

COA# 43724-4

No. 86757-7

SUPREME COURT
OF THE STATE OF WASHINGTON

JULIE PALMER, MICHAEL BALLEW, and LARRY G. WESTBERRY,
Appellants,

v.

WASHINGTON STATE DEPARTMENT OF
LABOR AND INDUSTRIES,
Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COUNTY
THE HONORABLE LISA L. SUTTON

BRIEF OF APPELLANTS

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TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	ASSIGNMENTS OF ERROR	5
III.	ISSUES RELATED TO ASSIGNMENTS OF ERROR	6
IV.	STATEMENT OF FACTS	7
	A. The Supreme Court Held In <i>Common Carriers</i> That The Minimum Wage Act Applies To Interstate Truckers.	7
	B. The Supreme Court Rejected DLI’s “Work Around” To The <i>Common Carriers</i> Decision In <i>Bostain</i> , Holding That The Minimum Wage Act Applies To Interstate Truckers.	9
	C. The Trucking Industry And DLI Engineered A Second “Work Around” After The <i>Bostain</i> Decision.	11
	D. DLI’s “Immunizing” Rule Caused The Dismissal Of Petitioner Westberry’s Claim For Overtime Compensation Under <i>Bostain</i>	15
	E. Procedural History.	16
V.	ARGUMENT	18
	A. Introduction.	18
	B. Standard of Review.	21
	C. The Petitioners Were Harmed By The Amended Rule And Have Standing.	21
	D. DLI’s Amended Rule Is Not An Interpretation Of The Minimum Wage Act. Instead, It Was Expressly Intended To Circumvent The <i>Bostain</i> Decision.	23

E.	DLI’s Rule Is Unconstitutional, And Must Be Struck Down Under The APA.....	27
1.	DLI’s Rule Violates The Separation Of Powers By Purporting To “Correct” Case Law Interpreting The MWA.....	27
2.	DLI’s Rule Violates the Due Process Rights of the Affected Employees.....	28
3.	DLI’s Retroactive Rule Interferes With Constitutionally Vested Contract Rights.	31
4.	DLI’s Unconstitutional Rule Must Be Struck Down Under The APA.....	33
F.	The Retroactive Application Of The Amended Rules Violate DLI’s Existing Rules.....	34
VI.	CONCLUSION.....	35

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Bay Ridge Operating Co. v. Aaron</i> , 334 U.S. 446, 68 S.Ct. 1186, 92 L.Ed. 1502 (1948).....	7
<i>Goldberg v. Kelly</i> , 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970)	30
<i>Walling v. Helmerich & Payne</i> , 323 U.S. 37, 65 S. Ct. 11, 89 L.Ed. 29 (1944)	7

STATE CASES

<i>1000 Virginia Ltd. Partnership v. Vertecs Corp.</i> , 158 Wn.2d 566 146 P.3d 423 (2006)	28
<i>Amunrud v. Bd. of Appeals</i> , 158 Wn.2d 208, 143 P.3d 571 (2006).....	21
<i>Bostain v. Food Express, Inc.</i> , 159 Wn.2d 700, 153 P.3d 846 (2007), <i>cert. denied</i> , 552 U.S. 1040 (2007).....	<i>passim</i>
<i>Burton v. Lehman</i> , 153 Wn.2d 416, 103 P.3d 1230 (2005).....	24
<i>Champagne v. Thurston County</i> , 163 Wn.2d 69, 178 P.3d 936 (2008).....	19, 32, 34
<i>Cockle v. Dept. of Labor and Ind.</i> , 142 Wn.2d 801, 16 P.3d 583 (2001).....	20
<i>Dept. of Labor and Ind. v. Common Carriers, Inc.</i> , 111 Wn.2d 586, 762 P.2d 348 (1988).....	7-9
<i>Dept. of Labor and Ind. v. Granger</i> , 159 Wn.2d 752, 153 P.3d 839 (2007).....	19
<i>Dot Foods Inc. v. Washington Dept. of Revenue</i> , 166 Wn.2d 912, 215 P.3d 185 (2009).....	26

<i>Edelman v. State ex rel. Public Disclosure Comm'n</i> , 152 Wn.2d 584, 99 P.3d 386 (2004).....	23
<i>Eggert v. Employment Security Dep't</i> , 16 Wn. App. 811, 558 P.2d 1318 (1976).....	30
<i>Ervin v. Columbia Distributing, Inc.</i> , 84 Wn. App. 882, 930 P.2d 947 (1997).....	8, 20
<i>Esmieu v. Schrag</i> , 88 Wn.2d 490, 563 P.2d 203 (1977).....	30-31
<i>Gillis v. King County</i> , 42 Wn.2d 373, 255 P.2d 546 (1953).....	31
<i>In re Personal Restraint of Stewart</i> , 115 Wn. App. 319, 75 P.3d 521 (2003).....	27
<i>Knight v. City of Yelm</i> , __ Wn.2d __, 267 P.3d 973 (Dec. 15, 2011)	21
<i>Matter of Shepard</i> , 127 Wn.2d 185, 898 P.2d 828 (1995).....	18, 28
<i>McDaniel v. DSHS</i> , 51 Wn. App. 893, 756 P.2d 143 (1988).....	30
<i>Navlet v. Port of Seattle</i> , 164 Wn.2d 818, 194 P.3d 221 (2008).....	32
<i>Peste v. Mason County</i> , 133 Wn. App. 456, 136 P.3d 140 (2006), <i>rev. denied</i> , 159 Wn.2d 1013 (2007).....	33
<i>Schneider v. Snyder's Foods, Inc.</i> , 116 Wn. App. 706, 66 P.3d 640 (2003), <i>rev. denied</i> , 150 Wn.2d 1012 (2003)	8
<i>Seattle Building and Construction Trades Council v. Apprenticeship and Training Council</i> , 129 Wn.2d 787, 920 P.2d 581 (1996), <i>cert. denied</i> , 520 U.S. 1210 (1997).....	23

