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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

DAVID STEVENS, DONALD A. GOINES and JEFFREY R. PORTER,
on behalf of all others similarly situated,

Respondents,

v.

BRINK'S HOME SECURITY, INC.,

Appellant.

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SUPREME COURT
STATE OF WASHINGTON
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BRIEF OF *AMICI CURIAE*
ASSOCIATION OF WASHINGTON BUSINESS
WASHINGTON RETAIL ASSOCIATION

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ORIGINAL

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I. INTRODUCTION

This brief of *amici curiae* is filed by two large, statewide business federations on behalf of their members and the employer community generally urging the court to hold “commute time” between an employee’s home and first or last worksite is not compensable “hours worked” under our state’s Minimum Wage Act, RCW ch. 49.46, merely because it occurs through voluntary use of a company-provided vehicle that is used in the work.

Unless reversed, the trial court’s judgment to the contrary threatens to establish a rule in Washington far beyond what federal law or the laws of other states mandate, viz., that simple commuting time constitutes “hours worked” for which employees must be paid. Such a threat, if upheld, will force employers to restructure the workplace with respect to commute time in a way that will be to the detriment of employers and employees alike, especially concerning the voluntary use of employer-owned vehicles. The court should reverse the trial court’s partial summary judgment entered for the plaintiff class on the commute time issue and instead order partial summary judgment on behalf of Appellant Brink’s Home Security (“Brink’s”).

II. IDENTITY AND INTEREST OF *AMICI*

A. The Association of Washington Business

The Association of Washington Business (“AWB”), founded in 1904, is the state’s oldest and largest general business trade association. AWB represents over 6,100 member businesses, of whom 85 percent are small businesses employing fewer than 50 workers, and who are engaged in all aspects of commerce in Washington. In total, AWB members employ over 650,000 individuals in Washington. Acting as the state’s chamber of commerce, AWB is an umbrella organization representing the interests of 114 trade and business associations engaged in industry-specific activities as well as 56 local and regional chambers of commerce across Washington.

AWB’s interest in this case is based upon a need for sure, certain, and stable rules governing employment relations in Washington, especially where state rules may differ from the requirements of federal law and the laws of other states.

B. The Washington Retail Association

The Washington Retail Association (“WRA”) was founded in 1987 and is a non-profit section 501(c)(6) corporation whose primary purpose is to represent the legislative, regulatory and political interests of the retailing industry.

The WRA provides programs of service and action to its 2,800 storefront members. Typical WRA members are in the retail, wholesale, service, and shopping center industries.

WRA's interest in this case is two-fold. First, as with AWB members, WRA members are subject to both state and federal employment standards and face considerable risk exposure when state and federal laws differ, or as in this case, when state law is not clear on a matter where federal law is established. Secondly, WRA represents many retail members in Washington who engage in the specific practice at issue in this case – voluntary use of company-owned service or installation vehicles for commuting time.

III. ISSUES OF CONCERN TO *AMICI*

Does an employee's voluntary use of a company-owned vehicle transform ordinary non-compensable commute time between home and a worksite into "hours worked" triggering the payment and overtime protections of our state's Minimum Wage Act, RCW ch. 49.46? *Cf. Br. of App.* at 2 (Issue 1).

Should the court grant deference to the informal, non-regulatory administrative policy interpretation of the Department of Labor & Industries regarding commute time when this interpretation differs significantly from state and federal law? *Cf. Br. of App.* at 3 (Issue 3).

IV. STATEMENT OF THE CASE

For the sake of brevity, *amici* adopt the Statement of the Case as set forth by Brink's in its opening brief at 4-16. To frame the primary focus of *amici* in this brief, however, the following record facts are highlighted:

At all times relevant to this litigation, appellants' use of Brink's vehicles for commute time between home and worksite was voluntary. Clerk's Papers ("CP") at 143-44. Workers were free to switch from one commuting option to another at any time. CP at 138.

Voluntary participation in the Brink's home dispatch program was clearly to the workers' advantage in terms of personal savings and convenience, resulting in reduced driving times, CP at 47, not having to put wear and tear on a personal vehicle, CP at 51, not having to go out and purchase a personal vehicle. CP at 19; 364; 376.

The only restriction on the use of company vehicles was to use them for business purposes, obey traffic laws, and not consume or transport alcoholic beverages. CP at 329.

