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NO. 54498-9-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

PORT OF TACOMA,

Respondent,

v.

JOEL SACKS, Director of the Department of Labor & Industries,
State of Washington,

Appellant.

BRIEF OF APPELLANT

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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ASSIGNMENT OF ERROR.....2

III. ISSUE.....2

IV. STATEMENT OF THE CASE2

 A. Overview of Applicable Law2

 B. The Port Asked Its Employees to Travel to China to Inspect Crane Manufacturing Facilities to Ensure That Cranes for the Port Were Manufactured to the Port’s Specifications3

 C. Even Though Port Employees Traveled to China in March 2017 at the Request of the Port, the Port Did Not Pay All Their Travel Time6

 D. Port Employees Made Other Trips at the Request of the Port, Including a June 2017 Trip to China, Without Receiving Pay for All Their Travel Time8

 E. After Completing an Investigation, the Department Cited the Port for Not Paying Their Employees All Their Hours Worked While Traveling10

 F. The Director Concluded That Out-of-Town Assignment Travel Is Hours Worked and the Port Must Pay Its Employees for That Time10

V. STANDARD OF REVIEW.....11

VI. ARGUMENT13

 A. The MWA Requires an Employer to Compensate Travel on Out-of-Town Assignments Because Unlike a Commute, the Travel Itself Is a Duty of the Work

Assignment Performed at an Employer-Approved Location	14
1. The hours-worked regulation looks to the task the employee is doing and where the employee is doing it: here the “on duty” task is inspecting cranes with travel as a component and one “prescribed work place” is the instrumentality of travel, <i>e.g.</i> , the airplane	16
2. The hours-worked regulation does not treat out-of- town assignment travel as commute time.....	21
B. Washington’s Long-Held Policy Is to Protect Employees by Paying for Their Labor.....	24
VII. CONCLUSION	26

TABLE OF AUTHORITIES

Cases

<i>Anderson v. Dep't of Social & Health Servs.</i> , 115 Wn. App. 452, 63 P.3d 134 (2003).....	12, 18, 22, 23
<i>Anfinson v. FedEx Ground Package Sys., Inc.</i> , 174 Wn.2d 851, 281 P.3d 289 (2012)	25
<i>B & R Sales, Inc. v. Dep't of Labor & Indus.</i> , 186 Wn. App. 367, 344 P.3d 741 (2015).....	13
<i>Bostain v. Food Exp., Inc.</i> , 159 Wn.2d 700, 153 P.3d 846 (2007).....	15
<i>Brady v. Autozone</i> , 188 Wn.2d 576, 397 P.3d 120 (2017).....	12
<i>Carranza v. Dovex</i> , 190 Wn.2d 612, 416 P.3d 1205 (2018).....	14, 18, 20, 25
<i>City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.</i> , 136 Wn.2d 38, 959 P.2d 1091 (1998).....	12, 13
<i>Dep't of Licensing v. Cannon</i> , 147 Wn.2d 41, 50 P.3d 627 (2002).....	15
<i>Drinkwitz v. Alliant Techsys., Inc.</i> , 140 Wn.2d 291, 996 P.2d 582 (2000)	19, 25
<i>IBP, Inc. v. Alvarez</i> , 546 U.S. 21, 126 S. Ct. 514, 163 L. Ed. 2d 288 (2005).....	14
<i>Ketchum v. City of Vallejo</i> , 523 F. Supp. 2d 1150 (E.D. Cal. 2007)	14
<i>Kittitas Cty. v. Kittitas Cty. Conservation</i> , 176 Wn. App. 38, 308 P.3d 745 (2013).....	11, 12

<i>Lindell v. General Elec. Co.</i> , 44 Wn.2d 386, 267 P.2d 709 (1954).....	18, 23
<i>State v. Watson</i> , 146 Wn.2d 947, 51 P.3d 66 (2002).....	16
<i>Steven’s v. Brink’s Home Sec., Inc.</i> , 162 Wn.2d 42, 169 P.3d 473 (2007).....	15, 17, 20, 21
<i>Weeks v. Chief of Washington State Patrol</i> , 96 Wn.2d 893, 639 P.2d 732 (1982).....	23

Statutes

RCW 34.05.570(1)(a)	12
RCW 34.05.570(3)(d)	12
RCW 34.05.570(3)(i)	12
RCW 49.46.005	13
RCW 49.46.010	3
RCW 49.46.020	3
RCW 49.46.130	3
RCW 49.46.130(1).....	3

Other Authorities

Administrative Policy ES.C.2, https://lni.wa.gov/employees-rights/_docs/esc2.pdf	15
<i>Webster’s Third International Dictionary</i> 705 (2002).....	17

Regulations

29 C.F.R. § 785.3	18
-------------------------	----

29 C.F.R. § 785.37	19
29 C.F.R. § 785.39	19
RCW 49.46.090(1).....	3
WAC 296-126-002(8).....	passim
WAC 356-15-040.....	24

I. INTRODUCTION

Compensating employees fairly for their “hours worked” advances Washington’s long-held public policy to make sure employers pay employees for their labor. The Port of Tacoma asked four mechanics to travel to China to inspect cranes for the Port’s business needs but did not pay for all their travel time. The Department of Labor & Industries required the Port to pay the four mechanics for their labor. In reviewing this decision, the Director correctly applied the law covering job tasks performed for the employer’s benefit and at its direction, but the superior court incorrectly reversed the Director.

