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I. INTRODUCTION

The Marine Engineers' Beneficial Association (Union) and the Washington State Department of Transportation, Ferries Division (WSF) bargained a grievance process in their collective bargaining agreements (CBA) covering licensed and unlicensed engine room employees. That grievance process empowers an arbitrator to interpret and construe the terms of the CBAs. Thus, the parties bargained for an arbitrator's construction of the CBAs.

In *Davis v. Dep't of Transp.*, 138 Wn. App. 811, 159 P.3d 427 (2007), *review denied*, 163 Wn.2d 1019 (2008), the Court agreed with WSF, holding that the engine room employees must bring their claim pursuant to the grievance process outlined in the CBAs. The Court also opined on the meaning of the CBAs, as applied to watch turnover activities, but that view did not preclude an arbitrator from interpreting the CBAs differently once the issue was properly submitted for grievance arbitration. The job of interpreting the CBA falls to the arbitrator, not the Court. Accordingly, as contemplated by the *Davis* opinion, the Union filed a grievance on behalf of the engine room employees who were the plaintiffs in *Davis*, and WSF exercised its right under the CBAs to ask an arbitrator to construe the contract terms.

The Marine Employees' Commission (MEC), acting as arbitrator, interpreted the CBAs consistent with the interpretation proffered by the Court in *Davis* and awarded back wages. However, the MEC also awarded attorney fees to the Union, in direct contravention of the CBAs and its own WAC requiring each party to bear their own costs at grievance arbitration. WAC 316-65-150. The MEC and the Union now attempt to rationalize the MEC's award of attorney fees by claiming essentially that WSF did not have the right to seek an arbitrator's interpretation of the CBAs, notwithstanding the grievance provision of the CBAs, MEC WAC, and RCW 47.64, all of which grant authority to interpret the CBAs to an arbitrator of the parties' choosing and constrain the arbitrator from changing the terms of the CBAs. WSF sought the benefit of its bargain – to have an arbitrator interpret the CBA language – and now seeks the benefit of its bargain that each party pay their own attorney fees for the arbitration proceeding.

II. ARGUMENT

A. **WSF And The Union Bargained For An Arbitrator's Construction Of The CBAs And The Court's Decision In *Davis* Did Not Deprive The Parties Of That Process.**

The Union and the MEC tout the language in *Davis* indicating that the Court was of the view that watch turnover was compensable under the overtime provisions of the CBAs. From this, they argue that WSF acted

inappropriately in exercising its right under the CBAs to arbitrate. Given the Court's ultimate holding that the employees were required to pursue their claim through the contractual grievance process, it would be illogical to interpret the Court's view of the meaning of the CBAs as depriving the parties of that process.

The United States Supreme Court in *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599, 80 S. Ct. 1358, 4 L. Ed. 2d 1424 (1960), held:

[T]he question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which is bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.¹

See also *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 37-38, 108 S. Ct. 364, 370, 98 L. Ed. 2d 286 (1987) ("Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept.").

¹ The Union apparently fails to see the irony in its reliance on this specific passage from *Enterprise Wheel* in support of its argument that the Court's opinion regarding the compensability of watch turnover under the CBAs mandated that the MEC interpret the CBA identically.

This is precisely what WSF was arguing before the MEC. The interpretation of the CBAs was a question for the arbitrator, not the *Davis* Court, because it is the arbitrator's construction for which the parties bargained. In the words of the Supreme Court in *Enterprise Wheel*, just as a court has "no business" overruling an arbitrator because it disagrees with his interpretation of the contract, the *Davis* Court had "no business" construing the CBAs before the matter went to arbitration.² WSF's insistence on having the CBAs interpreted and decided by an arbitrator rather than a court was entirely appropriate.

The recent decision by the Court in *Davis v. Dep't of Transp.*, 159 Wn. App. 1035, 2011 WL 300194, at *4, *5, attached for the Court's convenience as Appendix A, confirms that WSF proceeded appropriately to arbitration.

