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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

NO. 316688-III

JOHN JENSEN, a single person,
Appellant/Plaintiff,

v.

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

Respondents/Defendants.

Respondents' Brief

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TABLE OF CONTENTS

| | | |
|------|--|----|
| I. | INTRODUCTION | 1 |
| II. | ISSUE PRESENTED..... | 3 |
| III. | STATEMENT OF THE CASE..... | 3 |
| | A. Factual Background | 3 |
| | B. Procedural Background..... | 6 |
| IV. | ARGUMENT..... | 7 |
| | A. Scope of Review | 7 |
| | B. Crushing Crew Members Are Not "Required" To Utilize The County-Owned Vehicle To Travel To Job Sites..... | 9 |
| | C. The Trial Court Correctly Determined As A Matter of Law That Mr. Jensen's Drive Time Does Not Constitute Hours Worked | 10 |
| | 1. Mr. Jensen Was Not "On Duty" During His Commute..... | 13 |
| | 2. Mr. Jensen Was Not At Lincoln County's "Premises" or "Prescribed Work Place."..... | 18 |
| | D. The Department Of Labor And Industries Administrative Policy Cited By Mr. Jensen Does Not Support His Argument. | 22 |
| | E. Mr. Jensen Is Not Entitled To Payment Of "Wages" Or "Attorney Fees." | 24 |
| | F. Since Mr. Jensen's Commute Does Not Constitute Compensable Time, His Rights Under the Minimum Wage Act Are Not Implicated by the Collective Bargaining Agreement. | 26 |
| V. | CONCLUSION..... | 27 |
| VI. | APPENDIX A..... | 29 |

TABLE OF AUTHORITIES

| | Page(s) |
|--|----------------|
| Cases | |
| <i>Anderson v. Dept. of Social and Health Servs.</i> , 115 Wn.App. 452, 63 P.3d 134 (2003)..... | <i>passim</i> |
| <i>Brandt v. Imperio</i> , 1 Wn.App. 678, 463 P.2d 197 (1969)..... | 25 |
| <i>Castro v. Stanwood Sch. Dist. No. 401</i> , 151 Wn.2d 221, 86 P.3d 1166 (2004)..... | 7 |
| <i>Haubry v. Snow</i> , 106 Wn.App. 666, 31 P.3d 1186 (2001)..... | 8 |
| <i>Keytronic Corp., Inc., v. Aetna Fire Underwriters Ins., Co.</i> , 124 Wn.2d 618, 881 P.2d 2001 (1995)..... | 7 |
| <i>Kinney v. Cook</i> , 150 Wn.App. 187, 208 P.3d 1 (2009)..... | 8 |
| <i>Kirby v. City of Tacoma</i> , 124 Wn.App. 454, 98 P.3d 827 (2004)..... | 7 |
| <i>Meyer v. Univ. of Wash.</i> , 105 Wn.2d 847, 719 P.2d 98 (1986)..... | 8 |
| <i>Qwest Corp. v. City of Bellevue</i> , 161 Wn.2d 353, 166 P.3d 667 (2007)..... | 8 |
| <i>Ranger Ins. Co. v. Pierce Co.</i> , 164 Wn.2d 545, 192 P.3d 886 (2008)..... | 8 |
| <i>Reich v. New York City Transit Auth.</i> , 45 F.3d 646 (2d. Cir.1995)..... | 16 |
| <i>Schilling v. Radio Holdings, Inc.</i> , 136 Wn.2d 152, 961 P.2d 371 (1998)..... | 25 |
| <i>Stevens v. Brink's Home Security, Inc.</i> , 162 Wn.2d 42, 169 P.3d 473 (2007)..... | <i>passim</i> |

Statutes

RCW 49.46, Washington Minimum Wage Act..... *passim*
RCW 49.46.01025
RCW 49.46.010(7).....24
RCW 49.48.01024
RCW 49.48.03024
RCW 49.52.05024
RCW 49.52.07024

Other Authorities

WAC 296-126-002(8)..... *passim*
WAC 296-128-002(8).....1
Washington Department of Labor and Industries Administrative
Policy ES.C.222, 23, 24

I. INTRODUCTION

The issue on appeal is whether Plaintiff/Appellant John Jensen is entitled to additional compensation under the Minimum Wage Act. More specifically, the issue is whether the time Mr. Jensen spends commuting in a county-owned vehicle constitutes compensable time under the Minimum Wage Act (RCW 49.46).

Mr. Jensen contends that his travel time between the county shop and the job site constitutes "hours worked" as defined by WAC 296-128-002(8). Defendant/Respondent Lincoln County contends that Mr. Jensen's voluntary decision to use a county-owned vehicle, as opposed to his own vehicle, to travel to and from the job site, is non-compensable time and not "hours worked."

Mr. Jensen's argument that the travel time at issue is compensable is based solely upon the fact that he frequently chooses to utilize a Lincoln County vehicle as his method of transportation. Indeed, in an effort to transform his non-compensable travel time to meet the definition of "hours worked," Mr. Jensen repeatedly mischaracterizes his use the county-provided vehicle as a "requirement" imposed upon him by Lincoln County. As is set forth below, Mr. Jensen's representation that he was "required" to use the county-owned vehicle to travel to and from a job site is belied by his own deposition testimony, in which he readily concedes

that he was free to utilize his own transportation to and from the mobile crushing sites, and in fact, previously did so without incident or prohibition from Lincoln County. Further, Mr. Jensen testified that other employees utilized personal transportation to get to and from the crusher sites. Pursuant to and based upon Mr. Jensen's own deposition testimony, there was no genuine issue of material fact before the trial court regarding whether or not Mr. Jensen was required to utilize the county-owned vehicle to travel to and from job sites.

As a matter of law, Mr. Jensen's time spent commuting does not constitute "hours worked" under the Minimum Wage Act. Mr. Jensen is not "on duty" while using the county-owned vehicle. Additionally, Mr. Jensen cannot establish that he was at his "prescribed work place" while commuting. Mr. Jensen's use of the county-owned vehicle to commute to work cannot be considered "essential" or "integral" to Lincoln County's business, nor is it a "requirement" imposed upon Mr. Jensen under the Minimum Wage Act. As such, Mr. Jensen is a normal commuter who is not entitled to compensation for travel time to and from employment. The trial court properly dismissed Mr. Jensen's claims, as he is not entitled to compensation for his "travel time" to and from the jobsite. This Court should affirm the trial court's order granting summary judgment in favor of Lincoln County.