<i>Shoemaker v. City of Bremerton</i> , 109 Wn.2d 504, 745 P.2d 858 (1987).....	28-29, 31
<i>St. Joseph Hospital v. Department of Health</i> , 125 Wn.2d 733, 887 P.2d 891 (1995).....	22
<i>State v. Clausen</i> , 146 Wash. 588, 264 Pac. 403 (1928).....	35
<i>State v. Dupard</i> , 93 Wn.2d 268, 609 P.2d 961 (1980).....	28-29
<i>Tapper v. State Employment Sec. Dept.</i> , 122 Wn.2d 397, 858 P.2d 494 (1993).....	21
<i>Washington Cedar & Supply Co., Inc. v. State, Dept. of Labor & Indus.</i> , 119 Wn. App. 906, 83 P.3d 1012 (2003), <i>rev. denied</i> , 152 Wn.2d 1003 (2004).....	33
<i>Washington Natural Gas Co. v. P.U.D. No. 1 of Snohomish County</i> , 77 Wn.2d 94, 459 P.2d 633 (1969).....	22
<i>Westberry v. Interstate Distributor Co.</i> , 164 Wn. App. 196, 263 P.3d 1251 (2011), <i>rev. pending</i> , No. 86789-5	2-5, 12, 16-17, 19, 30

STATUTES

RCW 34.05.410–.476	30
RCW 34.05.434	30
RCW 34.05.455	30
RCW 34.05.542	17
RCW 34.05.570	33
RCW 49.17.180	33
RCW 49.46.005	7

RCW 49.46.090	14
RCW 49.46.130	5, 7-9, 10, 20, 28

RULES AND REGULATIONS

RAP 2.5	33
RAP 4.2	17
WAC 296-128-011	9, 11, 34
WAC 296-128-012	5, 9, 11-12, 14, 16, 22, 26, 32, 34
WAC 296-155-24510	33

OTHER AUTHORITIES

Black’s Law Dictionary (6th Ed., 1990)	25
American Heritage Dictionary (1981)	24

I. INTRODUCTION

This case challenges a rule issued by the Department of Labor and Industries (DLI) to circumvent this Court’s decision in *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 153 P.3d 846 (2007), *cert. denied*, 552 U.S. 1040 (2007). The rule was expressly intended to *retroactively* “immunize” employers from overtime pay already owed to interstate truck drivers under *Bostain* and the Minimum Wage Act (MWA). In *Bostain* the Court rejected DLI’s prior regulation that erroneously said interstate truck drivers were owed overtime based only on their hours of work in Washington. 159 Wn.2d at 713-16. The Court determined that *Bostain* and other interstate truck drivers were entitled to overtime pay based on all their hours worked and awarded overtime pay to *Bostain*.

After *Bostain*, the trucking industry, which had never considered interstate truck drivers eligible for overtime pay and never provided them with any additional pay for working overtime, sought DLI’s assistance in immunizing trucking companies from the overtime pay they owed their employees and former employees under *Bostain*. The trucking industry asked DLI to issue a *retroactive* rule that would allow DLI to *retroactively determine in ex parte proceedings* — without any employee notice or participation — that the companies had in fact been providing pay that was “reasonably equivalent” to overtime compensation in the three years

before the *Bostain* decision. The trucking industry said that the retroactive rule and retroactive factual determinations were necessary “to address the obvious unfairness of the Washington Supreme Court’s *Bostain* decision.” AR 197. DLI agreed to enact the rule and agreed with the trucking companies that such *ex parte retroactive factual* determinations by DLI were necessary. These determinations were specifically intended to be used by trucking companies as a defense in lawsuits. AR 200, 222. DLI said that without DLI’s *ex parte* “reasonably equivalent” determinations, the companies would be “wide open to legal action” for overtime pay. AR 222.

DLI’s retroactive rule, and the retroactive *ex parte* factual determinations it made under the rule, worked just as DLI and the trucking industry intended, circumventing *Bostain* by giving employers a retroactive defense to overtime pay they already owed under *Bostain*. This effect is shown in petitioner Larry Westberry’s companion proposed class action lawsuit for overtime, in which Division Two held in a published opinion that Westberry’s overtime pay claim was foreclosed by DLI’s *ex parte* “reasonably equivalent” determination for his employer IDC even though Westberry had no notice and no opportunity to participate in that determination. *Westberry v. Interstate Distributor Co.*,

164 Wn. App. 196, 202, 204, 206-09, 263 P.3d 1251 (2011), *rev. pending*, No. 86789-5.

Despite the fact that these DLI factual determinations were the death knell to petitioners' legal claim to overtime compensation that they had already earned under *Bostain*, the trial court in this case nevertheless ruled that Westberry and the other truck driver petitioners have no standing to challenge DLI's rule because they had not appealed from DLI's *ex parte* factual determinations – of which they had no notice, and in which they had no opportunity to participate – that their employer's pay system before *Bostain* was in fact “reasonably equivalent” to overtime. CP 301-304. The trial court also ruled in this case that petitioners were not harmed by DLI's retroactive rule because the *ex parte* determinations are not binding – precisely the opposite effect given these determinations by Division Two in its published decision in *Westberry*.¹ 164 Wn. App. at 206.

DLI's “advisory” characterization of the retroactive “determinations,” pursuant to the amended rule, is contradicted by the brief filed by *amicus* WTA, at whose behest the amended rule was

¹ The petitioners seek review of that decision by Division II in Cause No. 86789-5. The trial court's decision here in *Palmer* and Division II's decision in *Westberry* are both wrong, and also completely at odds.

adopted. DLI asserts that the determinations are “advisory only” and “nonbinding opinions.” CP 252, 262. In contrast, WTA admits that the determinations are not “advisory,” but are instead “factual determinations.” WTA Amicus in Opposition to Review in *Westberry*, No. 86789-5, p. 1.

And, DLI actually agrees that factfinding under these circumstances is prohibited, writing, “Petitioners state that administrative fact findings may be given binding effect only if the agency acts in a judicial capacity in a proceeding where the parties have had an adequate opportunity to litigate. Petitioner's Trial Brief at 14. The Department agrees.” CP 272. This admission is impossible to reconcile with DLI’s accompanying argument in the same brief that “The Department’s reasonably equivalent approvals provided for under both the former and amended rule constitute nonbinding opinions concerning whether a company properly pays overtime.” CP 262.

This Court should reverse, strike down DLI’s retroactive rule, and declare that DLI had no authority to retroactively approve the trucking companies’ payment plans in order to immunize them from overtime under *Bostain*.