Employers must pay employees their “hours worked,” which is time spent on duty at a prescribed work place. WAC 296-126-002(8). Travel time for an out-of-town assignment to inspect cranes was “hours worked” because the mechanics were on duty when completing tasks necessary to inspect cranes for the Port’s benefit (traveling), and they were doing so at locations prescribed by the Port (*e.g.*, airplanes).

The superior court accepted the Port’s argument that the travel should be treated like a commute—a normal daily trip to and from the jobsite during which work is not performed. CP 1065-66, 1134, 1199-1200. But the law distinguishes between commutes and assigned travel. In assigned travel, the employee travels at the employer’s behest and its

interest, so the employer must pay the employee. The Port has cited no authority—and none exists—that an employer may obtain the benefit of the labor that it assigns without compensating its employees. That the mechanics engaged in personal activities like reading and sleeping on the airplane is of no significance because the whole purpose of the trip was to inspect cranes at the Port’s direction. It was not a commute; it was assigned travel.

This Court should reverse the superior court and affirm the Director.

II. ASSIGNMENT OF ERROR

The Department assigns error to the entry of summary judgment for the Port, as found in the January 13, 2020 judgment.

III. ISSUE

“Hours worked” includes all hours during which the employee is authorized by the employer to be on duty at a prescribed work place. WAC 296-126-002(8). The Port sent four Port employees to China to inspect cranes being built for use at the Port. Was the time spent traveling hours worked?

IV. STATEMENT OF THE CASE

A. Overview of Applicable Law

Among other provisions, the Minimum Wage Act (MWA) describes employers and employees subject to the Act, establishes minimum wages that employers must pay employees, and sets maximum

hours employees can work without overtime pay. RCW 49.46.010, .020, .130. RCW 49.46.130 provides that an employer must pay employees one and one-half times their regular rate of pay for all hours worked more than 40 hours in a single workweek. RCW 49.46.130(1).

Employers must pay employees for their “hours worked.” WAC 296-126-002(8). WAC 296-126-002(8) defines this term “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.”

The MWA does not permit employees to agree to waive any rights under the Act. RCW 49.46.090(1) (“Any agreement between such employee and the employer allowing the employee to receive less than what is due under this chapter shall be no defense to such action.”).

B. The Port Asked Its Employees to Travel to China to Inspect Crane Manufacturing Facilities to Ensure That Cranes for the Port Were Manufactured to the Port’s Specifications

The Northwest Seaport Alliance (NWSA) decided to purchase new marine cranes to use at the Port. FF 4.12.¹ NWSA selected a crane manufacturer in China called ZPMC. FF 4.13; CP 504, 849. The Port is responsible for maintaining cranes operated on its premises and employs

¹ The Director adopted the findings of fact cited at CP 503. CP 128. No one disputes the Director’s findings.

crane maintenance mechanics for that purpose. FF 4.15; CP 504. NWSA and Port management decided that Port mechanics and electricians should travel to China to inspect the new cranes. FF 4.15; CP 504, 849.

The Port invited mechanics and electricians to go to China, and Glenn Brazil, Bruce Koch, Dax Koho, and Donald Olsen agreed to go. FF 4.15; CP 128, 505-506. They are Port employees and journey-level mechanics represented by the International Longshore and Warehouse Union Local 22. CP 824. Koch is also a journey-level electrician. CP 824.

The Port had a policy called “Travel and Expense Reimbursement” that addressed reimbursement for travel expenses but not compensation for travel time. CP 853-59. So the Port and Local 22 executed a separate agreement concerning compensation for work in China. FF 4.20; CP 505, 862. In the travel agreement, the Port agreed to pay “for all hours worked at the applicable day shift straight-time wage rate in the Collective Bargaining Agreement.” FF 4.20; CP 505, 862. The Port did not agree to pay any overtime, even if actual hours worked exceeded 40 hours in a workweek. *See* CP 862. For travel between the U.S. and China, the Port would pay up to eight hours in a 24-hour period. FF 4.20; CP 505, 862. The Port does not dispute that it did not pay all the travel time to its employees. *See* FF 4.21; CP 505.

The Port made all the arrangements for the trips, including air transportation and hotel rooms. FF 4.18; CP 505. Koho and Brazil learned the dates of the first trip about a week before they were to leave, and it was too late for them to make alternative arrangements. FF 4.18 n.5; CP 505, 828. An executive administrative assistant booked flights and gave the mechanics their tickets. CP 828-29. She made the travel arrangements without asking the mechanics what date they would like to fly to China. CP 842. In any case, there were no other options for flights to Shanghai so close to the departure date—the flights were already full. CP 829. The mechanics had no say over the airline used, the route taken, or whether to stop over at another city. *See* CP 842, 892. Koho looked for available upgrades, but there were none. CP 829. At six feet tall and 260 pounds, with a handful of screws and plates in his back, Koho was miserable in his economy class seat. CP 844.

