Case No. S212704

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

TIM MENDIOLA, et al.,

Plaintiffs and Respondents,

v.

CPS SECURITY SOLUTIONS, INC., et al.,

Defendants and Appellants.

After a Decision of the Court of Appeal, Case No. B240519,
Second Appellate District, Division Four

Appeal from the Superior Court of Los Angeles County,
Case Nos. BC388956, BC391669, JCCP 4605, Honorable Jane L. Johnson

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The legislative history of the IWC proceedings in October 2000 leading up to the adoption of MW-2001, the IWC's general minimum wage order that took effect on January 1, 2001, which among other things brought about the elimination of the prior exclusion from minimum wage coverage as to personal attendants, clearly reveals that the IWC believed that *Monzon* only applied to ambulance drivers and attendants covered by Wage Orders 5 and 9; that the federal regulation allowing for agreements to exclude "sleep time" from "hours worked" did not apply to any employees other than those as to whom the IWC expressly adopted the FLSA for interpreting "hours worked," and; that the IWC's general definition of "hours worked" coupled with the absence of any express provision adopting federal law or expressly providing for agreements to exclude "sleep time" meant that as to

employees working 24-hour shifts – including but not limited to personal attendants – "sleep time" constituting "hours worked" would be compensable at no less than the minimum wage.

Prior to January 1, 2001, personal attendants working under Wage Order 15 (the occupational order governing "household occupations") were exempt from California minimum wage requirements. (See IWC Order 15-86, §1(B), and IWC Order 15-2000, §1(B), attached as Exhibit A to Mendiola's Motion for Supplemental Judicial Notice ["MSJN"], filed herewith.) This exemption came to an end on January 1, 2001, the effective date of IWC Order MW-2001and IWC Order 15-2001. (A copy of Order MW-2001 is attached to Mendiola's MSJN at Exhibit B, and a copy of Order 15-2001 was attached as Exhibit F to Mendiola's MJN filed on December 2, 2013.) Subsection 1(B) of Order 15-2001 states: "Except as provided in sections 1, 2, 4, 10, and 15, the provisions of this order shall not apply to personal attendants." Thus, what had previously been a complete exemption from all provisions of that wage order became a partial exemption, with section 2 (the definitional section, including the general definition of "hours worked" at subsection 2(H)) and section 4 (the section requiring payment of not less than the minimum wage for "all hours worked") expressly made applicable to personal attendants. This change

was mandated by the IWC's adoption of MW-2001, which made the minimum wage applicable to personal attendants.

As explained in the IWC's Statement as to the Basis for the general minimum wage order that it adopted on October 23, 2000, IWC Order MW-2001: "[A]fter consideration of all the non-statutory full and partial exemptions from the minimum wage, the IWC included the elimination of some of these exemptions in its proposed regulations. The public hearings on the proposed regulations were held in September and October 2000." (See IWC Statement as to the Basis for Order MW-2001, attached to Mendiola's MSJN at Exhibit C, filed herewith.) The IWC acknowledged, in this Statement, that "[e]mployers of personal attendants ... initially expressed concerns about the action contemplated by the IWC," but despite those employer concerns, "the IWC eliminated the ... exemption[] from the minimum wage" for "personal attendants in private homes except for persons under the age of eighteen who are employed as baby sitters for a minor child of the employer in the employer's home." (*Id.*)

The legislative history of the IWC proceedings leading up to the adoption of minimum wage requirements for personal attendants shows that the IWC considered a proposal to exclude sleep time from compensable hours worked, but ultimately, chose not to adopt such an exclusion, and

instead, required payment of no less than the minimum wage for all hours worked including sleep time, and that it did this simply through application of the general definition of "hours worked." At the IWC's public hearing on October 3, 2000, one of the speakers, John Haggerty, a human resources manager for a third party employer of personal attendants, argued that his company was not making enough money to pay personal attendants the minimum wage for "sleep-over shifts." (See Official Transcript of IWC Public Hearing of 10/3/2000, attached as Exhibit D to Mendiola's MSJ, filed herewith, at p. 34-38.) IWC Commissioner Barry Broad responded that under the IWC's proposal, the personal attendants working such sleep-over shifts would be required to be paid the minimum wage for all hours in the shift, but would not be required to pay any overtime. (*Id.*, at p. 38.) Mr. Haggerty explained that he was not opposed to requiring the minimum wage for personal attendants who do not work "sleep-over shifts," as such employees are "already paid more than that," but that personal attendants who work 24-hour or 12-hour "sleep-over shifts" should remain exempt from minimum wage requirements. (*Id.* at p. 41-42.)

