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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 RESPONDENT

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I. INTRODUCTION

This appeal is ostensibly about travel to China by Port of Tacoma (the “Port”) employees Glenn Brazil, Bruch Koch, Dax Koho, and Donald Olsen (the “Wage Claimants”). But, at its core, this appeal is about the Department of Labor and Industries (the “Department”) and its Director attempting to impose compensation requirements for employee out-of-town overnight travel time that are arbitrary and contrary to all precedential Washington case law.

The Department contends that all time from when the Wage Claimants left their home to when they arrived at the hotel in China was work time for which they must be compensated. In doing so, the Department advances an interpretation of the relevant regulation – WAC 296-126-002(8) – that would somehow transform time where employees were free to eat, sleep, drink alcohol, read, and watch movies and were under no restrictions or control of their employer, into “on duty” work time. Likewise, it would turn Delta airliners, international airports, taxi cabs (or rideshare services), and personal vehicles, none of which are owned or controlled by the employer, into “prescribed work places.”

Unsurprisingly, in all the extensive briefing up to this point, the Department has failed to cite a single authority from any jurisdiction that adopts this novel interpretation of the law.

Both the trial court and the administrative law judge (“ALJ”) recognized this indisputable fact, and both correctly held that the Wage Claimants’ out-of-town overnight travel time did not constitute “hours worked” under WAC 296-126-002(8) and applicable Washington case law.

By contrast, the Director of the Department of Labor and Industries (the “Director”), unsurprisingly sided with the Department he directs and made the unprecedented decision that: (1) travel time where the employer exercises no control and the employee is free to engage in any number of personal activities constitutes “on duty” time; and (2) locations that are not owned or controlled by the employer in any way (airports, airplanes, taxis, etc.) are “prescribed work places.” In doing so, the Director’s Order¹ erroneously interprets and applies the law and is arbitrary and capricious.

This Court should deny the Department’s appeal and affirm the Superior Court’s decision overturning the Director’s unsupported and patently unreasonable decision.

¹ Issued by Director Joel Sacks on April 24, 2019.

II. STATEMENT OF THE CASE

The Director's Order adopted and incorporated the findings of fact in the ALJ's Initial Order² almost in their entirety.³ CP 128, FF 3. The Port does not dispute the findings of fact in the Director's Order (including those adopted and incorporated from the Initial Order).

The Department's Statement of the Case, however, includes numerous inaccuracies and misstatements that are not in accordance with the Director's Order.⁴ And while the Port believes these need not be resolved to decide the legal questions at issue in its favor, the Port would like to correct these inaccuracies and misstatements to provide a more accurate factual record for the Court. These factual inaccuracies are corrected as follows:

² Issued by administrative law judge Terry Schuh on October 10, 2018.

³ The only exceptions are:

- FF 4.30 of the Initial Order, which held that "On the return flight, the men did no work." CP 140. The Director's Order replaced this with the following factual finding: "On the return flight, Mr. Koho and Mr. Brazil did not spend time on activities related to their work for the Port." CP 128, FF 4.
- FF 4.44 of the Initial Order, which held that Department Industrial Relations Agent Shannon Enright based her recommendation of citation for the Wage Claimants based on WAC 296-126-002(8), Department Policy ES.C.2 and the Desk Aid. CP 142. This factual finding also notes that "the record is unclear as to precisely how much weight Ms. Enright attached to each of these authorities" but that she "was apparently not persuaded to recommend citations until after she consulted the Desk Aid." *Id.*

⁴ Notably, the Department's Brief makes very few citations to the Director's Order and, instead, is based primarily on the deposition testimony of the Wage Claimants.

- The Department is correct that the Port negotiated a compensation agreement with the Wage Claimants' collective bargaining representative – International Longshore and Warehouse Workers Local 22 (“Local 22”). Brief of Appellant at 4. However, this agreement was not an attempt to induce the Wage Claimants to waive any rights under any law, as the Department implies. *Id.* at 3. Rather, this agreement was negotiated because (i) there was no existing Washington statute or administrative guidance directly addressing out-of-town overnight travel time, (ii) the Port’s “Travel and Expense Reimbursement” policy did not address this type of travel either; (iii) it was unclear to both parties how to apply items in the CBA such as a shift premium to a different type of work done many time zones away in China and (iv) the Port wanted to ensure that the Wage Claimants were properly compensated. The agreement with Local 22 was consistent with (and even exceeded) the requirements for out-of-town overnight travel under the federal Fair Labor Standards Act (the “FLSA”), specifically, 29 C.F.R. § 785.39. This Regulation requires that employees be paid for travel time that corresponds to the employee’s regular work shift. It further provides that “time spent in travel away from home outside of regular working hours as a passenger on an airplane, train, boat,

bus, or automobile” is not considered compensable work time. *Id.* (emphasis added). Despite this, in its agreement with Local 22, the Port agreed to compensate the Wage Claimants for a full 8-hour workday for their travel to and from China, thus exceeding the provisions of the FLSA, the only published legal requirement for this travel time. See CP 140, FF 4.19–4.21.

- The Department asserts that because the Port made the necessary travel arrangements, the Wage Claimants had “no say over the airline used, the route taken, or whether to stop over at another city.” Brief of Appellant at 5. But the Wage Claimants were informed about the upcoming trips months in advance and were given various options for when they wanted to make the trip. CP 876–87. As a practical matter, no one requested different travel arrangements, although they were free to do so if they wished. CP 588. In the end, the flights were purchased by the Port’s executive administrative assistant as a convenience.
- The Department claims that the Port instructed Mr. Koho that he would be “representing the Port on the trip.” Brief of Appellant at 5. This is not the case. The Port did provide instructions regarding cultural and behavioral expectations in China, but these were to

ensure that the employees were aware of cultural differences and to avoid preventable misunderstandings or problems. These instructions related purely to conduct in China. CP 519–20. Notably, during his deposition, when asked about these instructions, Mr. Koho was unable to identify any Port instructions regarding his conduct during travel, at the SeaTac Airport, or on the airplane. CP 595–96.

