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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,

Appellant.

**REPLY BRIEF
DEPARTMENT OF LABOR & INDUSTRIES**

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I. INTRODUCTION

The Minimum Wage Act demands that employers pay workers for their labor, and this includes any time when the employer has assigned travel as part of an employee's job duties. Traveling upon the request of an employer is hours worked, be it the overnight travel here or in the parallel situation of travel from jobsite to jobsite.¹

The Port assigned four mechanics to travel to China to inspect cranes. The Port conceded that observing the crane's manufacturing process "necessitated overnight international travel." CP 1051. This out-of-town assignment travel is indistinguishable from jobsite-to-jobsite travel because, in both situations, the employer controls the employee by directing the travel, and the travel is an integral component of the job task. Given this control, it does not matter that one trip started from another jobsite and one started at home. The Port's arguments to the contrary would lead to the result that an employer can choose whether to pay for labor by directing where the work begins.

The Port claims that it is not arguing that the employer-required travel here was commuting time, yet it relies almost exclusively on cases addressing commute times to support its argument. *E.g.* Resp't's Br. 14. In

¹ The Port agrees jobsite-to-jobsite travel is hours worked. Resp't's Br. 34.

doing so, the Port fails to acknowledge the crucial distinction between commutes and assigned travel. Unlike a commute, in which the relevant factor is the level of employer control over an employee's personal activities, in assigned travel the employer exerts overall control over the employee by directing that the employee travel from one place to another as part of the job task.

In contrast is commuting where daily and routine travel to and from work is not a job task: an employer expects only that an employee will show up to work and the employee is free to choose how to do that. In commuting, the employer has not requested anything besides attendance. Commuting is traditionally not counted as hours worked because employers do not direct their employees to perform job tasks during this time.² So the discussion of personal activities in case law addressing commutes is necessary to highlight the differences between commuting and other travel between home and work. And this discussion is limited to

² Although Washington has not adopted the federal 1947 Portal-to-Portal Act, 29 U.S.C. § 254, which provides that "traveling to and from the actual place of the principal activity or activities which such employee is employed to perform" is not compensable, it has followed the principle that commuting time is not compensable. *Anderson v. Dep't of Social & Health Servs.*, 115 Wn. App. 452, 456, 63 P.3d 134 (2003) ("An 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.") (quoting Department of Labor and Industries policy).

the circumstances of determining whether there is a commute for this segment of travel time.

Instead of treating out-of-town assignment travel like commute time, this Court should instead look to authority that distinguishes between uncompensable commuting travel and compensable travel “to carry out a work assignment at a different location than the regularly assigned work site.” *Anderson v. Dep’t of Social & Health Servs.*, 115 Wn. App. 452, 457, 63 P.3d 134 (2003) (quoting former WAC 356-15-040).

The Director of the Department of Labor and Industries correctly determined that assigned travel, as distinct from commuting travel, is hours worked under WAC 296-126-002(8). This Court should affirm the Director.

II. ARGUMENT

The central question in this case is whether assigned travel is hours worked.³ “Hours worked’ shall be considered to mean all hours during which the employee is authorized or required by the employer to be on

³ The Port’s quibbles with L&I’s Statement of the Case lack merit. Resp’t’s Br. 4-8. First, despite the Port’s attempt to manufacture a dispute over the contract (Resp’t’s Br. 4), there is no dispute that the parties entered into an agreement that only provided 8 hours of straight pay regardless of how many hours worked, so “not all time the wage claimants spent traveling was paid.” CP 29 (FF 4.19-4.21). Second, despite its claim that the mechanics knew about the trip months in advance (Resp’t’s Br. 5), it is undisputed that the Port made all travel arrangements and that the workers did not choose any of their flights or accommodations and when they were advised about them, it “was likely too close in time for them to make their own travel arrangements.” CP 29 n.5 (FF 4.18 and footnote). Finally, although it does not matter how much active work the mechanics engaged in, there is no dispute that they discussed the inspections during the flights. CP 30 (FF 4.36).

duty on the employer’s premises or at a prescribed work place.” WAC 296-126-002(8). The focus of “on duty” time is whether there is control over the employee, as discussed in Part II.A. The specific elements of the hours worked test are further discussed in Part II.B.

