

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

APPELLANTS  
MAY 11 1985  
COURT OF APPEALS  
DIVISION II  
STATE OF WASHINGTON

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FRANCIS M. WOODS et ux. *Appellants,*

v.

MITCHELL BROS. TRUCK LINE, INC., *Respondent.*

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BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

*Assignment of Error*

1. The trial court erred in its Finding of Fact 2. b. in its Order on Cross-Motions for Summary Judgment entered on March 11, 2005 when it found that, in determining whether Defendant was required to pay Plaintiff Francis M. Woods overtime, RCW 49.46.130(1) does not apply to hours he worked outside the confines of the State of Washington.

*Issues Pertaining to Assignment of Error*

1. In determining whether Defendant was required to pay Plaintiff Francis M. Woods overtime, does RCW 49.46.130(1) apply to hours he worked outside the confines of the State of Washington?

2. Should this Court grant judgment for the amount the Plaintiffs requested in the trial court for unpaid overtime and prejudgment statutory interest?

3. Should this Court remand to the trial court on the issues of double damages for wilful withholding under RCW Chapter 49.52 and

attorney fees?

## B. STATEMENT OF THE CASE

Plaintiff Francis M. Woods (hereinafter, “Plaintiff”) worked as a truckdriver for Defendant Mitchell Bros. Truck Lines, Inc. (hereinafter, “Defendant”) for almost nine years. CP 49. He was a resident of Oregon. Id.

Defendant is a Washington corporation. CP 3-4. Defendant has a terminal in Vancouver, WA on approximately three or four acres, including a shop, a fueling station, office buildings, a parking lot and a place to park trucks. At the time Plaintiff was terminated, Defendant had approximately 120 trucks in Vancouver, WA. This is its only terminal except for one for containers in British Columbia, which was opened about a year before Plaintiff was terminated, but he was never there nor did he receive dispatches from there. CP 49-50.

Plaintiff was hired by Defendant in Vancouver, WA. CP 50. He always started and ended his runs at the Vancouver, WA terminal. He spent a good deal of time driving in Washington but also a good deal of time driving in Oregon, Idaho, Utah and Montana. But he always received

his orders from the dispatcher at Vancouver, WA terminal and when he had a problem or a question he would talk to that dispatcher. Id. On the average, he was back at the Vancouver, WA terminal every third day. Then he would go back to the Vancouver, WA terminal the next day and wait to be dispatched from there again. Id. He always turned in his bills of lading at the Vancouver, WA terminal; the company required him to turn them in before he was paid. Id.

Plaintiff always turned in his miles and expenses at the Vancouver, WA terminal. Id. The bookkeeper in Vancouver, WA calculated his pay and then it would be signed by David Braman, the general manager, who worked out of the Vancouver, WA terminal, and by Gordon Cahoon, the owner, who lived in Vancouver, British Columbia but spent Monday through Friday in Vancouver, WA. CP 50-51. The company had Plaintiff take the physicals required by law in Vancouver, WA. CP 51.

Most of the time Plaintiff was paid by the mile but he was also compensated for referring other drivers to Defendant and was sometimes paid flat fees for other activities. Id. He was never paid overtime. Id.

On May 7, 2004, Plaintiffs filed suit for unpaid overtime under Washington law, unpaid wages under Washington law, and wilful failure to pay wages under Washington law. CP 3-5. Plaintiffs calculated the

amount of unpaid overtime owed as \$12,474.13 plus prejudgment statutory interest to November 27, 2004 of \$4,805.54 and provided evidence of how they calculated this sum. CP 12-39, 40-41, 51, 53-75.

Defendant's only affirmative defense was failure to state a claim for which relief may be granted. CP 9.

On March 11, 2005, the trial court issued an Order on Cross-Motions for Summary Judgment. CP 315. In that Order the trial court denied Plaintiffs' Motion for Summary Judgment and granted Defendant's Motion for Summary Judgment. CP 317. This Order was based on an Opinion, CP 319-23, which is attached to the Order as Exhibit A, CP 317. In the Opinion the trial court determined "that RCW 49.46 does not apply to those hours worked outside the confines of the state of Washington." CP 319.

### C. SUMMARY OF ARGUMENT

Although Plaintiff's work carried him to other states, he was based in Washington. Both Department of Labor and Industries v. Common Carriers, Inc., 111 Wn. 2d 586, 762 P.2d 348 (1988) and Department of Labor and Industries v. Overnite Transportation Company, 67 Wn. App. 24, 834 P.2d 638 (1992) deal only with claims for overtime for hours worked in Washington and thus do not resolve the question in the case at

bar. However, the Washington Minimum Wage Act contains no exemption for work performed out of state by Washington employees. Thus, under the clear language of RCW 49.46.130(1) and the doctrine of liberal construction, Defendant owes Plaintiff overtime for his out-of-state hours. In addition, two early worker's compensation cases in which the Supreme Court found jurisdiction even though the accident occurred outside of Washington show the willingness of the appellate courts of Washington to liberally construe employment-related laws in favor of Washington employees.

The trial court advances eight reasons in support of its conclusion that the Washington Minimum Wage Act is not applicable but none of them are persuasive. Neither RCW 49.46.130(2)(f), the reasonably equivalent exemption, nor WAC 296-128-011 and -012, the regulations that implement it, are a bar to Plaintiffs' recovery, since Defendant never pled the reasonably equivalent exemption nor is it relevant. Furthermore, the letter from a Department of Labor and Industries employee on overtime for out-of-state hours cited by the trial court is not entitled to deference. Likewise, neither the trial court's quotations from Overnite nor the Common Carriers Court's citation to a District of Columbia case nor a different District of Columbia case support its conclusion. Finally,

contrary to the trial court's assertion, the opinions in Burnside v. Simpson Paper Co., by both the Court of Appeals and the Supreme Court in 66 Wn. App. 510, 832 P.2d 537 (1992) and 123 Wn. 2d 93, 864 P.2d 937 (1994) do in fact mandate the conclusion that out-of-state hours count toward overtime under the Washington Minimum Wage Act.

#### D. ARGUMENT

##### 1. Under the WMWA, Employees Based in Washington Are Due Overtime for Hours Worked Out of State.

###### a. Case Law.

RCW 49.46.130(1), which is part of the Washington Minimum Wage Act (hereinafter, "WMWA"), provides:

(1) Except as otherwise provided in this section, no employer shall employ any of his employees for a work week longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(Emphasis supplied.)

Washington appellate courts have considered the issue of overtime pay for truckdrivers in Department of Labor and Industries v. Common Carriers, Inc., 111 Wn. 2d 586, 762 P.2d 348 (1988) and Department of

Labor and Industries v. Overnite Transportation Company, 67 Wn. App. 24, 834 P.2d 638 (1992).

In Department of Labor and Industries v. Common Carriers, Inc., 111 Wn. 2d 586, 762 P.2d 348 (1988) the Washington Supreme Court held that the Fair Labor Standards Act (hereinafter, “FLSA”) did not preempt the WMWA as to drivers covered under the federal Motor Carrier Act. Id. at 590. Therefore, defendant employer owed overtime to the mechanic on whose behalf the the Department of Labor and Industries (hereinafter, “DLI”) brought the case. This mechanic worked entirely within the State of Washington. Id. at 589.

In Department of Labor and Industries v. Overnite Transportation Company, 67 Wn. App. 24, 834 P.2d 638 (1992), the DLI determined that the defendant owed drivers money “for overtime work performed within the state....” Id. at 28. The defendant therein attempted to distinguish its case from Common Carriers, arguing that whereas Common Carriers involved a mechanic who worked entirely within the state, its case involved “drivers who work primarily within the state but who may be and have been called upon to drive interstate.” Id. at 29-30. Nevertheless, the Court held that “the WMWA’s overtime provisions are not preempted by the federal MCA [Motor Carrier Act].” Overnite, 67 Wn. App. at 31.

Neither case dealt with the situation existing in the case at bar, where Plaintiff is seeking overtime for hours worked outside the state of Washington as well as inside the state. Neither case discussed whether hours worked outside the state by an employee based in Washington should be counted in determining overtime under the WMWA.

In Drinkwitz v. Alliant Techsystems, 140 Wn. 2d 291, 300, 996 P.2d 582 (2000), the Court stated that Washington has a long and proud history of being a pioneer in the protection of employee rights. “Numerous statutory provisions exemplify this long and proud history. For example, 25 years before Congress passed the federal minimum wage law in 1938 the people of Washington enacted [a statute making it unlawful to employ any person under conditions of labor detrimental to their health.]” The Drinkwitz Court went on to cite other examples. The Drinkwitz Court also spoke of “the Legislature’s concern for the health and welfare of Washington’s workforce ....” Id. “Exemptions from remedial legislation, such as the MWA and FLSA, are narrowly construed and applied only to situations which are plainly and unmistakably consistent with the terms and spirit of the legislation.” Id. at 301.