II. ISSUE PRESENTED

1. When an employer provides its employees with the option of traveling to a job site in an employer-owned vehicle, but does not require the employees to utilize the employer-owned vehicle, are the employees who choose to utilize the employer-owned vehicle entitled to compensation for their travel time, when employees who choose not to utilize the employer-owned vehicle are not compensated for their travel time?
2. Did the trial court properly conclude that there was no issue of material fact, where all evidence established that Mr. Jensen was not required to utilize the county-owned vehicle for commuting purposes?
3. Did the trial court properly conclude that as a matter of law Mr. Jensen was not entitled to payment of wages for the time he spent commuting, where he is not "on duty" or at his "prescribed work place" during the commute?

III. STATEMENT OF THE CASE

A. Factual Background

John Jensen is employed on a Lincoln County rock-crushing crew. CP 49. The rock-crushing crew utilizes a portable crusher, which has been set up at a variety of locations during Mr. Jensen's tenure with Lincoln

County. CP 192. Mr. Jensen is also part of the Local #1254 and Washington State Council of County and City Employees of the American Federation of State, County and Municipal Employees, AFL-CIO ("Local 1254"). CP 177. The AFL-CIO entered into a collective bargaining agreement (CBA) with Lincoln County on behalf of Mr. Jensen and other union members. CP 178. The pay schedule attached as Appendix A to the CBA specifies that "Crusher" classification and "Crusher Foreman" classification will entitle employees to an additional \$150.00 per month for "travel allowance." CP 148. The CBA also specified the following:

12.3 Daily working hours shall be from 7:00 to 3:30 P.M. with one half (1/2) hour lunch time for the Crusher Foreman, Crusher Crew, Bridge Foreman, and Bridge Crew. This eight (8) hour period does not include travel time to and from the work site, but transportation shall be furnished by the County to and from the work site.

CP 134.

The requirement that Lincoln County furnish transportation to and from the work site was negotiated by the union so that crushing crew members did not have to park their vehicles next to the crushing plant, where they would collect dues and debris all day long. CP 109. There is no requirement in the CBA or elsewhere that any crushing crew member utilize the county-provided transportation.

In his deposition, Mr. Jensen testified that it was his practice to ride in the county-owned vehicle to the job site. CP 173-74. Mr. Jensen would drive his own vehicle to the county shop in the morning, whereupon he would visit with the mechanics until the other members of the crusher crew would arrive. CP 175. Once the entire crew was present, he and the other crew members would take the county-owned vehicle to the job site. CP 174. The crew member who would drive was "whoever got behind the wheel." CP 174. During the drive to the mobile crushing sites, Mr. Jensen engaged in personal activities and was not required to perform any work. CP 175. Lincoln County did not impose any rules as to allowed activities in the county-owned vehicle except for prohibiting alcohol consumption and towing personal property with the vehicle. CP 175.

Mr. Jensen acknowledged that other individuals on the crusher crew would drive their personal vehicles to and from the mobile crusher sites. CP 172-74. Mr. Jensen also admitted that no individual from either Lincoln County or the AFL-CIO told him the CBA required him to pick up the county-owned vehicle and drive it to the job sites. CP 178. Additionally, no individual has ever told him he was required to travel to the mobile crushing sites in the county-owned vehicle, nor has any individual informed Mr. Jensen he was not allowed to drive his personal vehicle to a job site. CP 176-77. Indeed, and perhaps most importantly,

Mr. Jensen testified that he drove his own personal vehicle to job sites in the past. CP 171. Essentially, the county-owned vehicle was available for the crusher crew for convenience, but none of the crew members were required to drive the vehicle to the mobile crushing sites.

B. Procedural Background

This case comes to the Court on appeal from a summary judgment order. Mr. Jensen first filed a Complaint for Damages on June 12, 2012, alleging that Lincoln County had failed to compensate Mr. Jensen and others for work in excess of 40 hours a week in violation of RCW 49.46 *et seq.* CP 3-8. Lincoln County filed an Answer and Affirmative Defenses on July 11, 2012. CP 29-33. In February of 2013, Mr. Jensen filed a motion seeking leave to amend his complaint. CP 78. On March 14, 2013, the trial court granted Mr. Jensen's motion. CP 92-93. Mr. Jensen then filed an Amended Complaint that asserted claims against Lincoln County on his own behalf. CP 101.

Subsequently, Mr. Jensen and Lincoln County both filed motions seeking summary judgment. CP 243; CP 179. In a memorandum supporting their motion, Lincoln County asserted that Mr. Jensen was not entitled to wages for the time he spends traveling to and from the rock-crushing sites, because he was not "on duty" or at his "prescribed work place" during the commute. CP 149. Mr. Jensen asserted that he was

entitled to compensation for time spent in the county-owned vehicle as a matter of law, and requested that the trial court issue an order finding Lincoln County liable for violations of the Washington Minimum Wage Act. CP 221.

Finding that no material issues of fact exist, the trial court granted summary judgment for Lincoln County and denied Mr. Jensen's motion on May 3, 2013. CP 292-93. Mr. Jensen's claims against Lincoln County were dismissed with prejudice. CP 293. Mr. Jensen then filed a Notice of Appeal on May 14, 2014, appealing the trial court's order. CP 296.

IV. ARGUMENT

A. Scope of Review

An appellate court engages in the same inquiry as the trial court when reviewing the propriety of a grant of summary judgment. *Keytronic Corp., Inc., v. Aetna Fire Underwriters Ins., Co.*, 124 Wn.2d 618, 623-24, 881 P.2d 2001 (1995). A trial court's grant of a summary judgment motion is reviewed de novo. *Castro v. Stanwood Sch. Dist. No. 401*, 151 Wn.2d 221, 224, 86 P.3d 1166, 1167 (2004). Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Kirby v. City of Tacoma*, 124 Wn.App. 454, 464, 98 P.3d 827 (2004). All facts and reasonable inferences must be viewed in the light most favorable to the nonmoving

party. *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353, 358, 166 P.3d 667 (2007). A material fact is one upon which the outcome of litigation depends. *Kinney v. Cook*, 150 Wn.App. 187, 192, 208 P.3d 1 (2009).

Once the absence of a material fact is established, the non-moving party must show that it creates a genuine issue for the fact finder. *Meyer v. Univ. of Wash.*, 105 Wn.2d 847, 852, 719 P.2d 98 (1986). A genuine issue of fact exists, which precludes summary judgment, only when reasonable minds could reach different factual conclusions after considering the evidence. *Ranger Ins. Co. v. Pierce Co.*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008).