[Plaintiffs] contend that *Davis* held that the CBA gave them the right to recover wages for watch change and that the MEC merely determined the amount of wages owed. We disagree. Although *Davis* gave direction to the MEC about whether the CBA addressed compensation for watch changes, *the MEC had authority to interpret the CBA as it saw fit*, which it did, coming to the same conclusion as we did in *Davis*.

...

² The Union, the other party to the CBAs, was not a party in the *Davis* case, and the issue of the meaning of the CBAs was not before the Court, only whether the employees were in the wrong forum.

Thus, despite our direction in *Davis*, the MEC independently found that the CBA provided overtime compensation for work shift changes. Plaintiffs were unsuccessful in *Davis*, and that decision was not necessary to the MEC's decision to award wages. *The CBA gave the MEC authority to award wages, not Davis.*

To the extent that the MEC entered findings of fact or conclusions of law that projected Davis as precedent as to the issue of the right to recover lost wages, the MEC misunderstood the nature of Davis. Davis ultimately held that plaintiffs could not first bring an action to court without exhausting the issue with the MEC.³

(Emphasis added.)

Thus, the Court has made clear that WSF was entitled to fully arbitrate the meaning of the CBAs on the issue of the compensability of watch turnover, and the Union's and the MEC's reliance on the first *Davis* decision was and continues to be misplaced.

B. When Acting As An Arbitrator, The MEC Does Not Have Authority, Equitable Or Otherwise, To Alter The Parties' Bargain By Granting Relief That The Parties Have Agreed Is Prohibited.

The MEC argues that it has equitable authority to award attorney fees, even where the CBA prohibits such an award. Interestingly, the MEC's brief appears to imply – without expressly averring – that this equitable authority derives from the MEC's statutory responsibilities in promoting “harmonious relations between Washington State Ferries and

³ Although this decision is unpublished, it is the law of the case.

its employees.” By devoting several pages to describing the MEC’s history and providing a litany of its various duties as an administrative agency, the MEC is perhaps hoping the Court will conflate the MEC’s authority as a grievance arbitrator with its broader authority in adjudicating other types of labor cases. *See* Brief of Respondent Marine Employees’ Commission (Br. Resp’t MEC) at 3-6, 28. In defending its decision in this case, the MEC apparently wants to hide behind the limited standard of review applied to judicial review of grievance arbitrations – under which the Court will not allow a challenge based on a finding that the arbitrator’s decision was arbitrary and capricious – while at the same time asserting that its decision to award fees was within its plenary authority as an administrative agency.⁴

The MEC cannot have it both ways. If it is defending its decision based on its status as an administrative agency, then its decision should be reviewed under the standard of review applicable to administrative

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⁴ Tellingly, the MEC argues that “recognizing the authority *of the Commission* to grant attorneys’ fees in extraordinary situations where there is no valid dispute promotes the public policy enunciated by the Legislature.” (Emphasis added.) Br. Resp’t MEC at 28. Clearly the MEC is seeking to be allowed greater discretion, when it sits as a grievance arbitrator, than would be allowed to a private arbitrator. There is no legal support for any such distinction to be made.

actions.⁵ Under that standard, it cannot be seriously disputed that the MEC's decision to award attorney fees was arbitrary, capricious and contrary to law. Not only did the MEC act arbitrarily and capriciously and contrary to law when it ignored the express terms of the CBA requiring each side to pay its own attorney fees, it also acted arbitrarily, capriciously and contrary to law when it mischaracterized the holding in *Davis* as a dispositive ruling on the merits of the engine room employees' wage claim.