In Fire Fighters v. City of Everett, 146 Wn.2d 29, 35, 42 P.3d 1265 (2002) the Court stated, “[R]emedial statutes ‘should be liberally

construed to advance the Legislature's intent to protect employee wages and assure payment.' [Citation omitted.]”

In Schilling v. Radio Holdings, Inc., 136 Wn.2d 152, 157, 961 P.2d 941 (1998) the Court states, “The Legislature has evidenced a strong policy in favor of payment of wages due employees by enacting a comprehensive scheme to ensure payment of wages, including [the Court then details various statutes under RCW Chapters 49.46, 49.48 and 49.52.]”

In Goff v. Airway Heights, 46 Wn. App. 163, 730 P.2d 691 (1986), reversed on other grounds as Chelan County Sheriffs' Association v. Chelan County, 109 Wn. 2d 282, 745 P.2d 1 (1987) the Court stated:

Exclusions pertaining to [Washington Minimum Wage Act] coverage should be construed strictly in favor of the employees so as not to defeat the broad objectives for which the act was passed. Employers asserting an exclusion have the burden of proving their employees fit plainly and unmistakably within its terms.

Goff, 46 Wn. App. at 166.

In Stahl v. Delicor of Puget Sound, 109 Wn. App. 98, 109, 34 P.3d 259 (2001), reversed on other grounds in 148 Wn.2d 876, 64 P.3d 10 (2003) the Court cited Mechet v. Four Seasons Hotels, Ltd., 825 F.2d 1173 (7<sup>th</sup> Cir. 1987) and stated, “The court noted that one purpose of the FLSA

was to protect workers from impairing their health or incurring accidents from tiredness.”

The Court in Innis v. Tandy, 141 Wn. 2d 517, 523, 7 P.3d 807 (2000) stated, “[T]he Legislature enacted RCW 49.46.130(1) to conform state minimum wage laws to the federal Fair Labor Standards Act of 1938.” (Footnote omitted.)

In Thompson v. Dept of Labor and Industries, 192 Wn. 501, 73 P.2d 1320 (1937) the Washington Supreme Court considered a case in which an employee who worked out of a Spokane office and who was responsible for supervising eleven stores in Washington and three in Idaho was killed in a traffic accident in Idaho. Id. at 501-02. The deceased’s widow sued for industrial insurance benefits. Id. at 504. The jury found he was in the course of his employment when he died and entered judgment in favor of the widow. Id. at 504-05. The Court stated, “The law question is whether our industrial insurance act, when it applies solely by private contract, covers an injury in Idaho in an employment, eleven-fourteenths of which is in this state and three-fourteenths of which is in Idaho.” Id. at 505. The Court cited Hilding v. Dept. of Labor and Industries, which will be discussed in the next paragraph. Id. at 506. The Court affirmed the judgment of the jury. Id. at 507.

In Hilding v. Dept. of Labor and Industries, 162 Wn. 168, 298 P. 321 (1931) the Court stated, “The parties by stipulation presented to this court but one question: ‘Whether or not the industrial insurance act of the state of Washington has any extra-territorial operation.’” Id. at 169. The Hilding Court quoted Industrial Commission v. Aetna Life Insurance Co., 64 Colo. 480, 174 P. 589 (1918):

“Counsel concede that it is within the legislative power to give extraterritorial effect by express provision, but contend that in the absence of such expressed purpose it must be conclusively presumed that general words were intended to be limited in their application to the territorial jurisdiction of the legislature using them. [Citation to the Gould case from Massachusetts and lengthy discussion of it omitted.] We cannot assume that the legislature ever intended such an injustice and absurdity, in the absence of some clear and express provision in the statute to that effect, which we do not find.”

Hilding, 162 Wn. at 171-72. The Hilding Court then stated:

The authorities generally hold that, unless the workmen’s compensation act expressly provides that it shall have no extraterritorial effect, it applies to workmen employed in a state to do work outside of the territorial limits of that state. [Citations omitted.]

Id. at 172. The Court also stated, “Clearly, Hilding was acting within the scope and in the course of his employment.” Id. at 173. The Hilding Court also cited State ex rel. Loney v. Industrial Accident Board, 87 Mont.

191, 286 P. 408 (1930) as follows:

.... The court, [points] out that the weight of authority in this country sustains the view that the workmen's compensation act will apply to injuries to workmen employed in the state and injured while temporarily out of its limits, unless there is something in the act making it inapplicable or clearly denying the right to the employee to recover in such case ....

Hilding, 162 Wn. at 174. The Hilding Court also stated, "This court is committed to the doctrine that our workmen's compensation act should be liberally construed in favor of its beneficiaries." Id. at 175. The Court affirmed the judgment. Id.

**b. Application.**

In the case at bar, RCW 49.46.130(1) is the operative section of the WMWA—the one that mandates that overtime be paid. It is unambiguous: overtime must be paid to employees unless there is a applicable exemption. Here there is no applicable exemption. Hence, overtime must be paid.

Drinkwitz, Fire Fighters, and Goff hold that employment statutes such as the WMWA must be liberally construed and exceptions to such statutes narrowly construed against the employer. Schilling demonstrates the importance that the Legislature places on payment of wages to

Washington employees.

Stahl and Innis together show that one purpose of the WMWA is to protect employees from incurring accidents because of tiredness. The decision of the trial court does exactly the contrary, by giving employers an economic incentive to use fewer truckdrivers for longer hours per week. Fewer drivers working longer hours means more accidents. Highway safety is important to all citizens of the state of Washington.

If the trial court were right in assuming that a state's statutes can never apply beyond its borders, then the Washington Supreme Court in Thompson and Hilding would have ruled against the plaintiffs therein. But in both cases the Court in fact ruled in favor of the employee. Hilding quotes with approval Aetna Life, a Colorado case, which holds there is a presumption in favor of extraterritorial effect and then the Hilding Court states that the authorities generally hold that unless otherwise expressly provided, a worker's compensation act has extraterritorial effect and finally it cites Loney, a Montana case, to the same effect. If a state's law were not valid beyond its borders, the Supreme Court would never have found for the survivors of the employees in Thompson and Hilding.

Defendant may try to distinguish Thompson and Hilding from the case at bar because they are worker's compensation cases. But these two

cases share a significant similarity with Burnside v. Simpson Paper Co., 66 Wn. App. 510, 832 P.2d 537 (1992), aff'd on other grounds, 123 Wn. 2d 93, 864 P.2d 937 (1994), which will be discussed below at pp. 33-42, and the case at bar: they all are interpreting statutes that are to be liberally construed in favor of the employee. Hilding, 162 Wn. at 175; Burnside, 123 Wn.2d at 99. As such, it is not surprising that in Hilding the Court held there was a presumption in favor of extraterritorial application of the industrial insurance act.

Thus, under RCW 49.46.130(1), it is clear that out-of-state hours accrued by an employee based in Washington should count toward overtime under the WMWA.

2. The Trial Court Erred in Ruling that Out-of-State Hours Should Not Be Counted for Overtime under the WMWA.

In its Order on Cross-Motions for Summary Judgment entered on March 11, 2005 the trial court denied Plaintiffs' motion for summary judgment and granted Defendant's motion for summary judgment. CP 317. In its Finding of Fact 2. b. it stated as follows:

In determining whether defendant was required to pay plaintiff Francis M. Woods overtime, RCW 49.46.130(1) does not apply to hours plaintiff Francis M. Woods worked outside the confines of the State of Washington.

CP 317.

An undated Opinion by the trial court is attached as Exhibit A to the Order on Cross-Motions for Summary Judgment. CP 319-23. In that Opinion the trial court gives eight reasons for concluding that Plaintiff's out-of-state hours should not be counted in determining overtime under the WMWA. First, the trial court cites RCW 49.46.130(2)(f), the reasonably equivalent exemption, in support of its position. CP 320. Second, the trial court cites WAC 296-128-012, which, the trial court states, "restricts ... reasonably equivalent pay to only those 'hours worked within the state of Washington, in excess of 40 hours per week.'" CP 320. Third, the trial court notes that in response to a hypothetical, the DLI issued what the trial court terms an advisory opinion to the effect that only hours worked in-state were to be counted toward overtime and the trial court states that the DLI's regulations are "entitled to deference if they are consistent with the state of the law on this issue." CP 320. Fourth, the trial court states that in Overnite, 67 Wn. App. at 33, "the Court of Appeals acknowledged that the Department changed their regulations in response to the Common Carriers decision ...." CP 321. Fifth, the trial court also states that on the same page the Overnite "Court declared that such a regulation [one requiring motor carriers to pay their employees

overtime if the employees worked more than 40 hours per week within the state] was within the authority of the Department and would, in effect, save defendant money....” CP 321. Sixth, the trial court notes that the Common Carriers Court cited Williams v. W.M.A. Transit Co., 472 F.2d 1258 (D.C. Cir. 1972) as authority. CP 322. Seventh, the trial court also cites District of Columbia v. Schwerman Trucking Co., 327 A.2d 818 (D.C. Cir. 1974) as a case that refined the Williams decision “by restricting overtime for only those hours worked within the District [of Columbia].” CP 322. Eighth, the trial court notes that counsel had cited Burnside v. Simpson Paper Co., 123 Wn. 2d 93, 864 P.2d 937 (1994) but found that Burnside was not relevant to the case at bar. CP 322-23.

