

Supreme Court No. 79815-0
Court of Appeals No. 58039-6-I
Superior Court Case No. 02-2-32464-9 SEA

SUPREME COURT OF THE STATE OF WASHINGTON

DAVID STEVENS, DONALD A. GOINES AND JEFFREY R.
PORTER, ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents,

v.

BRINK'S HOME SECURITY, INC.,

Appellant.

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RESPONDENTS' ANSWER TO
MEMORANDUM OF AMICI AWB-WRA

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I. INTRODUCTION

Respondents (also referred to as “class members” or “employees”) hereby answer the memorandum filed by amici Association of Washington Business (“AWB”) and Washington Retail Association (“WRA”).

The AWB-WRA misstate the fundamental issue here. Contrary to the amici’s argument, this case will not determine the lawfulness of all home dispatch programs in which employees take home company vehicles. The only issue before this Court is whether, given the specific facts of the Brink’s highly restrictive home dispatch program, class members must be compensated under Washington law for their “drive time.”¹ It also is not true, as amici allege, that “plaintiffs invite [a rule], that all commute time is more or less compensable with only certain narrowly construed exemptions [causing]... the death knell to a benefit enjoyed by many employees in many industries....” Amici Brief, at 13. The class members do not seek a “bright line” test (*id.*), but rather recognize that the compensability of drive time necessarily involves a

¹ Amici use the term “commuting time” but the class members instead refer herein to “drive time,” which is the term used in Brink’s own policies (CP 71, 72, & 73), as well as by the trial court below. *E.g.*, CP 613 (Order).

fact-specific inquiry to determine whether Washington law compels a finding that such travel time constitutes “hours worked” in any given case.

Further, the amici’s complaint about the differences between the federal Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 201 *et seq.*, and the Washington Minimum Wage Act (“MWA”), RCW 49.46, should be directed to the Legislature and not to this Court. The FLSA explicitly anticipates that states may choose to provide additional protections for employees above and beyond those in federal law.² While amici complain about the “risk exposure” businesses face when differences exist between federal and state laws (Amici Brief, at 3), the fact remains that this Court has recognized and enforced such differences in the past, and there is no legal basis for eliminating them. *E.g.*, *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 306, 996 P.2d 582 (2000).

That the claim in this case may have been resolved in favor of the employer if it had been brought under federal law is irrelevant. Federal law has never been at issue in this case because there exists

² In fact, under Section 13(b)(1) of the FLSA, 29 U.S.C. §213(b)(1), the class members here were exempt from FLSA coverage because they were subject at the time to coverage under the federal Motor Carrier Act (“MCA”), 49 U.S.C §30101 *et seq.* They were not exempt under Washington wage law, however, which requires at least the reasonable equivalent of state overtime wages for MCA-covered workers. RCW 49.46.130(2)(f). This further demonstrates how state law can and does provide superior protection for employees than the FLSA.

distinct federal and state statutory schemes with respect to pay for travel time in company-provided vehicles. The Washington legislature has declined to adopt the more restrictive provisions found in the 1996 amendments to the Portal to Portal Act of the FLSA, 29 U.S.C. §254 (“Portal Act”), namely, the Employee Commuting Flexibility Act (“ECFA”), §2102 of Pub. L. 104-188, 110 Stat. 1755, 1928 (1996).

Finally, the amici misapprehend class members’ legal argument under Washington law. The employees do not argue that the administrative policies of the Washington Department of Labor & Industries (“DL&I”) form the “crux” of their claim for back pay. Amici Brief, at 14. As described in detail in their brief to the Court, class members rely principally upon the published regulation on the definition of “hours worked,” which has not been challenged by either Brink’s or amici. WAC 296-126-002(8). Class members do not rely upon DL&I administrative policies as a statement of law or as a basis for the cause of action, but rather as well-reasoned interpretations of the agency’s own regulation. Under these circumstances, the Court should give great weight to the agency’s interpretation of its own regulation.