The trial court correctly concluded that there was no dispute of material fact, and as such the case was proper for summary judgment. CP 292-93. "If there is a dispute as to any material fact, then summary judgment is improper. However, if reasonable minds could reach but one conclusion from the admissible facts in evidence, summary judgment is proper." *Haubry v. Snow*, 106 Wn.App. 666, 670, 31 P.3d 1186 (2001). Here, based on Mr. Jensen's own testimony, reasonable minds can only conclude that Mr. Jensen was not required to use the county-owned vehicle. Instead, as Mr. Jensen testified, the use of the county-owned vehicle was simply an option that he chose to utilize, an option he chose for his own personal benefit.

B. Crushing Crew Members Are Not "Required" To Utilize The County-Owned Vehicle To Travel To Job Sites.

Recognizing that his claims are dependent upon a finding that he was required to travel to and from the job site in the county-owned vehicle, Mr. Jensen repeatedly represents to this Court that he was "required" to use the county-owned vehicle. For example:

- "Prior to each shift, members of the rock-crushing crew must personally travel to the County shop, pick up necessary parts to operate the rock crushing equipment,..." Appellant's Brief, pg. 5;
- "Despite requiring employees to arrive at the County shop before each shift and requiring travel in a contractually provided vehicle..." Appellant's Brief, pg. 7.

In fact, the very issue Mr. Jensen presents to this Court for review is premised upon the representation that Mr. Jensen was "required" to travel to and from job sites in the county-owned vehicle:

"When an employee is required to pick up an employer's vehicle at the employer's shop, sometimes load employer owned equipment into the employer's vehicle, and drive that vehicle to the work site, is that drive time compensable." Appellant's Brief, pg. 4.

The error in Mr. Jensen's position in this matter is that contrary to the foregoing representations, Mr. Jensen was never required to travel in the county-owned vehicle. Mr. Jensen testified that he and other members

of the crew would drive their personal vehicles to and from the mobile crusher sites. CP 172-74. Additionally, no individual ever told Mr. Jensen that he was required to travel to the mobile crushing sites in the county vehicle nor has any individual informed Mr. Jensen he was not allowed to drive his personal vehicle to a job site. CP 176-77. Lastly, Mr. Jensen testified that he drove his own personal vehicle to job sites in the past. CP 171. Accordingly, the evidence establishes that Mr. Jensen was not "required" to drive to the shop prior to arriving to work at the mobile crushing sites, and there is no dispute as to any material fact.

C. The Trial Court Correctly Determined As A Matter of Law That Mr. Jensen's Drive Time Does Not Constitute Hours Worked

Mr. Jensen asserts that he is entitled to compensation because he voluntarily chose to utilize transportation provided as a convenience by Lincoln County to get to and from job sites. As discussed above, Mr. Jensen was not required to use the county-owned vehicle - he merely did so for his own personal convenience. *See Section B, Supra*. The parties agree WAC 296-126-002(8) governs this instant dispute. *See*, Appellant's Brief at 12. WAC 296-126-002(8) provides: "'Hours worked' shall be considered to mean all hours during which the employee is authorized or required by the employer to be *on duty* on the employer's premises or at a *prescribed work place*.'" (emphasis added).

Thus, in order to be entitled to compensation for his drive time, Mr. Jensen must show that he was "on duty" at his "employer's premises" or "prescribed work place" pursuant to WAC 296-126-002(8). Thus, he has the burden of establishing two separate factors – he was "on duty" and he was at his "prescribed work place." *See Anderson v. Dept. of Social and Health Servs.*, 115 Wn.App. 452, 456, 63 P.3d 134 (2003); *Stevens v. Brink's Home Security, Inc.*, 162 Wn.2d 42, 49, 169 P.3d 473 (2007). Although the Washington Administrative Code does not define the terms "on duty" and "prescribed work place," Washington courts have interpreted the terms.

However, Mr. Jensen cannot show he was "on duty" during his drive because he was free to engage in personal activities and was not required to be available to respond to any requests of Lincoln County during his drive. He was in no different position than he would have been had he chosen, as he had the right to do, to drive his own personal vehicle to the job site. The fact that Lincoln County gave Mr. Jensen the option to use a county-owned vehicle does not convert non-compensable drive time into compensable drive time. Additionally, Mr. Jensen cannot establish that he was at his "prescribed work place" during the drive in the county-provided vehicle because it was not essential to Lincoln County's rock crushing business. As a result, Mr. Jensen's claims fail as a matter of law

as he is merely a normal commuter not entitled to compensation for his drive to work.

Mr. Jensen asserts that pursuant to *Stevens v. Brink's Home Security, Inc.*, 162 Wn.2d 42, 169 P.3d 473 (2007), each time an employee travels to an employer's office and drives an employer vehicle, the employee is performing "work" as contemplated in WAC 296-126-002(8). In *Stevens*, the Court concluded that employees who serviced and installed home security systems were entitled to compensation for their time spent driving the employer's trucks between jobsites, on the basis that the technicians were on duty and the essential and integral nature of the trucks to the business made them a prescribed work place. *Id.* Contrary to Mr. Jensen's assertions, *Stevens* does not support such a broad reading and *Anderson* directly contradicts such an assertion.

The *Stevens* Court noted that due to the fact the Legislature has not defined hours worked or addressed the compensability of travel time, it "must examine the undisputed facts and assess whether technicians are 'on duty' at the 'employer's premises' or 'prescribed work place' within the meaning of WAC 296-126-002(8)." *Stevens*, 162 Wn.2d at 47. While Mr. Jensen contends that the trial court failed to properly analyze this case in light of *Stevens*, the truth is that the trial court's ruling was not inconsistent with *Stevens*. In the present case, Mr. Jensen was merely a normal

commuter not performing any work on his way to the job sites. Accordingly, Mr. Jensen was neither "on duty" nor at a "prescribed work place" during his travel time to the mobile crushing sites. As such, the trial court correctly found that his claims for compensation under the Minimum Wage Act fail as a matter of law.

1. Mr. Jensen Was Not "On Duty" During His Commute.

Mr. Jensen asserts that Washington courts look to the amount of control the employer exerts over the employee during the employee's drive time to determine whether the drive is compensable under the Minimum Wage Act. *See* Appellant's Brief at 14. Contrary to that overly broad reading of *Stevens*, courts look to the amount of control an employer exerts in order to determine whether the employee is "on duty" during the drive time. Accordingly, the amount of control is relevant only to the first factor Mr. Jensen must establish under WAC 296-126-002(8) – whether he was "on duty" during the drive.