V. ARGUMENT

A. THE COURT SHOULD HOLD COMMUTE TIME IS NOT COMPENSABLE “HOURS WORKED” UNDER STATE LAW.

It is the general rule in our federal and state wage and hour law, so ingrained in custom and practice as to constitute common sense, that commute time – the time an employee spends driving between his or her first or last worksite and home – does not constitute working time for which an employer must pay wages. *See* 29 U.S.C. § 254(a); 29 C.F.R. § 785.35; *Anderson v. Dept. of Social and Health Services*, 115 Wn. App. 452, 456, 63 P.3d 134 (2003). No one disputes that if Brink’s employees choose to drive their personal vehicle from home to Brink’s headquarters to pick up a company service truck that time is not compensable “hours worked” under state or federal law. And there is essentially *no doubt* that a commute program such as Brink’s voluntary home dispatch arrangement requires no compensation under federal law. *See Baker v. GTE North Inc.*, 110 F.3d 28 (7th Cir. 1997).

Here, the plaintiff class essentially seeks an exemption from this general rule on the basis that plaintiffs were able to choose to make their commute time in a company-owned vehicle. Yet the law is clear, there is no company-car component of the “hours worked” concept that miraculously transforms simple commute time *to work* into *work itself*.

1. While federal law is clear, Washington law makes no provision for the compensability of commute time.

Unlike the federal Fair Labor Standards Act (“FLSA”), which since 1947 has contained within it the federal Portal to Portal Act, 29 U.S.C. § 251 et seq., the Washington Minimum Wage Act (“WMWA”) is silent on commute time. All the WMWA requires, in essence, is that a minimum wage be paid to covered employees for hours worked, RCW 49.46.020, and that overtime at a rate of 1.5 times the employee’s regular rate be paid for hours worked in excess of forty hours in a given workweek. RCW 49.46.130. This court has said on several recent occasions it will look to laws, rules, and interpretations under the FLSA to help construe the requirements of the WMWA. See, e.g., *Innis v. Tandy Corp.*, 141 Wn.2d 517, 523, 7 P.3d 807 (2000); *Hisle v. Todd Pacific Shipyards Corp.*, 151 Wn.2d 853, 862, 93 P.3d 108 (2004). This is an appropriate case for this court to reaffirm that employers attempting to comply with the WMWA may properly look to FLSA for guidance to fill

in the gaps under the WMWA.¹

2. The regulatory definition of “hours worked” requires a specific showing.

Given that the WMWA is silent on commute time, it is also appropriate that the analysis turn to the regulatory definition of “hours worked” promulgated by the Department of Labor & Industries. WAC 296-126-002(8) provides:

‘Hours worked’ shall be considered 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.

Under this regulatory definition, then, the plaintiff class must show three things in the commute context: that the employee is “authorized or required” to do something; that specifically, the employee is “on duty”; and that the employee is “on the employer’s premises or at a prescribed work place.” Key in this case is whether the employee is “on duty” while

¹ At the present time the employer community relies on FLSA to fill in gaps in the WMWA at its peril. In *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 299, 301, 996 P.2d 582 (2000), the court specifically refused to look to identical FLSA requirements and interpretations with respect to the salary basis requirement for exemptions to overtime and the availability of a window of correction for errors that are infrequent or inadvertent. *Drinkwitz* remains a significant concern to the employer community because the court construed identical statutory language to impose inconsistent legal obligations on Washington employers who are bound by both FLSA and WMWA. Such employers now must often employ legal counsel when the WMWA does not specifically address a matter covered by FLSA rather than simply follow FLSA.

commuting to the first job site. Also important is whether the employee is “on the employer’s premises” or “at a prescribed work place” while commuting.

This analysis is illustrated in *Anderson*. There, a class of DSHS employees claimed that the time they spent commuting to and from McNeil Island on a Department of Corrections ferry each day should be counted as work time. *Anderson*, 115 Wn. App. at 454. The Superior Court granted the employer’s motion for summary judgment and the Washington Court of Appeals affirmed. The Court of Appeals held that the 20-minute ferry ride was not “hours worked” because the DSHS workers were neither “on duty” nor at a “prescribed work place” during their ferry ride. *Id.* at 456. Instead, the workers would relax, play cards, listen to the radio, nap or engage in other personal activities, and were not given specific assignments while riding the ferry. *Id.* at 454.

Keeping in mind the ferry in *Anderson* was a company-provided vehicle, it is difficult to distinguish commute time generally, or Brink’s voluntary home dispatch program specifically, from the regulatory factors analyzed in *Anderson* most specifically with respect to the “on duty” requirement.