The Port's chief operations officer instructed Koho that Koho would be representing the Port on the trip. CP 840-41, 848. He warned Koho not to get in trouble because any trouble would fall on the Port, and he told Koho he was a direct representative of the Port. CP 842. Koho felt the intent of the chief operations officer's directive applied to the entire trip. CP 845.

The Port designated Joseph Caldwell as the management representative on the March and June 2017 trips to China. CP 852. Even though Caldwell does not ordinarily have supervisory duties as maintenance project manager, he had supervisory duties during the trip to ensure that the Port staff were at the jobsite to inspect the cranes and that crane inspections were occurring in a productive and efficient manner. CP 805, 852.

C. Even Though Port Employees Traveled to China in March 2017 at the Request of the Port, the Port Did Not Pay All Their Travel Time

The first team of employees departed SeaTac International Airport on Saturday, March 25, 2017, with a return flight Sunday, April 1, 2017, arriving at SeaTac on April 2, 2017. FF 4.23; CP 505, 802. The Port instructed Brazil and Koho to arrive at the airport three hours early. FF 4.24; CP 505, 790, 831. Koho met Brazil at the Port, and Brazil's wife drove them to the SeaTac airport. FF 4.25; CP 505, 790. After going through security, Koho and Brazil ate lunch at a restaurant at the airport. FF 4.26; CP 505, 791. Koho and Brazil each had a beer with lunch. FF 4.26; CP 505. Then, they went to the gate where Koho, Brazil, and Caldwell discussed the priorities of the trip and what they wanted to be sure to inspect. FF 4.27; CP 505. Koho reviewed some of the work documents while waiting for the flight. FF 4.27; CP 505, 832. Brazil did

not feel free to do anything he wanted because he was in the company of Port management. CP 792. He had the feeling that he was at work while waiting at the gate. CP 792.

During the flight, Brazil reviewed “a lot of material” about the cranes because the Port asked him to join the team late, and he needed to review the materials before arriving in China. *See* FF 4.28; CP 505, 793. He had downloaded all of the past inspection reports from the Port’s crane consultant to his personal phone and went over them on the airplane. CP 793. The flight took around 12 hours. FF 4.31; CP 505, 863.

The schedule for the mechanics while they were in China was dictated to them. CP 505, 799. ZPMC would pick up the team at the hotel and take them to the manufacturing sites. CP 806-07. The time record the Port kept shows that from Monday to Friday of that week, the employees spent 50 hours traveling to crane inspection sites and visiting the sites. CP 863-64. But Caldwell only reported eight hours of work each day on the mechanics’ timesheets, so that is how the Port paid them. CP 863-64. The Port also only paid Koho and Brazil for eight hours of travel on the travel days to and from China (March 25 and April 1, 2017). FF 4.20, 4.21; CP 505, 813. So it did not pay them for all their travel to and from China. FF 4.20; CP 505.

Having high-quality cranes is necessary for the work the Port does. CP 893. Both Koho and Brazil identified deficiencies in the cranes they inspected in China that raised quality concerns. *See* CP 843.

D. Port Employees Made Other Trips at the Request of the Port, Including a June 2017 Trip to China, Without Receiving Pay for All Their Travel Time

In June 2017, Koch went to China to inspect cranes for the Port on the second inspection trip it requested its mechanics to take. FF 4.34; CP 506, 876. Caldwell, Brazil, Koho, and Olsen accompanied Koch on the second trip. FF 4.34; CP 506, 879.

Koch learned from Caldwell about 10-14 days before the second trip when the team would be traveling to China. CP 878. Koch did not have any control over the date or the itinerary for the flight and could not stopover in another city on his way to or from China. CP 892. Koch could not have made separate travel arrangements to get to Shanghai because they flew at the last minute, and he never would have been able to find a flight. CP 892. The flight for the second trip to China departed Friday, June 16, 2017, with a return flight Saturday, June 24, 2017. FF 4.35; CP 506, 895. On the departure date, Koch arrived at the Port and rode with Olsen to the airport. *See* CP 879-80. In the flight, Koch chatted with the team about the project as well as personal things. FF 4.36; CP 506, 882. Koch also watched some movies and may have slept. CP 882-83.

Like the first trip, the schedule for while the mechanics were in China was dictated to them. *See* CP 868-71. ZPMC would pick up the team at the hotel and take them to the manufacturing sites. CP 868-71. The time record Caldwell kept shows that from Monday to Friday, the employees spent 50 hours traveling to crane inspection sites and visiting the sites. CP 863-69. But Caldwell only reported eight hours of work each day on the mechanics' timesheets. *Id.*

After a week of inspections, the team rode a bullet train back to the Shanghai airport. CP 886. They went through security and customs and waited for the flight to depart. CP 886-87. Koch spent his waiting time looking at his cell phone and checking the reservations. CP 887. On the return flight, Koch did not sit with the team but did stand in the back of the plane at times to talk with them. CP 888. They discussed who would keep track of the information, who would provide details for the trip report, and other odds and ends. CP 888. Koch also attended work training in Houston, Texas, to learn the drive systems in use on the Port's new cranes. FF. 4.32; CP 506; CP 894. The Port paid him for training time, but not travel time. FF 4.33; CP 506.