At that point in the proceedings, IWC Commissioner Doug Bosco asked whether it would be possible for the IWC to keep the minimum wage exemption for personal attendants who "sleep on the job," while eliminating

the exemption for all other personal attendants. (*Id.,* at p. 42-43.) The IWC's legal counsel, deputy attorney general Marguerite Stricklin, responded that the IWC could take such action. (*Id.*) Commissioner Broad then explained that alternatively, the IWC could adopt a similar provision to what it had in place for ambulance drivers working 24-hour shifts, under which 8 hours of uninterrupted sleep time could be excluded from compensable hours worked but that no sleep time would be deducted if there was any interruption. (*Id.,* at p. 43.) Another speaker, Virginia Pinkerton, speaking on behalf of an industry group, California Association for Health Services at Home ("CAHSA") noted that "sleep time" was work time for these personal attendants working 24-hour shifts: "There were some comments made that sounded like this person is sleeping on the job. This person is not sleeping on the job. This person is there to provide care, 24-hour supervision, for a person who is not able to care for themselves at home. The only other option is to be in a facility or an institution." (*Id.,* at p. 46-47.) A following speaker, Karen Orlando, argued in favor not deducting "sleep time" from compensable "hours worked": "[Y]ou can't count on being able to sleep at night. So you're getting paid because you don't know what kind of services are going to be required of you during those hours." (*Id.,* at p. 56-57.) As the discussion of personal attendants

wound down, Commissioner Broad again raised the possibility of adopting a provision in the wage order that would allow for the exclusion of 8 hours of regularly scheduled uninterrupted sleep time from "hours worked" by personal attendants. (*Id.,* at p. 57-59.)

This then brings us to the IWC's next public meeting, on October 23, 2000, during which the IWC voted to eliminate the personal attendant exemption from the minimum wage (except for babysitters under the age of 18, who remained exempt from minimum wage requirements). (See Official Transcript of IWC Public Hearing of 10/23/2000, attached as Exhibit E to Mendiola's MSJ, filed herewith, at p. 15.) The proposal to eliminate the personal attendant exemption was put forward in a motion brought by Commissioner Broad, and it was unanimously adopted by the five IWC commissioners. Significantly, the Commission did not adopt any provision that would exempt personal attendants working "sleep-over shifts" from the requirement to pay no less than the minimum wage for all hours worked, nor did it adopt any provision that would allow the parties to agree to exclude such "sleep time" from "hours worked," or in any way to categorize the "sleep time" as non-compensable. (*Id.*) The fact that no such provision was adopted, notwithstanding the IWC's extensive discussion – just three weeks earlier – of those very proposals compels the conclusion that the

IWC made a policy choice to reject these proposals, and to require payment of the minimum wage for all hours worked including sleep time. Significantly, not one word was spoken during these meetings about *Monzon* or about any federal regulation allowing agreements to exclude sleep time from hours worked. No one – not a single IWC Commissioner, not the IWC's legal counsel, nor any speaker at the public hearing – made so much as a suggestion that *Monzon or* the federal sleep time regulation might apply to these personal attendants. This is not surprising – until the issuance of *Seymore v. Metson Marine, Inc.* (2011) 194 Cal.App.4th 361 – it was not at all clear that *Monzon* applied to any workers other than ambulance drivers and attendants under IWC Orders 5 and 9. That was unquestionably the DLSE's interpretation of *Monzon.* An opinion letter issued by State Labor Commissioner Jose Millan on May 29, 1998 on the subject of "exclusion of sleep periods from hours worked under the ambulance drivers and attendant provisions of IWC Orders 5-98 and 9-98" explained the holding in *Monzon* as follows:

> In that case, the court held that under the IWC orders that preceded 5-98 and 9-98, an employer can enter into an agreement with ambulance drivers and attendants to 'exclude up to eight hours of sleep time from work or compensable time on twenty-four hour shifts of adequate sleeping facilities are provided by the employer and the employee has the opportunity to get at least five hours of uninterrupted sleep.... *This holding was largely based upon the express intent of the*

IWC in its "Statement on Special Provision for Ambulance Industry in Orders 5-80 and 9-80.