3. Brink's employees were not "on duty" while commuting because they are free to engage in personal activities.

The Brink's employees, on this record, cannot be said to be "on duty" within the meaning of WAC 296-126-002(8). Just as the passengers in *Anderson* were free during the commute to read, play video games, nap, knit, visit, etc., a Brink's truck driver surely could engage in commensurate activities while commuting. For example, it is not inconceivable that on commute, an employee in a Brink's truck might choose his or her own course; take or receive a cell phone call from a friend; go through the drive through at McDonald's for breakfast or a snack; stop at Starbuck's for a cup of coffee; stop at the grocery store for fresh milk for dinner; listen to a personal CD on the radio. Brink's has no ability to control how or when or the amount of time the employees take to do such things. And most fundamentally, by driving from the employee's home to the worksite, the employee is engaging in the essentially personal activity of transporting himself or herself from home to work. Under *Anderson*, the freedom to engage in these essentially personal activities

makes it clear the employee is not “on duty”.²

4. Transporting tools or equipment by itself does not make commute time “on duty” time.

At the same time, plaintiffs may claim that Brink’s commuters are on duty because their trucks contain tools and equipment and they are essentially hauling tools and equipment for Brink’s to the first jobsite. Since the tools and equipment are necessary to do the work, plaintiffs may claim, the commute is essentially the employee performing the duty of getting necessary to get the tools (and him or herself and the vehicle) to the job and thus makes the employee “on duty.”

Here the court must employ common sense. The record shows that Brink’s workers stock up their trucks with tools and equipment at weekly staff meetings at company headquarters for which they are compensated. CP at 61; 145. Workers using the voluntary home dispatch program were never required to stock their trucks at home or have inventory or tools delivered or shipped to their homes. CP at 145. The fact the trucks happen to sit in employees’ driveways and contain tools or equipment that

² Plaintiffs may here argue that Brink’s company rules state that trucks are to be used for business purposes only. Such a boilerplate policy including the following of traffic laws and excluding use or transport of alcohol are widespread throughout business and are put into place for liability insurance reasons, as well as for purposes of common sense. They do not preclude employees from personal activities such as listening to the radio, getting a cup of coffee, making a run to the store, etc.

are conveyed to worksites is inconsequential unless the tools or equipment are actually used for something at home, away from the work site. It may be a different case if the tools or equipment were used at home for work purposes (e.g., tuning, cleaning, modifying, etc.) if such activity were required by the employer. But merely because transport of tools or equipment is “necessary” in a philosophical sense to the work at the jobsite does not mean the employee is “on duty” in passively carrying them.

In *Anderson*, it was “necessary” in the same philosophical sense that workers take the ferry in order to perform their work at McNeil Island, because the ferry was the only way for them to get to their place of work at the special commitment center. Yet this theoretical “necessity” did not render them “on duty.”

Similarly, if an employee takes an employee-owned laptop computer home to finish a project, any substantial work at home would be considered “hours worked.” But the simple commute home is not transformed into “hours worked” merely because the employee’s car contains the instruments of future labor (the company laptop). Likewise, the mere transport of the instruments of work -- tools and equipment-- does not make commute time “on duty” time unless the tools are employed *for work* prior to arrival at the first job site.

5. Commute time is not “at the employer’s premises” or “at a prescribed work place.”

Once the employer arrives from his or her commute at the company headquarters or the first job site and drives from site to site thereafter, no one disputes such later driving in most cases will constitute “hours worked” because the employee is no longer coming from home to work, or from work to home, but is actively working. The clock, as it were, has started. Yet it was part to the *Anderson* court’s reasoning that the state-owned ferry was neither the prescribed work place nor the employer’s premises. *Anderson*, 115 Wn. App. at 456. Likewise, Brink’s prescribes no work to take place in the truck and it is clearly not the employer’s premises. The commuting Brink’s employee does not reach the prescribed work place until he or she reaches the first job site just as the DSHS worker did not reach the prescribed work place until after the ferry docked at McNeil Island.