II. ASSIGNMENTS OF ERROR

1. Valuing form over substance, the trial court erred in entering Finding of Fact No. 11, CP 301-02, because DLI's approvals were considered dispositive in the *Westberry* lawsuit commenced by petitioners to obtain overtime pay and because DLI intended its pay determinations to immunize employers by providing a binding defense when it enacted the rule challenged here (although DLI now says the opposite – that the determination are just nonbinding opinions):

The Department's approval of a company's compensation system as reasonably equivalent under RCW 49.46.130(2)(f) and WAC 296-128-012 is not binding on workers such as Petitioners, who do not have notice of or participate in the Department's review. CP 302.

2. The trial court erred in entering Finding of Fact No. 12, CP 302, because DLI intended that its *ex parte* determinations would immunize employers from overtime lawsuits, and because petitioners did not "remain free" to file *successful* suits against their employers for overtime wages since DLI's approval was considered dispositive by the courts, just as DLI intended:

The standards for the Department's review and approval of companies' compensation systems as reasonably equivalent under WAC 296-128-012 did not change before and after adoption of amended WAC 296-128-012 allowing retroactive approvals did not affect Petitioners who remained free to file suits against their employers for overtime wages. CP 302.

3. The trial court erred in entering its letter opinion of November 10, 2011, CP 309-316.

4. The trial court erred in entering its judgment of December 16, 2011, CP 298-305.

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Do trucker petitioners have standing to challenge a retroactive rule that was specifically intended by DLI to circumvent the Court's *Bostain* decision, and which, as DLI intended, was used by their employer IDC to obtain a retroactive *ex parte* factual determination from DLI that was the sole basis for summary judgment dismissing their overtime claims?

2. Did DLI violate *Bostain* and the MWA by enacting a retroactive rule specifically intended to circumvent the Court's overtime pay decision in *Bostain*?

3. Did DLI violate *Bostain* and the MWA because under the rule no extra compensation need be provided to truckers for overtime work?

4. Did DLI violate the MWA and the APA by adopting a rule and making retroactive *ex parte* factual determinations that employers' pay schemes are "reasonably equivalent" to overtime?

IV. STATEMENT OF FACTS

A. The Supreme Court Held In *Common Carriers* That The Minimum Wage Act Applies To Interstate Truckers.

The Washington Minimum Wage Act (MWA) provides that no employer shall employ any employee for a work week longer than forty hours unless such employee receives compensation for the work he performs in excess of forty hours “at a rate not less than one and one-half times the regular rate at which he is employed.” RCW 49.46.130(1). The purposes of the 50% overtime premium are to deter, but not prevent, longer work weeks, and to encourage hiring more workers. RCW 49.46.005; *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 712, 153 P.3d 846 (2007); *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 460, 68 S.Ct. 1186, 92 L.Ed. 1502 (1948); *Walling v. Helmerich & Payne*, 323 U.S. 37, 40, 65 S. Ct. 11, 89 L.Ed. 29 (1944).

Prior to 1988, respondent Department of Labor and Industries (DLI) interpreted the MWA as being inapplicable to interstate truck drivers who did not work at least 50% of the time in Washington. In *Dept. of Labor and Ind. v. Common Carriers, Inc.*, 111 Wn.2d 586, 762 P.2d 348 (1988), this Court held that the Federal Motor Carrier Act does not in fact preempt the overtime pay provision of the MWA, and that the MWA’s overtime provisions apply to employees of interstate trucking

companies, applying overtime provisions to interstate motor carriers without reference to the percentage of time that an employee worked in Washington.

After *Common Carriers*, the Legislature enacted RCW 49.46.130(2)(f), which provides that a driver covered by the Federal Motor Carrier Act would not be owed overtime pay under the MWA for hours worked in excess of 40 hours per week “if the compensation system under which the truck or bus driver is paid includes overtime pay, reasonably equivalent to that required by [the MWA], for working longer than forty hours,” *i.e.*, if the driver was paid under some other state’s law that provided overtime pay that was reasonably equivalent, or the driver received extra compensation that was *in fact* reasonably equivalent to overtime.² After the decision in *Common Carriers* and the Legislature’s enactment of RCW 49.46.130(2)(f), though, DLI changed its rules to make it even more difficult for interstate truckers to receive overtime pay. DLI repealed its previous rule that stated the MWA only applied if the interstate truck driver worked 50 percent of his or her time in Washington, and issued a rule stating that the MWA applied only if the truck driver

² *Schneider v. Snyder's Foods, Inc.*, 116 Wn. App. 706, 714, 66 P.3d 640 (2003), *rev. denied*, 150 Wn.2d 1012 (2003). Whether a pay scheme is “reasonably equivalent” to overtime is a question of fact. *Ervin v. Columbia Distributing, Inc.*, 84 Wn. App. 882, 893-94, 930 P.2d 947 (1997) (“genuine factual issue”); *Schneider v. Snyder's Foods*, 116 Wn. App. at 714-16.

worked in excess of 40 hours per week in Washington. WAC 296-128-011 and -012.

WAC 296-128-012 included a formula that DLI “recommended for establishing a uniform rate of pay to compensate work that is not paid on an hourly basis and for which compensation for overtime is included.” The regulation required an employer to give notice to interstate truck driver employees that it intended to use a reasonably equivalent compensation system under RCW 49.46.130, and to keep contemporaneous records “indicating the base rate of pay, the overtime rate of pay, the hours worked by each employee for each type of work, and the formulas and projected work hours used to substantiate any deviation from payment on an hourly basis pursuant to WAC 296-128-012.”

B. The Supreme Court Rejected DLI’s “Work Around” To The *Common Carriers* Decision In *Bostain*, Holding That The Minimum Wage Act Applies To Interstate Truckers.

In 2007, this Court rejected DLI’s regulation, promulgated in response to *Common Carriers*, that provided that the MWA and RCW 49.46.130(2)(f) applied only to hours worked within Washington as inconsistent with the plain language of the MWA. *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 715-16, 153 P.3d 846 (2007). Plaintiff Larie Bostain was an interstate truck driver residing in Washington and

employed by Food Express, Inc., a California-based trucking company with a terminal in Washington. Food Express paid Bostain on a per-mile basis for interstate driving, and did not pay him any extra for overtime. Bostain sued for overtime under the MWA. This Court accepted review of Division Two's decision reversing the trial court's partial summary judgment in favor of Bostain.