E. After Completing an Investigation, the Department Cited the Port for Not Paying Their Employees All Their Hours Worked While Traveling

Brazil, Koch, Koho, and Olsen filed wage complaints with the Department because the Port only paid them for eight hours a day and not for their full out-of-town assignment travel time. FF 4.37; CP 507. The Department cited the Port for wage payment violations after completing its investigation. FF 4.45; CP 507, 749; RCW 49.48.083 (authorizing citations and notices of assessment for wages for MWA violations). The Department's program manager David Johnson explained that the Department considers a car, a train, a bus, or an airplane as the employee's "prescribed work place" when the transportation is used as part of an employee's work assignment. *See* CP 748. Johnson viewed the Port employee's travel to the airport as hours worked and not a commute because the employer directed them to go to the airport and take a flight to China as part of their work assignment. CP 737. The Port appealed. FF 4.47; CP 507.

F. The Director Concluded That Out-of-Town Assignment Travel Is Hours Worked and the Port Must Pay Its Employees for That Time

The administrative law judge granted summary judgment to the Port. CP 500-518. The Department petitioned the Director for administrative review, and the Director performed a de novo review.

Based on undisputed findings in the initial order, which the Director mainly adopted, the Director reversed the initial order and reinstated the citation for hours worked with modifications. CP 71-78.

The Director reasoned that “[u]nder WAC 296-126-002(8), ‘hours worked’ includes travel time for out-of-town work assignments” and that “[b]ecause the travel time itself is a duty of the work assignment, so long as the employer approves the means of travel, the employee is on duty at a prescribed work place throughout the travel time.” CP 73, CL 5.

The Port petitioned the superior court for judicial review. CP 2-11. The parties cross-moved for summary judgment. CP 1051-1105, 1169-1190. Accepting the Port’s argument that the travel time should be treated like a daily commute, the superior court reversed the Director’s decision. CP 1065-66, 1134, 11989-1202.

V. STANDARD OF REVIEW

This Court reviews the decision of an agency fact-finder on the agency record. *See Kittitas Cty. v. Kittitas Cty. Conservation*, 176 Wn. App. 38, 48, 308 P.3d 745 (2013).² Under the Administrative Procedure

² The Director of the Department is the final agency fact-finder. RCW 49.48.084. Although the Port appears to claim the Director isn’t a neutral fact-finder, the Administrative Procedure Act provides otherwise. CP 1052; RCW 34.05.464. In any event, the ALJ’s order need not have any consideration since there is no credibility issue in this case. *See* RCW 34.05.464(4); *Tapper v. State Employment Sec. Dep’t*, 122 Wn.2d 397, 406, 858 P.2d 494 (1993).

Act, the “burden of demonstrating the invalidity of agency action is on the party asserting invalidity.” RCW 34.05.570(1)(a). The court views the evidence in the light most favorable to the party who prevailed (the Department) in the highest forum that exercised fact-finding authority (the Director). *See Kittitas Cty.*, 176 Wn. App. at 48.

Subsumed in its error of law argument, the Port challenges the actions of the Director based on RCW 34.05.570(3)(d), asserting that the Director erroneously interpreted or applied the law. CP 1059. The court reviews issues of law de novo. *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998). In doing so, the court accords deference to an agency interpretation of the law when the agency has specialized expertise in dealing with such issues, though the court is not bound by an agency’s legal interpretation. *Id.* In travel cases and other wage and hour cases, courts have looked to the Department’s policies for guidance. *Anderson v. Dep’t of Social & Health Servs.*, 115 Wn. App. 452, 456, 63 P.3d 134 (2003) (travel case); *Brady v. Autozone*, 188 Wn.2d 576, 581-82, 397 P.3d 120 (2017).

The Port also argued at superior court that the Director’s order is arbitrary and capricious under RCW 34.05.570(3)(i). CP 1073-74.

Arbitrary and capricious agency action means willful and unreasoning

action, taken without regard to the circumstances surrounding the action.

City of Redmond, 136 Wn.2d at 46-47.³

VI. ARGUMENT

The Legislature adopted the MWA to protect the “immediate and future health, safety, and welfare of the people . . .” RCW 49.46.005.

Under the MWA, employers must pay their employees for their labor. And under the hours-worked regulation, WAC 296-126-002(8), time spent traveling for an employer is compensable time when the employer assigns the travel. For example, no one disputes that travel from one jobsite to another is hours worked.