Accordingly, under WAC 296-126-002(8) and *Anderson*, the commuting employee, such as in Brink’s home dispatch program, is not “on duty” merely because of the company vehicle; and is not “at the employer’s premises or at a prescribed work place.” For purposes of existing and controlling legal authorities, the court’s inquiry can and should stop there with a bright line rule that commute time is not

compensable as “hours worked” under state law merely because it occurs in a company-owned vehicle.³

To issue a bright line rule to the contrary, as plaintiffs invite, that all commute time is more or less compensable with only certain narrowly construed exemptions, would not only conflict with state and federal law but would be the death knell of a benefit many employees in many industries enjoy. *See Baker*, 110 F.3d at 29 (noting GTE’s home dispatch program “can save employees a lot of time, not to mention wear and tear on their own cars.”).

B. THE COURT SHOULD GRANT NO DEFERENCE TO THE DEPARTMENT OF LABOR & INDUSTRIES’ ADMINISTRATIVE POLICY ON “HOURS WORKED.”

The Department of Labor & Industries has issued an administrative policy which states:

Time spent driving from home to the job site, from job site to job site, and from job site to home is considered work time when a vehicle is supplied by an employer for the mutual benefit of the employer and the worker to facilitate progress of the work. All travel that is an integral and indispensable function without which the employee could not perform his/her principal activity, is considered hours worked. Employment begins when the worker enters the vehicle and ends when the worker leaves it on the termination of that worker’s labor for that shift.

³ While the parties brief Labor & Industries’ “mutual benefit” interpretation, *amici* contend *infra* that the Department’s non-statutory, non-regulatory, essentially self-invented interpretation is contrary to statute and should be disregarded.

Department of Labor & Industries, Administrative Policy ES.C.2, Hours Worked (Rev. 2005) at 2 (available online at www.lni.wa.gov/WorkplaceRights/files/policies/esc2.pdf). This administrative policy forms the crux of plaintiffs' case and was relied on extensively below. Yet this interpretive statement, which interjects several non-statutory and non-regulatory legal standards into discussion ("mutual benefit," "facilitate progress," "integral and indispensable function") is entitled to no deference from this court, has already been contradicted by Labor & Industries staff, and in any event is the exact opposite of the law.

1. The administrative policy is entitled to no deference.

In its clearest recent rejection of agency interpretations that are not subject to the due process of the Administrative Procedures Act, RCW ch. 34.05, but rather present merely the latest bureaucratic opinion this court in *Washington Educ. Ass'n v. Public Disclosure Comm'n*, 150 Wn.2d 612, 619, 80 P.3d 608 (2003), addressed the WEA's challenge to interpretive guidelines published by the Public Disclosure Commission. The court found the interpretive guidelines to be "advisory only," stating:

. . . the issuance of interpretive statements is not governed by formal adoption procedures. There is no need for formal procedures because such advisory statements have no legal or regulatory effect. A person cannot violate an interpretive statement, and conduct contrary to the agency's written opinion does not subject a person to penalty or administrative sanctions.

The PDC's advisory statements serve only to aid and explain the agency's interpretation of the law.

WEA, 150 Wn.2d at 619.

In *Association of Washington Business v. Dept. of Revenue*, 155 Wn.2d 430, 120 P.3d 46 (2005), the court engaged in an extended discussion of the effect of interpretive *rules*, which are themselves more formal than mere interpretive *policy statements* not subject to the rulemaking process. Distinguishing between interpretive rules and legislative rules, the court said:

Interpretive rules, however, are not binding on the courts at all: 'Reviewing courts are not required to give any deference whatsoever to the agencies' views on that subject [correctness and desirability of the agencies' interpretations]. Legislative rules therefore have greater finality than interpretive rules because courts are bound to give some deference to agency judgments embodied in the former, but they need not defer to agency judgments embodied in the latter.'

AWB, 155 Wn.2d at 447. The court went on to state interpretive rules

are not binding on the courts and are afforded no deference other than the power of persuasion. Accuracy and logic are the only clout interpretive rules wield. If the public violates an interpretive rule that accurately reflects the underlying statute, the public may be sanctioned and punished, not by authority of the rule, but by authority of the statute. This is the nature of interpretive rules.

Id. at 447.

Labor & Industries' own administrative policies have been expressly disregarded by this court. In *Wingert v. Yellow Freight*, 146

Wn.2d 841, 50 P.3d 256 (2002), the court in a footnote *would not even consider* a L&I administrative policy on the basis that it did “not constitute a published agency rule under [the APA]”. *Wingert*, 146 Wn.2d at 851, n. 1.