A. Employers Control Their Employees in Assigned Travel and So It Is Distinct From Commute Travel, and It Is Hours Worked

The inherent control in assigned travel dictates that the out-of-town travel is hours worked. Because of this control, the personal activities approach that the Port advocates for applies only to commutes, not assigned travel.

1. Out-of-town assignment travel is indistinguishable from jobsite-to-jobsite travel because both involve overall control of the employer over the employee

Like travel from jobsite to jobsite, in out-of-town assignment travel, the employer exerts overall control over the worker, so the time is hours worked. *See Stevens v. Brink’s Home Sec., Inc.*, 162 Wn.2d 42, 48, 169 P.3d 473 (2007) (looking to control over worker).⁴ The Washington

⁴ L&I has long interpreted hours worked to include out-of-town assignment travel. CP 17-18 (policy ES.C.2 and desk aid). The Port cites *Carranza* to argue there should be no deference to L&I’s interpretation. Resp’t’s Br. 10 (citing *Carranza*, 190 Wn.2d at 624-25). Although the *Carranza* Court did not find an inapplicable agency policy useful, our state Supreme Court has given a “high level of deference to [L&I’s] interpretation of its regulations based on the agency’s expertise and insight gained from administering the regulation.” *Brady v. Autozone Stores, Inc.*, 188 Wn.2d 576, 581, 397 P.3d 120 (2017). And regardless that it is unpublished, because the desk aid shows the agency’s enforcement position, it may be considered. *Sleasman v. City of Lacey*, 159 Wn.2d 639, 646, 151 P.3d 990 (2007),

Supreme Court has found that travel between one jobsite to another is hours worked. *Carranza v. Dovex Fruit Co.*, 190 Wn.2d 612, 620-21, 416 P.3d 1205 (2018). And there is no meaningful distinction between time spent traveling between jobsite to jobsite and time spent traveling in an out-of-town travel assignment. In both situations, the employer has exerted overall control over the employee by making it part of the employee's job to travel.

As the Port admits, “the question of whether an employee is ‘on duty’ depends on the degree of control the employer exercises over the employee’s time.” Resp’t’s Br. 14 (citing *Brink’s*, 162 Wn.2d at 48) (emphasis omitted). This focus on control is true in the range of travel time options: commute (no control—*Anderson*), time from house to worksite while working (control—*Brink’s*), jobsite to jobsite travel (control—*Carranza*), and out-of-town assignment travel (control—CP 17-18). When an employer dictates that an employee shall travel, there is overall control over the worker.

Although the Port repeatedly relies on *Brink’s* (Resp’t’s Br. 8, 14, 16, 30-32), that case supports L&I, not the Port. In *Brink’s*, the Court held that technicians whose activities were controlled by their employer as they traveled daily from their houses to their first work sites were performing hours worked and needed to be compensated. *Brinks*, 162 Wn.2d at 48-49.

The Court needed to determine whether this segment of travel was a commute. *Id.* at 48 (distinguishing “ordinary commuters”).

In *Brink’s*, travel time the technicians spent from job assignment to job assignment was covered time. *Id.* at 49-50. In *Carranza*, the Court considered *Brink’s* and found it supported the conclusion that jobsite to jobsite time was covered. *Carranza*, 190 Wn.2d at 620.⁵

Carranza and *Brink’s* support the principle that the court looks to see if there is overall control of the employee through the assignment of a task where travel is a necessary component of the task. In *Brink’s*, the Court evaluated “the extent to which Brink’s restricts Technicians’ personal activities and controls Technicians’ time to determine whether Technicians are ‘on duty.’” *Brinks*, 162 Wn.2d at 48. It then looked at indicia of control to determine whether the travel time was hours worked. *Id.* Thus, the real import of *Brink’s* is looking to control. As discussed below, the inquiry into personal activities is only relevant to distinguish a commute. *See infra* Part II.A.2. And once control is established over the

⁵ Federal case law echoes this rule. *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 travel time between one assignment place to another is compensable); *Ketchum v. City of Vallejo*, 523 F. Supp. 2d 1150, 1162 (E.D. Cal. 2007) (same); 29 CFR § 785.37. Although the Port acknowledges that employers must pay assignment-to-assignment time (Resp’t’s Br. 34), it questions these cases because they discuss the Portal-to-Portal Act, which doesn’t apply in Washington. Resp’t’s Br. 22, n.11. The Portal-to-Portal Act is more restrictive than Washington law, meaning it covers travel time under fewer circumstances. *See Anderson*, 115 Wn. App. at 456. That a more restrictive scheme finds the time hours worked only strengthens the Director’s Order here.

worker in performing a job duty (like the assigned travel here), there is no need to look at personal activities. Here, the Port exercised overall control over the mechanics by directing their travel to China.