However, as WSF argued in its opening brief, WSF believes the appropriate standard of review is the standard applied to grievance arbitration decisions, and that review is limited to whether the arbitrator acted illegally by exceeding his or her authority under the contract. *Saldin Sec., Inc. v. Snohomish Cy.*, 134 Wn.2d 288, 292, 949 P.2d 370 (1998). In applying that standard of review to the arbitrator's decision in

⁵ If in fact, the Court determines to decide this case as a review of an agency action, the Court has jurisdiction over this petition pursuant to the Court's inherent power to review agency actions. Const. art. IV § 6; *Dep't of Corr. v. Pers. Appeals Bd.*, 92 Wn. App. 484, 967 P.2d 6 (1998). A constitutional or common law writ of certiorari to review an administrative action is warranted when "the petitioner's allegations, if true, clearly demonstrate that the . . . [administrative] actions were arbitrary, capricious, or contrary to law." *Foster v. King Cy.*, 83 Wn. App. 339, 346-47, 921 P.2d 552 (1996) (citing *Kerr-Belmark Constr. Co. v. City Coun.*, 36 Wn. App. 370, 373, 674 P.2d 684, review denied, 101 Wn.2d 1018 (1984)). "The right to be free from [arbitrary and capricious] action is itself a fundamental right and hence any arbitrary and capricious action is subject to review." *Pierce Cy. Sheriff v. Civil Serv. Comm'n*, 98 Wn.2d 690, 693-94, 658 P.2d 648 (1983) (citing *Williams v. Seattle Sch. Dist. 1*, 97 Wn.2d 215, 221-22, 643 P.2d 426 (1982)). Such review is not full appellate review, but is limited to a review of the record below to determine whether the decision or act complained of was or involved arbitrary and capricious or illegal actions, thus violating the petitioner's fundamental right to be free of such action. *Id.*

this case, it must be emphasized that in fact and in law, the MEC's authority when sitting as a grievance arbitrator is no greater than that of any private labor arbitrator that might be selected by the parties to adjudicate a grievance under the parties' CBAs.

RCW 47.64.150 provides that "an arbitrator's decision on a grievance shall not change or amend the terms, conditions or applications of the collective bargaining agreement." Significantly, this statute does not contain an exception authorizing an arbitrator to change the terms of a collective bargaining based on equitable considerations. As a matter of policy, such an exception would only beget mischief. Not only would an "equity exception" undermine the parties ability to rely on their labor agreements, it would spawn pleas for judicial relief, brought by parties victimized by capricious modifications of their labor agreement, implemented by arbitrators under the guise of equity.

The cases cited by the MEC in support of its position that grievance arbitrators have equitable authority to ignore and override the terms of a CBA are inapposite. They either did not involve a contract that specifically prohibited the award of attorney fees, as the CBAs here do, or the fees were incurred for actions that took place outside the arbitration proceeding.

In *Synergy Gas Co. v. Sasso*, 853 F.2d 59, 64 (2nd Cir. 1988), the parties had stipulated that the arbitrator had authority to decide whether to award payments other than back pay, including attorney fees.

In *Langemeier v. Kuehl*, 307 Mont. 499, 503, 40 P.3d 343 (2001), attorney fees were authorized by the settlement agreement the parties were in court to enforce. Further, all of the parties requested attorney fees, indicating their understanding that such an award was contemplated. *Id.*

In *Fortex Mfg. Co.*, 67 LA 934 (1976), the union failed to prevent its members from striking in violation of a no-strike clause in the contract, and the attorney fees were incurred by the employer as a result of the strike. This was not a situation of a grievance arbitration to construe the terms of the contract. In fact, the arbitrator specifically found the grievance provisions inapplicable and that the issue submitted to him was strike damages. In enforcing the arbitration award, the district court found the award of attorney fees justified as consistent with the request of the parties to assess damages. *See Amalgamated Clothing Workers of America*, 99 LRRM 2303 (M.D. Ala. 1978).