- In its Brief, the Department claims that Joe Caldwell was the “management representative” and had “supervisory duties during the trip.” Brief of Appellant at 6 and 8. But this is directly contrary to the un-appealed finding of fact that “Mr. Caldwell ... was not a supervisor of either of the mechanics.” CP 140, FF 4.27 n.6 (emphasis added). Even if this finding of fact had been appealed, the Department’s assertion in its Brief is completely unsupported by the record. See CP 605, 609, 785–86, 791.
- The Department’s Brief also contends that some of the Wage Claimants performed work at the airport and on the airplane. Brief of Appellant at 7. But this claim ignores the fact that the Director’s Order held that the Port did not require any work to be done during the travel time. See CP 140, FF 4.28 (“[W]hile on the flight to

China, both men spent some of their time electronically reviewing materials regarding the inspection in which they were going to participate. The Port did not require them to do so.") (emphasis added), and FF 4.29 ("The rest of the time they spent on activities not related to work."). These factual findings were not appealed.

- The Department suggests that the Port controlled the travel details for the Wage Claimants while they were in China. Brief of Appellant at 7. In fact, Chinese officials decided where the Port personnel would stay and how transportation would occur. CP 588.
- The Department implies that on the return flight of the second China trip, the Wage Claimants spent their time working (or at least discussing work-related matters). Brief of Appellant at 9. But again, the Director's Order does not support this assertion. Instead, the Director held that: "On the flights, the men chatted at times about the inspection but spent most of their time amusing themselves or sleeping." CP 141, FF 4.36 (emphasis added).
- Finally, the Department asserts that the trial court reversed the Director's decision "[a]ccepting the Port's argument that the travel time should be treated like a daily commute." Brief of Appellant at 11. This is not entirely accurate. The trial court reversed the

Director's decision noting that the "cases most central to the analysis here include *Anderson v. State, Dep't of Soc. & Health Servs.*, 115 Wn. App. 452 (2003), and *Stevens v. Brink's Home Sec., Inc.*, 162 Wn.2d [42] (2007)", as well as other helpful cited cases. CP 1199 (emphasis added). The Court further noted that "the Department has been aware of these cases addressing the circumstances under which regular travel time or commute time is considered 'hours worked'" for some time and that this was "an additional reason why this Court will apply the rationale set forth in [those] case to the undisputed material facts in this case." *Id.*

Critically, the Department does not appear to contend, and certainly does not show, that any of the factual findings of the Director (including those adopted and incorporated from the Initial Order) are not supported by substantial evidence. And the Department did not assign error to any of the factual findings. As such, this Court should disregard all assertions in the Department's Brief that are inconsistent with the Director's Order in this case.⁵

⁵ In their appeal to the Director, the Department challenged only a few of the ALJ's findings of fact in the Initial Order. CP 156. The unchallenged findings of fact became "verities" upon appeal. *Harrington v. Pailthorp*, 67 Wn. App. 901, 911, 841 P.2d 1258 (1992). Furthermore, as noted, the Director adopted all of the challenged findings of fact (or at least their substance) and incorporated those findings into the Director's Order. *Id.*; see also CP 128, FF 3.

III. ARGUMENT

A. Standard of Review.

In reviewing the Director's Order, the Court applies "[Washington Administrative Procedure Act] standards directly to the [agency] record, performing the same function as the superior court." *Kittitas Cty. v. Kittitas Cty. Conservation*, 176 Wn. App. 38, 47, 308 P.3d 745 (2013) (citing *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 45, 959 P.2d 1091 (1998)).

Under the WAPA, this Court must grant relief from the Director's Order "if it determines that ... [the Director] has erroneously interpreted or applied the law." RCW 34.05.570(3)(d) (emphasis added). Similarly, this Court must grant relief if it determines that the Director's Order is "arbitrary and capricious." RCW 34.05.570(3)(i). "Arbitrary and capricious action has been defined as willful and unreasoning action, without consideration and in disregard of the facts and circumstances." *Heinmiller v. Dep't of Health*, 127 Wn.2d 595, 609, 903 P.2d 433 (1995).

Because the Director's Order was on summary judgment, the Court does this by "overlay[ing] the Administrative Procedure Act standard of review with the summary judgment standard." *Verizon Nw., Inc. v. Washington Employment Sec. Dep't*, 164 Wn.2d 909, 916, 194

P.3d 255 (2008). Generally, the reviewing court evaluates conclusions of law in light of the “error of law” standard, which allows this Court to “substitute its view of the law for that of the [Director].” *Id.*; *Lemire v. State, Dep’t of Ecology, Pollution Control Hearings Bd.*, 178 Wn.2d 227, 232, 309 P.3d 395 (2013). “[C]onclusions of law are reviewed de novo.” *Lemire*, 178 Wn.2d at 232.

Both the Department and the Director’s Order assert that this Court owes deference to the Department’s interpretation of the relevant law in conducting this analysis. Brief of Appellant at 12; CP 130. This is not the case. “While the level of deference owed to regulations is an issue of ongoing debate, [unpublished DLI agency wage interpretations] do not even have the force of regulations, and deference to such [interpretations] is inappropriate because ‘[t]his court has the ultimate authority to interpret a statute.’” *Carranza v. Dovex Fruit Co.*, 190 Wn.2d 612, 624–25, 416 P.3d 1205 (2018) (citing *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 716, 153 P.3d 846 (2007)).

B. WAC 296-126-002(8) and Applicable Washington Case Law Interpreting the Regulation Provide the Applicable Standard – The Department’s Interpretation of “Hours Worked” is Entitled to No Deference.

