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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COURT OF APPEALS OF THE
STATE OF WASHINGTON, DIVISION III

JOHN JENSEN, a single person,

Appellant,

v.

LINCOLN COUNTY, a political subdivision of
the State of Washington,

Respondent.

APPEALED FROM SPOKANE COUNTY SUPERIOR COURT
CAUSE NO. 12-2-02275-0

APPELLANT JOHN JENSEN'S REPLY BRIEF

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I. INTRODUCTION

Both the Trial Court and Respondent Lincoln County improperly ignore the multi-factor Stevens test to determine if Mr. Jensen's drive time is compensable. In doing so, both the Trial Court and Lincoln County assert that whether use of the County owned Suburban was required is dispositive of the issue. In fact, it is not. The dispositive issue is whether Lincoln County authorized Mr. Jensen to perform work on its behalf at the County shop and in the County Suburban prior to arriving at the crusher site.

Lincoln County authorized Mr. Jensen to arrive at the County shop, load the County Suburban with crusher parts, and travel to the crusher site in that vehicle. The rules regarding use of the County Suburban evidence that Mr. Jensen's drive time is compensable. Mr. Jensen's drive time is compensable under the Washington Minimum Wage Act ("MWA").

As such, the Trial Court erred in denying Mr. Jensen's Motion for Partial Summary Judgment and granting Lincoln County's Motion for Summary Judgment.

II. ARGUMENT

Contrary to Lincoln County's argument, Mr. Jensen's claims are not dependent on a finding that use of the County Suburban is a requirement. Use of the County owned vehicle and the rules imposed by the County are evidence to support application of the Stevens factors. Because both the Trial Court and Lincoln County fail to apply the factors to this case, the Trial Court should be overturned.

It is clear that the County is required to provide a vehicle for the crushing crew's use. (CP 135, ¶ 12.3). Further, it is undisputed that Mr. Jensen drives a Lincoln County vehicle from the County shop to the crushing sites without being compensated his hourly wage. Lincoln County restricts the vehicle to employee use only thereby prohibiting non-employees from riding as passengers in the County vehicle. (CP 219). The County requires employees operating the employer vehicle to wear seat belts, obey the rules of the road, and not carry alcohol. Id. Moreover, the County requires Mr. Jensen to anticipate any repairs or special maintenance the vehicle may need, fuel the vehicle, obtain oil changes, and

keep the vehicle in a reasonably clean condition. (CP 218-219). Furthermore, the County vehicle is used strictly for travel to and from the County shop and the rock-crushing site. (CP 135; 219). Mr. Jensen also utilizes that vehicle to bring necessary rock crusher parts to the rock-crushing site. (CP 49; 135; 195-196; 202). As such, Mr. Jensen's drive time to and from the County shop and the variable crushing sites is compensable.

A. The Trial Court Failed to Apply The Stevens Factors In Determining Whether Mr. Jensen's Drive Time Constituted Hours Worked At A Prescribed Work Place or Premises.

Lincoln County concedes that the Trial Court did not apply the Stevens factors. It argues that if the Trial Court had applied the Stevens factors the outcome would have been the same. (Respondent's Brief, p. 12). However, the Trial Court addressed factors entirely different than those contemplated by the Stevens Court. The Trial Court considered whether Mr. Jensen was required to go to the County shop prior to arriving at the rock-crushing site, whether Mr. Jensen could take his personal vehicle to the crushing site, whether the monthly \$150.00 drive time compensation was a benefit that could be

taken away, and the distance Mr. Jensen lives from the crushing site. (RP 7, 10-11, 18, 29). These are not the proper inquires.

According to the Stevens Court, the proper inquiries are: whether the employer is “on duty,” at the “employer’s premises” or “prescribed work place.” Stevens v. Brink’s Home Security, Inc., 162 Wn.2d 42, 47 (2007) (quoting WAC 296-126-002(8)). In determining whether an employee is “on duty” the Court looks at the amount of control the employer exerts over the employee and whether the employee is required to perform work. Id. at 48-49. Likewise, when determining whether an employee is at the “employer’s premises” or “prescribed work place” the Court looks to whether the utilization of the vehicle is an integral part of the work performed by the employee. Id. at 49.

i. Mr. Jensen Is On Duty When He Utilizes The County Suburban For Travel To And From The County Shop And The Various Rock-Crushing Sites.