II. LEGAL ARGUMENT

A. Washington Law Is More Protective Of Pay For Drive Time Than Is Federal Law.

Amici mistakenly argue that this Court should rely on federal law in this case. While Washington courts have often looked to FLSA law for aid in resolving disputes arising under the MWA (*see e.g., Hisle v. Todd Pacific Shipyards Corp.*, 151 Wn.2d 853, 862, 93 P.3d 108 (2004), and *Inniss v. Tandy Corp.*, 141 Wn.2d 517, 524, 7 P.3d 807 (2000)), amici fail to point out that this is done only when the statutory provisions are “comparable.” *Inniss*, 141 Wn.2d at 524. *Accord Weeks v. Chief of the Wash. State Patrol*, 96 Wn.2d 893, 897, 639 P.2d 732 (1982). *See also Martini v. Boeing Company*, 137 Wn.2d 357, 375, 971 P.2d 45 (1999) (where the Title VII remedies are “so different” than those in the Washington’s law against discrimination, Title VII cases are distinguishable).

The FLSA contains a “savings clause” which preserves the right of states, in the exercise of their police powers, to pass laws that are more protective of employees than is the contained in the FLSA. *See* 29 U.S.C. §218(a). In *Pacific Merchant Shipping Ass’n v. Aubrey*, 918 F.2d 1409 (9th Cir. 1990), the Ninth Circuit held that states are free to provide different and more expansive rights to workers who are concurrently covered by the FLSA and state statutes. The Ninth Circuit reasoned:

“The purpose behind the FLSA is to establish a national *floor* under which wage protections cannot drop, not to establish absolute uniformity in minimum wage and overtime standards nationwide at levels established in the FLSA.” *Id.* at 1425 (emphasis in original).

Reliance upon federal law here is inappropriate because federal law restricts pay for drive time but the MWA does not. *See e.g., Drinkwitz*, 140 Wn.2d at 306 (“The MWA fails to provide a “window of correction” exception [found in federal regulation] and no such exception has been recognized by prior Washington case law”). Indeed, *Anderson v. State*, 115 Wn.2d 452, 63 P.3d 134, *rev. denied*, 149 Wn.2d 1036 (2003), a case upon which amici rely, recognizes that current federal law is of no assistance in deciding travel time cases. There, the court held that “the Legislature [did not] intend[] to adopt the [federal] Portal to Portal Act; and we do not hold that it was adopted.” *Id.* at 457.

The MWA contains no definition of “hours worked” and is silent on the compensability of travel time in company vehicles at the beginning and end of the work day. On the other hand, Section 254(a) of the FLSA, as amended by the ECFA, provides:

no employer shall be subject to any liability or punishment under the Fair Labor Standards Act . . . on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of the follow activities of such employee...

(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

(2) activities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities. For purposes of this subsection, the use of an employer's vehicle for travel by an employee and activities performed by an employee which are incidental to the use of such vehicle for commuting shall not be considered part of the employee's principal activities if the use of such vehicle for travel is within the normal commuting area for the employer's business or establishment and the use of the employer's vehicle is subject to an agreement on the part of the employer and the employee or representative of such employee.

29 U.S.C. § 254 (emphasis added).

Further, this Court repeatedly has recognized that Washington has a “long and proud history of being a pioneer in the protection of employee rights” exemplified by wage and hour legislation that predated the 1938 passage of the FLSA. *Drinkwitz*, 140 Wn.2d at 300. The *Drinkwitz* Court pointed to the 1899 passage by the Washington legislature of a law requiring an 8 hour day (codified at RCW 49.28) and to the fact that this state passed a minimum wage law in 1913, 25 years before the FLSA was enacted into law. *Id.*

In *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 712, -- P.3d -- (2007), this Court recently affirmed this “long and proud history” of

Washington law, and that the MWA must be “liberally construed to carry out the legislature’s goal of protecting employees’ wages” (*citing Drinkwitz*). This Court further recognized that any exemptions from coverage must be “narrowly construed and applied only to situations which are plainly and unmistakably consistent with the terms and spirit of the legislation.” *Id.*

In sum, the issues in this case can only be decided under Washington law. FLSA case law, which arises from a different statutory scheme, is not persuasive and should be disregarded.