Unlike under the FLSA, there is no Washington statute, regulation, or administrative guidance that directly addresses the

compensability of out-of-town overnight travel time.⁶ That said, it is not disputed that an employer must pay employees for all “hours worked.” Nor is it disputed that WAC 296-126-002(8) defines the term “hours worked.” The point here is that the out-of-town overnight travel time at issue in this case does not meet the definition of “hours worked” and, therefore, does not require compensation.

Under WAC 296-126-002(8), “hours worked” is defined as work time during which,

- (1) The work is “authorized or required” by the employer,
- (2) The employee is “on duty,” and
- (3) The work takes place “on the employer's premises or at a prescribed work place.”

(emphasis added). As the Department itself notes in its own Administrative Policy, all three elements must be satisfied — “[i]f any of the three elements is not satisfied, then the time ... is not considered ‘hours worked.’” DLI ADMINISTRATIVE POLICY ES.C.2 at p.2. Thus, to show

⁶ Under the FLSA, time spent “in travel away from home outside of regular working hours as a passenger on an airplane, train, boat, buss, or automobile” is not considered worktime. See 29 C.F.R. § 785.39. This Regulation explicitly addresses “[t]ravel that keeps an employee away from home overnight.” *Id.* It is the applicable Regulation for the travel time at issue in this appeal under federal law.

The Department’s citation to 29 C.F.R. § 785.37 (miscited as 29 U.S.C. § 785.37) is misplaced. See e.g., Brief of Appellant at 14 and 19. That Regulation addresses the similar, yet legally distinct, circumstance of travel time spent during a one-day special assignment in another city where the employee returns to home that same day and no overnight travel is required. Because 29 C.F.R. § 785.39 is directly on-point in this case, the Department’s citation to 29 C.F.R. § 785.37 is irrelevant.

that the Director's Order is invalid, the Port need only show that one of these elements was not met.

Whether any specific travel time is "hours worked" depends on the facts specific to that time. *Id.* at p.1. **Travel time is work time if and only if all three elements of "hours worked" are met.**

The Department claims that it has "long interpreted" the regulation defining "hours worked" to mean that out-of-town overnight travel is "hours worked." Brief of Appellant at 15. But the Department's own published guidance does not say this.⁷ Indeed, the Department's Administrative Policy clarifies that "[a]n analysis of 'hours worked' must be determined on a case-by-case basis, depending on the facts." DLI ADMINISTRATIVE POLICY ES.C.2 at p.1 (emphasis added). The policy further notes that it is "not intended to address or cover all employee travel time issues." *Id.* at p.2.

More to the point, the Department's Administrative Policy says nothing that is specific to out-of-town overnight travel time. That concept is simply not addressed in DLI ADMINISTRATIVE POLICY ES.C.2. Rather, as the Department admits, its position here (and the alleged "long-standing interpretation") is based on its unpublished

⁷ And, as noted, the Department's Administrative Policies are not entitled to deference in this case anyway.

Employment Standards Desk Aid, which is available to the public only under the Public Records Act and which, by the Department's own admission, was not implemented as required under the WAPA.⁸ This "secret" Desk Aid is entitled to no deference whatsoever. *Carranza*, 190 Wn.2d at 624–25. As the Washington Supreme Court has made clear, it is the Court's role to determine the meaning of the "on duty" and "prescribed work place" requirements of WAC 296-126-002(8) – the Department and its Director's opinion as to what these terms "should" mean is irrelevant.

C. The Wage Claimants' Out-of-Town Overnight Travel Time Does Not Constitute "Hours Worked" because They Were Not Under the Control of the Port and, Therefore, Were Not "On Duty."

As noted, to be compensable, travel time must first be "on duty" time. WAC 296-126-002(8). The most relevant legal authorities defining what constitutes "on duty" time are this Court's decision in *Anderson v. State, Dep't of Soc. & Health Servs.*, 115 Wn. App. 452

⁸ To date, the Department has presented no evidence that the unpublished and undisclosed Employment Standards Desk Aid constitutes the Department's established practice of enforcement. Any such claims would be nothing more than an attempt to "bootstrap a legal argument into the place of agency interpretation." *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 816, 828 P.2d 549 (1992). And what's more, even if the Department had presented such evidence, deference still would not be appropriate because, as discussed above, the Department's interpretation conflicts with the relevant regulation and the precedential case law interpreting that regulation. "Deference is inappropriate when the agency interpretation conflicts with the statute." *Crosswhite v. Washington State Dep't of Soc. & Health Servs.*, 197 Wn. App. 539, 549, 389 P.3d 731 (2017) (internal citations omitted); see also *Cowiche Canyon*, 118 Wn.2d at 816–817.

(2003), and the Washington Supreme Court's decision in *Stevens v. Brink's Home Sec., Inc.*, 162 Wn.2d 42 (2007). Although, these cases do not specifically address out-of-town overnight travel, they do define the terms "on duty" and "prescribed work place."

Contrary to the Department's claims, the Port does not contend that the out-of-town overnight travel time at issue here is "commuting time." Brief of Appellant at 21–24. What the Port does contend, however, is that under *Anderson* and *Brink's*, the Wage Claimants were not "on duty" or at a "prescribed work place" and, therefore, their travel time was not compensable time.

Anderson and *Brink's* provide the controlling definition of these terms because they are the primary cases that discuss WAC 296-126-002(8) in the context of employee travel of any kind, a fact that was acknowledged by the trial court and ALJ. CP 145, FF 5.24–5.25; CP 1199 ("The cases most central to the analysis here include [*Anderson*] and [*Brink's*]").