Plaintiffs will answer each of these points in turn.

**a. RCW 49.46.130(2)(f) Is Not Relevant to the Case at Bar.**

The trial court’s first point is that its position is supported by RCW 49.46.130(2)(f), the reasonably equivalent exemption. CP 320.

RCW 49.46.130 generally mandates payment of overtime for work over 40 hours a week but contains a number of exceptions; RCW 49.46.130(2)(f), the reasonably equivalent exemption, is one of them. It states:

This section does not apply to:

....

An individual employed as a truck or bus driver who is subject to the provisions of the Federal Motor Carrier Act (49 U.S.C. Sec. 3101 et seq. and 49 U.S.C. 10101 et seq.), if the compensation system under which the truck or bus driver is paid includes overtime pay, reasonably equivalent to that required by this subsection, for working longer than forty hours per week;

(Emphasis supplied.) It should be noted that, unlike most exemptions from the WMWA, this is not a blanket exemption for employers or employees in a certain category: instead, the reasonably equivalent exemption only applies if the driver's pay includes pay that is reasonably equivalent to overtime.

It should also be noted that Defendant does not raise RCW 49.46.130(2)(f) as an affirmative defense; its sole defense is failure to state a claim for which relief may be granted. CP 8.

Rainier National Bank v. Lewis, 30 Wn. App. 419, 422, 635 P.2d 153 (1981) states:

In general, if [affirmative] defenses are not affirmatively pleaded, asserted with a motion under CR 12(b), or tried by the express or implied consent of the parties, such defenses are deemed to have been waived and may not thereafter be considered as triable issues in the case. [Citation omitted.]

Plaintiffs did not consent to trial on the reasonably equivalent exemption. CP 164-65, n. 1. Thus, Defendant has waived this affirmative defense.

Even if Defendant had pled RCW 49.46.130(2)(f), it is not relevant to the case at bar. Two points should be made about the reasonably equivalent exemption. First, it makes no mention of whether the hours referred to are in-state or out-of-state; only the regulations, which will be discussed below, do. Second, in the case at bar the reasonably equivalent exemption is a red herring: there is no reason to believe Defendant ever provided reasonably equivalent pay for Plaintiff.

RCW 49.46.130(1) is unambiguous: overtime must be paid unless there is an applicable exemption.

Furthermore, as stated above on pp. 8-9, under Drinkwitz, Fire Fighters, and Goff, employment statutes such as the WMWA must be liberally construed and exceptions to such statutes narrowly construed against the employer. It is impossible to understand how RCW 49.46.130(2)(f), an exemption that Defendant neither pled nor proved and that has nothing to do with the case at bar, can provide an affirmative defense for Defendant—let alone meet the test of liberal construction.

Plaintiffs' argument can be stated in the form of a syllogism: (1) RCW 49.46.130(2)(f) exempts trucking companies which provide

reasonably equivalent pay from the duty to pay overtime to their drivers; (2) Defendant did not provide reasonably equivalent pay to Plaintiff; (3) therefore, RCW 49.46.130(2)(f) does not exempt Defendant from the duty to pay overtime.

**b. WAC 296-128-012 Is Not Relevant to the Case at Bar.**

The trial court's second point is that WAC 296-128-012 "restricts ... reasonably equivalent pay to only those 'hours worked within the state of Washington, in excess of 40 hours per week.'" CP 320.

Plaintiffs believe that WAC 296-128-011 and WAC 296-128-012 should be read in tandem. When so read, it is clear that both of them are aimed at giving trucking companies guidance on when they can use the reasonably equivalent exemption. In broad terms, WAC 296-128-011 requires a special set of records to be kept by trucking companies wishing to use the reasonably equivalent exemption and WAC 296-128-012 suggests a formula for substantiating that the pay given is reasonably equivalent.

The trial court is correct when it states that WAC 296-128-012 "restricts ... reasonably equivalent pay to only those 'hours worked within

the state of Washington, in excess of 40 hours per week.” CP 320. But the important point—which the trial court does not appear to notice—is that WAC 296-128-011 and -012 only excuse trucking companies from the duty to pay overtime where the trucking company provides “reasonably equivalent pay.” Since both parties and the trial court agree that Defendant did not provide reasonably equivalent pay in the case at bar, WAC 296-128-011 and -012 are not relevant.

Once again, Plaintiffs’ argument can be stated in the form of a syllogism: (1) WAC 296-128–011 and -012 both relate to the reasonably equivalent exemption; (2) the reasonably equivalent exemption is not relevant in the case at bar; (3) therefore, WAC 296-128–011 and -012 are not relevant in the case at bar.

**c. The Letter from Elaine Fischer Is Not Entitled to Deference.**

The trial court’s third point is that in response to a hypothetical the DLI issued what the trial court terms an advisory opinion to the effect that only hours worked in-state were to be counted toward overtime. The trial court states that the DLI’s regulations are “entitled to deference if they are consistent with the state of the law on this issue.” CP 320.

The trial court is referring to a letter from Elaine Fischer, an

industrial relations specialist at the DLI, which reads in relevant part:

1. Would the Department of Labor and Industries require the employer to pay Washington overtime wages to the driver pursuant to the overtime wage laws cited above [RCW 49.46.130(1). CP 285] or any other applicable laws?

**Response:** No. The department regulates only hours worked within the state of Washington. WAC 296-128-012, Overtime for truck and bus drivers, specifically references “for working within the state of Washington in excess of forty hours a week.”

CP 287.

In Children’s Hospital v. Department of Health, 95 Wn. App. 858, 975 P.2d 567 (1999), pet. den. 139 W.2d 1021 (2000) the Court stated, “Where a regulation is clear and unambiguous, a court should apply its plain language and may not look beyond the language to consider the agency’s interpretation.” Id. at 868.

In Cockle v. Labor & Industries, 142 Wn.2d 801, 812, 16 P.3d 583 (2001) the Court stated:

While we may “defer to an agency’s interpretation when that will help the court achieve a proper understanding of the statute,” [citation omitted] such interpretation is not binding on us. [Citation omitted.] Indeed, we have deemed such deference “inappropriate” when the agency’s interpretation conflicts with a statutory mandate. [Citation

omitted.] “[B]oth history and uncontradicted authority make clear that it is emphatically the province and duty of the judicial branch to say what the law is” and “to determine the purpose and meaning of statutes....” [Citation omitted.]

In Cockle, a worker’s compensation case, the Court stated that the construction of the statute by the Department of Labor and Industries “cannot be reconciled with the Legislature’s statutory mandate that all Title 51 RCW provisions ‘shall be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment.’” [Citation omitted; emphasis in the original.] Id. at 812. See also Faben Point v. Mercer Island, 102 Wn. App. 775, 781, 11 P.3d 322 (2000), rev.den. 142 Wn. 2d 1027 (2001)(“Misunderstanding or misinterpretation of a statute or ordinance by those charged with its enforcement does not alter its meaning or create a substitute enactment.”); Othello Community Hospital v. Department of Employment Security, 52 Wn. App. 592, 596, 762 P.2d 1149 (1988)(deference only when the agency’s action has a sound basis; no deference to a policy that is wrong).

In Sunnyside v. Fernandez, 59 Wn. App. 578, 581, 799 P.2d 753 (1990) the Court of Appeals held that an agency employee's subjective understanding of agency intent is not an agency interpretation and is not

entitled to weight.

In Western Telepage v. City of Tacoma, 140 Wn. 2d 599, 612, 998 P.2d 884 (2000) the Court stated that for deference to occur, “the agency interpretation must be clear and definitive. DOR [the Department of Revenue] did not adopt a rule on the issue in this case nor did it adopt an interpretive guideline or a policy statement. We decline to give deference to a short article in an agency bulletin that lacks an official, definitive analysis of the issue in question.” (Footnotes omitted.)

Thus, in the case at bar, there are four reasons why Ms. Fischer’s letter is not relevant to the case at bar.

First, under Children’s Hospital, to the extent that Ms. Fischer’s letter can be considered a construction of WAC 296-128-012 by the DLI, that construction is not entitled to deference because that regulation is unambiguous—it applies only where the employer wishes to take advantage of the reasonably equivalent exemption. See pp. 19-20 of this Brief. Since both parties and the Court agree that the reasonably equivalent exemption is not relevant in the case at bar, the regulations implementing it are likewise not relevant.