Lincoln County exerts the requisite amount of control over Mr. Jensen when he utilizes the County vehicle when he

travels in or operates that vehicle. Thus, Mr. Jensen is on duty during his drive time. Similar to the employer in Stevens, Lincoln County exerts a significant amount of control over Mr. Jensen and restricts Mr. Jensen's personal activities when he operates the County vehicle. (CP 218-220). Like the employer in Stevens, Lincoln County restricts the vehicle to employee use only thereby prohibiting non-employees from riding as passengers in the County vehicle. (CP 219). Likewise, both the employer in Stevens and Lincoln County require employees operating the employer vehicle to wear seat belts, obey the rules of the road, and not carry alcohol. Id. Moreover, the County requires Mr. Jensen to anticipate any repairs or special maintenance the vehicle may need, fuel the vehicle, obtain oil changes, and keep the vehicle in a reasonably clean condition. (CP 218-219). Furthermore, the County vehicle is used strictly for travel to and from the County shop and the rock-crushing site. (CP 135; 219). As a result, it is unequivocal and contrary to the finding of the Trial Court, Mr. Jensen is on duty when he utilizes the County vehicle for travel to and from the County

shop and the various rock crushing sites because Lincoln County controls Mr. Jensen's use of the vehicle and his time while he is using that vehicle.

ii. Mr. Jensen Is At A Prescribed Work Place Or Premises When He Utilizes The County Suburban For Travel To And From The County Shop.

The County vehicle is a prescribed workplace because it is an integral component to the performance of Mr. Jensen's job as a member of the rock-crushing crew. The vehicle is so integral to Mr. Jensen's job that the County is required to provide the vehicle as a condition of employment under the collective bargaining agreement. (CP 135, ¶ 12.3). Like the Stevens employees, utilizing the County vehicle is an integral part of the work performed by Mr. Jensen because the County vehicle is necessary to allow Mr. Jensen and members of the rock crushing crew to reach distant rock-crushing sites and to transport essential rock-crushing equipment and parts to the crushing site, as needed. (CP 49; 135; 195-196; 202). Furthermore, similar to the employees in Stevens, and like a work premises, Mr. Jensen is required to keep the County

vehicle clean. (CP 218-219). Mr. Jensen is required to clean the interior of the vehicle and wash the exterior of the vehicle. Id. Moreover, he is required to keep it safe by indicating when maintenance is required, keep the vehicle fueled, and obey the rules of the road while operating the vehicle. Id. The collective bargaining agreement requires that the County provide a vehicle to the rock-crushing crew specifically for travel to and from work sites (the County shop and the various rock-crushing sites). (CP 135). In addition, Lincoln County insures that vehicle.

Therefore, it is clear that Mr. Jensen is at a prescribed workplace or on the employer's premises when traveling in or operating the County vehicle because the vehicle is an integral part of the rock-crushing crew's work and is treated by both Lincoln County and the crushing crew like a work place.

iii. Contrary To The Trial Court's Improper Analysis, Mr. Jensen Is Not An Ordinary Commuter.

The "average commute" is the time an employee spends traveling from home to a work site or workplace, not the time

an employee spends traveling between work sites or from a workplace to a work site. Mr. Jensen's commute consists of walking or driving approximately 7 blocks from his home in Davenport, Washington to the County shop. Once he arrives at the County shop and travels to the crushing site, he is not a commuter. Thus, there exist stark differences between Mr. Jensen's drive time to the crushing site and the average employee's commute to work.

Mr. Jensen is not seeking compensation for the time he spends commuting from home to the County shop. Mr. Jensen seeks compensation for the time he spends acting on behalf of Lincoln County while traveling from the County shop to crushing sites.

Commuter cases, such as Anderson v. Dep't of Social and Health Servs., 115 Wn. App. 452, 63 P.3d 134 (2003), concern compensating an employee for travel from home to the workplace and focus on the amount of control the employer has over the employee during the commute. As set forth in Mr. Jensen's initial brief, Anderson does not apply.