In these and every other case that addresses what constitutes "hours worked" under WAC 296-126-002(8), the question of whether an employee is "on duty" depends on the degree of control the employer exercises over the employee's time. See *Brink's*, 162 Wn.2d at 48 ("[W]e must evaluate the extent to which Brink's restricts

Technicians' personal activities and controls Technicians' time to determine whether Technicians are 'on duty' for purposes of WAC 296-126-002(8)."); *Levias v. Pac. Mar. Ass'n*, 760 F. Supp. 2d 1036, 1053 (W.D. Wash. 2011) ("To determine whether employees are 'on duty,' the Court examines the extent to which an employer restricts or controls the employees' time.").⁹

In *Anderson*, this Court held that McNeil Island Special Commitment Center (SCC) staff were not "on duty" while riding a state-owned ferry they were required to use to get to their place of work. 115 Wn. App. at 454-56. This Court held the SCC staff were not "on duty," because during the ferry rides the staff were not required to perform any work and were free to engage in "various personal activities, such as reading, conversing, knitting, playing cards, playing hand-held video games, listening to CD (compact disc) players and radios, and napping." *Id.* In other words, even though the employer required the ferry ride to get to work, the travel time was not "on duty" time and thus not "hours worked" because the employer did not control the time and the SCC staff were instead free to engage in personal pursuits while on the ferry.

⁹ See also *Lenahan v. Sears, Roebuck & Co.*, 266 F. App'x 114, 117-19 (3d Cir. 2008) (unpublished but persuasive) (noting that the *Brink's* "'on duty' analysis focused almost exclusively on the extent to which the employer exercised control over the employee during drive time").

Using a similar analytical approach in *Brink's*, the Washington State Supreme Court determined that Brink's installation and service technicians (the Technicians) were "on duty" when traveling in a company-owned truck because Brink's (1) strictly controlled the Technician's use of the company-owned trucks; (2) prohibited the Technicians from engaging in personal activities while driving the Brink's trucks and (3) required the Technicians to respond to new assignments and take work instructions during their travel. 162 Wn.2d at 48-49. Relying heavily on this Court's analysis in *Anderson*, the Court held that these Technicians were "on duty" because their time was "strictly [controlled]" by the employer. *Id.* at 49.

Here, the Wage Claimants were permitted to travel to the airport in any manner and from any destination they chose — they could drive themselves, be driven by a friend or family member, carpool with other employees, utilize a paid service, etc. They were not prohibited from picking up passengers or running errands on the way. Instead, they were free to engage in whatever personal pursuits they wished to pursue while traveling to the airport.

While at the airports (SeaTac and Shanghai) and during the flights, the Wage Claimants were not required, or even requested, to bring work with them or perform any work while traveling. Although,

some of the Wage Claimants may have brought schematics to review and/or discussed work-related topics together, none of them were requested or required to do so. In fact, while at the Seattle airport, the wage claimants ate in a restaurant and consumed alcohol – certainly not activities that were controlled by the Port. And during their airplane travel time, the Wage Claimants were likewise unrestricted in how they used their time – they were free to engage in any personal activities they desired. And they did. The Wage Claimants read books, watched movies, ate meals, slept, and drank alcohol – again, activities not controlled by the Port in the least.

The personal activities engaged in by the Wage Claimants are strikingly similar to the list of personal pursuits engaged in by the SCC staff while on the required ferry rides in *Anderson*. 115 Wn. App. at 454–56. Indeed, almost every argument the Department makes in its Brief is contrary to this Court’s decision in *Anderson*:

- First, the Department contends that because the Delta flights were the only way to get to China, this makes the travel time “hours worked.” But for the SCC staff members, the state-owned ferry was the only way to get to McNeil Island.
- Next, the Department also contends that the Port restricted the Wage Claimants’ freedom “by providing for them to be traveling.”

Brief of Appellant at 17. But again, the same was true in *Anderson* – in that case, the employer required the SCC staff to travel by state-owned ferry to get to work.

- Finally, the Department argues that if the purpose of the travel was to benefit the employer, the travel time was automatically “hours worked.” Brief of Appellant at 18. But, once more, the SCC staff members were not riding the ferry for a pleasure cruise; that travel was required by and primarily for the benefit of the employer.

To accept the Department’s (and its Director’s) re-formulation of the regulation defining “hours worked,” this Court would need to reverse its decision in *Anderson*. In *Anderson*, the State assigned the SCC staff to travel by state-owned ferry. The State did so for its own benefit and the SCC staff had no choice in the matter. Under the Department’s proposed re-formulation of the term “hours worked,” that would make the ferry ride work time. But this Court held exactly to the contrary, instead focusing on the term “on duty” as part of defining what travel time is “hours worked.” Specifically, this Court held that the term “on duty” focuses on the employer’s degree of control. Because the State did not control the SCC staff’s activities while on the ferry (and the employees could and did eat, read, sleep, etc.) the staff were not “on

duty” and thus the travel time was not “hours worked.” The same conclusion follows here.

Next, the Department cites several cases it alleges stand for the proposition that “eating or socializing do not necessarily transform on-duty time to personal time.” Brief of Appellant at 22–23. But these cases actually demonstrate why the Wage Claimants’ travel was not “on duty” time in the first place. The cited cases — *Weeks v. Chief of Washington State Patrol*, 96 Wn.2d 893, 639 P.2d 732 (1982) and *Lindell v. Gen. Elec. Co.*, 44 Wn.2d 386, 267 P.2d 709 (1954) — both involve the question of whether employees, who were admittedly “on duty,” had been completely released from duty while they were “on call” such that they would no longer be considered “on duty.” In *Lindell*, the Washington State Supreme Court held that the guards in that case remained “on duty” for the following reasons:

[D]uring the thirty-minute lunch period, these patrolmen were not free agents and under no restrictions whatsoever. They were under the domination and control of their superiors and were subject to be called out on a moment's notice. They ‘were not waiting to be engaged; they had been engaged to wait.’