The Port had a chance to distinguish between the control in out-of-town assignment travel and control in assignment-to-assignment travel, but provided no meaningful distinction between the two. Resp't's Br. 21-24. Instead, it conclusorily states that travel from jobsite to jobsite "is completely different from the out-of-town overnight travel time at issue here." Resp't's Br. 34. It gives no rationale as to why it is different. Instead, it points out how *Carranza* was in a different context. *Id.*⁶ But later in its brief, the Port concedes that traveling from jobsite to jobsite is hours worked. Resp't's Br. 34; *see also* Resp't's Br. 23.

The Port also argues that there is significance in the fact the federal Department of Labor (DOL) has two regulations for out-of-town travel and for work from jobsite to jobsite. Resp't's Br. 23-24. But how another jurisdiction organizes its rules says nothing about Washington law.

⁶ The Port is wrong that *Carranza* did not decide whether travel from orchard-to-orchard was hours worked. Resp't's Br. 22-23. This was a holding of the decision. *Carranza*, 190 Wn.2d at 620. *Carranza* relied on *Brink's* for the principle that the MWA requires covering jobsite-to-jobsite travel, and *Brink's* cites WAC 296-126-002(8), the hours worked regulation at issue here. *Carranza*, 190 Wn.2d at 620 (citing *Brink's*, 162 Wn.2d at 47). Although the Court limited piecework holding to the agriculture workers, it did not have a similar constraint on the orchard-to-orchard travel. *Carranza*, 190 Wn.2d at 626.

The Port presents also the circular argument that “the question here is whether the Wage Claimants were ‘on duty’ to begin with.” Resp’t’s Br. 23. Its argument might be that employees performing out-of-town assignments could start from their house, while jobsite to jobsite travel starts from a jobsite. There are three problems with this claim. First, to say that the employer would pay the Port mechanics only if they started travel from the Port’s office where they were on duty would allow the employer to play games in order to avoid compensating the employee by changing their start location. Second, the Port controlled the mechanics by directing them to travel from their home. And third, whether an employee is “on duty” would be the same question during assignment-to-assignment travel.

Finally, the Port appears to argue that federal law supports its position. Resp’t’s Br. 24. But under the Fair Labor Standards Act, DOL has determined that 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. “Travel away from home is clearly worktime when it cuts across the employee’s workday.” 29 C.F.R. § 785.39. DOL “as an enforcement policy” does not act on 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 DOL chooses not to enforce its regulation for that circumstance. Washington has no such rule.

Here, the employer directed the travel to China as a special job assignment that was a necessary component of the inspection, and it is indistinguishable from covered assignment-to-assignment travel. Although the Port concedes that assignment-to-assignment travel is hours worked, adopting the Port’s position would upend settled law about assigned travel. When interpreting a regulation, the court considers “the general object to be accomplished and consequences that would result from construing the particular statute in one way or another.” *See Burns v. City of Seattle*, 161 Wn.2d 129, 146, 164 P.3d 475 (2007) (quotations omitted). Construing assigned travel to not be hours worked would hurt all workers who travel after their employers assign such travel to them—a consequence this Court should not tolerate.

2. Commuting case law distinguishes between commuting and travel to carry out a work assignment at a different location than the regularly assigned work site

The Port argues that to be hours worked, the employer must have controlled the personal activities of the worker such that they could not engage in activities like reading, eating, and chatting. Resp’t’s Br. 14-17. 19-21. The Port derives this personal activities approach from *Anderson* and *Brink’s*, which it argues “provide the controlling definition[s] of [‘on

duty’ and ‘prescribed work place’] because they are the primary cases that discuss WAC 296-126-002(8) in the context of *employee travel of any kind.*” Resp’t’s Br. 14.⁷ But the focus on personal activities concerns only the daily trip between one’s home and one’s work, and whether it is a commute.⁸ *Anderson* and *Brink’s* do not purport to impose the personal activities approach on “travel of any kind,” but address potential commutes. So the discussion about personal activities must be limited to this context. *See Wilber v. Dep’t of Labor & Indus.*, 61 Wn.2d 439, 445-46, 378 P.2d 684 (1963) (holdings limited to facts).