In *Litton Systems v. Local 522*, 90 LRRM 3176, 3179 (S.D. Ohio 1975), the agreement was silent on the right of the arbitrator to award damages of any kind, and fees were awarded for losses incurred by the employer from the union's attempts to obstruct access to the contractual

arbitration forum. That is the opposite of this case. The CBAs are not silent on the authority of the arbitrator to award attorney fees. Further, WSF was attempting to force the employees and the Union into the contractually created arbitration forum, not prevent access. In *Litton*, the arbitrator found:

The sham proceedings in this case bear no analogy to genuine, bona fide contests over procedural and arbitrability issues. Interjection of the patently spurious defense of non-arbitrability required the Company to expend a substantial sum of money merely to obtain the opportunity to have a dispute resolved by arbitration, which was a right the labor agreement clearly granted.

Id. at 3180. In terms of equity, it is WSF that expended substantial sums of money in *Davis* merely to obtain the opportunity to have this dispute resolved by arbitration, which was a right the CBAs clearly granted.

In *Rust Engineering Co.*, 77 LA 488 (1981), the CBA provided that each party pay its own expenses incidental to the preparation of its case. However, the attorney fees claimed by the employer were to obtain a court order compelling arbitration, not for the presentation of its case at arbitration. Similarly, in *Sunshine Convalescent Hosp.*, 62 LA 276 (1974), the fees were incurred due to the employer's refusal to arbitrate.

The common thread through these cases is that there was no contractual language prohibiting the award of attorney fees in the specific circumstances. Here, there is specific contractual language requiring each

side to pay their own attorney fees for the grievance arbitration proceeding itself. That provision, therefore, prohibits an arbitrator from awarding fees pertaining to the grievance arbitration proceeding.

C. WSF Proceeded To Arbitration In Good Faith, And The *Davis* Case Did Not Render WSF's Position At Arbitration So Meritless That Arbitration Was Unnecessary And Enforcing The CBA Provision On Attorney Fees Inequitable.

Notwithstanding its protestation that this case is not about why the MEC awarded attorney fees but simply whether it has any authority in any circumstances to award attorney fees, MEC argues that WSF “asserted a claim or defense that is so without merit that it causes the other party to expend resources unnecessarily”; therefore, it would be inequitable to enforce the CBA provision requiring each side to bear their own costs. Br. Resp’t MEC at 23. However, as the second *Davis* decision clarifies, the first *Davis* decision was not controlling as to the interpretation of the CBAs. Accordingly, the arbitration proceeding was not unnecessary.

Further, the MEC relies on cases where one party refused to arbitrate. Again, that is the opposite of this case. It is WSF that was forced to obtain a court ruling requiring the engine room employees to arbitrate their claim for watch turnover pay in accordance with the grievance procedures in their CBAs rather than suing for damages in superior court. The rationale and logic contained in the cases cited by the

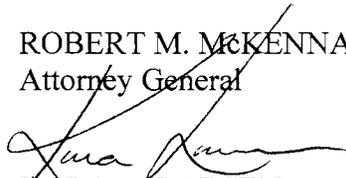
MEC might support an award of attorney fees to WSF, the party seeking arbitration, but comes nowhere close to supporting a fee award for the Union, the party which resisted arbitration on the merits of the employees' wage claim under a mistaken theory that the claim had been decided by the Court of Appeals.

III. CONCLUSION

The MEC's award of attorney fees to the Union did not draw its essence from the CBAs. This is not a case of a wrong interpretation or legal error, which are not generally reviewable. This is a case of the arbitrator exceeding the authority granted him by the parties, by WAC, and by statute. The MEC did not act within the scope of its authority as an arbitrator. WSF respectfully requests that this Court reverse the superior court, grant its petition for certiorari, and vacate Paragraph 5 of the MEC's arbitration award, awarding attorney fees to the Union.

RESPECTFULLY SUBMITTED this 25th day of March, 2011.

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Appendix A

Not Reported in P.3d, 159 Wash.App. 1035, 2011 WL 300194 (Wash.App. Div. 2)
(Cite as: 2011 WL 300194 (Wash.App. Div. 2))

HOnly the Westlaw citation is currently available.

NOTE: UNPUBLISHED OPINION, SEE RCWA
2.06.040

Court of Appeals of Washington,
Division 2.
Ben DAVIS, Floyd Fulmer, Roy Hyett, Dick Olson,
individually and on behalf of all persons similarly
situated, Respondents,

v.