Anderson v. Dept. of Social and Health Servs., 115 Wn.App. 452, 63 P.3d 134 (2003), is particularly instructive. In that case, the plaintiffs were DSHS employees who worked at the Special Commitment Center on McNeil Island. *Id.* at 454 . The Special Commitment Center was operated by DSHS while McNeil Island was operated by the Department of Corrections. *Id.* In order to reach McNeil Island, the plaintiffs had to

commute by riding a DOC ferry boat from Steilacoom. *Id.* Essentially, the plaintiffs were utilizing their employer, the State of Washington's, vehicle to get to and from the job site. The plaintiffs' work shifts conformed to the DOC ferry schedule. *Id.* The ferry ride took approximately 20 minutes each way. *Id.* While riding in the ferry, the "plaintiffs engage[d] in various personal activities, such as reading, conversing, knitting, playing cards, playing hand-held video games, listening to CD players and radios, and napping. They perform[ed] no work during the passage, but they assert they are subject to discipline." *Anderson*, 115 Wn.App. at 454.

The *Anderson* court held that the travel time was normal travel from home to work because the employees were not on their employer's "premises" or "prescribed work place" during their commute. *Id.* at 456. Thus, under the statutory scheme, the plaintiffs were not entitled to overtime pay under the Minimum Wage Act despite the fact they utilized their employer, the State of Washington's, vehicle to get to and from work. However, the court did note the fact that the plaintiffs were subject to employer discipline during the passage. *Id.* At 454. Thus, the *Anderson* court was looking to the amount of control the employer exerted over the employees during their commute to determine whether the employees were "on duty."

Similarly, the Court in *Stevens* held:

The undisputed facts establish that Technicians were "on duty" during the drive time for purposes of WAC 296-126-002(8). Technicians are performing company business during the drive time because Brink's strictly controls the drive time, prevents Technicians from using the trucks for personal business, and requires Technicians to remain available to assist at other jobsites while en route to and from their homes. Thus, we must next determine whether the Brink's trucks constitute the employer's "prescribed work place" under the WAC definition of "hours worked."

Stevens, 162 Wn.2d at 49.

Similar to the plaintiffs in *Anderson*, Mr. Jensen was free to engage in various personal activities during the drive. CP 175. He was not required to remain available to assist at other jobsites while en route to the location of the mobile rock crusher and there is no evidence that Mr. Jensen ever did assist any other employees of Lincoln County at different job sites on his way to the mobile crusher location. Additionally, there was no requirement that he drive. Rather, the individual that would drive the county-provided vehicle was the worker that "got behind the wheel." CP 174. Mr. Jensen also could have driven his own personal vehicle to and from the mobile crushing sites as no individual ever prohibited him from doing so. CP 177. Overall, Lincoln County did not exert the requisite amount of control to make Mr. Jensen "on duty" during his commute.

Mr. Jensen argues that he was required to take necessary parts to the crusher site in the county-owned vehicle. Appellant's Brief at 18. However, that statement is an overly broad assertion of Mr. Jensen's activities prior to utilizing the county vehicle as a convenient method of transportation. Mr. Jensen testified that he would "see what's on the shelves for parts and stuff . . ." CP 174. Thus, Mr. Jensen was merely grabbing spare parts and not regularly hauling rock crusher equipment. It is undisputed the portable rock crusher would be set up at a location, stay at that location for the duration of the work, and then be dismantled at the conclusion of the crushing activities. This is not a case wherein Mr. Jensen was hauling the equipment, i.e., the portable crusher, necessary to conduct Lincoln County's business. Further, grabbing spare parts off of a shelf is de minimus in nature and not compensable under the doctrine in *Reich v. New York City Transit Auth.*, 45 F.3d 646 (2d. Cir.1995). Additionally, Mr. Jensen was not required to utilize the truck, thus he cannot be considered "on duty" as a result of his decision to use the vehicle for his own personal convenience. As such, Mr. Jensen was not "on duty" during his commute and his claims fail as a matter of law.

Mr. Jensen cites to Justice Madsen's concurrence in *Stevens* and states that "if [an] employee picks up a[n] [employer vehicle] at the [employer's] office and drives it to the first job assignment of the day, no

one would dispute that this travel time constitutes 'hours worked' for which the technician must be compensated." Appellant's Brief at 14. (citing *Stevens*, 162 Wn.2d at 53 (J. Madsen's concurrence)). Despite the obvious non-binding nature of such a quote, as Justice Madsen was merely concurring in the result, not the analysis, Justice Madsen focuses on whether the employer vehicle was provided for the mutual benefit of both the employee and the employer:

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

Stevens, 162 Wn.2d at 54 (J. Madsen's concurrence).

Here, the vehicle was provided by Lincoln County as a convenience to the employees of the crusher crew. CP 109. The vehicle serves no purpose for Lincoln County as it was merely provided due to members of the crusher crew complaining about their personal vehicles becoming dusty as a result of crushing activities. *Id.* Further, it is undisputed that Lincoln County shoulders the financial burden of providing the vehicle for the convenience of the crusher crew. Clearly, the

Lincoln County vehicle does not provide a mutual benefit for both Lincoln County and its employees. Further, Mr. Jensen can still perform his crushing duties without use of the county-owned vehicle and, in fact, did so in the past. *See Section A, supra.* Accordingly, the vehicle is not integral and indispensable to the rock crushing activities. As such, Mr. Jensen's claims fail even under Justice Madsen's non-binding analysis.

Overall, Mr. Jensen was not "on duty" and required to respond to Lincoln County's demands during his drive time to the mobile crushing sites, unlike the plaintiffs in *Stevens*. Mr. Jensen was not required to be "on duty" during his drive time such that he would be required to assist other employees at different job sites, unlike the plaintiffs in *Stevens*.