Commute time is time primarily advancing the employee’s personal interests, so it is not compensable under the hours-worked regulation. Traveling back and forth to work is not the principal activity that an employee is engaged to perform. 29 U.S.C. § 254. In commuting, 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. It is

⁷ The Port argues that L&I has conceded that the on-duty test for commuting (determining whether the employer restricts the personal activities of the employees) applies to out-of-town assignment travel. Resp’t’s Br. 25 (citing Appellant’s Br. 17-18). L&I makes no such concession. As discussed in the Appellant’s Brief, if the personal activities test applies, then the Port still owes the wages. But the test does not apply.

⁸ Commuting entails going daily from one’s home to one’s regular jobsite. The dictionary defines it as “to travel back and forth regularly (as between a suburb and a city). // He commutes to work every day by car.” *Commute*, Merriam-Webster.com Dictionary, <https://www.merriam-webster.com/dictionary/commute> (last visited Aug. 6, 2020).

uncompensated because employees can choose where they live and how they get to work.

In contrast, out-of-town assignment travel is not for the personal benefit of the employees but part of a work assignment made at the employer's direction and solely to the benefit of the employer. Here, inspecting cranes so they are safe is in the employer's interest and not a personal interest of the mechanics.

The Port tries to shoehorn the facts about out-of-town assignment travel into *Anderson*, which found that daily and routine travel on a ferry to a correctional facility on McNeil Island was a commute. Resp't's Br. 13-20. But this case aids L&I, not the Port. Like the Director here, *Anderson* differentiated commuting and "travel . . . to carry out a work assignment at a different location than the regularly assigned work site," with the latter time being compensated. *Anderson*, 115 Wn. App. at 457 (quoting former WAC 356-15-040). So the Port is wrong that this Court would have to reverse *Anderson* in order to uphold the Director's order. *See* Resp't's Br. 18.

Contrary to the Port's claims, it does not matter that the only way to get to McNeil Island was the ferry; that the ferry ride allowed the employees to come to work, which benefited their employer; and that they engaged in personal activities during the commute. Resp't's Br. 17-19.

Instead, the Court distinguished between normal travel time from home to work and other types of travel, such as travel to a different location than the regularly assigned work site. *Anderson*, 115 Wn. App. at 457. It relied on L&I's former policy which said "an 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." *Id.* at 456 (quoting former policy ES-016 at 5). L&I's policy plainly applied to the circumstance of a commute. *Anderson* in no way stands for the proposition that out-of-town travel is not compensable.

Reinforcing the principle that travel to different locations is treated differently than a commute, the employer in *Carranza* directed that the employees would travel from one orchard to another and imposed no limitation on personal activities. *Carranza*, 190 Wn.2d at 620. If employees travel together in a van from orchard A to orchard B, passenger employees can text on their phones, chitchat, read a book, or eat. And their time would still be hours worked because the employer has assigned the employee to be on duty when it directed the employee to go to orchard B. As the Port admits, "under long-standing regulations and settled law" (Resp't's Br. 34), the court counts jobsite-to-jobsite travel as hours worked. *Id.* at 620. Similarly, out-of-town assignment travel allows the worker to

engage in personal activities during the travel, but it is still hours worked because the employer has exercised overall control.

Likewise, the Port's argument that the personal activities approach in *Brink's* applies here lacks merit. Resp't's Br. 14-16. The *Brink's* Court relied on *Anderson* about personal activities, and *Anderson* is unabashedly a commute case. *Brink's*, 162 Wn.2d at 48. Reinforcing that its central concern was commute time is *Brink's* distinction of the technicians there from ordinary commuters. *Id.* Focusing on what distinguished them was necessary since traditionally commutes are not hours worked because there is no control from the employer over this time and because there is an expectation that people come to work. To address the nuances in the travel time between house and work and back again, the Court looked to personal activities to distinguish the ordinary commute. But this look at personal activities is unnecessary when there is overall control over the workers through assigned travel. *See supra* Part II.A.1.