STATE of Washington DEPARTMENT OF
TRANSPORTATION, Appellant.

No. 40019-7-II.
Jan. 21, 2011.

As Corrected Feb. 8, 2011.

West KeySummaryAttorney and Client 45 ↻155

45 Attorney and Client

45IV Compensation

45k155 k. Allowance and Payment from Funds
in Court. Most Cited Cases

Ferry engine room employees who brought class action against state department of transportation (DOT) to recover wages for performing watch change activities were not entitled to attorney fees based on the common fund doctrine. Employees were not successful in the court action that culminated in their original action and could not claim attorney fees for that unsuccessful action. West's RCWA 49.48.030.

Appeal from Pierce County Superior Court; Honorable Rosanne Nowak Buckner, J.
Stewart Arthur Johnston, Kara Anne Larsen, Attorney
General Office L & P Div., Olympia, WA, for Appellant.

Warren Evans Martin, Attorney at Law, Tacoma, WA,
for Respondents.

UNPUBLISHED OPINION
BRIDGEWATER, J.P.T.^{FN1}

FN1. Judge Bridgewater is serving as judge

pro tempore of the Court of Appeals, Division II, under RCW 2.06.150.

*1 The Washington State Department of Transportation (DOT) appeals an award of attorney fees under RCW 49.48.030 to plaintiffs in a class action lawsuit in which we held the plaintiffs were unsuccessful. We hold that RCW 49.48.030 does not entitle the plaintiffs to attorney fees. We vacate and reverse.

FACTS

In 2004, the DOT ferry engine room employees (plaintiffs) filed this lawsuit seeking to recover wages for performing watch change activities. Watch change is a process in which an oncoming shift relieves an off-going shift. The off-going shift had mandatory procedures that frequently continued past the scheduled start of the next watch, but the off-going workers were not compensated for this time.

The DOT moved for summary judgment, asserting that the lawsuit should be dismissed because plaintiffs failed to exhaust their administrative remedies under the terms of their collective bargaining agreements (CBA). Plaintiffs filed a cross motion for summary judgment, asserting that RCW 49.52.050 and .070 entitled them to recovery. The trial court granted summary judgment for plaintiffs and awarded them attorney fees based on the common fund doctrine.

The DOT appealed to this court, arguing that the trial court erred in granting summary judgment because plaintiffs had failed to follow their CBA grievance procedures, in effect not exhausting their alternative remedies. Davis v. Dep't of Transp., 138 Wash.App. 811, 825-26, 159 P.3d 427 (2007), review denied, 163 Wash.2d 1019, 180 P.3d 1291 (2008). Plaintiffs responded that their claims had nothing to do with the CBA and, thus, a grievance proceeding before the Marine Employees Commission (MEC) would be futile. Davis, 138 Wash.App. at 820, 159 P.3d 427.

In Davis, plaintiffs denied that they had a remedy under the CBA and instead argued that RCW 49.52.050 and .070 entitled them to relief. Davis, 138 Wash.App. at 820, 159 P.3d 427. We disagreed and

Not Reported in P.3d, 159 Wash.App. 1035, 2011 WL 300194 (Wash.App. Div. 2)
 (Cite as: 2011 WL 300194 (Wash.App. Div. 2))

held that the correct statutory remedy was under RCW 47.64.150, which directed the plaintiffs to follow the CBA grievance procedures. Davis, 138 Wash.App. at 824, 159 P.3d 427. Because the plaintiffs had failed to follow those procedures, we reversed and remanded to enter judgment for the DOT. Davis, 138 Wash.App. at 826, 159 P.3d 427. Plaintiffs also requested attorney fees in *Davis*, which we denied, stating, "Because the employees at this time have not recovered any wages owed, we do not award attorney fees under either RCW 49.48.030 or RAP 18.1." Davis, 138 Wash.App. at 826, 159 P.3d 427.