Rather, this case concerns compensating an employee for travel time after the employee has arrived at work. Like the Stevens employees, Mr. Jensen shows up at a work premises and begins performing work before arriving at a second work site, the crusher site. Mr. Jensen arrives at work, the County shop, and begins acting on behalf of his employer by loading the County vehicle with any necessary parts, then he travels in that County vehicle to the rock-crushing site, all on behalf of Lincoln County.

As such, Mr. Jensen's drive time is compensable and the Trial Court should be reversed.

B. DOL Policy ES.C. 2 Supports Mr. Jensen's Position.

Contrary to Lincoln County's assertions, DOL Policy ES. C. 2 unequivocally supports Mr. Jensen's claims. In fact, the policy was updated to comply with the Washington State Supreme Court ruling in Stevens v. Brink's Home Security, Inc., 162 Wn.2d 42, (2007).

According to the policy, for time to constitute "*hours worked*" three elements must be met: "(1) *an employee is*

authorized or required by the employer, (2) to be on duty, and (3) on the employer's premises or at a prescribed workplace.” (Respondent's Brief, Appendix A, ES. C. 2 Hours Worked, p. 2). For example, the policy further explains, “[t]ime spent driving a company-provided vehicle from the employer's place of business to the job site is considered hours worked... Time spent driving or riding as a passenger from job site to job site is considered hours worked.” *Id.* at p. 3.

Here, Mr. Jensen is **authorized** by the employer to be on duty at the County shop looking for necessary rock-crushing equipment and loading that equipment, if any, into the County vehicle prior to utilizing the County vehicle for travel from the County shop to the rock-crushing site. Moreover, Mr. Jensen is authorized to use the County vehicle for travel to and from the County shop and the variable rock-crushing sites. As a result, according to the policy, the time Mr. Jensen spends traveling in the County vehicle to and from the County shop and the rock crushing sites constitutes “*hours worked.*”

The policy also provides that Mr. Jensen is “on duty” when he travels in the County owned vehicle between work sites. “*To determine if the employee is on duty, you must evaluate the extent to which the employer restricts the employee’s personal activities and controls the employee’s time.*” (ES. C. 2 Hours Worked, p. 3).

The Court looks at the following factors; however, the mere presence or absence of any single factor is not determinative: (1) the extent to which the employee is free to make personal stops and engage in personal activities or whether the vehicle may only be used for company business, (2) the extent to which the employee is required to respond to work related calls or to be redirected while en route, (3) whether the employer is required to maintain contact with the employer, and (4) the extent to which the employee receives assignments at home and must spend time writing down the assignments and mapping the route to reach the first job site before beginning the drive. Id.

Here, Mr. Jensen cannot make personal stops or engage in personal activities during the drive between job sites. (CP 49, 135, 219). Moreover, Mr. Jensen may only use the County vehicle for County business. *Id.* While Mr. Jensen's use of the County vehicle does not meet all four of the aforementioned factors, the absence of any single factor is not determinative. Mr. Jensen is on duty while he operates the County vehicle because Lincoln County exerts the requisite amount of control over Mr. Jensen's use of the vehicle by restricting the vehicles use and requiring that employees conduct only County business while utilizing the vehicle.

Lastly, according to the policy, Mr. Jensen is on the employer's premises or at a prescribed work place when driving the company vehicle between job sites. The policy provides, "*[t]o determine if a company-provided vehicle constitutes a 'prescribed work place,' you must evaluate whether driving the particular vehicle is an integral part of the work performed by the employee.*" (ES. C. 2 Hours Worked, p. 3). The following factors are considered; however

the mere presence or absence of any single factor is not determinative: (1) whether the nature of the business requires the employee to drive a particular vehicle provided by the employer to carry necessary non-personal tools and equipment to the site, (2) the extent to which the company provided vehicle serves as a location where the employer authorizes the employee to load materials or equipment, and (3) the extent to which the employer requires the employee to ensure that the vehicle is kept clean, organized, safe, and serviced. Id. at 4.

Here, Mr. Jensen often carries essential rock-crushing tools and equipment in the County vehicle and is authorized by Lincoln County to do so. Mr. Jensen uses the vehicle to load equipment at the County shop. And, Lincoln County imposes numerous requirements upon Mr. Jensen's use of the County vehicle including keeping the vehicle safe, clean, and serviced. Therefore, the County vehicle constitutes Lincoln County's premises or a prescribed work place.