Second, Ms. Fischer’s letter refers only to regulation of overtime by the Department of Labor and Industries. There is nothing in RCW

Chapter 49.46 (unlike, for example, Title VII for the EEOC) that requires plaintiffs to file a claim with the Department either before proceeding to court or at all. In other words, the Department may have its own internal policies as to which cases it will take but these do not affect suits by private litigants.

Third, under Sunnyside v. Fernandez, an individual agency employee's interpretation of the law is not entitled to weight. Furthermore, even if the contents of this letter were shown to be the agency's position, under Cockle, Faben Point, and Othello this position is not entitled to deference because the DLI apparently took a statement from Common Carriers that is less than dictum, see pp. 25-27 of this Brief, and leapt to the conclusion that out-of-state hours are not compensable.

Fourth, as our Supreme Court stated in Western Telepage, 140 Wn. 2d at 612, the agency interpretation must be clear and definitive. If “a short article in an agency bulletin that lacks an official, definitive analysis of the issue in question” is not entitled to deference, then a fortiori a short letter by an agency employee is also not entitled to deference.

Thus, the views expressed in Ms. Fischer's letter are not entitled to deference.

**d. The Overnite Court's Mention of the Fact that the DLI Had Changed Its Policy Is Less than Dictum.**

The trial court's fourth point is that in Overnite, 67 Wn. App. at 33 "the Court of Appeals acknowledged that the Department changed their regulations in response to the Common Carriers decision ...." CP 321.

In Johnson v. Ottomeier, 45 Wn. 2d 419, 421, 275 P.2d 723 (1954) the Washington Supreme Court, discussing its own previous decisions, said, "But the language we use in our decisions must always be appraised in the light of the facts of the particular case and the specific issues which were before the court." (Emphasis supplied.) See also State v. Forhan, 59 Wn.App. 486, 489, 798 P.2d 1178 (1990)(since the statement quoted in another case was unnecessary to the decision, it was dictum and subsequent courts were not bound by it.)

The passage the trial court quotes is as follows:

... Previously, the Department had required that overtime pay be given to any employee who regularly spent more than 50 percent of his or her work time within the state. [FN4] However, in Department of Labor & Indus. v. Common Carriers, Inc., 11 Wn.2d 586, 762 P.2d 348 (1988), our Supreme Court applied the overtime provisions of the WMWA to interstate motor carriers without reference to the percent of time an employee worked in Washington. See Common Carriers, at 589-90. Pursuant to Common Carriers, the Department changed the way it applied the overtime provisions of the WMWA to interstate motor carriers and required that overtime pay be given to

employees who worked more than 40 hours per week  
**within the state.** [FN5]  
[Emphasis added; footnotes omitted.]

Overnite, 67 Wn.App. at 32-33 quoted in CP 321. (Minor errors in trial court’s transcription of quotation corrected; bold in trial court’s opinion.)

Reviewing this quotation, it is true that the Overnite Court did note that after Common Carriers the DLI changed the way it applied the overtime provisions to require overtime if the driver works more than 40 hours in the State of Washington. Overnite, 67 Wn. App. at 33. But the Court simply noted this change in the policy and the apparent source of the new policy; it did not approve or disapprove it. In fact, the Court stated, “[In Common Carriers] our Supreme Court applied the overtime provisions of the WMWA to interstate motor carriers without reference to the percent of time an employee worked in Washington.” Overnite, 67 Wn. App. at 33.

If the Overnite Court had made a statement approving or disapproving of the DLI’s standard, it would have been dictum, since in the case before the Court the DLI was seeking payment for drivers for work exclusively in the State of Washington. Overnite, 67 Wn. App. at 28. What the Court did—make a reference to one of the facts of the case (the DLI’s change in policy)—was even less than dictum, and, as stated in

cases such as Johnson and Forhan, therefore provides no support for the trial court's opinion.

One other point should be made about the passage quoted above. As noted above, the trial court states that “the Department changed their regulations ....” CP 321. (Emphasis supplied.) Although the Overnite Court spoke of a “rule,” it never cited or quoted the rule. It appears that what the DLI changed was merely its internal rule or policy, perhaps an unwritten one, that is, “the way it applied the overtime provisions of the WMWA ....” Overnite, 67 Wn. App. at 33. Specifically, it should be noted that the Common Carriers Court does not cite WAC 296-128-011 or -012 or, for that matter, any other regulation.

**e. The Overnite Court's Discussion of the Administrative Procedure Act Issue Is Not an Endorsement of the DLI's Policy on Overtime.**

The trial court's fifth point is that the Overnite Court at 67 Wn. App. at 33 “declared that such a regulation [one requiring motor carriers to pay their employees overtime if the employees worked more than 40 hours per week within the state] was within the authority of the Department and would, in effect, save defendant money....” CP 321. The trial court then quotes a passage from Overnite, 67 Wn. App. at 33. CP

321-22. First Plaintiffs will discuss the issue of authority and then the issue of saving money, both as supposed indications that the Overnite Court voiced approval of the DLI's policy.

It is useful to carefully review the language of the passage the trial court is referring to:

Overnite contends that the Department's adoption of the Common Carriers rule amounts to a violation of the Administrative Procedure Act, because it was not "properly adopted and published in accordance with the administrative procedure act." [Citation omitted.] However, requiring the Department to adopt and publish the rule of Common Carriers in accordance with the Administrative Procedure Act belies the fact that our Supreme Court's Common Carriers opinion had the force of law on the date on which it was decided. In applying Common Carriers to Overnite's interstate drivers, the Department was merely acting in compliance with the law as articulated by our Supreme Court. Under the particular circumstances present here, enforcement was not dependent upon the promulgation of a specific rule pursuant to the Administrative Procedure Act. ....

Overnite, 67 Wn.App. at 33. Cf. CP 321-22. (The language quoted above begins with a sentence not quoted in the trial court's opinion on CP 321-22 and omits a sentence at the end of the passage from Overnite the trial court quoted.)

The trial court assumes that the version it quotes of this passage shows that the Overnite Court was endorsing the substance of the DLI's

policy.

But reviewing the version of the passage Plaintiffs quoted, it is clear that what the Washington Court of Appeals was endorsing was the DLI's ability to "apply[] Common Carriers to Overnite's interstate drivers" without first publishing the rule under the APA, not the correctness of the DLI's over-40-hours-a-week rule. The Court of Appeals' point was that whether or not the DLI adopted a rule was irrelevant since the Common Carriers decision "had the force of law on the date it was decided." Overnite, 67 Wn.App. at 33. Thus, the issue in the passage quoted immediately above is one of administrative law, not wage and hour law, and the Overnite Court was not voicing approval of the DLI's policy regarding overtime for in-state hours.

Furthermore, since Overnite dealt only with work inside the State of Washington, Overnite, 67 Wn. App. at 28, even if the Overnite Court had made a statement voicing approval of the DLI's policy, it would have been dictum. In actuality, the Court's mere reference to the DLI's policy is less than dictum as to the out-of-state hours issue. See pp. 25-27 of this Brief.

The last sentence that the trial court quotes at CP 321-22 is as follows: "Moreover, had the Department not changed its approach,

Overnite would have been subject to the 50 percent rule, which would have likely increased the economic burden imposed on Overnite by the WMWA.” CP 321-22, quoting Overnite, 67 Wn. App. at 33. The trial court assumes that this statement by the Overnite Court constitutes approval. CP 321. In a footnote the Overnite Court also states, “Thus, the Department actually reduced the economic burden imposed by the WMWA.” Overnite, 67 Wn. App. at n. 5.

However, once again these statements by the Overnite Court occur in the context of the issue of “whether the Department of Labor and Industries failed to comply with the Administrative Procedure Act in adopting a rule to apply the WMWA to interstate motor carriers.” Overnite, 67 Wn. App. at 32. The Court’s point is that the change in the rule actually helped defendant Overnite, since the new policy was more lenient than the old one, and thus Overnite could not complain of being hurt by the change and thus could not challenge the change on grounds of administrative procedure. Again, it is an issue of administrative law, not wage and hour law, and, again, these statements do not indicate either approval or disapproval of the DLI’s policy.

**f. The Citation of Williams v. W.M.A. Transit Co. by the Common Carriers Court Does Not Indicate Approval of the**

### **Williams Court's Holding on Overtime.**

The trial court's sixth point is that the Common Carriers Court cited Williams v. W.M.A. Transit Co., 472 F.2d 1258 (D.C. Cir. 1972) as authority. CP 322. In Williams the District of Columbia Circuit held that employees who spend more than 50% of their time working in the District of Columbia are subject to its overtime statute. Williams, 472 F.2d at 1265.