In March 2008, the plaintiffs' union, the Marine Engineers' Beneficial Association (union), filed a request for grievance arbitration with the MEC to recover wages for watch change activities. The individual plaintiffs could not file for grievance arbitration on their own behalf; that could only be done by the union.

In July 2009, the MEC sustained the union's grievance and awarded back pay for watch change activities. The MEC's decision entered the following findings of fact relevant to this appeal:

*2 2. ... [T]he WSF has never paid engine room employees for the time involved in performing the watch turnover, even though watch turnover extends the employee's work beyond the regular assigned work shift.

....

5. The Washington Court of Appeals reversed the Superior Court's ruling, dismissing the class action lawsuit because the employees' claims should have been brought pursuant to RCW 47.64.150, which required them to seek a remedy through procedures in the CBA or procedures established by the MEC. However, the Court of Appeals also held that "watch changes are a regular, essential, and required work activity for which the State must compensate under the CBA. **And whether watch changes are work or whether watch changes must be compensated is not an issue for future grievance or arbitration.**" (Emphasis added.)

....

7. The parties agree that each watch turnover takes less than fifteen (15) minutes.

8. [The CBA provides] that, when work is extended less than 15 minutes beyond the regularly assigned workday, the minimum payment is 15 minutes at the overtime rate.

CP at 1106-07. The MEC also entered the following relevant conclusions of law:

3. The Washington State Court of Appeals has ruled that engine room employees are to be compensated under the Collective Bargaining Agreements for time spent on watch turnover.

4. [The CBA] provide[s] compensation for work that is extended beyond a regular assigned work day.

CP at 1108.

In addition to these findings of fact and conclusions of law, the MEC stated the following in a discussion:

It is the view of the Commission that the State of Washington Court of Appeals overstepped its bounds and directed us, in advance of arbitration, as to what our findings should be. We strongly believe it was inappropriate of the court to have given advance instructions to the Commission on the interpretation of the collective bargaining agreement.

However, the matter is before us as an agency of the State of Washington and we are governed by the courts of this State. We therefore concede to the directive of the Court and find that the matter of whether or not watch changeover is "work" within the meaning of the statutes of the State of Washington has already been determined, and our challenge is to determine the proper remedy.

It is unreasonable to believe that had this grievance over watch turnover been filed with MEC prior to the Court proceedings, MEC would not have applied the same interpretation of the contract as the Court. The contract specifically provides for overtime compensation when work is performed prior to or beyond the end of a work shift.

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... [T]he Court properly concluded that the contract requires watch turnover pay is owed to engine room employees at WSF.”

CP at 1109 (emphasis added).

The union requested that the MEC award the plaintiffs attorney fees for their action before the MEC and for the plaintiffs' litigation in *Davis*. The MEC awarded the union attorney fees for bringing the grievance before it but denied the union's request to also award plaintiffs attorney fees.

*3 In October 2009, the plaintiffs, not the union, filed a motion in trial court seeking attorney fees in *Davis*. They also filed an alternative motion to reopen the case solely for consideration of an award of attorney fees, but not costs. The plaintiffs argued that we left open the possibility that they could recover attorney fees because the *Davis* opinion stated, “Because the employees *at this time* have not recovered any wages owed, we do not award attorney fees.” *Davis*, 138 Wash.App. at 826, 159 P.3d 427 (emphasis added). The trial court granted plaintiffs' motion for attorney fees and costs.

ANALYSIS

We award attorney fees only if authorized by a contract, statute, or recognized ground of equity. *Bowles v. Dep't of Ret. Sys.*, 121 Wash.2d 52, 70, 847 P.2d 440 (1993). We review de novo a trial court's decision that a particular contract, statute, or recognized ground in equity authorizes an attorney fee award. *Tradewell Group, Inc. v. Mavis*, 71 Wash.App. 120, 126, 857 P.2d 1053 (1993).