DLI appeared in *Bostain* as *amicus curiae* and argued that its interpretation of the statute "should be followed" and that it was entitled to deference as the agency charged with interpreting the MWA. 159 Wn.2d at 715. This Court disagreed. The Court explained that the MWA applied to all overtime work, whether performed in-state or out-of-state: "[DLI's] rules defining hours for purposes of overtime provisions as hours worked within Washington's borders are not consistent with the plain language of the statutes being implemented, nor with the stated purposes of the MWA, nor with the principles that apply to interpretation of remedial legislation governing payment of wages in this state . . ." *Bostain*, 159 Wn.2d at 715. The Court reiterated that, "whether paid under the time-and-a-half provisions of RCW 49.46.130(1) or by "reasonably equivalent" compensation, *the [MWA] mandates that truck drivers must obtain extra compensation for hours worked over 40 hours per week.*" *Bostain*, 159 Wn.2d at 710 (emphasis added).

C. The Trucking Industry And DLI Engineered A Second “Work Around” After The *Bostain* Decision.

After *Bostain*, DLI recognized that truckers were owed “extra compensation” for overtime hours, and that trucking companies that had failed to pay overtime to their employees as required by *Bostain* faced potential lawsuits:

[E]mployers in the trucking industry must pay Washington-based employees overtime wages based on the total number of hours, including out-of-state work hours. The Court overturned the Department’s directives in WAC 296-128-011(a) and 012(1)(a) that required employers to pay overtime wages in the trucking industry based only on in-state work hours. *** [C]ompanies who choose not to follow the Washington State Supreme Court decision do so at their own risk. We are in the process of evaluating how to best proceed following the decision.

AR 384. The trucking industry tried to convince the Legislature to change the overtime requirements for interstate truck drivers, but the Legislature did not enact the proposed change. CP 12.

The trucking industry was at the same time conferring with DLI about how to retroactively “correct” the decision in *Bostain* by amending DLI rules. A series of communications occurred between representatives of the trucking industry (including its counsel Phil Talmadge), and DLI representatives (including DLI counsel Suchi Sharma). In these communications, as explained below, DLI and the trucking industry

devised a scheme to circumvent *Bostain* and deny the truck drivers the overtime pay that the Supreme Court had just determined they were owed:

DLI's intent to immunize employers from lawsuits brought under *Bostain* was openly acknowledged by DLI during the rulemaking process. The amended rule was drafted by the Washington Trucking Association (WTA) (now a vocal, repeated "friend of the 'court'" both in this case and in *Westberry*) with the express intent of achieving that objective. In a letter to AAG Amanda Goss after the *Bostain* decision, WTA counsel Phil Talmadge wrote, "As you and I discussed, enclosed please find a draft regulation providing a *safe harbor*... for trucking companies." AR 176.

The WTA explained that it had drafted the rule to "immunize" trucking companies from the *Bostain* decision:

Bostain should be addressed administratively. WTA has provided to the Department's counsel a proposed draft regulatory amendment for a *safe harbor* during which interstate trucking carriers could submit their compensation systems in place prior to *Bostain* for approval. If such compensation systems are approved as paying drivers the reasonable equivalence of overtime, this would likely *immunize the carriers from lawsuits* for back wages.

AR 183-84 (emphasis added). WTA counsel Talmadge reiterated WTA's objective of foreclosing the right of truck drivers to obtain any overtime pay they might be owed under *Bostain*. Talmadge explained that DLI's adoption of the new subsection (3) of WAC 296-128-012, followed by

DLI's retroactive approval of purportedly "reasonably equivalent" payment schemes for the three years preceding *Bostain*, "presumably would insulate those carriers from liability for [overtime]." AR 197. Talmadge asserted that retroactive approval was necessary "to address the obvious unfairness of the Washington Supreme Court's *Bostain* decision." AR 197.

DLI fully cooperated with the trucking industry's efforts to "immunize the carriers" from the "obvious unfairness of the *Bostain* decision." AR 184, 197. DLI counsel Sharma reassured Talmadge: "I want to make sure that the language [of proposed new subsection (3)] indeed provides a *safe harbor* for employers who relied on the WACs³ before *Bostain*. *** Again, my ultimate goal is to make sure that the proposal does indeed provide a *safe harbor* to employers..." AR 196.

DLI counsel explained the agency's intent in another e-mail to WTA counsel:

The revised language of the amendment . . . achieves *the intent of providing a safe harbor to employers . . . The intent of the amendment is to avoid class action lawsuits and ensuing transactional costs.* By the Department certifying that a compensation system pre-*Bostain* was

³ The WACs relied on, of course, were those struck down in *Bostain*, which provided that the trucking companies were not required to pay overtime compensation, **not** that they had paid the "reasonable equivalent" of overtime compensation.

reasonably equivalent to current law, an *employer may be able to avoid such costs*.

AR 200 (emphasis added). DLI intent in adopting WTA's proposal was to provide "a defense" to *Bostain* claims for the companies:

*** [WTA's] primary interest lies in saving transactional costs from lawsuits – if they get an ok from L&I, they can use the ok as a defense. If they don't get an ok from L&I, then of course they are wide open to legal action.

AR 222 (emphasis added).

Thus, to achieve the objective of retroactively *immunizing* trucking companies from the consequences of *Bostain*, DLI amended WAC 296-128-012 to authorize the companies to seek retroactive factual determinations from DLI approving *past* payment schemes, by characterizing the schemes as having been "reasonably equivalent" to the overtime compensation required by the MWA. WAC 296-128-012(3). The retroactive factual determinations would cover the three years immediately preceding the decision in *Bostain*.⁴

The process of amending the WAC was initiated by DLI under the Administrative Procedure Act (APA) on May 6, 2008. The amendment was adopted and took effect on November 21, 2008. CP 95.

⁴ Three years is the limitations period for an overtime pay claim. RCW 49.46.090.

D. DLI's "Immunizing" Rule Caused The Dismissal Of Petitioner Westberry's Claim For Overtime Compensation Under *Bostain*.

The three petitioners in this action, Julie Palmer, Michael Ballew and Larry Westberry, were all employed by Interstate Distributor Co., Inc. (IDC), one of the Washington-based trucking companies DLI wanted to protect in amending its rules. Palmer was employed from March 2007 to February 2008, Ballew from 2004 to December 2007, and Westberry from 2003 through 2007. CP 299. Petitioners were paid on a "piecework," flat mileage rate basis. Each of them frequently worked in excess of 40 hours a week. None of them ever received any extra compensation for their overtime hours. Not at any time did IDC ever represent to any of the petitioners while they were working that it had a pay system that was "reasonably equivalent" to overtime. CP 7.