(Emphasis added. A copy of this opinion letter is attached as Exhibit F to Mendiola's MSJN, filed herewith.)

And certainly, with the issuance of both *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785 and *Morillion v. Royal Packing* (March 27, 2000) 22 Cal.4th 575 within the year prior to the IWC's proceedings in October 2000, the IWC that adopted Order MW-2001 would have had no reason to believe that the federal regulation governing agreements to exclude sleep time (or any other federal regulation providing less protections to workers than the applicable IWC Order) would be imported into the IWC order absent an express provision in the order explicitly adopting that regulation.

This history of the adoption of Wage Order MW-2001 demonstrates the fallaciousness of CPS's argument that because the IWC never amended a wage order to specifically disavow *Monzon,* it must be presumed that the IWC intended to permit the wholesale incorporation of the federal regulation governing the exclusion of sleep time from hours worked into each and every wage order covering every industry and occupation in California. Of course, once *Seymore v. Metson Marine* was decided in 2011, it was no longer possible to view *Monzon* as being applicable only to

ambulance drivers and attendants under IWC Orders 5 and 9. But by then, the IWC had been defunded by the Legislature and was not functioning. (See, *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1102 fn. 4, noting; "The Legislature defunded the IWC in 2004, however its wage orders remain in effect." Also see IWC's current webpage at www.dir.ca.gov/iwc/iwc.html, stating: "The IWC is currently not in operation.")

II. Sections in the DLSE Manual Setting Out DLSE's Enforcement Policy Regarding The Exclusion of Sleep Time From Hours Worked Are Entitled to No Deference, Have No Persuasive Value, Have No Legal Support, And Are Contradicted by DLSE's Own Opinion Letters

CPS directs the Court's attention to various editions of the DLSE's Manual as a centerpiece of its argument as to why sleep time should be excluded from 'hours worked." First, there is Section 10.75 in the DLSE's Operations and Procedures Manual of September 1989. (CPS Motion for Judicial Notice, Exhibit A.) This is, of course, the exact same manual that was the subject of this Court's decision in *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, holding that another section of that Manual constituted an underground regulation, was void for violating the requirements of the Administrative Procedures Act, and therefore was

entitled to no deference. This Court explained:

> The APA ... defines "regulation" very broadly to include "every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it ... (Gov. Code §11342, subd. (g) [now found at §11342.600].) A regulation subject to the APA thus has two principal identifying characteristics. [Citation omitted.] First, the agency must intend its rule to apply generally, rather than in a specific case. The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided. [Citation omitted.] Second, the rule must "implement, interpret or make specific the law enforced or administered by [the agency].

(*Tidewater Marine Western Inc. v. Bradshaw,* 14 Cal.4th at 571.)

To be sure, this Court carved out certain types of policy statements or interpretations that may be issued by agencies that are not subject to the APA:

> Of course, interpretations that arise in the context of case-specific adjudications are not regulations, though they may be persuasive as precedents in similar subsequent cases. Similarly, agencies may provide private parties with advice letters, which are not subject to the rulemaking provisions of the APA. Thus, if an agency prepares a policy manual that is no more than a restatement or summary, without commentary, of the agency's prior decisions in specific cases and its prior advice letters, the agency is not adopting regulations. A policy manual of this kind would of course be no more binding on the agency in subsequent agency proceedings than are the decisions and advice letters that it summarizes.

(*Id.,* Internal citations omitted.)

Like the underground regulation at issue in *Tidewater,* the section of the DLSE's 1989 Manual entitled "24-Hour Employer Control" is not a restatement of statutory law, duly promulgated regulations, prior DLSE case specific adjudications or prior DLSE advice letters. This section of the Manual does not contain a single citation to any source of authority. It purports to set out the DLSE's enforcement policy for "determining hours worked" for an "employee [who] is subject to 24-hour employer control." This section of the Manual states:

> If the employee is subject to 24-hour employer control, DLSE could, of course, arbitrarily hold that all 24 hours constitute hours worked. However, this Division and the federal Wage and Hour Division have historically taken a more realistic and reasonable approach, in that sleep time, meal time, and other non-active times which the employee can use for private pursuits or during which the employee is free to leave the premises have not been considered work time.