In any event, the Port did exercise control over the mechanics' personal activities in two ways. First, it restricted the mechanics to travel on airplanes. This restriction controlled their time and restricted them from freely engaging in any activity they wanted—showing control. *Cf. Weeks v. Chief of Washington State Patrol*, 96 Wn.2d 893, 897, 639 P.2d 732 (1982) (state troopers were restricted during their lunch hour even when

they could go home and eat during that time); *Lindell v. General Elec. Co.*, 44 Wn.2d 386, 394, 267 P.2d 709 (1954) (security guard lunch compensable because they “were not free agents” and were not “under no restrictions whatsoever.”). The mechanics performed assigned travel, where the Port controlled these employees. 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. The primary activity the workers engaged in 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.

Second, the employees during their travel were “on the clock” because they were required to travel, and the Port could have required them to engage in work activities such as reading manuals or plans. The fact that the Port chose, in its discretion, to allow the employees to engage in personal tasks did not change their work status. Because the mechanics were traveling at their employer’s direction, the Port could have required them to perform such tasks as reading plans and manuals in preparation for the inspection. It was in the position to direct work activities, and it

chose, in its discretion, to allow personal activities. The fact that the Port acted in a magnanimous manner in allowing personal activities does not take away its authority to direct the mechanics' actions.

For decades, L&I has taken the position that hours worked includes jobsite-to-jobsite travel and out-of-town travel because this travel is integral to the work performed. *Brink's*, 162 Wn.2d at 54 (Madsen J., concurring) (discussing L&I policy); CP 17-18 (L&I policy). It hardly "stand[s] years of employment law on its head" (Resp't's Br. 33) to cover time where the employer has directed the worker to do something as part of a job task.

B. The Out-of-Town Assignment Travel Meets the Elements of WAC 296-126-002(8) Because the Port Directed the Employees to Inspect Cranes, and Directed Travel to Accomplish That Task

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).

1. The Port concedes it authorized the employees to travel to China

The parties agree that the Port authorized the out-of-town assignment travel. CP 1051; *see also* Resp't's Br. 5-6. This is key because it shows that the Port acted volitionally in directing the employees to

travel. By contrast, an employer does not act volitionally regarding an employee's commute to work beyond the expectation that the employee attend work.

2. An employee assigned out-of-town travel is “on duty”

The Port authorized the mechanics to be on duty during their required travel. WAC 296-126-002(8)'s words in the statutory and regulatory context of assigned travel must be examined to ascertain the plain meaning of “on duty.” A court's primary goal in interpreting an administrative regulation is to give effect to the agency's intent and the regulation's underlying policies. *Dep't of Licensing v. Cannon*, 147 Wn.2d 41, 56, 50 P.3d 627 (2002). The MWA's purpose is to compensate all labor. RCW 49.46.005. When interpreting a regulation, the court will use a dictionary for undefined terms. *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.”⁹

Here, the “assigned task” was an inspection in China, and part of this “duty” was travel. The Port does not dispute that the travel was a necessary component of the inspection. Unlike an ordinary commute that is not assigned travel, the “assigned task or duty” was to inspect, and part

⁹ *On duty*, Merriam-Webster.com Dictionary, <https://www.merriam-webster.com/dictionary/commute> (last visited Aug. 6, 2020).

of the inspection required out-of-town travel. And the Port controlled the worker to dictate performance of the assigned task or duty.

Rather than address the plain language of the statute and the dictionary definition, the Port argues the term “on duty” about personal activities has been defined by the court. Resp’t’s Br. 25. But concerning personal activities, *Brink’s* has only analyzed hours worked related to commute time, and this is not “controlling precedent” (*contra* Resp’t’s Br. 25-26) in the context of out-of-town assignment travel. *Wilber*, 61 Wn.2d at 445-46 (holdings limited to facts). It is telling that the Port makes no effort to deny that under the dictionary definition of “on duty,” the mechanics would be “on duty.” The workers were engaged in or responsible for an assigned task or duty that the Port controlled by directing them to inspect cranes, and travel was a component of that assignment.