However, it is useful to review the passage of Common Carriers which cites Williams:

None of the standards for finding preemption are shown here. Congress has not expressed a clear intent to preempt state overtime wages provisions. Neither Congress nor the Secretary has manifested an intent to occupy the field of overtime wage regulation. The MCA and the motor carrier regulations do not contain any requirements for rates of pay. See 49 U.S.C. § 3102; 49 C.F.R. §§ 301-399 (1987). The WMWA does not require any employee to work in excess of the maximum hours set by the Secretary nor is there any claim this occurred here. State economic regulation of hours worked up to the federal minimum safety standard does not, in the abstract, interfere with the safety goals of the MCA. See Williams v. W.M.A. Transit Co., 472 F.2d 1258, 1264 (D.C. Cir. 1972).

Common Carriers, 111 Wn. 2d at 589. Thus, the passage from Common Carriers which cites Williams deals only with the issue of preemption.

It is an elementary principle of law that opinions by appellate

courts do not approve a case in general but rather only as to the specific proposition for which they cite it. Thus, there is no evidence that Common Carriers approved the holding in Williams interpreting the District of Columbia's wage and hour statute.

**g. The Opinion in District of Columbia v. Schwerman Does Not Provide Support for the Trial Court's Holding.**

The trial court's seventh point is that District of Columbia v. Schwerman Trucking Co., 327 A.2d 818 (D.C. Cir. 1974) refined the Williams decision "by restricting overtime for only those hours worked within the District [of Columbia]" and thus provides support for trial court's opinion. CP 322.

In District of Columbia v. Schwerman Trucking Co., 327 A.2d 818 (D.C. Cir. 1974) the Court interpreted the District of Columbia's wage and hour statute as covering only hours worked within the District. Id. at 825. Although the Schwerman Court discussed the history of amendments to the District of Columbia's statute, id. at 822-24, it decided that these amendments had no bearing on the issue because the employment for which the claim was made took place before the amendments, id. at 823, and the Schwerman Court did not explain why it determined that the

statute covered only hours worked within the District. Schwerman does cite a United States Supreme Court case, West Coast Hotel Company v. Parish, 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703 (1938), but that case simply held that it was constitutionally permissible for a state to set a minimum wage for women which was not applicable to men, a point which has no relevance to the case at bar.

The Schwerman Court suggests that each state should only prescribe wage and hour laws for work done within its borders. Schwerman, 327 A.2d at 825. Of course, the problem with this for overtime claims is that if an employee works in, for example, three states during a given week, he or she is not likely to have worked more than 40 hours in any of them. Thus, under the Court's reasoning, he or she would not have an overtime claim even if he or she worked many more than 40 hours in that week. Also, the fact that the Schwerman Court does not explain its reasoning makes its opinion of little use in the case at bar. Finally and most important, the trial court should have realized that the plain language of RCW 49.46.130(1) takes precedence as authority over an out-of-state decision interpreting an out-of-state statute.

**h. The Trial Court Was Incorrect in Stating that Burnside v. Simpson Paper Co. Is Not Relevant to the Case at Bar.**

The trial court's eighth point is that although counsel had cited Burnside v. Simpson Paper Co., 123 Wn. 2d 93, 864 P.2d 937 (1994), that case was not relevant to the case at bar. CP 322-23. Specifically, the trial court stated:

The interpretation of ["inhabitants"] in Burnside for jurisdictional purposes have no relevancy with the present issue of "within the state" for compensation purposes. Whether this state may extend its net of regulations beyond its borders is not the crucial issue in this case. By this Court's interpretation of the applicable law, the relevant focus is on the hours worked within the state. Only if this Court came to a different conclusion would the concepts of conflicts of law and jurisdictional boundaries come into discussion.

CP 323.

A review of Burnside v. Simpson Paper Co. is useful in order to evaluate the trial court's conclusion. Burnside was the subject of decisions by both the Washington Court of Appeals and the Supreme Court. Mr. Burnside was employed for a number of years by Simpson Paper, a Washington corporation, in Washington. In 1983 he was transferred to California and worked there until his termination in 1984. Burnside v. Simpson Paper Co., 66 Wn. App. at 514-15. After his termination he filed suit for age discrimination under RCW Chapter 49.60 and for breach of

implied contract. Id. at 516. Simpson claimed that RCW 49.60.010

denies jurisdiction to anyone who is not a Washington resident. Id. at 517.

The Court of Appeals stated:

Because the Washington State Constitution confers such a broad grant of jurisdiction on the superior courts, exceptions to that jurisdictional grant will be narrowly read. [Citation omitted.] If a Legislature has shown no indication of its intention to limit jurisdiction, an act should be construed as imposing no limitation. [Citation omitted.]

Id.

The Court of Appeals examined the issue of the applicability of Washington law. It stated:

Washington resolves choice of law questions under the "most significant relationship" test embodied in the Restatement (Second) of Conflict of Laws §§ 6, 145 (1971). Johnson v. Spider Staging Corp., 87 Wn.2d 577, 580, 555 P.2d 997 (1976). This approach requires that contacts be considered in terms of which contacts are most significant; the number of contacts alone is not in itself determinative. Johnson, 87 Wn. 2d at 581. Factors considered in Johnson include the place where the injury occurred, the place of residence, the place of incorporation or place of doing business of the parties, and the place where the relationship between the parties is centered, if any. 87 Wn.2d at 581. The significance of each of the various contacts is to be evaluated in the context of the type of claim that is being made and the facts of the particular case. See 87 Wn. 2d at 581. The "most significant relationship" approach also directs a court to evaluate the interest and policies expressed in the respective laws of the concerned states. 87 Wn.2d at 580-82.

Id. at 519-20. The Court further stated:

It is not particularly meaningful to attempt to focus on the specific location where that discrimination occurred, particularly when the job involved was an international marketing position that involved a great deal of travel. Of the factors articulated in Johnson, therefore, it is the place of domicile or incorporation of the parties involved that retains the most significance.

Id. at 520. In a footnote the Court stated:

That the firing took place in San Francisco is also of little moment. One could also argue that Japan, where Fannon [Mr. Burnside's supervisor] heard the reports, or the Pacific Ocean, over which he was flying when he decided to fire Burnside, were places where the discrimination occurred.

Id. at n. 7. The Court concluded:

... Washington's interest in assuring that Washington corporations abide by its laws generally, and specifically that they do not engage in illegal discrimination, is primary and mandates the application of Washington law in this case.

Id. at 521.

The Supreme Court reviewed the case in 123 Wn. 2d 93, 864 P.2d 937 (1994). It affirmed the Court of Appeals on the application of the statute. It stated:

The Court of Appeals also reasoned, soundly, that limiting the statute's application to Washington inhabitants would effectively allow Washington employers to discriminate freely against non-Washington inhabitants, thus undermining the fundamental purpose of the act, deterring discrimination. [Citation omitted.] The court therefore interpreted the Legislature's use of the term "inhabitants" as a general reference not intended to impose a residency requirement as a jurisdictional prerequisite to bringing

suit. [Citation omitted.]

We affirm the Court of Appeals' disposition of this issue because it comports with the purpose underlying the statute, to deter discrimination. Statutes should be interpreted to further, not frustrate, their intended purpose. [Citation omitted.] The declaration section of Washington's Law Against Discrimination emphasizes the statute is to be liberally construed. [Citation omitted.]

Burnside, 123 Wn.2d at 99. The Supreme Court agreed with the Court of Appeals that conflict of laws cases in Washington are ordinarily decided by determining which jurisdiction has the most significant contacts and one of the cases it cited was Johnson v. Spider Staging, 87 Wn.2d 577, 580, 555 P.2d 997 (1976). Id. at 100. However, it found that there was no conflict between California's law and Washington's and therefore that a conflict of laws analysis was unnecessary. Id. at 100-04.

Thus, in Burnside v. Simpson Timber both the Court of Appeals and the Supreme Court held that the Washington Law Against Discrimination applied despite the fact that the plaintiff therein lived and worked in California.

Although the Supreme Court, unlike the Court of Appeals, found no conflict between the law of California and Washington, it agreed with the Court of Appeals' interpretation of Washington Law Against Discrimination as giving a cause of action to a non-resident.

The case at bar has three notable similarities to Burnside.

First, both the defendant in Burnside and the defendant in the case at bar are Washington corporations, and, as the Court of Appeals in Burnside said, "... Washington's interest in assuring that Washington corporations abide by its laws generally, and specifically that they do not engage in illegal discrimination, is primary and mandates the application of Washington law in this case." Burnside, 66 Wn. App. at 521.

Second, both cases are ones to which the doctrine of liberal construction in favor of the employee applies. See pp. 8-9 of this Brief and Burnside, 123 Wn.2d at 99.

Third, the Burnside Court stated, "If a Legislature has shown no indication of its intention to limit jurisdiction, an act should be construed as imposing no limitation." Burnside, 66 Wn. App. at 517, and here, as in Burnside, there is no indication that the Legislature intended to limit jurisdiction.