This statement of the DLSE's enforcement policy does not even attempt to analyze the provisions of the controlling IWC orders. There is no discussion of the need for an agreement authorizing the exclusion of sleep time (as is required under the federal regulation), much less the fact that the IWC orders only permit such a deduction for ambulance drivers and attendants and only if there is a written agreement. What was truly arbitrary was the DLSE's belief that it could create an enforcement policy without reference to the language of the IWC's orders, based solely on what DLSE

itself deemed to be "realistic and reasonable." Furthermore, the reference to the enforcement practices of the Wage and Hour Division of the United States Department of Labor ignored the fact that the federal agency is enforcing the Fair Labor Standards Act and the federal regulations adopted to interpret the FLSA, not the California Labor Code or the requirements of the IWC orders.

Regardless of whether this was DLSE's enforcement policy at the time it issued the Manual in 1989, by the time *Monzon v. Schaeffer Ambulace Service, Inc.* (1990) 224 Cal.App.3d 16 was argued, DLSE was taking another position. The Court explained:

> Our concern over the lack of clarity of IWC's intent is further complicated because DLSE, under whose enforcement policy the exclusion for ambulance drivers and attendants was supposedly permitted, argues in its amicus brief that the agreement must be in writing. DLSE urges us to apply the general principle that statutes which confer an express exception from a regulatory scheme are narrowly construed and will not be extended beyond their terms." (*Id.*, at 45.)

Indeed, the dissent in *Monzon* was sharply and justifiably critical of the majority's failure to follow the analysis presented by the DLSE in its amicus brief:

> The majority accepts this argument which starts with the assertion that the California Division of Labor Standards Enforcement (DLSE) as well as federal regulators accept the federal definition of "hours worked" and the circumstances under which "sleep time" can be excluded. However, the

> DLSE filed an amicus curiae brief in this case taking a position directly opposite. DLSE pointed out that California law has an express definition of "hours worked," which definition is different from the one arrived at in federal judicial opinions. DLSE takes the position that it is *California* law which defines "hours worked" in such a broad way as to encompass sleep time and it is *California* law which defines the terms and conditions under which this narrow class of employees – ambulance drivers and attendants – can be deprived of compensation for their sleep time.... I agree with the DLSE view of these wages and hours in California work places. True, in this instance these regulations afford somewhat greater protections for California workers than they would enjoy under federal law. But that was their intent. In my view, we should implement not defeat that intent.

(*Monzon v. Schaefer Ambulance Service, Inc., supra,* concurring and dissenting opinion., J. Johnson, 224 Cal.App.3d at 51.)

The principles that underlie this dissent – and the DLSE's amicus brief in *Monzon* – echo in this Court's holdings in *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785 and *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575. These are the same principles that animated the DLSE's opinion letters regarding CPS and its compensation practices that were issued on August 12, 1999 and September 16, 2002, concluding that under *California* law, it is unlawful for CPS to deduct "sleep time" from the "hours worked by its guards working 24-hour shifts. (See Mendiola Motion for Judicial Notice, filed December 2, 2013, Exhibits A and B.)

And inexplicably, these are the principles that DLSE chose to ignore

in a new version of its manual, the 2002 Update of the the DLSE Enforcement Policies and Interpretations Manual (2006 revision), which states, at §46.4: "DLSE enforcement policy has historically allowed eight hours to be deducted if an employee is scheduled for 24-hour work shifts and is required to remain on the employer's premises during the work shift and, in fact, receives eight hours of uninterrupted sleep." (CPS Motion for Judicial Notice, Exhibit C.) Again, as was the case with the 1989 Manual, this assertion is unsupported by citation to any authority – despite the intervening issuance of this Court's decision in *Tidewater* making clear that any such unsupported assertions regarding enforcement policies or interpretations of IWC orders are void as underground regulations. Despite *Tidewater's* invitation to DLSE to summarize its advice letters in a manual, this section of the current Manual fails to mention, much less summarize, any of the letters that DLSE issued in past years dealing with this very issue – including the 1999 and 2002 letters that completely contradict the assertion set out in this section of the Manual.

