Class members are unaware of any authority that would justify such a radical switch in the characterization of the same work activity.

The first three elements of the federal de minimis defense focus collectively on how much work is at issue, what the total amount of hours are and how regularly the work occurs. *Lindow* applies a federal de minimis defense to work that is not required, is irregular and would be administratively impractical to measure. Here, by contrast, watch change is mandatory, the work occurs every day, twice a day, 365 days per year. Given the size of the ferry fleet and staffing levels, class members estimate that there are over 32,000 watch changes per year. If a watch change requires 5.3 minutes (the estimate from the Ferry System’s expert),

there are almost 170,000 minutes (or over 2,800 hours) of watch change time every year. How can the Ferry System credibly argue that 2,800 hours of work every year is “de minimis.”¹⁰

Under the fourth element of the federal de minimis defense (impracticability of recording time), the defense does not apply if it would be practical for an employer to record the time worked. *Lindow* itself holds that “employers must compensate employees for even small amounts of time unless that time is so miniscule that it cannot, as an administrative matter, be recorded for payroll purposes.” *Lindow*, 738 F.2d at 1062-63. Most other federal decisions reach the same conclusion. *See Mireles v. Frio Foods*, 899 F.2d 1407, 1414 (5th Cir. 1990) (employer who required employees to arrive at work at specified time but did not begin recording time until plant was ready could record all of employees’ time by always beginning to record time at their regularly scheduled start time; 15 minutes of work time not de minimis); *Sanders v. John Morrell & Co.*, 1 WH Cases 2d 885, 886, 1992 U.S. Dist. Lexis 21716 (N.D. Iowa Oct. 1992) (3 minutes per day spent cleaning equipment after each regular shift was not de minimis because employer, who maintained time with computerized timekeeping system, did not show that it could not record such time “in this day of technology.”); *Dole v. Enduro Plumbing*, 30 WH

¹⁰ Based on the estimates from class members’ expert, watch change requires over 370,000 minutes (or over 6,200 hours) of work every year.

Cases 196, 200-201 (C.D. Cal. 1990), 1990 U.S. Dist. Lexis 20135 (construction workers' time spent working at place of business before and after work at job site not de minimis because they checked in and out at place of business and time could be recorded); *Brusstar v. Southeastern Pa. Transp. Auth.*, 29 WH Cases 152, 155-56 (E.D. Pa. 1988) (aggregate work time amounting to almost \$20 per year per employee not de minimis; employer unable to show practical administrative difficulty in recording this time).

In this case, it is not impractical for the Ferry System to record watch change time. The Ferry System knows when the ferries are at the dock. When the on-coming crew boards the ferry and when the off-going crew leaves the ferry are easily identifiable events. The Ferry System could have employees complete time records to document watch change time which could be compared with the known dock times and the observable "walk on/walk off" times. The Ferry System could record watch change time, it has just chosen not to.

Moreover, as noted above, the Ferry System pays 15 minutes of overtime if even one minute of overtime is worked. The Ferry System admits knowing that watch change takes more than one minute every watch change. Thus, the Ferry System can hardly argue that whether it may have difficulty measuring the precise length of a watch change is a

legally significant fact when it would in fact pay for 15 minutes regardless of how long watch change actually takes.

The Ferry System cannot meet the de minimis defense even if it is newly recognized under Washington law. The Ferry System requires a watch change every day, 365 days per year. The Ferry System has a practice of paying for even one minute of overtime work. The Ferry System would pay for any other required task that took two minutes to complete. The Ferry System could easily record and pay for watch change time. Therefore, even if this Court were inclined to recognize a de minimis defense under Washington law (and it should not be recognized), the undisputed facts here show that the defense would not be met.

F. The Class Is Entitled to Attorney's Fees on Appeal.

RCW 49.52.070 and RCW 49.48.030 authorize an award of attorney's fees to the class if the class recovers wages owed. Pursuant to RAP 18.1, the class requests an award of attorney's fees on appeal.

V. CONCLUSION

The Ferry System has extracted work from its engine room crews for years by requiring them to perform watch changes. Watch changes are an indispensable part of the crew change process. Class members who do not do a proper watch change are subject to discipline. Nonetheless, the Ferry System would have this Court condone the Ferry System's practice of requiring free labor. Workers in the State of Washington are entitled by

statute and decisional law to be paid when they work. The trial court recognized that truth and its decision should be affirmed.

Dated this 12 day of July, 2006.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of July, 2006, I filed this Brief of Respondent with the Court of Appeals Division II and caused to be delivered via email on the 12th a copy of this Brief of Respondent and also via U.S. mail to:

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STATE OF WASHINGTON
BY Jennifer Milsten-Holder

Dated in Tacoma, Washington this 12th day of July, 2006.

Jennifer Milsten-Holder
Jennifer Milsten-Holder, Secretary