3. Because the Port directed the mechanics to travel on the airplane, the airplane is 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 truck, car, or airplane is an integral of the work (*e.g.*, you need it to get your job done), it is a prescribed work place. *See Brink 's*, 162 Wn.2d at 49.¹⁰ Flying in an airplane was an integral part of the work directed by the Port and performed by the mechanics because it was necessary for the mechanics to inspect the cranes in China. *See CP 843*. The Port-approved instrumentality of travel (*i.e.*, the airplane) was a “prescribed work place.”

The Port claims that the prescribed work place must serve as a place where work is performed. Resp't's Br. 31. To the extent that the Port means that a specific job task like inspecting a crane needs to be done at the work place, this is not correct. In assigned travel, such as assignment-to-assignment travel, the traveling is the work.

The Port also asserts that a prescribed work place must be one “actually owned by the employer” or under the control of the employer. Resp't's Br. 30-31 (emphasis omitted). Not so. Salespersons, repairpersons, pizza and other delivery drivers, and other traveling employees often travel from one jobsite to another in cars they own, and this is a prescribed work place. If a legal assistant takes a taxi from the

¹⁰ The Port cites an unpublished federal opinion for the proposition that the vehicle in that case was not a prescribed work place because there were no restrictions on its use, and no work was performed in it. Resp't's Br. 31 (citing *Kerr v. Sturtz Finishes, Inc.*, No. C09-1135RAJ, 2010 WL 3211946, *4 (W.D. Wash. 2010) (unpublished opinion)). But the federal case is about commute time and does not apply here. *Id.* at *1.

office to court, that is a prescribed work place because the employer has directed the legal assistant to use the taxi to get to court. There is no requirement that the work place be under the control of the employer.

In fact, in the non-travel context, there are many times when a worker is in a place that isn't under the control of the employer. For example, when the legal assistant is in the courthouse, the law firm has no control over the work place. Yet even the Port presumably would not dispute that the legal assistant is in a prescribed work place when performing work tasks at the courthouse. And the Port cannot deny that it paid the mechanics for some of their time in China, and the Port had no control over the areas where the mechanics performed inspections. Presumably, even if the Port had not had an agreement with the union to pay the mechanics some wages, the Port would not argue that it did not need to pay the workers *any wages* for the time they spent in China, as such a contention would be absurd. Yet that result would follow from the Port's argument that an employer is never liable for wages unless it controls the area where the work was performed.

C. The Port Has Not Preserved an Argument About the Calculations

The Port does not deny that it must preserve its arguments below. Resp't's Br. 35; RAP 2.5; RCW 34.05.554. The Port has failed at every

turn to sufficiently challenge the wage amount due. The Port basically argues that it made a strategic decision not to argue about the wage amounts so therefore it didn't have to preserve their arguments at the agency level. Resp't's Br. 36. This is not how RCW 34.05.554 works. Any "[i]ssues not raised before the agency may not be raised on appeal except to the extent that [specifying four exceptions]." RCW 34.05.554(1). The Port makes no showing that any of the exceptions apply, and RCW 34.05.554 does not give the Port the ability to pick and choose what issues must have been considered at the agency level, absent some stipulation by the parties, which is not present.

L&I's citation listed the amounts it claimed were due. CP 441-53, 684-91. At the Office of Administrative Hearings, the Port didn't contest the wage rate or hours used to calculate the wages. CP 924-1046. In its summary judgment briefing at the Office of Administrative Hearings, it did not contest how long the trip was to China. CP 924-48. It did not contest the hours worked in China, as shown by the timesheets. CP 924-48. It did not contest the hourly rate. CP 924-48.