44 Wn.2d at 394 (emphasis added). Again, it was the employer’s control over the time that meant the employees remained “on duty.”

Here, unlike the guards in *Lindell*, the Wage Claimants in this case **were not** (a) “on duty” to start with, (b) under the “dominion and control” of the Port while traveling or (c) “subject to be called out on a moment’s notice.” They were free to engage in their own personal pursuits as they chose and were under no restrictions by the Port.

The Department also argues that the Wage Claimants were under the Port’s control or were otherwise restricted by the Port because they “could not relax at home or decide to go somewhere else.” Brief of Appellant at 17. But this is not the standard for what constitutes “on duty” time. As noted above, the same could be said for SCC staff in *Anderson* – unquestionably, the ferry travel in that case limited the kinds of activities in which the employees could engage.¹⁰ But this Court held that the employer had not exercised sufficient control during the ferry rides to make the employees “on duty.” Here, the restrictions the Department references were primarily imposed by Delta (the airline company), the Federal Aviation Administration, and the Chinese government. But regardless, the fact that the Wage Claimants could not, while travelling, “relax at home or decide to go

¹⁰ In fact, the SCC staff were subject to the State’s work rules while riding the ferry, but even this did not make their travel time “hours worked.”

somewhere else” is not sufficient on its own to make the employee “on duty” while travelling.

Washington case law makes it abundantly clear that travel time is not “on duty” where the employer does not “strictly control” the time by “prohibiting personal pursuits.” It is almost axiomatic that employees are not “on duty” when they are free to sleep, eat, drink alcohol, and engage in other personal activities and are under no control or restrictions of their employer. It is clear that the Wage Claimants in this case were not “on duty” as defined under applicable law. In holding otherwise, the Director’s Order erroneously interpreted and applied settled Washington law regarding “on duty” time. This Court should uphold the Superior Court’s granting of summary judgment for the Port (and denying summary judgment to the Department).

1. Cases involving travel from jobsite-to-jobsite throughout the workday are not relevant to the analysis of whether out-of-town overnight travel constitutes “on duty” time.

The Department next attempts to transform all travel time into “hours worked” by conflating overnight out-of-town travel time with travel from one jobsite to another throughout the workday, citing, primarily, *Carranza*. Brief of Appellant at 14, 17–19. But that case, and

the other cases cited by the Department in support of this position,¹¹ are inapposite to the legal question at issue here.

The question at issue in *Carranza* – which the Washington Supreme Court indicated was a “narrow issue” limited to the “context of agricultural workers” – was whether the piece-rate paid to fruit pickers for picking work could permissibly include non-picking activities, including driving from orchard to orchard during the workday. *Id.* at 617–618. In other words, at issue was whether an employer could meet its minimum wage obligations for non-piece activities by paying on a workweek basis as part of the agreed-upon piece-rate, rather than paying for jobsite-to-jobsite travel separately on a “per hour” basis, as required under RCW 49.46.020(1)-(3). *Id.* at 619–626 (holding that “agricultural workers who are paid on a piece-rate basis are entitled to separate hourly compensation for the time they spend performing tasks outside of piece-rate picking work”).

¹¹ The Department also cites *IBP, Inc. v. Alvarez*, 546 U.S. 21, 126 S. Ct. 514, 163 L. Ed. 2d 288 (2005) and *Ketchum v. City of Vallejo*, 523 F. Supp. 2d 1150 (E. Cal. 2007). Brief of Appellant at 14. These cases address commute time under the federal Portal-to-Portal Act, which is irrelevant to the travel time at issue here. See e.g., *Anderson*, 115 Wn. App. at 457 (“We are not persuaded that the Legislature intended to adopt the Portal to Portal Act.”); *Kerr v. Sturtz Finishes, Inc.*, No. C09-1135RAJ, 2010 WL 3211946, at *4 (W.D. Wash. Aug. 12, 2010) (“[W]ashington has not, however, adopted the Portal to Portal Act”). The Department also cites 29 C.F.R. § 785.37 – but as discussed above, this Regulation is not applicable to the out-of-town overnight travel time at issue here.

This holding of *Carranza* is irrelevant to the Wage Claimants' travel time here. First, despite the Department's contention that "[n]othing materially distinguishes the assigned travel in *Carranza* from the assigned travel here" (Brief of Appellant at 18), the Wage Claimants' out-of-town overnight travel is completely different from *Carranza*. Again, the question in *Carranza* was not whether the orchard-to-orchard travel constituted "hours worked" (no party disputed this), but whether the piece-rate included pay for this travel. *Id.* at 620. Regulatory guidance has established for years that jobsite to jobsite travel constitutes "hours worked." See 29 C.F.R. § 785.38; DLI ADMINISTRATIVE POLICY ES.C.2 at p.3. By contrast, the question here is whether the Wage Claimants were "on duty" to begin with. If not, the out-of-town overnight travel time does not constitute "hours worked" and the method of payment utilized is irrelevant. *Carranza* offers no insight into whether this out-of-town overnight travel time constitutes "hours worked" — its holding and reasoning are immaterial to the legal issues in this case.

It is worth noting that the Department of Labor finds the distinction between jobsite-to-jobsite travel and out-of-town overnight travel to be significant enough to have separate Regulations addressing each, which reach completely different outcomes for these

types of travel. Compare 29 C.F.R. § 785.38 (“[t]ravel that is all in the day’s work,” including “travel from job site to job site during the workday,” which “must be counted as hours worked”) (emphasis added), with 29 C.F.R. § 785.39 (“[t]ravel away from home community,” for which “time spent in travel away from home outside of regular working hours as a passenger on an airplane, train, boat, but or automobile” is not considered hours worked).