Petitioner Larry Westberry filed a proposed class action against Interstate seeking the overtime wages he was due on May 29, 2008, six months before DLI adopted the retroactive rule challenged in this action. AR 237-39. The other two petitioners in this action are Washington residents and putative class members who were ready to participate in Westberry's action as class representatives. CP 6-7.

Unbeknownst to Westberry and the other petitioners, their former employer IDC was already applying to DLI for a retroactive determination

that its payment system while they were employees was “reasonably equivalent” to overtime when this overtime pay action under *Bostain* was commenced. In May 2009, without any notice and without any participation by the petitioners or by the other affected truck drivers, DLI issued its retroactive determination that IDC’s payment system for the three years preceding the *Bostain* decision was “reasonably equivalent” to overtime. CP 303. Then (exactly as DLI intended), IDC used the DLI’s opinion as a conclusive defense in Westberry’s proposed class action for overtime. The trial court dismissed Westberry’s case solely on the basis of DLI’s *ex parte* determination on April 2, 2010. CP 77. Division Two affirmed in *Westberry v. Interstate Distributor Co.*, 164 Wn. App. 196, 202, 204, 206-09, 263 P.3d 1251 (2011), *rev. pending*, No. 86789-5.

E. Procedural History.

The plaintiffs commenced this action in Thurston County Superior Court on March 23, 2010. CP 5. They sought a declaratory judgment that WAC 296-128-012(3) is invalid because DLI lacked legislative authority to enact it, failed to comply with the APA in adopting it, lacked authority to apply it retroactively, and because the regulation violated the separation of powers doctrine and due process. They also sought an injunction prohibiting DLI from adopting any rule intended to overcome the *Bostain* decision and otherwise forbidding DLI from interfering in judicial

procedures in manners which failed to comply with the APA and DLI's express statutory authority. CP 16.

By memorandum opinion issued November 10, 2011, CP 309-16, and formal Judgment entered December 16, 2011, CP 317-24, Judge Lisa Sutton dismissed petitioner's action. The trial court held both that petitioners lacked standing to challenge DLI's rule because they "remain free to file suits against their employers for overtime pay wages," CP 303, and that their challenge was untimely because they "failed to file judicial review under the APA (RCW 34.05.542) within 30 days of the challenged agency action (the Department's reasonably equivalent determination of Interstate Distributor's compensation system)." CP 304. The trial court held that the new rule was proper and that DLI's determinations issued under it were "nonbinding" and did not "harm Petitioners." CP 303. The trial court refused to consider petitioners' constitutional challenges to DLI's actions on the grounds that petitioners "lack standing." CP 304.

Petitioners appeal, and seek direct review in the state Supreme Court. RAP 4.2. They ask that this appeal be considered in conjunction with discretionary review of Division Two's decision in *Westberry v. Interstate Distributor Co.*, 164 Wn. App. 196, 263 P.3d 1251 (2011), *rev. pending*, No. 86789-5.

V. ARGUMENT

A. Introduction.

DLI has a long history – over 20 years – of protecting interstate trucking companies from paying overtime. *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 713-19, 153 P.3d 846 (2007) (rejecting DLI’s statutory interpretation, regulation, opinion letter, and *amicus* brief supporting trucking company). After the Supreme Court rejected DLI’s position in *Bostain*, and the Legislature did not approve the trucking companies’ legislative “fix,” DLI worked with the trucking companies to “immunize” them from *Bostain* through a retroactive rule allowing the agency to retroactively make *ex parte* factual determinations that trucking companies did not owe any additional pay for overtime, despite *Bostain*’s holding to the contrary. DLI expressly intended to permit the trucking companies to use these *ex parte* factual determinations to bar actions for overtime paid owed under *Bostain* by truck drivers. AR 196, 200, 222.

Even if DLI had authority to adopt this amendment to its regulations, it did not have authority to implement it *retroactively*. This Court will not enforce agency rules that are implemented retroactively, and particularly not if they are intended to change the law as determined by this Court. *Matter of Shepard*, 127 Wn.2d 185, 193, 898 P.2d 828 (1995) (“the court will not enforce retroactive amendments [to agency

rules] used to circumvent a judicial opinion”); *Dept. of Labor and Ind. v. Granger*, 159 Wn.2d 752, 765 n.3, 153 P.3d 839 (2007); *Champagne v. Thurston County*, 163 Wn.2d 69, 178 P.3d 936 (2008).

Contrary to the trial court’s reasoning, the petitioners in this case were indisputably subjected to and harmed by this DLI *ex parte* process, which retroactively found their employer IDC did not have to pay for overtime under *Bostain’s* holding. Division Two held that DLI’s factual determination foreclosed their overtime pay claim. *Westberry*, 164 Wn. App. at 202, 206-09. In contradiction to the published holding of *Westberry*, DLI argued in this case, and the trial court agreed, that the same DLI determination on which the *Westberry* court relied was not binding under the APA on the truck drivers, who had no notice of those proceedings.

The trial court wrongly held in this case that the truck drivers have no standing to complain about the retroactive DLI rule that allowed it to issue retroactive *ex parte* determinations because the determinations are not binding, knowing that *Westberry* held exactly the opposite, and Division Two had therefore dismissed *Westberry’s* claim. Inconsistently, the trial court also held that the truck drivers, who were unaware of the *ex parte* IDC proceedings, had to appeal within 30 days from the *ex parte* DLI determinations, of which they had no notice or opportunity to be

heard, in order to have standing to challenge the rule allowing DLI to have those *ex parte* proceedings. CP 301-04.

DLI has no statutory authority, either express or implied, to adopt a rule purporting to retroactively “immunize” trucking companies from failing to pay interstate truckers the overtime wages to which they are entitled under *Bostain*. Nor do its retroactive approvals comport with the MWA. This Court interpreted the MWA in *Bostain* in a manner that precludes DLI’s adoption of the retroactive rule, and its “approval” of compensation schemes that do not have a component of additional pay for overtime hours. By its plain language, RCW 49.46.130(2)(f) provides trucking companies with a potential method of *paying* overtime (such as an hourly rate “reasonably equivalent” to 1.5 times the mileage rates), not a method of completely *evading* it. Whether a given compensation system is indeed “reasonably equivalent” to the overtime pay required under the MWA is a matter of *fact* for a court to determine, not for DLI to decide *ex parte*. *Cockle v. Dept. of Labor and Ind.*, 142 Wn.2d 801, 812, 16 P.3d 583 (2001); *Ervin v. Columbia Distributing*, 84 Wn. App. at 893-94; AR 381. This court should reverse the trial court’s decision approving DLI’s arrogation of that power to itself.