2. Mr. Jensen Was Not At Lincoln County's "Premises" or "Prescribed Work Place."

Mr. Jensen glosses over whether the county-provided vehicle constitutes his "prescribed work place." However, an employee must establish that the employer-provided vehicle is essential and integral to the employer's business, such that the vehicle is tantamount to the employee's "prescribed work place" in order to be compensated for drive time under the Minimum Wage Act. The *Stevens* Court addressed the same and held:

Driving the trucks is an integral part of the work performed by Technicians. The nature of Brink's business requires Technicians to drive the Brink's trucks to reach customers' homes and carry the tools and equipment necessary for

servicing and installing home alarm systems. Technicians in the HDP report to the Kent office only once each week to refill supplies and attend the weekly company meeting. In addition, the Brink's trucks serve as the location where Technicians often complete work-related paperwork because company policy dictates that employees must complete all paperwork either at the customer's home or in the Brink's truck. Finally, like a work premises, Brink's requires employees in the HDP to "ensure that the vehicle is kept clean, organized, safe and serviced." Based on these undisputed facts, we hold that the Brink's trucks constitute a "prescribed work place" under WAC 296-126-002(8).

Stevens, 162 Wn.2d at 49.

Mr. Jensen merely asserts he is required to be compensated because he is required to keep the vehicle fueled at Lincoln County's expense, schedule routine maintenance performed by others, and obey traffic laws while operating the vehicle. However, such "requirements" do not separate Mr. Jensen from any other worker in the state of Washington that commutes to work, and certainly do not elevate Mr. Jensen to the status of the plaintiff in *Stevens*. Additionally, the Court in *Anderson* implicitly recognized the fact that a requirement that employees conform their behavior to a certain standard during the commute does not transform the commute into compensable time. *See Anderson*, 115 Wn.App. at 135 (holding the transit time was non-compensable under the Minimum Wage Act despite the fact the plaintiffs were "subject to discipline" during the commute).

Further, unlike the plaintiffs in *Stevens*, it is undisputed that the nature of Lincoln County's rock crushing business did not require the use of the county-provided vehicle. This is manifested in the fact that Lincoln County did not require Mr. Jensen to utilize the vehicle; rather it was available merely as a bargained-for convenience for employees of the crusher crew. CP 109. Additionally, Mr. Jensen admitted as much by testifying that he drove his personal vehicle to the job sites in the past and witnessed other members of the crusher crew do the same without incident. CP 171-74. Lincoln County was able to continue its rock crushing activities at these times even though Mr. Jensen did not utilize the county-provided vehicle. This shows that the vehicle is not "integral" or "essential" to Lincoln County's rock crushing business by any interpretation of those terms.

Finally, Mr. Jensen did not perform any work out of the trucks like the plaintiffs in *Stevens*. The plaintiffs in that case used the trucks as a means to perform the servicing and installing of home alarm systems. They would carry all the tools and equipment necessary to perform the work in the truck, refill the trucks with the necessary components to install the systems when supplies became depleted, and complete required paperwork in the trucks. Essentially, the trucks were integral and essential given the nature of the company's business. In contrast, the Lincoln

County vehicle was merely a convenient and cheap method of transportation for Mr. Jensen. The vehicle did not serve as the lifeblood for Lincoln County's rock crushing business, unlike the trucks in *Stevens*. Mr. Jensen does not allege he was required to perform or that he did in fact perform any work in or out of the county-provided vehicle. Accordingly, the county-provided vehicle does not constitute a "prescribed work place" under WAC 296-126-002(8) and the trial court correctly found that Mr. Jensen's claims fail as a matter of law. As such, this Court should uphold the trial court's finding, as there is simply no evidence before this Court that Mr. Jensen was "required" or "authorized" to be "on duty" during his drive to the mobile crushing sites. Mr. Jensen was not required to do anything during the drive time but obey the law, just as any other normal commuter is required to do. Mr. Jensen also asserts that he is somehow entitled to compensation for being required to ensure that the vehicle is fueled and that ordinary maintenance is performed (not by Mr. Jensen). However, such facts do nothing to distinguish Mr. Jensen from every other worker in this state that commutes to work and is not entitled to compensation. As such, this Court should uphold the ruling of the trial court.

D. The Department Of Labor And Industries Administrative Policy Cited By Mr. Jensen Does Not Support His Argument.

On page 13 of his Brief, Mr. Jensen cites to one paragraph of the Washington Department of Labor and Industries Administrative Policy ES.C.2. The entire Administrative Policy is attached hereto as Appendix A. That Administrative Policy does not support Mr. Jensen's position, but instead supports Lincoln County's position that Mr. Jensen's travel time in a county-owned vehicle is not compensable.

Initially, it should be noted that the policy is "not intended to address or cover all employee travel time issues," but instead to outline the opinion of the Department of Labor and Industries' opinions regarding the "particular issues raised in the *Brink's* case." Appendix A, pg. 2. This is important because the Administrative Policy is not inconsistent with the holding of *Stevens v. Brink's*. To the contrary:

Time spent driving a company-provided vehicle during an employee's ordinary travel, when the employee is not on duty and performs no work driving between home and the first or last job site of the day, is not considered hours worked.

Appendix A, pg. 3.

In the Administrative Policy, the Department identifies various "factors to consider" in determining if an employee is "on duty" when

driving a company-provided vehicle. These "factors" do not support Mr. Jensen's position. Specifically:

- 1) Mr. Jensen is free to "engage in personal activities during the drive time;"
- 2) Mr. Jensen is not required to respond to work related calls or be redirected while en route;
- 3) Mr. Jensen is not required to maintain contact with his employer;
- 4) Mr. Jensen does not receive assignments at home and spend time writing down assignments and mapping routes to the first job site before beginning the travel.

Appendix A, pg. 3.

Similarly, the "factors" identified by the Department to determine whether an employee is "on the employer's premises or at a prescribed work place" during travel time in a company-provided vehicle are fatal to Mr. Jensen's position:

- 1) The nature of Mr. Jensen's business does not require him to drive a particular vehicle to carry necessary tools and equipment to the work site;

- 2) The county-provided vehicle does not serve as a location where Mr. Jensen completes business-required paperwork or load materials or equipment;
- 3) Mr. Jensen is not required to ensure that the vehicle is kept clean, organized, safe, and serviced.

Appendix A, pg. 4.

The Administrative Policy relied upon by Mr. Jensen leaves no doubt that his voluntary choice to utilize the county-provided vehicles, as opposed to driving his own vehicle to the job site, is not compensable time pursuant to the Minimum Wage Act. Summary judgment dismissing his claims was therefore proper.

E. Mr. Jensen Is Not Entitled To Payment Of "Wages" Or "Attorney Fees."

When an employer withholds wages, an employee is entitled to both recovery of unpaid wages and reasonable attorney fees. RCW 49.48.010; RCW 49.48.030. When the employer intentionally withholds the wages, the employee can recover double damages and attorney fees. RCW 49.52.050; RCW 49.52.070. However, those remedies are only available if the amount withheld qualifies as "wages." RCW 49.46.010(7) defines "wage" as "compensation due to an employee by reason of employment, payable in legal tender of the United States or checks on

banks convertible into cash on demand at full face value, subject to such deductions, charges, or allowances as may be permitted by rules of the director.”