Finally, even if the analysis in *Carranza* was relevant (it is not), the *Carranza* majority was careful to note that the decision was “limited, as it must be, to agricultural workers.” *Id.* at 626. To this end, the Washington Supreme Court itself denied an attempt last year to apply *Carranza* in non-agricultural contexts. *Certification from United States Dist. Court for W. Dist. of Washington in Sampson v. Knight Transportation, Inc.*, 193 Wn.2d 878, 889–90, 448 P.3d 9 (2019) (noting that *Carranza* was necessarily limited to agricultural workers who are “are expressly excluded from WAC 296-126-021,” which explicitly permits workweek averaging for non-agricultural workers).

2. The alternate methods proposed by the Department for determining whether an employee is “on duty” are contrary to established Washington law.

In its Brief, Department makes several assertions that are simply inconsistent with settled Washington law. First, the Department

claims that “assigned travel for work ... is [always] hours worked.” Brief of Appellant at 13. But as noted above, “assigning travel” does not make travel time “hours worked.” Instead, the analysis for determining whether an employee is “on duty” is based on whether the employer restricts the personal activities of the employees and controls their time. The Department concedes that this is the correct standard elsewhere in its Brief. *Id.* at 17–18.

Next, the Department incorrectly asserts that there are “three independent methods to determine whether an employee is ‘on duty.’” Brief of Appellant at 16–20. As noted, for one of these, the Department concedes that whether an employee is “on duty” depends on the restrictions and controls imposed by the employer over the employee’s time. The other methods advanced by the Department miss the mark completely.

First, the Department asserts that the Court should apply a dictionary definition to the term “on duty.” *Id.* at 16–17. But the term “on duty” is not undefined by controlling precedent. As discussed above, and acknowledged by the Department, this Court and the Washington Supreme Court have already held that whether an employee is “on duty” under WAC 296-126-002(8) is based on the degree of control or restriction exercised by the employer over the

employee's time. Although courts give "undefined words their common and ordinary meaning and may, in doing so, utilize a dictionary to discern the plain meaning of the undefined word" (*Newton v. State*, 192 Wn. App. 931, 936, 369 P.3d 511 (2016) (emphasis added)), the court does not do so where the term at issue has already been defined by precedential case law.

The Department's second asserted method claims that if "the primary purpose of the travel" benefits the employer, the travel time is always "on duty." Brief of Appellant at 18-19. This is not and has never been the law. And, as noted above, if this were the law, *Anderson* would have been decided differently.

In making this assertion, the Department mischaracterizes the holding in *Anderson*, claiming that the case holds that travel time is compensable if it is "primarily to benefit of the employer." *Id.* (also citing 29 C.F.R. § 785.37¹²). This is not the holding in *Anderson*. The Department's citation is to the *Anderson* court's discussion of the standard for compensable time under U.S. Supreme Court case law

¹² Miscited as "29 C.F.R. § 785.3"

29 C.F.R. § 785.37 notes that travel time spent during a one-day special assignment in another city where the employee returns home that same day is "performed for the employer's benefit," and thus "[qualifies] as an integral part of the 'principal' activity which the employee was hired to perform on the workday in question." As noted above, this Regulation is irrelevant to this case. 29 C.F.R. § 785.39 provides the applicable standard under federal law for the legal issue in this case.

prior to the Portal-to-Portal Act being enacted into federal law in 1947. *Anderson*, 115 Wn. App. at 458 (citing *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590 (1944) and *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of Am.*, 325 U.S. 161 (1945)). As summarized by the *Anderson* court, these pre-1947 federal FLSA Supreme Court cases held that employees were only entitled to FLSA compensation for work-related travel when “(1) the travel required physical or mental exertion; (2) the employer controlled or required the exertion; and (3) the exertion was wholly for the employer’s benefit (i.e., pursued necessarily and primarily to benefit the employer and his business).” *Id.*

In *Anderson*, this Court did not adopt this federal pre-Portal-to-Portal Act case law as the standard to define the term “on duty” under WAC 296-126-002(8). *Anderson*, 115 Wn. App. at 457–59 (noting that “[w]e are not persuaded that the Legislature intended to adopt the Portal to Portal Act,” but reasoning that *Tennessee Coal* and *Jewell Ridge* were distinguishable). Instead, this Court held that the SCC staff’s ferry rides did not constitute compensable time even under this federal pre-Portal-to-Portal standard because riding on a ferry boat “requires no physical or mental exertion and does not occur on the employer’s premises.” *Id.* Of course, the same is true of the out-of-town

overnight travel time here. Thus, even under this inapplicable standard, the travel time of the Wage Claimants would not be compensable because the flights “require[d] no physical or mental exertion” and “[did] not occur on the employer’s premises.” *Id.*

Moreover, the Department’s “primary purpose” re-formulation of its own rule could not be the applicable standard because it would violate basic rules of construction for interpreting administrative regulations. “[R]egulations [must be] interpreted as a whole, giving effect to all the language and harmonizing all provisions.” *State, Dep’t of Licensing v. Cannon*, 147 Wn.2d 41, 57, 50 P.3d 627 (2002). “[C]ourts must give effect to every word, clause, and sentence [of regulations] whenever possible; no part should be deemed inoperative or superfluous unless the result of obvious mistake or error.” *Conway v. Washington State Dep’t of Soc. & Health Servs.*, 131 Wn. App. 406, 416, 120 P.3d 130 (2005); *Carranza v. Dovex Fruit Co.*, 190 Wn.2d 612, 620 n.5, 416 P.3d 1205 (2018).

The Department suggests that if the “primary purpose of travel” is to the benefit of the employer, then it is compensable time. Brief of Appellant at 18. In essence, the Department asserts that the “on duty” element of WAC 296-126-002(8) is always met when the primary purpose of an employee’s travels is to the benefit of the employer,

regardless of how the employee spends his or her time. Under this reasoning, there would be no need for “on duty” element because simply requiring or authorizing any work-related travel would automatically transform that travel time into “on duty” time.