B. Standard of Review.

This court reviews issues of standing *de novo*. *Knight v. City of Yelm*, ___ Wn.2d ___, ¶ 15, 267 P.3d 973, 980 (Dec. 15, 2011). Constitutional challenges to administrative action are questions of law subject to *de novo* review. *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 215, ¶ 12, 143 P.3d 571, 574 (2006). In reviewing administrative actions, the appellate courts sit in the same position as the superior court, applying the law directly to the record before agency. *Tapper v. State Employment Sec. Dept.*, 122 Wn.2d 397, 858 P.2d 494 (1993).

C. The Petitioners Were Harmed By The Amended Rule And Have Standing.

The trial court found that petitioner Westberry was a "stakeholder" with respect to the amended rule, CP 301, but inconsistently held that the petitioners "do not have standing" and "have not demonstrated any injury." CP 303. DLI successfully argued that the petitioner's "lack standing because they are not harmed by the Department's amended rule but rather by a court's decision in a separate case." CP 128. But Westberry's lawsuit for overtime wages was dismissed by the trial court on the sole basis of DLI's retroactive factual determination issued by DLI to Westberry's former employer IDC. And the sole basis for DLI's retroactive approval on behalf of IDC's pay scheme on behalf of IDC was

DLI's amended rule. Findings of Fact 11 and 12, arguably to the contrary, CP 301-02, are not supported by any evidence, are in reality a legal conclusion, and must be reversed.

After its adoption of the WTA-drafted amendment, DLI proceeded to issue "approval" determination letters that retroactively gave DLI's stamp of approval to the pre-*Bostain* no-overtime practices of trucking companies, pursuant to the amended rule. Just as WTA and DLI intended, these "approvals" were then used to deprive truck drivers of their claim for overtime pay to which they are entitled under *Bostain*. The lawsuit filed by petitioner Westberry was dismissed by the trial court on the sole basis of DLI's retroactive approval of his employer IDC's overtime payment scheme, issued pursuant to "new amended WAC 296-128-012." To say that the amended rule "did not harm" petitioners when it was applied by the courts to deprive Westberry of overtime pay in *the precise manner intended* by DLI to "immunize" the company in that rule makes no sense.

Standing rules are liberally construed when public policy interests are at issue. *Washington Natural Gas Co. v. P.U.D. No. 1 of Snohomish County*, 77 Wn.2d 94, 459 P.2d 633 (1969). If employees do not have standing to protest actions taken by DLI at the behest of their employers, no one will have standing, and these actions will go uncontested. *See St. Joseph Hospital v. Department of Health*, 125 Wn.2d 733, 887 P.2d 891

(1995); *Seattle Building and Construction Trades Council v. Apprenticeship and Training Council*, 129 Wn.2d 787, 920 P.2d 581 (1996), *cert. denied*, 520 U.S. 1210 (1997). In particular, the trial court’s refusal to consider petitioners’ constitutional challenges was error. *See* Arg. § E, *infra*. The petitioners were harmed by the amended rule and had standing to bring this action.

D. DLI’s Amended Rule Is Not An Interpretation Of The Minimum Wage Act. Instead, It Was Expressly Intended To Circumvent The *Bostain* Decision.

The Court in *Bostain* determined that the term “reasonably equivalent” is *not* ambiguous with regards to the right of truck drivers to receive *extra compensation* for their overtime hours. The Court held that the MWA “unambiguously” requires that truck drivers obtain “extra compensation” for their overtime hours *regardless* of what method is used to pay them. *Bostain*, 159 Wn.2d at 710, 713. Accordingly, DLI cannot “interpret” the phrase “reasonably equivalent” in a rule to instead deprive truck drivers of *all* extra compensation for overtime hours.

“We will not strain to find ambiguity where the language of the statute is clear.” *Edelman v. State ex rel. Public Disclosure Comm’n*, 152 Wn.2d 584, 591, 99 P.3d 386 (2004). In *Edelman*, the Court held that the Public Disclosure Commission’s purportedly “interpretive” rule was not warranted because the statute being “interpreted” was not ambiguous. The

same holds true here: the MWA unambiguously requires “extra compensation” for truck drivers’ overtime hours, *as Bostain declared*.

Even if the phrase “reasonably equivalent” could be interpreted as being ambiguous, despite the Court’s holding in *Bostain*, it certainly cannot be interpreted to mean that paying *no extra compensation* for overtime work is “reasonably equivalent” to paying time-and-a-half. But that is precisely DLI’s “interpretation” under its amended rule – *truck drivers are denied any extra compensation at all for their overtime hours*. For example, it is undisputed that petitioner Westberry was not paid *any* extra compensation for his overtime hours. CP 7, 81; AR 238. Yet on his employer’s *ex parte* submission of “alternative compensation schemes” DLI retroactively “approved” his employer’s payment at a flat per-mile rate, regardless of the hours necessary to drive those miles in any week, as being “reasonably equivalent” to time-and-a-half. CP 238.

DLI’s interpretation is impermissible even if the Court had not already addressed the term “reasonably equivalent.” In the absence of a statutory definition, a term has its “usual and ordinary meaning, and courts may not read into a statute a meaning that is not there.” *Burton v. Lehman*, 153 Wn.2d 416, 422-23, 103 P.3d 1230 (2005). The court may refer to the dictionary to establish the meaning of a word. *Burton*, 153 Wn.2d at 422-23. Both the American Heritage Dictionary (1981, p.443)

and Black's Law Dictionary (6th Ed., 1990, p. 541) define "equivalent" as "equal in value." This definition does not even remotely support DLI's position that a trucking company's payment scheme that provides only a single base rate of pay, with *nothing* extra for overtime, is "equivalent" to overtime pay at 1.5 times the base rate. Such flat-rate payment schemes cannot be described as "reasonably equivalent." But DLI accepts them as being just that, contradicting this Court, the dictionary, and common sense.