B. The Fact That The Brink’s Home Dispatch Program Is Voluntary Is Irrelevant.

Amici’s misapprehension of the differences in the federal and state statutory schemes also lead them to mistakenly emphasize the voluntariness of the Brink’s drive time policies. Under the federal Portal Act (as amended by the ECFA), an employee’s drive time from home in the company vehicle will not be compensable if two prerequisites are met: (1) the drives occur within the “normal commuting area;” and (2) if there is an agreement between the employer and the employee concerning the use of the vehicle. Thus, the federal law exemption for drive time from home to work sites in company vehicles is premised in part on the fact that the program must be voluntary.

As explained above, however, Washington law does not include this language from the Portal Act, as amended. Under Washington law, there is no basis for finding that any work time is not compensable merely because employees voluntarily perform the duties. As discussed further below, class members are “on duty” from the moment they begin their travel in company trucks to the work sites. The fact they can choose not to take a truck home is immaterial to whether their time should be paid. The question under Washington law is whether the drive time constitutes “work,” and not whether an employee volunteers to perform it.

Likewise, it does not matter that driving the trucks benefits the employees. Compensability of work time does not turn on preferences of the employees. As discussed in the employees’ principal brief, there are many compensable work activities that are similarly beneficial to employees. Brief of Respondents, at 29. The fact that work practices (*e.g.*, telecommuting) may benefit both the employee and employer does not mean that the employer may escape responsibility to pay for work performed.

C. Deference Should Be Accorded To The Agency’s Interpretations Of Its Own Regulation.

Amici urge this Court to defer to the DL&I regulation (which they misapply) but to ignore the agency’s administrative

interpretations of that regulation. In doing so, they incorrectly set forth the law in this area.

Washington courts have explained that deference is accorded an agency's interpretation of a statute when (1) the particular agency is charged with the administration and enforcement of the statute, (2) the statute is ambiguous, and (3) the statute falls within the agency's special expertise. *Bostain, supra* at 716; *Salvation Army v. White*, 118 Wn. App. 272, 276, 75 P.3d 990 (2003) (DL&I guideline on meal and rest breaks given weight because it was issued by “an agency with expertise in a matter” and “the policy reflects that it has been thoroughly considered and is supported by valid reasoning”), *rev. denied*, 151 Wn.2d 1028, 94 P.3d 959 (2004). Here, there is no dispute that DL&I is charged with administration of the MWA (*see* RCW 43.22.270) and has special expertise in wage and hour issues. The statute does not define the critical term, “hours worked,” or otherwise address travel time compensation. Accordingly, DL&I’s interpretation of the term is entitled to judicial deference.

1. The Regulation Strongly Supports The Employees’ Claim.

WAC 296-126-002(8) defines the term “hours worked” as “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." The class members easily satisfy these requirements.

The employees were unquestionably "on duty" while driving the trucks to and from the work sites. Briefly stated, Brink's controls the time and efforts of the class members during their travel time in virtually every conceivable way. First, class members are directed by company policy that the trucks may be used for "company business only" and that only Brink's employees are permitted to ride in the vehicles. CP 74. While amici try to dismiss this language as mere "boilerplate" (Amici Brief, at 10 n.2), there is no evidence in the record that this command does not mean exactly what it says, namely, that employees are not permitted to engage in personal errands or activities while driving the trucks.

Moreover, class members are engaged in "work" at all times while driving trucks because they are "authorized or required" to do so, both during the morning and evening drives (the ones at issue here), as well as during their other travel to and from work sites during the day. It is undisputed, for example, that the tools and equipment on the trucks have to be brought to the work sites because the installation and repair work cannot proceed without them. Class members do not

have the option of driving their own car to any work site.³ In addition, Brink's dispatchers contacted class members during their morning and evening drive times to re-direct them to other company work sites. CP 273 & 281.