There is one segment of travel that may or may not be compensable time: the daily trip from the employee’s home to the first jobsite and the trip from the last jobsite to home. If this time is a commute, it is not hours worked; if it is assigned travel for work, it is hours worked. As discussed below, there is a body of case law that examines this segment of time. The

³ The Port has not raised a substantial evidence argument about the Director’s wage calculations. CP 2-11, 1051-1105, 1131-1144. At the Office of Administrative Hearings, the Port did not challenge the wage calculations. AR 331-44, 572-85, 925-948. Nor did it challenge the calculations before the Director. AR 167-91. RCW 34.05.554 requires the Port to have raised all issues at the administrative level. Belatedly, though still not arguing substantial evidence or pointing out an incorrect calculation, the Port argued in superior court that because it mentioned the calculations as an issue in early proceedings at OAH, this preserves the issue. CP 1141. But passing treatment of an issue in the administrative record does not preserve an issue. *B & R Sales, Inc. v. Dep’t of Labor & Indus.*, 186 Wn. App. 367, 382, 344 P.3d 741 (2015) (“[T]here must be more than a hint or a slight reference to an issue in the agency record to permit our review.”).

superior court erred by importing limitations about commutes discussed in these cases to assigned travel—a qualitatively different thing. CP 1199-1200.

Instead, the Port must pay for its employee’s out-of-town assignment travel under WAC 296-126-002(8) because the travel is a necessary component of the inspection.

A. The MWA Requires an Employer to Compensate Travel on Out-of-Town Assignments Because Unlike a Commute, the Travel Itself Is a Duty of the Work Assignment Performed at an Employer-Approved Location

The Supreme Court has long recognized that employers must pay their employees for all “hours worked” under the MWA, including travel time. *Carranza v. Dovex*, 190 Wn.2d 612, 620, 416 P.3d 1205 (2018). In *Carranza*, the Court held that the employer must pay agricultural employees their travel time between assignments as they traveled from orchard to orchard. *Id.*; see *IBP, Inc. v. Alvarez*, 546 U.S. 21, 34-36, 126 S. Ct. 514, 163 L. Ed. 2d 288 (2005) (recognizing under Federal Labor Standards Act that time between one assignment to another is compensable); *Ketchum v. City of Vallejo*, 523 F. Supp. 2d 1150, 1160 (E.D. Cal. 2007) (same); 29 U.S.C. § 785.37. In *Brink’s Home Security*, the Court held that the employer must pay travel time to installers of home security systems. *Steven’s v. Brink’s Home Sec., Inc.*, 162 Wn.2d 42, 48-

49, 169 P.3d 473 (2007).

“Hours worked” means “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). Under plain language analysis, the court determines a rule’s meaning from its terms “to give effect to its underlying policy and intent.” *Dep’t of Licensing v. Cannon*, 147 Wn.2d 41, 56, 50 P.3d 627 (2002). The court interprets MWA terms “consistent with the terms and spirit of the legislation.” *See Bostain v. Food Exp., Inc.*, 159 Wn.2d 700, 712, 153 P.3d 846 (2007).

Consistent with the MWA’s “terms and spirit” and consistent with court decisions holding that travel time between jobs is compensable, the Department has long applied the definition of “hours worked” to out-of-town assignment travel. Employment Standards Policy ES.C.2;⁴ CP 964-968 (Employment Standards Desk Aid explaining that out-of-town travel is hours worked). Policy ES.C.2 explains that “hours worked means all work requested, suffered, permitted, or allowed *and includes travel time, training and meeting time, wait time, on-call time, preparatory time and*

⁴ Administrative Policy ES.C.2, https://lni.wa.gov/employees-rights/_docs/esc2.pdf.

concluding time, and may include meal periods.” (emphasis added). This approach follows the hours-worked regulation and case law.

- 1. The hours-worked regulation looks to the task the employee is doing and where the employee is doing it: here the “on duty” task is inspecting cranes with travel as a component and one “prescribed work place” is the instrumentality of travel, e.g., the airplane**

Out-of-town assignment travel time is hours worked. “Hours worked” contains three elements: 1) all hours during which the employee is authorized or required by the employer, 2) to be on duty, 3) on the employer’s premises or at a prescribed work place. WAC 296-126-002(8). To meet its burden of showing the Director’s decision was invalid, the Port must show that the out-of-town assignment travel did not meet these elements. It cannot do so.

1) **Authorized.** The Port does not dispute that it authorized travel associated with the cranes. CP 1051.

2) **“On duty.”** There are three independent methods to determine whether an employee is “on duty.” And each way supports finding that Port’s employees were on duty when they traveled at the Port’s request.

The first method is to examine the rule’s words in their statutory and regulatory context and apply the plain meaning of “on duty.” If a term is undefined, the court will use a dictionary for the definition. *See State v. Watson*, 146 Wn.2d 947, 956, 51 P.3d 66 (2002). “On duty” means

“engaged in or responsible for an assigned task or duty.” *Webster’s Third International Dictionary* 705 (2002). Here, the on-duty “assigned task” was an inspection in China that included travel as a necessary component.⁵

Under the second method, the court looks to see if an employer restricts the personal activities of the employees and controls their time. *Brink’s*, 162 Wn.2d at 48. In *Brink’s*, the Court looked to control over the specific activities of the employees to determine whether the installers were on duty. *See id.* at 48-49. Here, the mechanics performed assigned travel, where the Port controlled these employees by restricting their freedom by providing for them to be traveling. The Port restricted the mechanics because they could not relax at home or decide to go somewhere else but had to travel as a part of a work assignment. Nor could they choose their route, their starting time, any stopping points, their traveling companions, their mode of transportation, or any of the other many choices that employees may make when commuting daily to work.