The Port points to two mentions of its disagreement with the calculations in proceedings about L&I's Motion to Amend the Citation before the summary judgment proceedings; but these mentions did not preserve the issue for two reasons. CP 424; Resp't's Br. 36. First, the Port

argues that it said the merits of the calculations would be determined in later proceedings. Resp't's Br. 36. But it not do so in the summary judgment or Director proceedings. And L&I did not stipulate that the Port could omit argument on the issue. The Port's passing mention to the issue does not preserve it. *See Pac. Land Partners, LLC v. Dep't of Ecology*, 150 Wn. App. 740, 754, 208 P.3d 586 (2009) ("To be properly raised, an issue must be more than slightly referenced" in agency record). Second, the Port argues that a statement that the penalties are "unwarranted by the facts and the law" is sufficient to preserve the issue. Resp't's Br. 36. But this passing claim also does not preserve the issue. CP 1140-41; *Pac. Land*, 150 Wn. App. at 754. But in any event, regardless of whether the Port may have raised the issue at the Office of Administrative Hearings, it did not address the issue before the Director, even though L&I raised the issue. CP 167-91. So it abandoned any claim of error.

The Port also failed to address the issue at the superior court as required by RAP 2.5, except for a passing discussion in its response brief asking for a remand if it loses. *See* CP 2-11, 1051-74, 1131-43. The Port is incorrect that the Director's order did not address how much wages were owed. Resp't's Br 36; CP 72-73, 75 (listing wage amounts due). When the Director found the amounts due, it was then the Port's obligation to refute

that amount in superior court.¹¹ *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985) (must specify the particular ground to preserve the question for appellate review).

Even in its briefing here, the Port does not point out any calculation that shows that the Director's findings on the amounts owed were incorrect. Resp't's Br. 35-38. The Port cannot resurrect the issue.

D. Travel Time in China Was Part of the Calculations, and the Port Failed to Pay Hours Worked for Travel in China

The Port waived its right to challenge the inclusion of travel time in China with its passing treatment in superior court. CP 2-11, 1051-74, 1131-43; RAP 2.5; *Guloy*, 104 Wn.2d at 422. But in any case, the Port is wrong that L&I did not cite the Port for its unlawful cap on hours in China and that L&I did not seek those wages below. *See* Resp't's Br. 38.

The record shows that the Port would only pay workers for 40 hours even though they worked more. The crane manufacturer ZPMC would pick up the team at the hotel and take them to the manufacturing sites. CP 806-07. Travel to the manufacturing sites could take up to two hours, depending on traffic. CP 863. The time record the Port kept shows

¹¹ In its response brief at superior court, it claimed for the first time without explanation that the wage rate used to calculate the wages in China should have been a day shift rate rather a shift premium rate. CP 1142. But it cited no evidence in the record that the Department applied an incorrect rate. And RCW 34.05.554 precluded the argument.

that from Monday to Friday, the workers spent 50 hours traveling to crane inspection sites and visiting the sites. CP 863-64. But the Port's on-site supervisor only reported 8 hours of work each day on the workers' timesheets. CP 863. If L&I's calculations did not include time spent in China, the citations would not have included the entire period. *E.g.*, CP 687 ("Donald Olsen performed work for his employer, Port of Tacoma from 6/16/2017 to 6/30/2017.").

The Port's claim that L&I raised the issue before the Director for the first time is irrelevant and untrue. It is irrelevant because, provided the evidence is in the record, there is nothing wrong with presenting an issue for the first time before the Director. RCW 34.05.464(4) (reviewing officer exercises all the decision-making power that the presiding officer has); *Tapper v. Employment Sec. Dep't*, 122 Wn.2d 397, 404, 858 P.2d 494 (1993) (same).

The Port's claim is untrue because L&I raised the issue in the issue statement in its motion for summary judgment before the Office of Administrative Hearings. *See* CP 697 ("Hours worked' includes all hours during which the employee is authorized or required by the employer to be on duty at a prescribed work place. Are wage claimants Dax Koho, Glenn Joseph Brazil, Bruce Koch and Donald Olsen entitled to wages for time spent traveling *to, from and in China* when Port of Tacoma arranged the

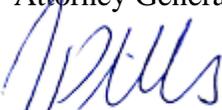
trips in order for Port inspection of Port-commissioned cranes?” (emphasis added)). L&I then presented evidence that confirmed its calculations throughout the deposition testimony of the workers and the Port’s witness. *See* CP 215-17. Holding the Port to its responsibility to pay all hours worked furthers the MWA’s intent to ensure that workers are paid for all their labor.

III. CONCLUSION

For the reasons stated above, this Court should affirm the Director.

RESPECTFULLY SUBMITTED this 31st day of August 2020.

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