This proposed method collapses the three separate and distinct elements of “hours worked” into one – only the first element that the employer has authorized or requested the employee to travel would be necessary to make the time “hours worked.” But this cannot be. Regulations cannot be interpreted to make one or more elements “inoperative or superfluous.” *Conway*, 131 Wn. App. at 416. Even if the Department and its Director believe that Washington law should require payment for this time, the Department cannot create that obligation by “interpreting” an unambiguous regulation so that it “subtract[s] from the clear language” of that regulation.¹³ *Cannon*, 147 Wn.2d at 57.

The Director’s Order asserts that all out-of-town overnight travel is necessarily “on duty” time, regardless of how the Wage Claimants actually used their time, whether they were required to perform any work or whether the Port imposed any restrictions or otherwise

¹³ The Department could, of course, revise its regulation after complying with the WAPA. But rather than doing so, it is attempting to re-write its regulation via this litigation.

exercised any control over them. This holding is unsupported by any authority from any jurisdiction and is directly contrary to this Court's holding in *Anderson* and the Washington Supreme Court's holding in *Brink's*.

D. The Wage Claimants' Out-of-Town Overnight Travel Does Not Constitute "Hours Worked" Because Taxis, Personal Vehicles, Delta Airliners, and the SeaTac and Shanghai Airports Are Not "Prescribed Work Places."

As noted, WAC 296-126-002(8) requires that work be performed "on the employer's premises or at a prescribed work place" to be considered "hours worked." Here, the travel time cannot be "hours worked" because nothing was done at a "prescribed work place."

Brink's was the first Washington case to hold that a location other than an actual worksite (in *Brink's*, a company-owned truck) could qualify as a "prescribed work place." 162 Wn.2d at 49. And on this point, the *Brink's* majority was conflicted. *Id.* at 53 (Madsen, J., concurring) ("[T]he majority's strained analysis shows the difficulty with trying to shoehorn a company truck into a rigid reading of 'employer's premises' or 'prescribed work place.' I am unconvinced by this implausible literal application of the terse phrases in the regulation."). Logically, under the *Brink's* decision, the only mode of transportation

an employer could exercise sufficient control to qualify as a “prescribed work place” would be one actually owned by the company.

Ultimately, the *Brink’s* majority held that the company-owned trucks were a “prescribed work place” because (1) they “[served] as a location where Technicians often complete work-related paperwork;” (2) Brink’s required its Technicians to keep the trucks “clean, organized, safe and serviced”; and (3) the Technicians were required to respond to new assignments and take work instructions while commuting.” See also DLI Administrative Policy ES.C.2 at p.3 (enumerating factors for determining if any employee is “on duty” when driving a company-provided vehicle between home and work, including but not limited to: (1) the extent to which the employee is free to make personal stops, (2) the extent to which the employee is required to respond to work-related calls and (3) whether the employee must maintain contact with the employer).

From the *Brink’s* decision it is clear that, to be a “prescribed work place,” at a minimum the location must (1) serve as a place where work is performed and (2) be under the control of the employer. See e.g., *Kerr*, 2010 WL 3211946, at *4 (employee’s vehicle was not a “prescribed work place” because there were no restrictions on its use and no work was performed in it).

Neither proposition is true here. None of the locations in this case (including airports, airplanes, taxis, rideshare services or personal vehicles) were owned by the Port or under the control of the Port in any way. The Port did not require the Wage Claimants to perform any work while at any of these places, nor were the Wage Claimants required to comply with any work-related requirements during their travels.

In short, the locations involved in the travel time at issue here are completely different from the company-owned work trucks in *Brink's*. *Brink's* involved company-owned work trucks. And even then, the majority struggled to agree that they could be a “prescribed work place.” By contrast, this case involves personal vehicles, taxicabs, rideshare services, the SeaTac and Shanghai airports and airplanes operated by Delta Airlines. None of these locations could possibly constitute a “prescribed work place” under *Brink's*. The very notion is farcical.

Because the Wage Claimants were not working at a “prescribed work place” their travel time cannot constitute “hours worked” under WAC 296-126-002(8). The interpretation and application of law in the Director’s Order to the contrary is erroneous.

E. Washington’s Policy to Protect Employees Does Not Allow the Department and its Director to Ignore Precedential Washington Case Law.

The Department implies that a finding for the Port would run contrary to Washington’s “long and proud history” of protecting employee rights. Brief of Appellant at 25–26. This is simply not true; the Port’s requested holding would simply follow settled law.

First, as discussed in detail above, the application of “hours worked” under WAC 296-126-002(8) advanced by the Department flies in the face of existing precedential case law. Numerous courts, including this Court in *Anderson*, have addressed the legal framework for what constitutes “hours worked” for travel time. And under existing Washington law, there is simply no permissible interpretation of “hours worked” that includes circumstances where the employer has imposed no restrictions and exercises no control over the employee. To hold otherwise would stand years of employment law on its head and require employers to pay for time spent sleeping, reading, watching a movie or engaging in other personal pursuits — something that no court (including this Court) has ever required.¹⁴ Likewise, there is no permissible interpretation of “hours worked” where the alleged “prescribed work places” include personal vehicles, taxis, rideshare

¹⁴ Here, it would require the public to pay for such time.

services, airplanes, and airports, none of which are owned or controlled by the employer in any way.

Second, the fact that Washington employment law may in some situations be more protective than federal law does not change this in the least. While Washington law sometimes may diverge from its federal counterpart in favor of employees, this does not allow the Department or its Director to ignore established precedents or to “re-interpret” duly implemented regulations contrary to such precedents.