The threshold question is whether the trial court had authority to hear plaintiffs' motion for attorney fees. The State argues that the court lacked such authority because we issued a mandate in *Davis*, in which we denied plaintiffs' request for attorney fees. Plaintiffs respond that *Davis* did not make a final decision on his request for attorney fees, but rather held, “ ‘Because the employees *at this time* have not recovered any wages owed, we do not award attorney's [sic] fees under either RCW 49.48.030 or RAP 18 .1.’ ” Br. of Resp't at 13-14 (quoting *Davis*, 138 Wash.App. at 826, 159 P.3d 427). They argue that RAP 12.2 allowed the trial court to hear his motion because we left open the possibility that they could recover attorney fees if the employees recovered

wages owed.

Under RAP 2.2(a)(3), a party may appeal a decision determining the action, unless a statute or court rule otherwise prohibits the appeal. RAP 12.2 governs the trial court's authority after an appellate mandate has issued. The rule provides that “[u]pon issuance of the mandate ... the action taken or decision made by the appellate court is effective and binding on the parties to the review and governs all subsequent proceedings in the action in any court, unless otherwise directed upon recall of the mandate as provided in rule 12.9.” RAP 12.2. The rule continues, “After the mandate has issued, the trial court may, however, hear and decide postjudgment motions otherwise authorized by statute or court rule so long as those motions do not challenge issues already decided by the appellate court.” RAP 12.2.

Plaintiffs point out that our decision in *Davis* did not unequivocally foreshadow recovering attorney fees but, rather, left open the possibility that plaintiffs could recover attorney fees after recovering back wages, which they have. Specifically, the plaintiffs recovered back wages via the union's claim before the MEC, an action in which the union also recovered attorney fees. But the union's attorney fee recovery, although benefiting the plaintiffs, was an award to the union, not to the plaintiffs for their litigation that culminated in *Davis*. Accordingly, plaintiffs now ask us to award them attorney fees for litigating *Davis*.

*4 To answer plaintiffs' request, we must determine whether a statute or court rule authorized plaintiffs' postjudgment motion for attorney fees and costs. RAP 12.2. Plaintiffs contend that RCW 49.48.030 entitles them to attorney fees for litigating *Davis*.

RCW 49.48.030 provides that “[i]n any action in which any person is successful in recovering judgment for wages or salary owed to him, reasonable attorney's fees, in an amount to be determined by the court, shall be assessed against said employer or former employer.” Plaintiffs construe “action” to include *Davis*, which the plaintiffs first brought to trial court, and a separate action, which the union first brought to the MEC and actually recovered lost wages. Reduced to its core, plaintiffs essentially contend that without *Davis*, the union would not have been able to recover lost wages for watch change procedures for its engine room employees. Plaintiffs, in part, base their con-

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 (Cite as: 2011 WL 300194 (Wash.App. Div. 2))

clusion on the assumption that they were unable to originally bring their claim under the CBA in *Davis* because their union and employer refused to do so, believing instead that the CBA did not address compensation for watch change.

Plaintiffs' first premise is that a series of different litigation steps can collectively constitute an "action" under RCW 49.48.030. But the cases they cite are inapposite. *Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett*, 146 Wash.2d 29, 42 P.3d 1265 (2002); *McIntyre v. State Patrol*, 135 Wash.App. 594, 141 P.3d 75 (2006). In both *Fire Fighters* and *McIntyre*, one action established the right to recover back wages, and the second action recovered attorney fees for the first action. *Fire Fighters*, 146 Wash.2d at 32-33, 42 P.3d 1265; *McIntyre*, 135 Wash.App. at 597, 141 P.3d 75. Here, *Davis* granted judgment in favor of the DOT and rejected plaintiffs' request for attorney fees. In a completely separate action that the union brought before MEC, the union successfully argued that the engine room employees were entitled to back wages for watch change activities under the CBA. Plaintiffs now request attorney fees for litigating *Davis*. Unlike *Fire Fighters* and *McIntyre*, in which the parties requesting attorney fees had prevailed, plaintiffs did not prevail in *Davis*, the action for which they now request attorney fees. The plain language of RCW 49.48.030 allows a person to recover attorney fees only if they are "successful in recovering judgment for wages or salary owed." (Emphasis added).