Likewise, the class members are at a company "premises or at a prescribed workplace" while driving the trucks. Given the necessity of the travel and the strict controls imposed by Brink's upon the class members during their drives, the truck itself is a "premises" of the company as well as being a "prescribed work place." This is further demonstrated by the fact that employees are paid for driving to customer homes from the office or between different customers' homes during the day. The analysis would be different if Brink's did not strictly control employee behavior while driving the trucks. For example, if employees had the opportunity to use the trucks to drop their children off at day care or school, or to go grocery shopping on the way home from work. Under those circumstances, a court might well find that the employees are not "on duty" while driving. In other words, Brink's must accept the consequences of its decision to strictly control its employees' conduct in the trucks.

³ An exception is new employees who are being trained by experienced technicians and who may drive their own cars to meet their trainer at the worksite. No back pay was sought or obtained at trial for travel time for these employees, whether they drove their own vehicles to the worksite or rode along with the trainer in the truck.

**2. This Court Should Defer To DL&I's Policies
On Travel Time.**

Amici contend that the DL&I's policies at issue (1992 policy at ES-016 and 2002 policy at ES.C.2) on "hours worked" and "travel time" are entitled to no deference at all because they are legally erroneous and have been contradicted by agency staff. Amici are wrong on both counts.

The policies principally derive from DL&I's regulations implementing the MWA and the Industrial Welfare Act. *See* WAC 296-126-002(8); Brief of Respondents, Appendicies C & E. This consideration bolsters the force of the administrative policy, because an agency's interpretation of its own regulations is normally accorded great deference from the courts. *E.g., Port of Seattle v. Pollution Control Hearings Board*, 151 Wn.2d 568, 588, 90 P.3d 659 (2004); *Clark v. City of Kent*, 136 Wn. App. 668, 673 & n. 12, 150 P.3d 161 (2007). This Court forcefully reiterated this point in *Silverstreak, Inc. v. Department of Labor and Industries*, -- Wn.2d --, 154 P.3d 891 (2007):

This court has made clear that we will give great deference to an agency's interpretation of its own properly promulgated regulations, "absent a compelling indication" that the agency's regulatory interpretation conflicts with legislative intent or is in excess of the agency's authority....We give this high level of deference to an agency's interpretation of its regulations because the agency has expertise and

insight gained from administering the regulation that we, as the reviewing court, do not possess.

Id. (emphasis added and citations omitted).

Washington Education Ass'n v. Public Disclosure Comm'n, 150 Wn.2d 612, 80 P.3d 608 (2003), and *Wingert v. Yellow Freight*, 146 Wn.2d 841 n. 1, 50 P.3d 256, (2002), are not contrary to these holdings. In *Washington Education Association*, the Court, which held that there was no justiciable controversy, observed merely that all agency interpretations are “advisory only” and do not have the force and effect of law or regulation. *Id.* at 611. Class members do not claim otherwise, but amici fail to recognize that the agency’s interpretation of its own regulation is entitled to great weight.

Amici’s reliance on footnote 1 in *Wingert* is similarly misplaced. There the Court refused to defer to an L&I administrative guideline, not because of any legal insufficiency in the guideline, but because the parties had not submitted it to the trial court and therefore the Court could not take judicial notice of it.

With respect to the letters from DL&I staff (CP 770, 772-73), amici’s contention that they “contradict” the administrative policies can be quickly dismissed. Amici Brief, at 17. First, this “evidence” was not before the trial court when it issued the summary judgment order, and therefore should not be considered by this Court on appeal

of that order. See *Colwell v. Holy Family Hospital*, 104 Wn. App. 606, 614, 15 P.3d 210 (2001). Beyond that, this Court has recently reiterated that an “employee's subjective understanding of the agency's intent is not a formal administrative decision entitled to any weight.” *Bostain, supra*, at 717 n.7.

D. Amici's Reliance On *Anderson v. State* Is Misplaced.

In *Anderson v. State of Washington*, 115 Wn. App. 452, 63 P.3d 134 (2003), Division Two rejected a claim brought by corrections officers who were transported by ferry to the McNeil Island Correction Center, during which the officers could engage in a range of personal activities. Moreover, only the employees themselves were being transported to the work site (as in all normal commuting), and not any equipment or tools.