Finally, the Department’s contention that a holding for the Port would “sweep up time an employee spends traveling from job assignment to job assignment” is simply not true. Brief of Appellant at 25. As previously discussed, *Carranza* is easily distinguishable from this case. Time spent traveling from jobsite to jobsite has been “hours worked” under long-standing regulations and settled law and is completely different from the out-of-town overnight travel time at issue here.

The Port is not asking this Court to hold that employers need not pay employees for all “hours worked.”¹⁵ To the contrary, the Port simply requests this Court follow its decision in *Anderson* and the

¹⁵ To the contrary, if the Wage Claimants’ travel time constituted “hours worked,” the Port would readily have compensated the Wage Claimants accordingly.

Washington Supreme Court's in *Brink's*, and hold that this specific travel time does not meet the settled definition of what is "hours worked." In short, the Port asks this Court to reject the Director's Order's unprecedented (and incorrect) re-formulation of "hours worked" – an effort that is runs contrary to existing case and violates basic rules of statutory construction.

F. The Factual Dispute Regarding the Department's Wage Calculations Has Been Preserved Pending Final Determination of the Compensability of the Wage Claimants' Travel Time.

The Department asserts that the Port failed to preserve the issue of the Department's wage calculations in its Citation and Notice of Assessment. Brief of Appellant at 13 n.3. This is incorrect for two reasons.

First, RCW 34.05.554(1) provides that "[i]ssues not raised before the agency may not be raised on appeal" except under certain circumstances. But the Department's wage calculations were not raised or addressed at the administrative level – instead, the factual dispute regarding the Department's calculations was preserved at that stage until a final determination had been made regarding the compensability of the Wage Claimants' travel time.¹⁶

¹⁶ Contrary to the Department's claim, RCW 34.05.554 does not require the Port "to have raised all issues at the administrative level." Brief of Appellant at 13 n.3 (emphasis added). Rather, RCW 34.05.554(1) provides that issues not raised before

Indeed, the Port has consistently taken the position that it believes the alleged penalties are “unwarranted by the facts and the law,” but that “the merits of [the Department’s] calculations will be determined in later proceedings,” if necessary, after the legal issues in the case have been addressed. CP 424 and 497. Because the factual issue of the Department’s calculations was not in dispute at the administrative level, no findings of fact or conclusions of law were made by the ALJ regarding the proper amount wage penalties owed. CP 135–153.

For their part, the Department itself failed to raise this issue in its appeal to the Director. And so, understandably, the Director did not make any findings of fact or conclusions of law regarding the proper damages in this matter either. CP 127–134. The Director did order the Port to pay all wages and penalties owed under the Department’s Citation and Notice of Assessment, but this alone does not make “the merits of [the Department’s] wage calculations” an issue in this appeal.

In short, there is no wage calculation issue for the Port to have raised before the Director or Superior Court. The Port has consistently

the agency may not be raised on appeal. But this does not prohibit the parties from preserving certain factual issues – such as the applicable damages – until issues of liability have been resolved.

disputed the Department's wage calculations and, until recently, the parties have operated under the understanding that any dispute regarding the Department's wage calculations would be addressed only after legal question of compensability had been finally adjudged.

Second, even if it was required to preserve this issue, the Port has made more than a mere passing treatment of the issue. Brief of Appellant at 13 n.3. As noted above, the Port has consistently asserted that the Department's wage calculations were not warranted by the facts or the law. CP 424 and 497. This is more than a "hint or slight reference to an issue in the agency record." *B & R Sales, Inc. v. Washington State Dep't of Labor & Indus.*, 186 Wn. App. 367, 382, 344 P.3d 741 (2015).

In *B & R Sales*, B & R failed to raise the issue of whether corporate officers and LLC members were excluded from mandatory IIA coverage. *Id.* B & R argued that this issue had been preserved because it had previously argued a separate, albeit related, question before the Board of Industrial Insurance Appeals of whether corporations and LLCs constitute workers. *Id.* The Court concluded that arguing a related legal question was not sufficient to preserve the issue on appeal. *Id.*

But here, the Port has explicitly asserted that the Department's wage calculations are not supported by the law or the facts (and that

this factual issue should be addressed in later proceedings, if necessary, after the legal issues have been resolved). CP 424 and 497. This is more than a “hint or slight reference to the issue,” this is an explicit attempt to preserve this issue pending a final determination of the legal question of compensability in the first place. Thus, if this Court makes such a holding — which would be contrary to law and should **NOT** be made — the appropriate remedy would be to remand for further factual findings.

G. The Department’s Claims Regarding Alleged Uncompensated Work in China Are Not Properly Before This Court and Are Not Supported by Evidence — They Should Be Disregarded.

On a related note, the Department has not produced substantial (or any) evidence regarding allegedly uncompensated work time for the Wage Claimants while in China. The first time the Department made any claims or allegations of uncompensated work (other than those related to the Wage Claimants overnight travel claims) was before the Director. They were **not** part of the original or amended Citation and Notice of Assessment (See CP 427–439 and 683–691), nor were they raised as an issue at the administrative level. CP 127–153 and 696–726. There is nothing in the record to support the Department’s claims regarding this alleged unspecified, uncompensated work time in China. These claims are not appropriately before this Court on appeal and

should be disregarded. RCW 34.05.554(1); *B & R Sales, Inc.*, 186 Wn. App. at 382.

IV. CONCLUSION

For the above-stated reasons, the Port respectfully requests that this Court deny the Department's appeal and affirm the trial court's entry of summary judgment for the Port (and denying the Department's cross-motion of summary judgment).

Dated this 1st day of June, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY under penalty of perjury under the laws of the State of Washington that the following is true and correct:

That on the June 1, 2020, I caused true and correct copies of this document to be served on the parties listed below, via the method(s) indicated:

DATED at Tacoma, Washington this 1st day of June, 2020.



Holly Harris, Legal Assistant

GORDON THOMAS HONEYWELL

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