Additionally, "willful" means the employer knows what it is doing, intends to do what it is doing, and is a free agent. *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 160, 961 P.2d 371 (1998). Washington courts have indicated "there are two instances when an employer's failure to pay wages is not willful: the employer was careless or erred in failing to pay, or a 'bona fide' dispute existed between the employer and employee regarding the payment of wages." *Schilling*, 136 Wn.2d at 161. A "bona fide" dispute is a "fairly debatable" dispute over whether a portion of wages must be paid. *See id.* at 161 (citing *Brandt v. Impero*, 1 Wn.App. 678, 680-81, 463 P.2d 197 (1969)) (additional citations omitted).

Here, Lincoln County has maintained that Mr. Jensen was not entitled to payment of wages for his drive time to and from the mobile crushing sites, and thus at a minimum a "bona fide" dispute existed and Lincoln County did not have the requisite knowledge necessary to find willfulness. *See Section C, supra*. Accordingly, even if the Court found that Mr. Jensen's travel time was compensable, Lincoln County did not "willfully" withhold "wages" as defined pursuant to RCW 49.46.010.

Thus, Mr. Jensen is not entitled to recovery of any compensation or reasonable attorney fees.

F. Since Mr. Jensen's Commute Does Not Constitute Compensable Time, His Rights Under the Minimum Wage Act Are Not Implicated by the Collective Bargaining Agreement.

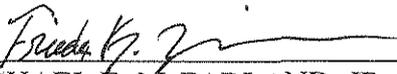
Mr. Jensen argues that the rights set forth by the Minimum Wage Act cannot be waived by a collective bargaining agreement. Appellant's Brief at 24. Lincoln County does not disagree with this proposition. Rather, as discussed above, it is Lincoln County's position that Mr. Jensen is not entitled to compensation under the Minimum Wage Act for his time spent commuting, as he was not required to use the county-provided vehicle, and was therefore not on duty while using the county-provided vehicle, and the county-provided vehicle does not constitute a prescribed workplace. *See Section C, supra*. The CBA is only relevant because it is what establishes Lincoln County's obligation to provide crusher crew employees the ability/option to utilize county-provided transportation. The CBA did not take any rights away from Mr. Jensen and did not attempt to alter the terms of the Minimum Wage Act. Instead, the CBA merely provides a benefit to Mr. Jensen (county-provided transportation), a benefit Mr. Jensen has taken advantage of for numerous years.

V. CONCLUSION

Based upon the foregoing, the District respectfully requests this Court affirm the trial court's order granting summary judgment to Lincoln County.

RESPECTFULLY SUBMITTED this 17 day of October, 2013.

EVANS, CRAVEN & LACKIE, P.S.

By 
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DECLARATION OF SERVICE:

On the 17th day of October, 2013, I caused the foregoing document described as Respondent's Brief to be personally served on all interested parties to this action as follows:

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Angel Gonzalez

VI. APPENDIX A



ADMINISTRATIVE POLICY

STATE OF WASHINGTON DEPARTMENT OF LABOR AND INDUSTRIES EMPLOYMENT STANDARDS

| | | | |
|-----------------|--|------------------|-------------------|
| TITLE: | HOURS WORKED | NUMBER: | ES.C.2 |
| CHAPTER: | <u>RCW 49.12</u> <u>WAC 296-126</u> | REPLACES: | ES-016 |
| | | ISSUED: | 1/2/2002 |
| | | REVISED: | 6/24/2005 |
| | | REVISED: | 11/28/2007 |
| | | REVISED: | 9/2/2008 |

ADMINISTRATIVE POLICY DISCLAIMER

This policy is designed to provide general information in regard to the current opinions of the Department of Labor & Industries on the subject matter covered. This policy is intended as a guide in the interpretation and application of the relevant statutes, regulations, and policies, and may not be applicable to all situations. This policy does not replace applicable RCW or WAC standards. If additional clarification is required, the Program Manager for Employment Standards should be consulted.

This document is effective as of the date of print and supersedes all previous interpretations and guidelines. Changes may occur after the date of print due to subsequent legislation, administrative rule, or judicial proceedings. The user is encouraged to notify the Program Manager to provide or receive updated information. This document will remain in effect until rescinded, modified, or withdrawn by the Director or his or her designee.

1. The department has the authority to investigate and regulate "hours worked" under the Industrial Welfare Act.

"Hours worked," means all hours during which the employee is authorized or required, known or reasonably believed by the employer to be on duty on the employer's premises or at a prescribed work place. An analysis of "hours worked" must be determined on a case-by-case basis, depending on the facts. See WAC 296-126-002(8). See Administrative Policy ES.C.1.

The department's interpretation of "hours worked" means all work requested, suffered, permitted or allowed and includes travel time, training and meeting time, wait time, on-call time, preparatory and concluding time, and may include meal periods. "Hours worked" includes all time worked regardless of whether it is a full hour or less. "Hours worked" includes, for example, a situation where an employee may voluntarily continue to work at the end of the shift. The employee may desire to finish an assigned task or may wish to correct errors, prepare time reports or other records. The reason or pay basis is immaterial. If the employer knows or has reason to believe that the employee is continuing to work, such time is working time.

An employer may not avoid or negate payment of regular or overtime wages by issuing a rule or policy that such time will not be paid or must be approved in advance. If the work is performed, it must be paid. It is the employer's responsibility to ensure that employees do not perform work that the employer does not want performed.

The following definitions and interpretations of "hours worked" apply to all employers bound by the Industrial Welfare Act, even those not subject to the Minimum Wage Act. There is no similar

definition of "hours worked" in RCW 49.46, the Minimum Wage Act, or in WAC 296-128, Minimum Wage rules. Therefore, these definitions and interpretations apply to all employers subject to RCW 49.12, regardless of whether they may be exempt from or excluded from the Minimum Wage Act.

2. What is travel time and when it is considered hours worked?

Introductory statement to the policy:

This policy is designed to provide general information in regard to the current opinions of the Department of Labor & Industries on the subject matter covered. This policy is intended as a guide in the interpretation and application of the relevant statutes, regulations, and policies, and may not be applicable to all situations. This policy does not replace applicable RCW or WAC standards. If additional clarification is required, the Program Manager for Employment Standards should be consulted.