This restricted travel here is much like the restrictions in jobsite-to-jobsite travel. In this travel, the employer may not control the activities the

⁵ This was time spent traveling to China and also includes uncompensated time in China traveling to and from the hotel. *See* CP 446, 863-870. The itinerary and time sheet show travel time to and from the hotel, but the Port only paid for eight hours a day. CP 505, 863-870; FF 4.20. Although the Port argues that the uncompensated time in China was not at issue, the Department’s citation covers that time. CP 446; CP 1141. The Port never challenged the Department’s calculations about this. *See supra* n. 3.

employees' perform, but the overall control is over where the employees go. The Washington Supreme Court has already held that jobsite-to-jobsite travel time is hours worked. *E.g.*, *Carranza*, 190 Wn.2d at 620. Nothing materially distinguishes the assigned travel in *Carranza* from the assigned travel here.

Under the third method, the court looks to the primary purpose of the travel, and if the primary purpose of an activity is to benefit the employer, then it is compensable time. *See Lindell v. General Elec. Co.*, 44 Wn.2d 386, 394, 267 P.2d 709 (1954) (looking to see if activity is “predominately” for the employee’s or employer’s benefit); *Anderson*, 115 Wn. App. at 458 (looking to see if travel activity was “pursued necessarily and primarily to benefit the employer and his business.”); 29 C.F.R. § 785.3 (looking to “primary” activity in analogous federal travel law). In *Anderson*, Special Commitment Center staff traveled to their worksite on McNeil Island by ferry. *Anderson*, 115 Wn. App. at 454. The court held that the purpose of this travel was an ordinary commute and that it was not an assignment for anywhere other than the employee’s normally scheduled work site. *Id.* at 456-58. Because the primary activity was a daily commute (*see id.* at 456), which is not compensable time, the ferry trip was not hours worked. *See Part A.2., infra* (contrasting commute time with out-of-town assignment travel time).

That the court may determine on-duty time by looking to the primary purpose of the activity is confirmed by analogous federal rules under the Fair Labor Standards Act, under which travel time on an out-of-town assignment would “qualify as an integral part of the ‘principal’ activity which the employee was hired to perform on the workday in question.” 29 C.F.R. § 785.37.⁶

The Port sent its employees to perform the job task of traveling to inspect the cranes. FF 4.15, 4.17, 4.18, 4.22, 4.23, 4.34; CP 504-6. Here, while flying, the mechanics engaged in a mixture of personal activities (*e.g.*, eating and sleeping) and work activities on the flights (*e.g.*, reading manuals and discussing the inspection). FF 4.28, 4.36; CP 506; CP 832, 880-882. But the primary activity was travel associated with the cranes to benefit the employer; it was not to afford the mechanics with the opportunity to eat, read, or engage in occasional socializing. Any one of the independent ways to establish the on-duty element shows that the

⁶ The federal government “as an enforcement policy” does not issue citations for travel away from home outside regular hours as a passenger on an airplane. 29 C.F.R. § 785.39. This is an enforcement policy that recognizes that such time is covered, but the federal government chooses not to enforce its regulation for that circumstance. The Department has made no such enforcement choice. Both its administrative policy and its desk aid confirm that the Department enforces its hours-worked regulation without exempting out-of-town, overnight travel time. CP 129-30. The Department takes that position because WAC 296-126-002(8) mandates it. Courts often look to FLSA because of the similarities with Washington law, but do not adopt positions inconsistent with Washington law. *Drinkwitz v. Alliant Techsys., Inc.*, 140 Wn.2d 291, 298, 300, 996 P.2d 582 (2000).

travel time itself was a duty of the work assignment, and so satisfies the element here.

3) **On duty at a “prescribed work place.”** WAC 296-126-002(8) provides for compensation for 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.” Here, the prescribed work place was the place or instrumentality of travel: *e.g.*, the airplane. If the instrumentality of travel is integral to the employer’s requested work, it is the prescribed work place. *See Brink’s*, 162 Wn.2d at 49. So for example, in *Carranza*, the Court had an implicit understanding that using a truck to travel from orchard to orchard was the prescribed work place when the Court found the time was hours worked. *Carranza*, 190 Wn.2d at 620-21. Similarly, in *Brink’s*, the Court found that driving trucks stocked with tools and equipment was integral to the security system installers’ work. *Id.* It looked to the nature of the employer’s business, which was to use the trucks to support installation of security equipment. *Id.* So the trucks were a “prescribed work place” under WAC 296-126-002(8). *Id.*

Likewise, as the Port conceded, the observation of the manufacturing process for maritime cranes “necessitated overnight international travel.” CP 1051. Flying in an airplane was an integral part of the work directed by the Port and performed by the mechanics. The nature

of the employer's work was to have safe cranes, and it ensured that by assigning their employees to travel to China to inspect the cranes. And the mechanics identified deficiencies in the cranes they inspected in China that raised quality concerns. *See* CP 843. The airplane travel was integral to facilitate the inspection; otherwise, the mechanics could not inspect the cranes. The Port-approved instrumentality of travel (*e.g.*, the airplane) was a "prescribed work place."