Here, the only foreign state contacts are that Plaintiff was a resident of Oregon, CP 49, and that he worked part of the time in California, Oregon, Idaho, Utah and Montana, CP 50. Most of the other contacts favor application of Washington law: Defendant is a Washington corporation doing business in Washington, CP 3-4, and it has a strong

presence in Washington, CP 49-50, and Plaintiff's pay was calculated in Vancouver, WA, CP 50, and his paychecks were signed by Gordon Cahoon, the owner, who spent Monday through Friday in Vancouver, WA, CP 50-51. The company had him take the physicals required by law in Vancouver, WA. CP 51. In addition, Plaintiff was hired in Washington, started and ended his runs at the Vancouver, WA terminal, would talk to the dispatcher in Vancouver, WA when he had a problem or question, was back at the Vancouver, WA terminal on the average every third day, after which he would go back to the Vancouver, WA terminal to wait to be dispatched. CP 50. He turned in his bills of lading (which was a prerequisite for being paid) and his miles and expenses in Vancouver, WA. CP 50.

Thus, Burnside presents a much stronger case for denying the plaintiff therein the protection of Washington law than the case at bar: in Burnside the employee was based in California and had no real contacts with Washington except that he had formerly worked in Washington, 66 Wn. App. at 515-16, and his employer was a Washington corporation, 66 Wn. App. at 515, whereas in the case at bar almost all contacts favor Washington.

Despite the comparatively weak facts mentioned above in the

plaintiff's case in Burnside, the Court of Appeals and the Washington Supreme Court both applied Washington law. Since Plaintiff's case for applying Washington law is stronger than Burnside, a fortiori Washington law should apply here. Just as the Court of Appeals and Supreme Court concluded that the Washington Law Against Discrimination should be interpreted here to apply to an employee who worked out of state, so the WMWA should be interpreted to apply to Washington-based employees when they are working out of state.

Defendant will doubtless argue that RCW 49.46.005 should change this result. However, since the trial court did not rest its decision on that statute, Plaintiffs will wait for the Brief of Respondent to see if Defendant raises this as an issue.

The trial court in the passage quoted on p. 34 of this Brief appears to be asserting that Burnside is distinguishable from the case at bar because it involved a question of jurisdiction and conflict of laws, whereas the case at bar only involves the interpretation of the statute. CP 323.

However, although some of the language in the Burnside decisions does use the word "jurisdiction," it is clear that what the Court of Appeals and Supreme Court mean by that is not the affirmative defense of jurisdiction but rather the reach the Legislature intended the Washington

Law Against Discrimination to have when it passed that statute, in other words, which employees and employers the statute applied to. This is clear because the Court of Appeals stated, “If a Legislature has shown no indication of its intention to limit jurisdiction, an act should be construed as imposing no limitation. [Citation omitted.]” Burnside, 66 Wn. App. at 517. (Emphasis supplied.) Similarly, the Supreme Court stated:

The court therefore interpreted the Legislature’s use of the term “inhabitants” as a general reference not intended to impose a residency requirement as a jurisdictional prerequisite to bringing suit. [Citation omitted.] .... Statutes should be interpreted to further, not frustrate, their intended purpose. [Citation omitted.]

Burnside, 123 Wn.2d at 99. (Emphasis supplied.) Therefore, the focus of both the Court of Appeals and the Supreme Court in Burnside was on determining the Legislature’s intent in passing the Washington Law Against Discrimination and the trial court was incorrect in assuming otherwise. Thus, the issue in Burnside—whether employees who are not inhabitants are covered by the Washington Law Against Discrimination—is analogous to the issue in the case at bar—whether the WMWA covers Washington-based employees when they work out of state. Accordingly, the Court of Appeals and Supreme Court opinions in Burnside do provide support for Plaintiffs’ position in the case at bar.

3. Defendant Has Not Contested the Amount Plaintiffs Are Owed Nor Plaintiffs' Figures on Prejudgment Interest.

Under federal law, Plaintiff was required to keep log books showing the time he worked. CP 51. The amount Plaintiff is owed has been calculated based on these log books. CP 51 and 53-75; CP 12-39; CP 40-41. Therefore, as shown in the spreadsheet drafted by Dana Gardner as Exhibit D to her Declaration, Plaintiffs are owed the sum of \$12,474.13 in unpaid overtime. CP 38-39. In the three Memoranda presented by Defendant in the trial court Defendant disputed liability but never disagreed with this figure. Thus, under Rainier National Bank v. Lewis, quoted above on p. 17, Defendant has waived this issue.

Also, the failure by Defendant to pay Plaintiff the overtime due him on time constitutes a "forbearance of money" under RCW 19.52.010(1). Therefore, under the statute, interest is due at 12% per annum. In Dautel v. Heritage Home Center, Inc., 89 Wn. App. 148, 154-56, 948 P.2d 397 (1997), rev. den., 135 Wn.2d 1003(1998) the Court held that the claim was liquidated because the employer could have determined the amount owed using objective data. In the case at bar, Plaintiffs have calculated the amount of unpaid overtime owed to the last penny. CP 13, 38-39.

Thus, for the period until when his employment was terminated, Plaintiff is owed \$2,440.45 in statutory interest. CP 38-39. For the period from April 27, 2003 (the end of his last week worked) until November 27, 2004, he is owed an additional \$2,365.09. CP 41. This leads to total prejudgment interest to November 27, 2004 of \$4,805.54. CP 41. It should be noted that in its three Memoranda in the trial court Defendant did not contest either the availability of prejudgment interest in the event Plaintiffs prevailed or Plaintiffs' calculations. Accordingly, it has waived this issue also.

Therefore, Plaintiffs respectfully request that this Court order judgment in the sum of \$12,474.13 in damages for unpaid overtime and statutory interest of \$4,805.54 to November 27, 2004.

4. This Court Should Remand to the Trial Court on Double Damages for Wilful Withholding under RCW Chapter 49.52 and Attorney Fees.

RCW 49.52.050(2) and .070 allow double damages for wilful withholding of an employee's wages. Plaintiffs filed a claim for double damages for wilful withholding. CP 4-5. Because the trial court dismissed Plaintiffs' motion for summary judgment it did not consider this issue. CP 317.

Plaintiffs also requested attorney fees under RCW 49.46.090(1), 49.48.030 and 49.52.070. CP 5. Again, because the trial court dismissed Plaintiffs' motion for summary judgment, it did not consider this issue. CP 317.

Plaintiffs respectfully request that this Court remand to the trial court for consideration of those two issues.

#### E. REQUEST FOR ATTORNEY FEES ON APPEAL

Plaintiffs respectfully request that this Court award attorney fees for this appeal on the basis of RCW 49.46.090(1), RCW 49.48.030 and RCW 49.52.070 and RAP 18.1(b).

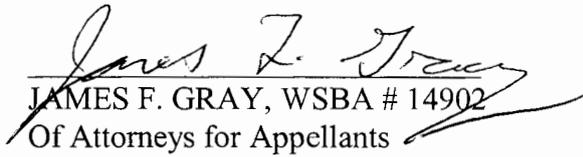
#### F. CONCLUSION

Plaintiffs respectfully request that this Court (1) reverse the trial court's judgment; (2) grant judgment for \$12,474.13 in unpaid overtime plus prejudgment statutory interest to November 27, 2004 of \$4,805.54 and thereafter at the same rate; (3) remand to the trial court for determination of whether double damages should be assessed against Defendant pursuant to RCW 49.52.050(2) and .070 and the amount of attorney fees below pursuant to RCW 49.46.090(1), RCW 49.48.030 and

RCW 49.52.070; and (4) grant Plaintiffs attorney fees for this appeal pursuant to RCW 49.46.090(1), RCW 49.48.030 and RAP 18.1(b).

DATED this <sup>28<sup>th</sup></sup> day of July, 2005.

Respectfully submitted,

  
JAMES F. GRAY, WSBA # 14902  
Of Attorneys for Appellants

SUPERIOR COURT OF WASHINGTON FOR CLARK COUNTY

FRANCIS M. WOODS and PATRICIA A. )  
WOODS, husband and wife, ) No. 04-2-02359-2  
 )  
Plaintiffs, ) OPINION  
 )  
v. )  
 )  
MITCHELL BROS. TRUCK LINE, INC., a )  
Washington corporation, )  
 )  
Defendants. )  
\_\_\_\_\_ )  
\_\_\_\_\_ )

In view of the specific factual circumstances of this case, I find that RCW 49.46 does not apply to those hours worked outside the confines of the state of Washington. The controlling facts, which are not disputed, are that while plaintiff's starting point may have been in Clark County, he did not return to the state each night. He was paid by the mile and not on an hourly rate. Finally the plaintiff was strictly a long haul driver not a combination of driver-installer or contractor.