Consequently, the policy supports Mr. Jensen's position and application of the policy to Mr. Jensen's situation reveals that under the policy Mr. Jensen is entitled to compensation for hours worked while on duty at a prescribed work place for his travel time to and from the County shop and the various rock-crushing sites in the County vehicle.

C. Lincoln County Willfully Withheld Wages From Mr. Jensen And As A Result Mr. Jensen Is Entitled to Payment of Wages and Attorney Fees.

As evidenced by the collective bargaining agreement governing the employee-employer relationship between Lincoln County and certain Lincoln County employees, Lincoln County compensates a number of employees for the time those employees spend traveling in a County owned vehicle between job sites. (CP 134-135). However, the rock-crushing crew is specifically excluded from such compensation. Id. Instead of compensating Mr. Jensen with his regular rate of pay for his travel time he is compensated with a \$150 monthly stipend for travel time. (CP 148). Such compensation is woefully insufficient and in violation of the

Washington Minimum Wage Act. RCW 49.46 et seq. Lincoln County intentionally withheld compensation for travel time from only the rock-crushing crew while compensating other Lincoln County employees for exactly the same type of travel to and from work sites. (CP 134-135). As a result, Lincoln County willfully withheld wages from Mr. Jensen in an attempt to circumvent the clear mandates of the MWA by compensating Mr. Jensen and the rock-crushing crew with a stipend of only \$150 per month rather than their regular rate of pay for the time they spend traveling to and from the work sites. Thus, Mr. Jensen is entitled to compensation for his travel time and reasonable attorney fees as provided by RCW 49.48.010 and RCW 49.48.030. Moreover, under RCW 49.52.070, Mr. Jensen is entitled to double damages and attorney fees for Lincoln County's willful withholding of wages.

D. Lincoln County Attempt To Waive Mr. Jensen's Rights Under the Washington Minimum Wage Act Is Improper.

As set forth in Mr. Jensen's initial brief, the rights provided by the Washington Minimum Wage Act ("MWA") cannot be waived by a collective bargaining agreement. Schneider v. Snyder's Foods, Inc., 95 Wn. App. 399, 402 (1999) review denied, 139 Wn.2d 1003 (1999). It provides, "[a]ny agreement between such employee and the employer to work for less than such wage rate shall be no defense" to an action brought under the MWA. RCW 49.46.090(1). Contrary to the Trial Court's apparent belief that the \$150.00 monthly stipend paid to Mr. Jensen is simply a benefit, as propounded by Lincoln County at the summary judgment hearing, Lincoln County admitted that the \$150 monthly travel stipend was compensation for travel time. (RP, p. 7, ll. 14-22; CP 148, 212-213). As set forth above, Mr. Jensen is on duty at a prescribed work place when he takes the County vehicle to and from the rock-crushing site and must be compensated for those hours. The \$150 monthly stipend is

woefully insufficient under the MWA. As a result, the Trial Court erred in finding that the \$150 monthly stipend comports with the Washington Minimum Wage Act.

III. RAP 18.1 MOTION FOR ATTORNEY FEES AND COSTS

“Any employer who pays any employee less than wages to which such employee is entitled under or by virtue of this chapter, shall be liable to such employee for the full amount of such wage rate... and for costs and such reasonable attorney’s fees as may be allowed by the court.”

RCW 49.46.090. Therefore, pursuant to RAP 18.1 and pursuant to RCW 49.46.090, John Jensen respectfully requests an award of reasonable attorney fees and costs incurred below and on Appeal.

IV. CONCLUSION

Pursuant to the foregoing, John Jensen requests that this Court reverse the Trial Court’s grant of Summary Judgment to Lincoln County and denial of John Jensen’s Partial Summary Judgment. In addition, John Jensen requests that this Court rule in favor of John Jensen and

remand this case back to the Trial Court for a determination of damages.

DATED this 16th day of November, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of November, 2013, a true and correct copy of the foregoing document was served by the method indicated below to the following parties:

<input checked="" type="checkbox"/>	HAND DELIVERY	Michael E. McFarland, Jr.
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