Amici's argument that the class members' travel is comparable to the ferry rides in *Anderson* makes no sense. Driving a van loaded with parts and equipment, unlike the passive riding of the ferry in *Anderson*, clearly involves physical and mental exertion. Driving and delivering supplies is the work that many workers are hired to perform. Further, the transportation of parts and equipment to the jobsite is primarily for Brink's benefit. If it were not so, then Brink's would not have to pay its technicians for driving the company trucks to and from work sites during the rest of the work day. The fact that the “drive times” at issue here

occur at the beginning and the end of the work day do not make them any less compensable.

In addition and as discussed above, *Anderson* supports class members' argument that the federal cases decided under the Portal Act (passed in 1947) and the ECFA (passed in 1996) have no relevance to the Washington law, which does not contain a Portal Act equivalent. Accordingly, and as recognized in *Anderson*, the comparable federal law, if any, was that which existed prior to 1947. 115 Wn. App. at 457-58.

The U.S. Supreme Court in *IBP, Inc. v. Alvarez*, 546 U.S. 21, 25-26, 126 S. Ct. 514, 519, 163 L. Ed. 2d 288 (2005) recently explained that this pre-Portal Act definition of "work" under federal law was very broad:

Our early cases defined those terms [*i.e.*, "work" and "workweek"] broadly. In *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 64 S. Ct. 698, 88 L. Ed. 949 (1944), we held that time spent traveling from iron ore mine portals to underground working areas was compensable; relying on the remedial purposes of the statute and Webster's Dictionary, we described "work or employment" as "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." *Id.*, at 598, 64 S. Ct. 698, 88 L.Ed. 949; see *id.*, at 598, n. 11, 64 S. Ct. 698, 88 L. Ed. 949. The same year, in *Armour & Co. v. Wantock*, 323 U.S. 126, 65 S. Ct. 165, 89 L. Ed. 118 (1944), we clarified that "exertion" was not in fact necessary for an activity to constitute "work" under the FLSA. We

pointed out that "an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen." *Id.*, at 133, 65 S. Ct. 165, 89 L. Ed. 118. Two years later, in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 66 S. Ct. 1187, 90 L. Ed. 1515 (1946), we defined "the statutory workweek" to "include all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace." *Id.*, at 690-691, 66 S. Ct. 1187, 90 L. Ed. 1515. Accordingly, we held that the time necessarily spent by employees walking from time clocks near the factory entrance gate to their workstations must be treated as part of the workweek. *Id.*, at 691-692, 66 S. Ct. 1187, 90 L. Ed. 1515.

Thus, because this pre-Portal Act definition must be utilized, the drive time hours at issue here are plainly "hours worked." The drive time involves effort and exertion by class members necessarily and primarily for the benefit of Brink's, is conducted on Brink's property (the trucks), and the trucks could only be used for "company business." The drive time was, as found by the trial court, "hours worked" and should have been compensated.

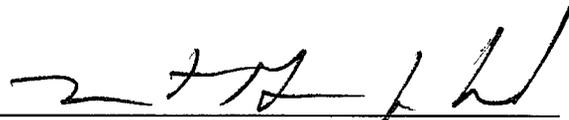
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III. CONCLUSION

For the foregoing reasons, and for the reasons stated in the Brief of Respondents, this Court should affirm the trial court's orders in all respects.

RESPECTFULLY SUBMITTED this 27th day of April, 2007.



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CERTIFICATE OF SERVICE

I, PAMELA HELM, the undersigned, hereby certify and declare under penalty of perjury under the laws of the State of Washington that the following statements are true and correct:

1. I am over the age of 18 years and am not a party to the within cause;

2. I am employed by the law firm of Schroeter Goldmark & Bender. My business/ mailing address is 810 Third Avenue, Suite 500, Seattle, WA 98104.

3. I served today true and correct copies of RESPONDENTS' ANSWER TO MEMORANDUM OF AMICI AWB-WRA via ABC Legal Messengers on counsel of record as follows:

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