Moreover, DLI's "no extra pay required" view is contrary to the statutory policy of the 40-hour week. The MWA is intended to encourage, not mandate, a 40-hour work week, subject to *extra* compensation for hours worked over 40. This encourages employers to not frequently require employees to work over 40 hours a week, and to hire more workers, while adequately compensating workers who do work more than 40 hours a week. DLI's rule, and its retroactive approval of compensation schemes that provide no extra compensation when an employee works more than 40 hours a week, are contrary to the statutory policies of the MWA.⁵

⁵ DLI's "determinations," such as IDC's, also violate its own regulations in numerous respects. *See* Argument § F, *infra*. But here it is the rule that is challenged, not the particular determinations.

The Court recently rejected a Department of Revenue rule where “[t]he wording of the statute has not changed since its enactment; only the Department's interpretation and application of the statute have changed.” *Dot Foods Inc. v. Washington Dept. of Revenue*, 166 Wn.2d 912, 921, 215 P.3d 185 (2009). The same is true here: the language of the MWA has not changed, and the Court held in *Bostain* that the statute “unambiguously” requires “extra compensation” for the overtime hours worked by truck drivers. *Bostain*, 159 Wn.2d at 710, 713. Accordingly, DLI’s amended rule is contrary to the statute and cannot be a basis for retroactive “approval” of flat-rate compensation schemes.

DLI also argues that the new rule is merely “interpretative” of the statute. CP 131. This is in essence the argument rejected in *Bostain*, where this Court held that DLI could not “interpret” the MWA in a manner inconsistent with its plain language. Further, DLI’s rule is simply not “interpretive.” Instead, the rule purports to establish a procedure for retroactively obtaining DLI factfindings (what DLI calls “determinations,” CP 130), followed by its “approvals” of flat-rate pay schemes that provide *no* extra compensation for work over 40 hours.

DLI’s *express* purpose in adopting subsection (3) of WAC 296-128-012 was *to immunize trucking companies against lawsuits* for unpaid overtime wages, AR 183-184, 197, 222, 226, by providing the employers

with a binding defense, which DLI calls a “safe harbor.” AR 176, 183, 196, 226, 231. DLI’s disclaimer *now* that the rule is merely “advisory,” CP 118, or “interpretative,” CP 118, 119, 131, 132, 137, is contrary to its entire rulemaking record, which proves that DLI specifically *intended* for the rule to be retroactively binding on the employees and provide defenses to lawsuits, particularly class action lawsuits. DLI’s rule does not express an “interpretation” of the MWA. Instead, it is only intended to circumvent the *Bostain* decision.

E. DLI’s Rule Is Unconstitutional, And Must Be Struck Down Under The APA.

1. DLI’s Rule Violates The Separation Of Powers By Purporting To “Correct” Case Law Interpreting The MWA.

DLI’s adoption of an amendment to retroactively “correct” or modify the effect of this Court’s decision in *Bostain* violates the separation of powers doctrine. Even the Legislature itself cannot enact a statute that retroactively circumvents a court decision. *In re Personal Restraint of Stewart*, 115 Wn. App. 319, 335, 75 P.3d 521 (2003) (“Retroactive application of the [amendments to the statute] would violate the constitutional separation of powers doctrine because the legislative branch of government cannot retroactively overrule a judicial decision which authoritatively construes statutory language.”).

“[T]he court will not enforce retroactive amendments used to circumvent a judicial opinion.” *Matter of Shepard*, 127 Wn.2d 185, 193 898 P.2d 828 (1995)); *1000 Virginia Ltd. Partnership v. Vertecs Corp.*, 158 Wn.2d 566, 584 146 P.3d 423 (2006) (“A curative amendment will not be given retroactive application if it contravenes a judicial construction of the statute that is clarified or technically corrected because of separation of powers considerations”). Given that the Legislature cannot alter a statute in a manner that circumvents a court decision, it follows that DLI as an administrative agency cannot “correct” the Supreme Court’s holding in *Bostain* that RCW 49.46.130(2)(f) unambiguously requires that truck drivers receive “extra compensation” for overtime hours.

2. DLI’s Rule Violates the Due Process Rights of the Affected Employees.

Administrative determinations that include factfinding, such as DLI’s retroactive approval of compensation systems pursuant to the rule at issue here, may be given binding effect only if the agency is acting in a judicial capacity and resolved the disputed issues of fact in a proceeding where “the parties have had an adequate opportunity to litigate.” *State v. Dupard*, 93 Wn.2d 268, 274, 609 P.2d 961 (1980); *Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 507-11, 745 P.2d 858 (1987). Even then, policy considerations must also support finality. *Dupard*, 93 Wn.2d at

274. Because DLI's opinion letters purport to apply the law to the facts, they can only be binding upon those who participated. And they could only be binding or conclusive on *other* persons, such as the truckers, if they had notice and a full opportunity to be heard in the administrative proceeding. *Shoemaker v. Bremerton*, 109 Wn.2d at 508-10 (explaining requirements of *Dupard*).

The amended WAC 296-128-012(3) violates these rules. The rule establishes a process by which DLI retroactively determines whether a trucking company's compensation system provided overtime wages that were "reasonably equivalent" to the time-and-a-half required by the MWA. The trucking company submits specified information regarding its past payment practices, and DLI determines, as a factual matter, whether those practices provided "reasonably equivalent" pay. DLI then issues a determination granting or denying retroactive approval of the company's past overtime compensation system. No notice is provided to the affected employees or former employees. The affected employees have no opportunity to participate in this process.

Under this *ex parte* process, DLI simply accepts as true the one-sided, self-serving "facts" presented by the employer applicants, while denying the affected employees any opportunity to submit their own facts or rebut the employer's allegations. Here, for example, it is undisputed

that IDC obtained a determination from DLI retroactively approving Interstate's overtime compensation system in an *ex parte* proceeding, at which none of the petitioners were given either notice or an opportunity to be heard. This determination then became the sole basis for the trial court's decision to dismiss petitioner Westberry's lawsuit against Interstate. *Westberry*, 164 Wn. App. at 206.