The beginning of any discussion on this issue must start with the case of Labor & Industries v. Common Carriers, 111 Wn.2d 586 (1988). That case involved a mechanic employed by an interstate trucking firm licensed by the state and the ICC. The Court held that WMWA (RCW 49.46) was not preempted by the federal Motor Carrier Act. Thus the employee was entitled to overtime compensation for all hours worked in excess

of 40 hours per week. One of factors to remember is that the employee worked entirely within Washington, thus there was no issue concerning interstate employment.

Defendant submits that in response to the Common Carriers case, the statute and WAC were amended to provide an exemption for interstate truck drivers. The result was RCW 49.46.130 (2) (f) exempting truck or bus drivers who are subject to the MCA, if compensated with a “reasonably equivalent” system of compensation for overtime. WAC 296-128-012 however, restricts this reasonably equivalent pay to only those “hours worked within the state of Washington, in excess of 40 hours per week”. This restriction is mentioned three times within that regulation. Evidence has further been submitted that under an identical hypothetical situation present in this case, the Department has issued an advisory opinion that a driver in plaintiff’s position would not be entitled to overtime compensation.

Plaintiff responds that the interpretations and/or regulations of the Department are not binding on the Court. I agree that this Court is not confined to the interpretations of the Department, but I do acknowledge that the Department’s regulations are entitled to deference if they are consistent with the state of the law on this issue. In this regard, the case of Labor & Industries v. Overnite Transportation, 67 Wn.App. 24 (1992); is enlightening. At first glance this case would seem to support plaintiff’s position where at page 30 the Court states:

First, Overnite argues that Common Carriers involved a mechanic who worked entirely within this state, while the present case involves drivers who work primarily within the state but who may be and have been called upon to drive interstate. However, two of the federal decisions relied upon by our Supreme Court in Common Carriers involved interstate drivers. See Pettis Moving Co. v. Roberts, 784 F.2d 439, 440 (1986); Williams v. W.M.A.

Transit Co., 472 F.2d 1258, 1259 (D.C. Cir. 1972). In addition, neither the federal cases nor Common Carriers suggest that working entirely within the state is a prerequisite to receiving overtime compensation.

However, later in their opinion the Court of Appeals acknowledged that the Department changed their regulations in response to the Common Carriers decision as stated at page

33:

... Previously, the Department had required that overtime pay be given to any employee who regularly spent more than 50 percent of his or her work time within the state. [FN4] However, in Department of Labor & Indus. v. Common Carriers, Inc., 111 Wn.2d 586, 762 P.2d 348 (1988), our Supreme Court applied the overtime provisions of the WMWA to interstate motor carriers without reference to the percent of time an employee worked in Washington. See Common Carriers, at 588-90. Pursuant to Common Carriers, the Department changed the way it applied the overtime provisions of the WMWA to interstate motor carriers and required that overtime pay be given to employees who worked more than 40 hours per week *within the state*. [FN5]  
[Emphasis added; footnotes omitted]

Finally, in acknowledging the potential economic impact this decision may have on employers, the Court declared that such a regulation was within the authority of the Department and would, in effect, save defendant money stating at 33:

... However, requiring the Department to adopt and publish the rule of Common Carriers in accordance with the Administrative Procedure Act belies the fact that our Supreme Court's Common Carriers opinion had the force of law on the date on which it was decided. In applying Common Carriers to Overnite's interstate drivers, the Department was merely acting in compliance with the law as articulated by our Supreme Court. Under the particular circumstances present here, enforcement was not dependent upon the promulgation of a specific rule pursuant to the Administrative Procedure Act. Moreover, had the Department not changed its approach, Overnite would have

been subject to the 50 percent rule, which would have likely increased the economic burden imposed on Overnite by the WMWA.

Clearly under the Court's interpretation, the regulations promulgated by the Department have as their authority the decisions rendered by the Supreme Court. As quoted above, the Common Carriers case cited the Williams v. W.M.A. Transit Co., as authority. That case was the source of the rule allowing compensation under the local minimum wage for bus drivers who drove more than 50% of the time within the District of Columbia. The case of District of Columbia v. Schwerman Trucking Co. 327 A.2d 818 (D.C. 1974); refined that decision, much like our Department, by restricting overtime for only those hours worked within the District. That Court concluded at page 825 as follows:

Accordingly, it is our conclusion that the place of employment is the controlling factor under the Act. This means that if an employee covered by the Act, regardless of whether he is an employee subject to hours of service regulation by the Department of Transportation, actually works more than 40 hours a week inside the District for the same employer, he is entitled to statutory overtime pay for all such hours. Hours worked in places outside the District borders, however, need not be credited to him for overtime pay computation.

Our courts have recognized the Department's authority to promulgate regulations defining the circumstances under which overtime pay will be awarded. Under these rules, the Department has explicitly stated that only those hours accumulated within the confines of this state are calculated.

Counsel have placed much emphasis on the case of Burnside v. Simpson Paper Co., 123 Wn.2d 93 (1994). In that case the Court, in interpreting RCW 49.60

(Washington's Discrimination statute) held that the legislature's use of the word "inhabitants" was not meant to impose a residency requirement as a jurisdictional prerequisite to bring a suit. Further, there was no actual conflict between the law in Washington and the proposed venue of California. In the case at bar there is no claim of lack of jurisdiction or conflict of laws. The interpretation of inhabitants in Burnside for jurisdictional purposes have no relevancy with the present issue of "within the state" for compensation purposes. Whether this state may extend its net of regulations beyond its borders is not the crucial issue in this case. By this Court's interpretation of the applicable law, the relevant focus is on the hours worked within the state. Only if this Court came to a different conclusion would the concepts of conflicts of law and jurisdictional boundaries come into discussion.

Based on the above conclusions, defendant's motion for Summary Judgment is granted. Please submit the appropriate Order reflecting the above.

  
\_\_\_\_\_  
John F. Nichols  
Judge Clark County Superior Court

**RCW 49.46.130****Minimum rate of compensation for employment in excess of forty hour work week -- Exceptions.**

(1) Except as otherwise provided in this section, no employer shall employ any of his employees for a work week longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(2) This section does not apply to:

(a) Any person exempted pursuant to RCW 49.46.010(5). The payment of compensation or provision of compensatory time off in addition to a salary shall not be a factor in determining whether a person is exempted under RCW 49.46.010(5)(c);

(b) Employees who request compensating time off in lieu of overtime pay;

(c) Any individual employed as a seaman whether or not the seaman is employed on a vessel other than an American vessel;

(d) Seasonal employees who are employed at concessions and recreational establishments at agricultural fairs, including those seasonal employees employed by agricultural fairs, within the state provided that the period of employment for any seasonal employee at any or all agricultural fairs does not exceed fourteen working days a year;

(e) Any individual employed as a motion picture projectionist if that employee is covered by a contract or collective bargaining agreement which regulates hours of work and overtime pay;

(f) An individual employed as a truck or bus driver who is subject to the provisions of the Federal Motor Carrier Act (49 U.S.C. Sec. 3101 et seq. and 49 U.S.C. Sec. 10101 et seq.), if the compensation system under which the truck or bus driver is paid includes overtime pay, reasonably equivalent to that required by this subsection, for working longer than forty hours per week;

(g) Any individual employed (i) on a farm, in the employ of any person, in connection with the cultivation of the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and furbearing animals and wildlife, or in the employ of the owner or tenant or other operator of a farm in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment; or (ii) in packing, packaging, grading, storing or delivering to storage, or to market or to a carrier for transportation to market, any agricultural or horticultural commodity; or (iii) commercial canning, commercial freezing, or any other commercial processing, or with respect to services performed in connection with the cultivation, raising, harvesting, and processing of oysters or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption;

(h) Any industry in which federal law provides for an overtime payment based on a work week other than forty hours. However, the provisions of the federal law regarding overtime payment based on a work week other than forty hours shall nevertheless apply to employees covered by this section without regard to the existence of actual federal jurisdiction over the industrial activity of the particular employer within this state. For the purposes of this subsection, "industry" means a trade, business, industry, or other activity, or branch, or group thereof, in which individuals are gainfully employed (section 3(h) of the Fair Labor Standards Act of 1938, as amended (Public Law 93-259));

(i) Any hours worked by an employee of a carrier by air subject to the provisions of subchapter II of the Railway Labor Act (45 U.S.C. Sec. 181 et seq.), when such hours are voluntarily worked by the employee pursuant to a shift-trading practice under which the employee has the opportunity in the same or in other work weeks to reduce hours worked by voluntarily offering a shift for trade or reassignment.

(3) No employer shall be deemed to have violated subsection (1) of this section by employing any employee of a retail or service establishment for a work week in excess of the applicable work week specified in subsection (1) of this section if:

(a) The regular rate of pay of the employee is in excess of one and one-half times the minimum hourly rate required under RCW 49.46.020; and

(b) More than half of the employee's compensation for a representative period, of not less than one month,

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represents commissions on goods or services.