This document is effective as of the date of print and supersedes all previous interpretations and guidelines. Changes may occur after the date of print due to subsequent legislation, administrative rule, judicial proceedings, or need for clarification. The user is encouraged to notify the Program Manager to provide or receive updated information. This document will remain in effect until rescinded, modified, or withdrawn by the Director or his or her designee.

The purpose of this policy statement is to update section two of Labor and Industries' administrative policy ES.C.2 (section 2) pertaining to hours worked. Following the *Stevens v. Brink's Home Security* decision, Labor and Industries committed to updating this section of the policy to reflect the Supreme Court decision in the *Brink's* case and address ambiguity created by that case. [*Stevens v. Brink's Home Security*, 162 Wn.2d 42, 169 P.3d 473 (2007)]. This policy is not intended to address or cover all employee travel time issues. Instead, it is limited to the particular issues raised in the *Brink's* case regarding whether time spent driving a company-provided vehicle between home and the first or last job site of the day constitutes compensable "hours worked."

Whether time spent driving in a company-provided vehicle constitutes paid work time depends on whether the drive time is considered "hours worked."

Whether travel or commute time is compensable depends on the specific facts and circumstances of each individual employee, employer, and work week. If the travel or commute time is considered "hours worked" under RCW 49.46.020 and WAC 296-126-002(8), then it is compensable and the employee must be paid for this time. These statutory and regulatory requirements cannot be waived through a collective bargaining agreement or other agreement.

"Hours worked" means all hours when an employee is authorized or required by the employer to be on duty on the employer's premises or at a prescribed workplace. WAC 296-126-002(8).

There are three elements to the definition of hours worked:

- 1- An employee is authorized or required by the employer,
- 2- to be on duty,
- 3- On the employer's premises or at a prescribed workplace.

If any of the three elements is not satisfied, then the time spent driving in a company-provided vehicle is not considered "hours worked." The specific factors used to establish the "authorized

or required" element are not listed in this policy. However, the element must be met for "hours worked" under the law.

Time spent driving a company-provided vehicle during an employee's ordinary travel, when the employee is not on duty and performs no work while driving between home and the first or last job site of the day, is not considered hours worked.

Time spent driving a company-provided vehicle from the employer's place of business to the job site is considered hours worked. Time spent riding in a company-provided vehicle from the employer's place of business to the job site is not considered hours worked when an employee voluntarily reports to the employer's location merely to obtain a ride as a passenger for the employee's convenience, is not on duty, and performs no work. Time spent driving or riding as a passenger from job site to job site is considered hours worked.

Factors to consider in determining IF AN EMPLOYEE IS "on duty" when driving a company-provided vehicle between home and work.

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. This includes an analysis of the frequency and extent of such restrictions and control. Following is a non-exclusive list of factors to consider when making a determination if an employee is "on duty." There may be additional relevant factors that the Supreme Court or L&I have not considered. All factors must be considered and weighed in combination with each other. 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 during the drive time between home and the first or last job site of the day, 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 employee is required to maintain contact with the employer.
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.

Factors to consider in determining if an employee is "on the employer's premises or at a prescribed work place" when driving a company-provided vehicle between home and work.

To 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. Following is a non-exclusive list of factors to consider when making a determination if an employee is "on the employer's premises or at a prescribed work place." There may be additional relevant factors that the Supreme Court or L&I have not considered. All factors must

be considered and weighed in combination with each other. 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 nonpersonal tools and equipment to the work site.
2. The extent to which the company-provided vehicle serves as a location where the employer authorizes or requires the employee to complete business required paperwork or load materials or equipment.
3. The extent to which the employer requires the employee to ensure that the vehicle is kept clean, organized, safe, and serviced.

The following are two examples of how this policy may be used to determine whether or not drive time between home and the first or last job site of the day in a company-provided vehicle is compensable. These examples are illustrative and are not intended to create additional factors or address other scenarios where the facts differ from those below.

COMPENSABLE EXAMPLE:

1. In this example, the facts establish that the drive time between home and the first or last job site of the day in a company-provided vehicle is compensable. For purposes of this example, all of the following facts are present. The employee drives between home and the first or last job site of the day in a company-provided vehicle:

- As a matter of accepted company practice, the employee is prohibited from any personal use of the vehicle, which must be used exclusively for business purposes; and
- The employer regularly requires the employee to perform services for the employer during the drive time including being redirected to a different location; and
- The employee regularly transports necessary nonpersonal tools and equipment in the vehicle between home and the first or last job site of the day; and
- The employee receives his/her daily job site assignments at home in a manner that requires the employee to spend more than a de minimis amount of time writing down the assignments and mapping travel routes for driving to the locations.

NON COMPENSABLE EXAMPLE:

2. In this example, the facts establish that the drive time between home and the first or last job site of the day in a company-provided vehicle is not compensable. For purposes of this example, all of the following facts are present. The employee drives between home and the first or last job site of the day in a company-provided vehicle:

- The employer does not strictly control the employee's ability to use the vehicle for personal purposes. E.g., the employee, as a matter of accepted company practice, is

able to use the vehicle for personal stops or errands while driving between home and the job site; and

- The employee is not required to perform any services for the employer during the drive including responding to work related calls or redirection; and
- The employee does not perform any services for the employer during the drive including work related calls or redirection.

3. What constitutes training and meeting time and when is it considered "hours worked"?

Training and meeting time is generally interpreted to mean all time spent by employees attending lectures, meetings, employee trial periods and similar activities required by the employer, or required by state regulations, and shall be considered hours worked.

Time spent by employees in these activities need *not* be counted as hours worked if all of the following tests are met:

3.1 Attendance is voluntary; and

3.2 The employee performs no productive work during the meeting or lecture;
and

3.3 The meeting takes place outside of regular working hours; and

3.4 The meeting or lecture is not directly related to the employee's current work, as distinguished from teaching the employee another job or a new, or additional, skill outside of skills necessary to perform job.

If the employee is given to understand, or led to believe, that the present working conditions or the continuance of the employee's employment, would be adversely affected by non-attendance, time spent shall be considered hours worked.

Time spent in training programs mandated by state or federal regulation, but *not* by the employer, need not be paid if the first three provisions are met; that is, if attendance is voluntary, the employee performs no productive work during the training time, and the training takes place outside of normal working hours.