2. The hours-worked regulation does not treat out-of-town assignment travel as commute time

Treating this case as if it involved a routine commute between an employee's home and the jobsite, the Port below offered a rule that there needs to be a restriction on what the employees did when traveling or that the employees needed to be performing certain tasks while traveling. CP 1133, 1136. Even though the travel itself is the work task because it was part of a work assignment, the Port cited *Brink 's* for the proposition that there is no coverage because the Port did not require the mechanics to perform any particular task. CP 1066-67, 1136 (citing *Brink 's*, 162 Wn.2d at 49). As a factual matter this is incorrect—the Port required them to travel: that was a task. And *Brink 's* does not hold that if travel was part of the assigned work that an employee must be performing job tasks during that travel for the travel to be considered hours worked. Instead, it looked to the facts to determine whether something that is normally a commute

(travel from work to the first job assignment) was transformed into hours worked because the employer imposed requirements on the employees. *Brink 's*, 162 Wn.2d at 49.

Just like *Brink 's* is a case only about how to treat daily time spent from an employee's home to the jobsite, *Anderson* is so limited. Yet the Port cites *Anderson* to argue that performing personal activities on their trips takes the Port employees out of coverage, noting that the *Anderson* court found the employees were not on duty because of the personal activities the employees could do, like “reading, conversing, knitting, playing cards, playing hand-held video games, listening to CD . . . players and radios, and napping.” CP 1133-34 (quoting *Anderson*, 115 Wn. App. at 454); *see also* CP 1065, 1068. The Port argues that because its mechanics could “eat, drink, watch movies, read books, sleep, chat, and otherwise engage in personal pursuits,” their time was not compensable. CP 1067. It argues that the focus is on what the employee was doing when traveling. CP 1065.

But the inquiry is not a mechanical inquiry into whether the employers engaged in tasks like eating and socializing—it is into the context in which this occurs. Washington courts recognize that eating or socializing does not necessarily transform on-duty time to personal time. In *Weeks v. Chief of Washington State Patrol*, 96 Wn.2d 893, 897, 639

P.2d 732 (1982), the court ruled that state troopers were on duty during their lunch hour even when they could go home and eat during that time. The troopers remained available for call by radio or telephone while at home enjoying a meal. *Id.* at 898. Similarly, the court in *Lindell* ruled that the security officers' lunch hour at a nuclear plant was work time because "they were not free agents" and were not "under no restrictions whatsoever." *Lindell*, 44 Wn.2d at 394.

The importance of context is shown by *Anderson*. In its focus on commuting, *Anderson* relied on the Department's interpretation that stated that "[a]n employee who travels from home before the regular work day and returns home at the end of the work day is engaged in ordinary home to work travel. . . . Normal travel from home to work is not work time and does not require compensation." *Anderson*, 115 Wn. App. at 456. Applying this interpretation, the *Anderson* court specifically characterized the trip to McNeil Island as a commute. *Id.* at 458. That *Anderson* looked to see if the activities on the commute constituted work activities—to see if there was hours worked—does not mean that is the inquiry for assigned travel.

Indeed, *Anderson* cited with approval a regulation that compensated time when "[t]he employee has a regularly assigned work site, and the travel is to carry out a work assignment at a different location

than the regularly assigned work site.” *Id.* at 456-57 (quoting former WAC 356-15-040). All of this shows that *Anderson* is in a different context: its focus was “normal travel.” *Anderson*, 115 Wn. App. at 256. By specifying “normal travel,” the court contemplated work other than normal commute travel. *Id.*

Contrasting commute time with out-of-town assignment travel shows that the latter is compensable time. Commute time is time primarily advancing the employee’s personal interests, so it is not compensable under the hours-worked regulation. The employee chooses to have a job with the employer and travels back and forth from home to get to the job. The primary reason for the travel is to advance the personal interests of the employee to get to work. Commute time is uncompensated because employees can choose where they live and how they get to work, and they may choose how to do so for their own benefit.

In contrast, the out-of-town assignment travel here was not for the personal benefit of the mechanics but part of a work assignment made at the employer’s direction and to the benefit of the employer. Inspecting cranes so they are safe is in the employer’s interest and not a personal interest of the mechanics.

B. Washington’s Long-Held Policy Is to Protect Employees by Paying for Their Labor

Our Supreme Court has repeatedly recognized Washington’s “long and proud history of being a pioneer in the protection of employee rights.” *Carranza*, 190 Wn.2d at 625 (quoting *Drinkwitz v. Alliant Techsys., Inc.*, 140 Wn.2d 291, 300, 996 P.2d 582 (2000)); *see also Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 870, 281 P.3d 289 (2012) (remedial workplace laws are interpreted to protect employees). Consistent with this long and proud history, the Court recognizes that employers must pay their employees for all hours worked. *Carranza*, 190 Wn.2d at 620.