Indeed, the very introduction of the DLSE's 2002 Manual discusses the need to comply with *Tidewater,* and towards that end, proclaims that the policies and interpretations set out in the manual are summaries derived from the following sources: judicial decisions, California statutes and regulations,

opinion letters, and prior decisions issued by DLSE in the course of adjudicating disputes, with the particular source for any specified policies and interpretations to be set out in the manual. (See Manual §1.1.2-1.1.6.1., at Exhibit G attached to Mendiola's MSJN, filed herewith.) No such sources are mentioned in support of the DLSE's purported enforcement policy set out at § 46.4 of the Manual. That section of the Manual, like the section of the 1989 Manual dealing with that topic, is "a standard of general application interpreting the law the DLSE enforce[s]" and "not merely a restatement of prior agency decisions or advice letters." (*Tidewater, supra,* 14 Cal.4th at 573.) It is therefore void and entitled to no weight.

And to the extent that we look at those void policies set out in the 1989 and 2002 manual sections simply to see what it is that the DLSE said there, we are left with the fact that the purported enforcement policy set out in those two manuals was contradicted by DLSE's amicus brief filed in *Monzon* prior to the issuance of the decision in that case in 1990, and by the DLSE opinion letters specifically addressed to CPS that were issued in August 1999 and in September 2002.

III. Regardless of What DLSE Stated In The Memorandum of Understanding Settling Its Lawsuit With CPS Over A Decade Ago, the Legality of CPS' Compensation Scheme Is For This Court to Decide,

and the Memorandum of Understanding Between DLSE and CPS Is Entitled to No Deference

In the face of this series of dizzying reversals of DLSE's professed enforcement policy as to the compensability of "sleep time" for employees working 24-hour shifts – including letters that were directed to CPS in 1997, 1999, and again in 2002 – CPS advances the argument that the DLSE has not applied varying enforcement policies with respect to the legality of its current compensation plan, and that the DLSE's approval of this compensation plan as set out in the October 14, 2003 Memorandum of Understanding between DLSE and CPS (at Joint Appendix 0176-0180) is "entitled to great weight, and unless it is clearly unreasonable, [should] be upheld." (CPS Answering Brief, p. 11.)

Initially, we note that CPS cites to *Keyes Motors, Inc. v. Division of Labor Standards Enforcement* (1987) 197 Cal.App.3d 557, 564, in support of its assertion that the DLSE's approval should be given "great weight" and upheld "unless it is clearly unreasonable." *Keyes,* in turn, cites to *Skyline Homes, Inc. v. Department of Industrial Relations* (1985) 165 Cal.App.3d 239, 249, for the proposition that "the DLSE's interpretation is entitled to great weight and under established principles of statutory construction, unless it is clearly unreasonable, it will be upheld." (*Keyes Motors, supra,*

197 Cal.App.3d at 564.) But this standard for deferring to DLSE enforcement policies was expressly rejected by this Court in *Tidewater*:

> The employer in *Skyline Homes* asserted that the DLSE's policy for calculating overtime was a regulation within the meaning of the APA and therefore void because DLSE did not adopt it in accordance with the APA. The Court of Appeal disagreed, reasoning that the policy was merely an interpretation precedent to enforcement.... The policy for calculating overtime pay at issue in *Skyline Homes* was a regulation within the meaning of the APA because it was a standard of general application interpreting the law the DLSE enforced and because it was not merely a restatement of prior agency decisions or advice letters. We acknowledge that the employer challenged the policy in the context of a particular adjudication, but this fact does not alter its character as a policy of general application and thus a regulation. We disapprove *Skyline Homes* to the extent it concludes otherwise.

(*Tidewater Western Marine v. Bradshaw,* 14 Cal.4th at 573.)

Under *Tidewater,* if the Memorandum of Understanding ("MOU") containing DLSE's approval of CPS's current compensation plan is considered a policy of general application, it would be entitled to no weight and no deference. A similar finding of no weight and no deference would flow from the characterization of the MOU as nothing more than a litigation decision made by DLSE to put an end to its ongoing battle with CPS. A litigation decision made by DLSE in the context of its decade-old lawsuit CPS could have no effect on a case that now does not involve DLSE as a party, but that instead was brought by private plaintiffs with no connection to

the DLSE-CPS litigation.

Under the terms of the MOU, all claims raised in CPS's complaint for declaratory relief and DLSE's cross compaint for unpaid wage, penalties, liquidated damages and injunctive relief were dismissed *without prejudice.* No court findings were made as to the legality of CPS's compensation scheme. Section 3.b of the MOU expressly stated: "This agreement is entered into by the parties solely for the purpose of compromising and settling the matters in dispute in the referenced litigation." (Joint Appendix 0176-0180.)