A state regulation may require that certain positions successfully complete a course in Cardio-Pulmonary Resuscitation (CPR). The rules may require that in order to be employed in such a position the person must be registered with the state or have successfully completed a written examination, approved by the state, and further fulfilled certain continuous education requirements. However, should the employer require all employees to attend training, all employees attending the training must be paid for the hours spent in the training course.

Although the training course may be directly related to the employee's job, the training is of a type that would be offered by independent institutions in the sense that the courses provide generally applicable instruction which enables an individual to gain or continue employment with any employer which would require the employee to have such training, then this training would be regarded as primarily for the benefit of the employee and not the employer. In training of this type, where the employee is the primary beneficiary, the employee need not be paid for attending.

Where an employer (or someone acting on the employer's behalf), either directly or indirectly, requires an employee to undergo training, the time spent is clearly compensable. The employer in such circumstances has controlled the employee's time and must pay for it. However, where

the state has required the training, as in the example stated above, a different situation arises. When such state-required training is of a general applicability, and not tailored to meet the particular needs of individual employers, the time spent in such training would not be compensable.

When state or federal regulations require a certificate or license of the employee for the position held, time spent in training to obtain the certificate or license, or certain continuous education requirements, will not be considered hours worked. The cost of maintaining the certificate or license may be borne by the employee.

4. What determines an employment relationship with trainees or interns?

As the state and federal definition of "employ" are identical, the department looks to the federal Fair Labor Standards Act for certain training conditions exempted from that act. Under certain conditions, persons who without any expressed or implied compensation agreement may work for their own advantage on the premises of another and are not necessarily employees. Whether trainees are employees depends upon all of the circumstances surrounding their activities on the premises of the employer. If all six of the following criteria are met, the trainees are not considered employees:

- 4.1 The training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school; and
- 4.2 The training is for the benefit of the trainee; and
- 4.3 The trainees do not displace regular employees, but work under their close observation; and
- 4.4 The business that provides the training derives no immediate advantage from the activities of the trainees, and may in fact be impeded; and
- 4.5 The trainees are not necessarily entitled to a job at the conclusion of the training period; and
- 4.6 The trainees understand they are not entitled to wages for the time spent in the training.

5. What constitutes paid or unpaid work for students in a school-to-work program?

Students may be placed in a school-to-work program on a paid or unpaid basis. The department will not require payment of minimum wage provided all of the following criteria are met. If all five requirements are not met, the business will not be relieved of its obligation to pay minimum wage, as required by the Minimum Wage Act.

- 5.1 The training program is a bona fide program certified and monitored by the school district or the Office of the Superintendent of Public Instruction; and
- 5.2 A training plan exists that establishes a link to the academic work, e.g., a detailed outline of the competencies to be demonstrated to achieve specific outcomes and gain specific skills. The worksite effectively becomes an extension of the classroom activity and credit is given to the student as part of the course; and
- 5.3 The school has a designated district person as an agent/instructor for the worksite activity and monitors the program; and
- 5.4 The worksite activity is observational, work shadowing, or demonstrational, with no substantive production or benefit to the business. The business has an

investment in the program and actually incurs a burden for the training and supervision of the student that offsets any productive work performed by the student. Students may not displace regular workers or cause regular workers to work fewer hours as a result of any functions performed by the student, and

5.5 The student is not entitled to a job at the completion of the learning experience. The parent, student, and business all understand the student is not entitled to wages for the time spent in the learning experience.

If a minor student is placed in a paid position, all requirements of the Minimum Wage Act, the Industrial Welfare Act, and minor work regulations must be met. Minor students placed in a paid position with public agencies are subject to the Industrial Welfare Act.

Public agencies are not subject to the state minor work regulations, but they are subject to payment of the applicable state minimum wage. Note: Public agencies employing persons under age 18 are subject to the federal Child Labor Regulations and should contact the United States Department of Labor for specific information on hours and prohibited occupations.

6. What constitutes “waiting time” and when is it considered “hours worked”?

In certain circumstances employees report for work but due to lack of customers or production, the employer may require them to wait on the premises until there is sufficient work to be performed. “Waiting time” is all time that employees are required or authorized to report at a designated time and to remain on the premises or at a designated work site until they may begin their shift. During this time, the employees are considered to be engaged to wait, and all hours will be considered hours worked.

When a shutdown or other work stoppage occurs due to technical problems, such time spent waiting to return to work will be considered hours worked *unless* the employees are completely relieved from duty and can use the time effectively for their own purposes. For example, if employees are told in advance they may leave the job and do not have to commence work until a certain specified time, such time will not be considered hours worked. If the employees are told they must “stand by” until work commences, such time must be paid.

7. Is there a requirement for “show up” pay?

An employer is not required by law to give advance notice to change an employee's shift or to shorten it or lengthen it, thus there is no legal requirement for show-up pay. That is, when employees report to work for their regularly scheduled shift but the employer has no work to be performed, and the employees are released to leave the employer's premises or designated work site, the employer is not required to pay wages if no work has been performed.

8. What constitutes “on-call” time and when is it considered “hours worked”?

Whether or not employees are "working" during on-call depends upon whether they are required to remain on or so close to the employer's premises that they cannot use the time effectively for their own purposes.

Employees who are not required to remain on the employer's premises but are merely required to leave word with company officials or at their homes as to where they may be reached are not working while on-call. If the employer places restrictions on where and when the employee may travel while "on call" this may change the character of that "on call" status to being engaged in the performance of active duty. The particular facts must be evaluated on a case-by-case basis.

9. What constitutes preparatory and concluding activities and when is this time considered “hours worked”?

Preparatory and concluding activities are those activities that are considered integral or necessary to the performance of the job. Those duties performed in readiness and/or completion of the job shall be considered hours worked. When an employee does not have control over when and where such activities can be made, such activities shall be considered as hours worked.

Examples may include the following:

- 9.1 Employees in a chemical plant who cannot perform their principle activities without putting on certain clothes, or changing clothes, on the employer's premises at the beginning and end of the workday. Changing clothes would be an integral part of the employee's principle activity.
- 9.2 Counting money in the till (cash register) before and after the shift, and other related paperwork.
- 9.3 Preparation of equipment for the day's operation, i.e., greasing, fueling, warming up vehicles; cleaning vehicles or equipment; loading, and similar activities.

10. When are meal periods considered “hours worked”?

Meal periods are considered hours worked if the employee is required to remain on the employer's premises at the employer's direction subject to call to perform work in the interest of the employer. In such cases, the meal period time counts toward total number of hours worked and is compensable. See Administrative Policy ES.C.6.