Later, in *White v. Salvation Army*, 118 Wn. App. 272, 75 P.3d 990 (2003), Division I of the Court of Appeals was presented with an L&I Administrative Policy. Unlike the *Wingert* court, the *White* court did consider the Administrative Policy but limited its consideration to this:

An agency’s interpretation of law may be entitled to deference ‘ to the extent that it falls within the agency’s expertise in a special area of the law,’ which generally means that the statute pertains to the agency’s authority and how it bases its policy decisions on that statute. The weight given an administrative policy depends upon the thoroughness evidenced in its consideration, the validity of its reasoning, and all those factors that give it power to persuade, if lacking power to control. No deference is to be accorded a policy that is wrong. Moreover, it is and always has been for the courts, not administrative agencies, to declare the law and interpret statutes.

White, 118 Wn. App. at 277. The Department’s administrative policy thus has no controlling effect. AWB would submit it is also unpersuasive because it has been freely contradicted by Department staff and in any event is legally erroneous.

2. L&I staff have contradicted the commute time provisions of ES.C.2.

Brink's references two instances in the record where L&I staff overseeing the Employment Standards program have come up with interpretations that have excused compliance with the agency's own interpretation of the law as contained in administrative policy ES.C.2. In its opening brief at 31-32, Brink's quotes two different letters from Richard Ervin, Labor & Industries Program Manager, to two different individuals setting forth conditions *in clear contradiction to ES.C.2* where commute time in a company-provided vehicle would not constitute "hours worked." *See CP at 770; 772-73.*

3. The Department's administrative policy is wrong.

The last basis on which to disregard the Department's administrative policy is that it is simply wrong. The correct analysis for commute time claims is found in WAC 296-126-002(8) under the three-part definition of "hours worked" ("authorized or required" to be "on duty" at the "employer's premises or a prescribed work place").

If the use of a company vehicle as a factual matter in a given case implicated any of these elements it may constitute an exception to the general rule that commute time is not compensable *even* in a company vehicle. Yet the Department's policy turns the law on its head. Under the

Department's conception, the general rule is that commute time in a company car is compensable hours worked and that it is an exception to this rule if, say, the use of the car is not for the "mutual benefit" of the employer and employee (i.e. is for the employee's sole benefit), etc. The policy states "[a]ll travel that is an integral and indispensable function without which the employee could not perform his/her principal activity, is considered hours worked" yet this could logically be said of *any* commute time. For instance, my travel to my office in my car is an indispensable function without which I could not perform the activity of writing this brief. Yet that reason alone does not transform my commute time into hours worked. By injecting these sweeping, sententious legal standards into the issue without the slightest statutory or regulatory warrant, the Department fully exceeds the statutory scope of permissible interpretation. The court should afford ES.C.2 no deference.

C. THE COURT SHOULD DECIDE THIS CASE AS A MATTER OF LAW RATHER THAN REMAND FOR TRIAL(S) OF FACT.

Should the court reverse the partial summary judgment of the trial court, it should enter partial summary judgment on behalf of Brink's. As the Commissioner noted in granting Brink's motion to transfer, the commute time issue is predominately a legal question. Ruling Granting Motion to Transfer (March 14, 2007) at 2. It would be legally correct and

appropriate public policy for this court to issue a bright line holding that commute time, as under federal law, is not compensable hours worked merely because it occurs in a company vehicle, whether under home dispatch or any other voluntary commuting use of a company vehicle.

It would not serve the interests of justice or the employer community to remand this case for trial under the “mutual benefit” theory of the Department’s administrative policy. Although in theory the plaintiffs are similarly situated with respect to their claims against Brink’s, the reality is they are not. They live in different places, take different routes to work, work different job sites, experience different levels of personal benefit from using a Brink’s truck, etc.

It would be very difficult to tease out the factual issues surrounding the use of Brink’s vehicles by members of the plaintiffs class and would give very little guidance to employers on what is the law of commute time. Because a bright line holding in favor of Brink’s would be most correct, and of most benefit to the goals of certainty and predictability in employment law, AWB urges the court to so hold.

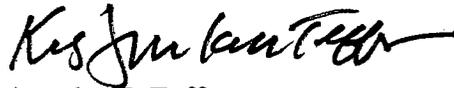
VI. CONCLUSION

Based on the foregoing, AWB asks the court to reverse the decision of the trial court as to partial summary judgment on liability, and

enter, or remand for entry of, partial summary judgment in favor of
Brink's.

Respectfully submitted this 17th day of April, 2007.

ASSOCIATION OF
WASHINGTON BUSINESS



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