Essentially, the Port’s arguments allow employers to avoid paying their employees anytime an employee is traveling to a job assignment in a method of travel where an employer permits personal activities. But this would allow what happened here: an employer assigning an employee a task, but not paying for it. And this overly broad rule would sweep up time an employee spends traveling from job assignment to job assignment if the employee could also engage in activities like chatting with co-employees or reading while another employee drove. Such a result goes against the hours-worked regulations and Supreme Court case law. *See Carranza*, 190 Wn.2d at 620-21 (agricultural employees’ time spent traveling between orchards hours worked).

Essentially, the rule the Port asks the Court to adopt is one in which the employer can direct its employees to do a task but not have to pay them

for it. The rule would allow an employer to benefit from the availability of the employee to perform critical functions for the employer but not pay for the all the components of the work. This proposed approach deviates from the long, proud history in Washington of protecting employees' rights.

VII. CONCLUSION

An employee should not have to provide uncompensated labor when the employee acts at the employer's direction in a location approved by the employer. The Port benefited from its employees' travel—they could inspect cranes in China. This is no ordinary commute—but assigned work-related travel for which the Port needs to compensate the employee's labor.

This Court should reverse the superior court and affirm the Director.

RESPECTFULLY SUBMITTED this 27th day of March 2020.

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DOCUMENT	CP NO.
ORDERS	
Director's Order	127
OAH Order: Initial Order Granting Appellant's MSJ & Denying Dept's MSJ	246
OFFICE OF ADMINISTRATIVE HEARINGS	
Department's Motion for Summary Judgment	694
- Declaration of Cynthia Gaddis in Support of Dept's MSJ	725
- Exhibit A: Excerpts of transcript of 5/11/2018 30(b)(6) Deposition of David Johnson	732
- Exhibit B: Excerpts of transcript of 5/10/2018 Deposition of Glenn Joseph Brazil	781
- Exhibit C: Excerpts of transcript of 6/27/2018 Deposition of Joe Caldwell	804
- Exhibit D: Excerpts of transcript of 6/12/2018 Deposition of Dax Koho	823
- Exhibit E: Excerpts of transcript of 6/06/2018 30(b)(6) Deposition of Port of Tacoma	847
- Exhibit F: Excerpts of transcript of 5/10/2018 Deposition of Bruce Koch	872
- Exhibit G: 11/15/17 Worker Rights Complaint filed by Donald Olsen	900
Port of Tacoma's Response in Opposition to the Department's MSJ	331
- Declaration of Joseph Caldwell	346
- Declaration of Warren Martin in Opposition to the Dept's MSJ	349
- Exhibit A: Excerpts of transcript of 6/12/18 30(b)(6) Deposition of Dax Koho	352
- Exhibit B: Excerpts of transcript of 6/6/18 30(b)(6) Deposition of Dustin Stoker	358
- Exhibit C: Excerpts of transcript of 5/10/18 Deposition of Glenn Brazil	362
- Exhibit D: Excerpts of transcript of 6/27/18 Deposition of Joseph Caldwell	366
- Exhibit E: DLI Administrative Policy ES.C.2	370
Department's Reply re Department's Motion for Summary Judgment	272
Port of Tacoma's Motion for Summary Judgment	925
- Declaration of Warren Martin in Support of Port of Tacoma's MSJ	950
- Exhibit A: DLI Administration Policy ES.C.2	954
- Exhibit B: Excerpts from DLI "Desk Aid" regarding travel time	963
- Exhibit C: 7/06/17 email from Shannon Enright to Brent DeBeaumont	969
- Exhibit D: 7/06/17 email from Brent DeBeaumont to Shannon Enright	972
- Exhibit E: Transcript of 6/12/18 Deposition of Shannon Enright	975

- Exhibit F: Transcript of 5/11/18 30(b)(6) Deposition of Department of Labor & Industries	986
- Exhibit G: Transcript of 6/12/18 Deposition of Brent DeBeaumont	1010
- Exhibit H: Excerpts of transcript of 5/10/18 Deposition of Glenn Brazil	1023
- Exhibit I: Excerpts of transcript of 5/10/18 Deposition of Bruce Koch	1029
- Exhibit J: Excerpts and Exhibit 18 of transcript of 6/6/18 30(b)(6) Deposition of Dustin Stoker	1036
- Exhibit K: Excerpts from Brief of Respondent in <i>Anderson v. State, Dep't of Soc. & Health Servs., 115 Wn. App. 452, 63 P.3d 134 (2003)</i> .	1041
Department's Response to Port of Tacoma's Motion for Summary Judgment	294
Reply in Support of Port of Tacoma's Motion for Summary Judgment	286
DIRECTOR	
Department's Petition for Administrative Review	222
Appellant's Brief	195
Respondent's Brief	167
Department's Reply Brief	156
SUPERIOR COURT	
Petition for Judicial Review of Administrative Decision	116
Errata Regarding Petition for Judicial Review of Administrative Decision	68
Motion to Stay Enforcement of Director's Order	101
Declaration of Warren Martin in Support of Motion to Stay Enforcement of Director's Order	109

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