But plaintiffs argue that they were successful in *Davis* because, in effect, that decision was necessary to the MEC's decision that actually awarded their lost wages. They contend that *Davis* held that the CBA gave them the right to recover wages for watch change and that the MEC merely determined the amount of wages owed. We disagree. Although *Davis* gave direction to the MEC about whether the CBA addressed compensation for watch changes, the MEC had authority to interpret the CBA as it saw fit, which it did, coming to the same conclusion as we did in *Davis*.

*5 The MEC's decision observed,

It is unreasonable to believe that had this grievance over watch turnover been filed with MEC prior to the Court proceedings, MEC would not have applied the same interpretation of the contract as the Court. The contract specifically provides for over-

time compensation when work is performed prior to or beyond the end of a work shift ... [and] the Court properly concluded that the contract requires watch turnover pay.

CP at 1109. The MEC also entered a conclusion of law stating that the CBA "provide[d] compensation for work that is extended beyond a regular assigned work day." CP at 1108. And the MEC's findings of fact 2, 7, and 8 supported the MEC's decision to award watch turnover pay. Thus, despite our direction in *Davis*, the MEC independently found that the CBA provided overtime compensation for work shift changes. Plaintiffs were unsuccessful in *Davis*, and that decision was not necessary to the MEC's decision to award wages. The CBA gave the MEC authority to award wages, not *Davis*.

To the extent that the MEC entered findings of fact or conclusions of law that projected *Davis* as precedent as to the issue of the right to recover lost wages, the MEC misunderstood the nature of *Davis*. *Davis* ultimately held that plaintiffs could not first bring an action to court without exhausting the issue with the MEC. Plaintiffs ask us to award them attorney fees in a case they lost (*Davis*) merely because that case indicated, in analysis separate from its ultimate holding, that the employees could pursue recovery under the CBA. *Davis* was not the first step in a multi-step action to recover back wages; instead, *Davis* held that the courts were not the first step, and, because we rejected plaintiffs' theory in *Davis* that they could recover under a lawsuit that they first filed in court, plaintiffs are not entitled to attorney fees for that action (*Davis*). RCW 49.48.030. It is axiomatic that an award of attorney fees is based on successful litigation.

Plainly said, the plaintiffs were not successful in the court action culminating in *Davis*. The plaintiffs cannot claim attorney fees for that unsuccessful action. Because of our decision, we need not address the State's challenge to the amount of attorney fees that the trial court awarded. Plaintiffs are not entitled to attorney fees for either the unsuccessful original action in *Davis* or for this appeal. RCW 49.48.030; RAP 18.1. We vacate and reverse the trial court's order granting plaintiffs' attorney fees and costs.

Vacated and reversed.

Not Reported in P.3d, 159 Wash.App. 1035, 2011 WL 300194 (Wash.App. Div. 2)
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A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

We concur: QUINN-BRINTNALL, J., and PE-NOYAR, C.J.

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Davis v. State Dept. of Transp.
Not Reported in P.3d, 159 Wash.App. 1035, 2011 WL 300194 (Wash.App. Div. 2)

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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON
BY _____
DEPUTY

STATE OF WASHINGTON,
DEPARTEMENT OF
TRANSPORTATION,

Appellant,

v.

MARINE EMPLOYEES'
COMMISSION, and MARINE
ENGINEERS' BENEFICIAL
ASSOCIATION,

Respondents.

CERTIFICATE OF
SERVICE

I certify that I served a copy of Reply Brief of Appellant on all parties or their counsel of record on March 25, 2010 as follows:

- U.S. mail and email to Mr. McCarthy; and
- Email and personal delivery to Mr. Daniels

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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.

RESPECTFULLY SUBMITTED this 25th day of March, 2011.


ERICA EDDINGS