The procedure established by DLI's amended regulations violates due process, which requires that at a minimum a person must receive notice and opportunity to be heard before his rights are affected. *Eggert v. Employment Security Dep't*, 16 Wn. App. 811, 816, 558 P.2d 1318 (1976), citing *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). The APA expressly requires that any DLI decisionmaking that involves factual determinations affecting specific persons must be conducted under the APA adjudication procedure. RCW 34.05.410–.476. Adjudications cannot be conducted *ex parte*. *Esmieu v. Schrag*, 88 Wn.2d 490, 497, 563 P.2d 203 (1977); RCW 34.05.455. The APA requires specific notice to a party, and an opportunity to be heard in a contested hearing. *McDaniel v. DSHS*, 51 Wn. App. 893, 897-98, 756 P.2d 143 (1988); RCW 34.05.434.

“An order based on a hearing in which there was not adequate notice or opportunity to be heard is void.” *McDaniel*, 51 Wn. App. at 897.

Similarly, an adjudication is improper and void when it is based on evidence acquired in an *ex parte* proceeding at which the opposing party had neither notice nor opportunity to be heard. *Esmieu*, 88 Wn.2d at 497. Accordingly, DLI's "reasonably equivalent" approvals cannot be binding on the affected employees, including the petitioners here. *Shoemaker*, 109 Wn.2d at 507-09; *Esmieu*, 88 Wn.2d at 497.

The unfairness of this procedure is apparent in the trial court's reasoning that the petitioners' challenge was also barred because they had failed to timely appeal the determinations of reasonable equivalency obtained by their employer IDC under DLI's regulation. CP 323. But petitioners were never notified of those proceedings, and were not parties to them. How could they within 30 days of the decision timely "appeal" a decision of which they were not aware, and in which they did not participate? DLI's rule and the "safe harbor" "determinations" made under it without notice or opportunity to be heard by the affected employees violates due process.

3. DLI's Retroactive Rule Interferes With Constitutionally Vested Contract Rights.

A statute – much less a rule – "may not be given retroactive effect, regardless of the intention of the legislature, where the effect would be to interfere with vested rights." *Gillis v. King County*, 42 Wn.2d 373, 376,

255 P.2d 546 (1953). An employee who renders service in exchange for compensation has a vested right to receive such compensation. *Navlet v. Port of Seattle*, 164 Wn.2d 818, 828, 194 P.3d 221 (2008). Here, petitioners rendered the service for which they are entitled to overtime pay long before DLI gave its retroactive approval to IDC's "reasonably equivalent" overtime-compensation system – and long before DLI amended WAC 296-128-012.

This Court refused to permit DLI to retroactively implement an amended rule in *Champagne*, in an action by a deputy sheriff who alleged that the County's practice of delaying payment of his overtime wages was a violation of the MWA. After the lawsuit was filed, DLI amended the applicable WAC. This Court rejected the County's request to apply the amended rule retroactively, holding that the amended rule "*violated the plain language of the previous rule and, thus, denotes a change in substantive rights,*" and that "the effect of the amendment is not remedial, which similarly militates against retroactive application." *Champagne*, 163 Wn.2d at 79-80 (emphasis added). Similarly here, DLI's amended rule cannot be given retroactive effect. The rule as implemented violates the vested rights of the affected employees, including petitioners here.

4. DLI's Unconstitutional Rule Must Be Struck Down Under The APA.

Under the Administrative Procedure Act, DLI's rule is invalid because it violates constitutional provisions. RCW 34.05.570(2)(c). DLI's rule violates the separation of powers by purporting to "correct" a case holding interpreting the MWA. DLI's rule violates the due process rights of the affected employees by purporting to provide a mechanism for their employers to obtain a "safe harbor" from application of the MWA without notice to or opportunity to be heard by the employees. DLI's retroactive rule interferes with employees' constitutionally vested contract rights to overtime compensation.

The constitutionality of an administrative regulation can be raised at any time; even for the first time on appeal. RAP 2.5; *Washington Cedar & Supply Co., Inc. v. State, Dept. of Labor & Indus.*, 119 Wn. App. 906, 918, 83 P.3d 1012, 1018 (2003) (allowing appellants to challenge constitutionality of WAC 296-155-24510 and RCW 49.17.180 for the first time on appeal), *rev. denied*, 152 Wn.2d 1003 (2004); *Peste v. Mason County*, 133 Wn. App. 456, 469, ¶ 25, 136 P.3d 140 (2006) (allowing appellants to challenge constitutionality of development regulations and comprehensive land use plans on appeal even though challenge not raised to the agency), *rev. denied*, 159 Wn.2d 1013 (2007). Petitioners raised

their constitutional challenges in the trial court. The trial court erred in refusing to consider the petitioners' constitutional challenges, and in refusing to strike down the rule. This Court should reverse and hold that the challenged regulation is unconstitutional.

F. The Retroactive Application Of The Amended Rules Violate DLI's Existing Rules.

The retroactive application of the amended rule also violates DLI's existing rules. Under WAC 296-128-012(1)(a), employers are required to give *advance notice* to employees before adopting a reasonably equivalent payment scheme. An employer “may, *with notice* to [a driver]... establish a rate of pay that is not on an hourly basis and that includes in the rate of pay compensation for overtime.” WAC 296-128-012(1)(a) (emphasis added). *See also* WAC 296-128-011(1) (“a base rate of pay shall be established *in advance of the work performed*”) and WAC 296-128-011(2) (“job applicants *seeking employment*... may obtain copies of the formula, the base rate of pay, and the overtime rate of pay.” [emphasis added]). The retroactive validation of a past payment scheme without any advance or contemporaneous notice to the employees affected is impossible to reconcile with DLI's advance notice requirement. *See Champagne*, 163 Wn.2d at 79-80.

VI. CONCLUSION

“Under our form of government, it is the right and duty of the judicial department to interpret the law and declare its true meaning and intent.” “Equally it is the right and the duty of the executive department to see that the laws thus interpreted are properly enforced.” *State v. Clausen*, 146 Wash. 588, 592, 264 Pac. 403 (1928). DLI had a duty to enforce the Court’s decision in *Bostain*, not to work with the trucking industry to concoct administrative immunity from *Bostain* by creating factual defenses for employers to lawsuits overtime owed under *Bostain*. This Court should reverse.

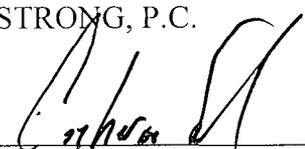
Dated this 24th day of February, 2012.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on February 24, 2012, I arranged for service of the foregoing Brief of Appellants, to the court and to counsel for the parties to this action as follows:

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DATED at Seattle, Washington this 24th day of February, 2012.



Victoria K. Isaksen