In determining the proportion of compensation representing commissions, all earnings resulting from the application of a bona fide commission rate is to be deemed commissions on goods or services without regard to whether the computed commissions exceed the draw or guarantee.

(4) No employer of commissioned salespeople primarily engaged in the business of selling automobiles, trucks, recreational vessels, recreational vessel trailers, recreational vehicle trailers, recreational campers, manufactured housing, or farm implements to ultimate purchasers shall violate subsection (1) of this section with respect to such commissioned salespeople if the commissioned salespeople are paid the greater of:

(a) Compensation at the hourly rate, which may not be less than the rate required under RCW 49.46.020, for each hour worked up to forty hours per week, and compensation of one and one-half times that hourly rate for all hours worked over forty hours in one week; or

(b) A straight commission, a salary plus commission, or a salary plus bonus applied to gross salary.

(5) No public agency shall be deemed to have violated subsection (1) of this section with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if: (a) In a work period of twenty-eight consecutive days the employee receives for tours of duty which in the aggregate exceed two hundred forty hours; or (b) in the case of such an employee to whom a work period of at least seven but less than twenty-eight days applies, in his or her work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his or her work period as two hundred forty hours bears to twenty-eight days; compensation at a rate not less than one and one-half times the regular rate at which he or she is employed.

[1998 c 239 § 2. Prior: 1997 c 311 § 1; 1997 c 203 § 2; 1995 c 5 § 1; 1993 c 191 § 1; 1992 c 94 § 1; 1989 c 104 § 1; prior: 1977 ex.s. c 4 § 1; 1977 ex.s. c 74 § 1; 1975 1st ex.s. c 289 § 3.]

#### NOTES:

**Findings -- Intent -- 1998 c 239:** "The legislature finds that employees in the airline industry have a long-standing practice and tradition of trading shifts voluntarily among themselves. The legislature also finds that federal law exempts airline employees from the provisions of federal overtime regulations. This act is intended to specify that airline industry employers are not required to pay overtime compensation to an employee agreeing to work additional hours for a coemployee." [1998 c 239 § 1.]

**Intent -- Collective bargaining agreements -- 1998 c 239:** "This act does not alter the terms, conditions, or practices contained in any collective bargaining agreement." [1998 c 239 § 3.]

**Retroactive application -- 1998 c 239:** "This act is remedial in nature and applies retroactively." [1998 c 239 § 4.]

**Severability -- 1998 c 239:** "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1998 c 239 § 5.]

**Construction -- 1997 c 203:** "Nothing in this act shall be construed to alter the terms, conditions, or practices contained in any collective bargaining agreement in effect at the time of the effective date of this act [July 27, 1997] until the expiration date of such agreement." [1997 c 203 § 4.]

**Intent -- Application -- 1995 c 5:** "This act is intended to clarify the original intent of RCW 49.46.010(5)(c). This act applies to all administrative and judicial actions commenced on or after February 1, 1995, and pending on March 30, 1995, and such actions commenced on or after March 30, 1995." [1995 c 5 § 2.]

**Effective date -- 1995 c 5:** "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect immediately [March 30, 1995]." [1995 c 5 § 3.]

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**WAC 296-128-011 Special recordkeeping requirements.** (1) In addition to the records required by WAC 296-128-010, employers who employ individuals as truck or bus drivers subject to the provisions of the Federal Motor Carrier Act shall maintain records indicating the base rate of pay, the overtime rate of pay, the hours worked by each employee for each type of work, and the formulas and projected work hours used to substantiate any deviation from payment on an hourly basis pursuant to WAC 296-128-012. The records shall indicate the period of time for which the base rate of pay and the overtime rate of pay are in effect.

For the purposes of this section and WAC 296-128-012, "base rate of pay" means the amount of compensation paid per hour or per unit of work in a workweek of forty hours or less. A base rate of pay shall be established in advance of the work performed and may be based on hours or work units such as mileage, performance of specified duties, or a specified percentage of the gross proceeds charged for specified work. A base rate of pay shall not be established that will result in compensation at less than the minimum wage prescribed in RCW 49.46.020. "Overtime rate of pay" means the amount of compensation paid for hours worked within the state of Washington in excess of forty hours per week and shall be at least one and one-half times the base rate of pay.

(2) The records required by this section shall be made available by the employer at the request of the department. Any current or past employee may obtain copies of the formula, the base rate of pay, the overtime rate of pay, and that employee's records. Job applicants seeking employment by the employer as truck or bus drivers subject to the provisions of the Federal Motor Carrier Act, may obtain copies of the formula, the base rate of pay, and the overtime rate of pay.

[Statutory Authority: RCW 43.22.270, 49.46.130 and 1989 c 104. 89-22-120, § 296-128-011, filed 11/1/89, effective 12/2/89.]

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**WAC 296-128-012 Overtime for truck and bus drivers.** (1)(a) The compensation system under which a truck or bus driver subject to the provisions of the Federal Motor Carrier Act is paid shall include overtime pay at least reasonably equivalent to that required by RCW 49.46.130 for working within the state of Washington in excess of forty hours a week. To meet this requirement, an employer may, with notice to a truck or bus driver subject to the provisions of the Federal Motor Carrier Act, establish a rate of pay that is not on an hourly basis and that includes in the rate of pay compensation for overtime. An employer shall substantiate any deviation from payment on an hourly basis to the satisfaction of the department by using the following formula or an alternative formula that, at a minimum, compensates hours worked within the state of Washington in excess of forty hours per week at an overtime rate of pay and distributes the projected overtime pay over the average number of hours projected to be worked. The following formula is recommended for establishing a uniform rate of pay to compensate work that is not paid on an hourly basis and for which compensation for overtime is included:

1. Define work unit first. E.g., miles, loading, unloading, other.
2. 
$$\frac{\text{Average number of work units}}{\text{per hour}} = \frac{\text{Average number of work units accomplished per week}}{\text{Average number of hours projected to be worked per week}}$$
3. Weekly Base Rate = Number of units per hour x 40 hours x base rate of pay
4. Weekly Overtime rate = Number of units per hour x number of hours over 40 x overtime rate of pay
5. Total weekly pay = Weekly base rate plus weekly overtime rate
6. 
$$\text{Uniform rate of pay} = \frac{\text{Total weekly pay}}{\text{Total work units}}$$

**Example:** A truck driver is paid on a mileage basis for a two hundred thirty mile trip performed about ten times a week. The base rate of pay is twenty cents a mile. The overtime rate of pay is thirty cents a mile. The average length of the trip is four and one-half hours.

1. 
$$\frac{2300 \text{ mi.}}{\text{per week}} \text{ divided by } \frac{45 \text{ hours}}{\text{week}} = \frac{51.1 \text{ miles}}{\text{per hour}}$$
2. (a) 51.1 miles/hour times 40 hours times .20/ mile = \$408.80
- (b) 51.1 miles/hour times 5 hours = 255.5 miles
- (c) 255.5 miles times .30/mile = \$76.65
- (d) \$408.80 plus \$76.65 = \$485.45 divided by 2300 miles = 21.1 cents mile

(b) In using a formula to determine a rate of pay, the average number of hours projected to be worked and the average number of work units accomplished per week shall reflect the actual number of hours worked and work units projected to be accomplished by persons performing the same type of work over a representative time period within the past two years consisting of at least twenty-six consecutive weeks.

(c) The department may evaluate alternative rates of pay and formulas used by

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employers in order to determine whether the rates of pay established under this section result in the driver receiving compensation reasonably equivalent to one and one-half times the base rate of pay for actual hours worked within the state of Washington in excess of forty hours per week.

(2) Where an employee receives a different base rate of pay depending on the type of work performed, the rate that is paid or used for hours worked within the state of Washington in excess of forty hours per week shall be at least the overtime rate of pay for the type of work in which most hours were worked.

[Statutory Authority: RCW 43.22.270, 49.46.130 and 1989 c 104. 89-22-120, § 296-128-012, filed 11/1/89, effective 12/2/89.]

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THE COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

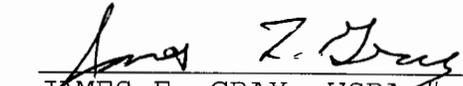
FRANCIS M. WOODS, husband and wife,)	NO: 33094-6-II
)	)
Appellants,	)
)	)
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vs.	DECLARATION OF SERVICE
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MITCHELL BROS. TRUCK LINE, INC.,	)
a Washington corporation,	)
)	)
Respondent.	)
)	)

On July 28, 2005 I hand-delivered a copy of the following documents: (1) Brief of Appellants, (2) letter to Clerk's Office dated July 28, 2005 and (3) this Declaration of Service to Mr. David J. Sweeney attorney for Respondent.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

1 Signed in Vancouver, WA.

2 DATED this 28th day of July, 2005.

3  
4   
5 ~~JAMES F. GRAY, WSBA # 14902~~  
6 Of Attorneys for Appellants