Though not relevant to this case, and certainly not controlling, it is worth taking a closer look at the MOU in order to fully appreciate its internal inconsistency. Its characterization of the hours between 9:00 p.m. and 5 a.m. as "free time" for the trailer guards , purporting they are "free to leave the site at will during this free time," is belied by the following conditions on this supposed "freedom" --

1. "the Trailer Guard will be on 'stand-by' subject to being required to respond to alarms and other recalls to work during those hours;"

2. "before any Trailer Guard leaves the site, he/she shall call into a central location and inform CPS that he/she is leaving, how long he/she intends to be gone from the site; and where he/she intends to be;"

3. "the Trailer Guard shall carry a pager or other device that will allow CPS to contact him/her;"

4. "if paged or otherwise summoned, the Trailer Guard shall answer the page or otherwise contact CPS immediately;"

5. "the Trailer Guard may be required to stay within a radius of distance that will allow him/her to return to the construction site within 30 minutes" and,

6. "CPS may require a Trailer Guard to remain at the site during all or any portion of his/her free time on any given occasion."

(Joint Appendix, 0176-0180.)

The MOU does not contain all of the facts relating to CPS's control over the trailer guards during the so-called "free time" hours. These undisclosed facts, as to which there is no evidence that DLSE was ever made aware, include the following:

1. Trailer Guards who wish to leave the construction site during the period from 9 p.m. to 5 a.m. are not allowed to depart until a reliever arrives and would violate company policy if they were to depart before a reliever arrives. (Joint Separate Statement of Undisputed Facts ["JSS'"] at Joint Appendix 0076-0089, Fact Nos. 16, and 34.)

2. If a Trailer Guard notifies CPS that he or she intends to leave the

work site during the period from 9 p.m. to 5 a.m., and a reliever is not available at the time the guard intends to be absent, the Trailer Guard will typically be ordered to remain on the premises. (JSS, Fact No. 38.)

3. CPS has a right to order a Trailer Guard to remain at the site during these hours, even if the Trailer Guard has an emergency. (JSS, Fact No. 39.)

4. CPS prohibited the trailer guards from entertaining adult visitors, and from having minors visit the construction site, and from keeping any pets in their trailers. (JSS Facts No. 26 and 28.)

These non-disclosed facts make clear that this is anything but "free time," that CPS does not permit the guards to come and go freely during the nighttime hours; that they are required to do more than just notify Dispatch in order to leave the work site; and that they cannot leave unless CPS gives them permission to leave *and* another employee arrives to relieve them. Designating this time as "free time" in the MOU does not make it so where each trailer guard was required to remain at the work site during the night time hours, and respond to any alarms and suspicious sounds, unless and until CPS gave the guard specific permission to leave *and* another employee showed up to take over the guard's duties. Moreover, the prohibition on any visitors (including family members) and on keeping any pets is simply

inconsistent with the characterization of these hours as "free time."

In truth, the MOU's designation of this time as "free time" was nothing but a fig leaf for CPS to conceal the actual extent of control it exercised over the trailer guards during these night time hours. The fact that the trailer guards were "free" to ask for permission to leave the work site for some part of this time does not make the time any less controlled than the time of a factory worker who is similarly "free" to ask his or her foreman for permission to leave the factory to attend to a personal task during some part of a scheduled shift. Make no mistake about it – these night time hours were scheduled shifts, during which time the trailer guards were required to remain at the work site and respond to alarms and other suspicious sounds. That was the esssence of CPS's business model and that is what CPS sold to its customers – the presence of a guard during these nighttime hours at the worksite ready and available to immediately respond to potential theft, trespass or vandalism. This is the essence of "being engaged to wait" in the words of the U.S. Supreme Court in *Armour & Company v. Wantock* (1944) 323 U.S. 126, 133.

Whatever "approval" DLSE gave to CPS in this MOU was conditioned as approval for the facts as disclosed in the MOU: "The Labor Commissioner and the DLSE agree that the terms of employment regarding

the 'uncontrolled standby plan' **agreed to herein** comply with all applicable current IWC orders and related wage and hour laws and regulations." (Emphasis added. Para. 2.b., MOU, at Joint Appendix 0177.) In any event, whatever facts DLSE may have had before it when it entered into this MOU, and whatever its motivations may have been for entering into the MOU, DLSE's interpretation contained therein as to whether CPS was in compliance with any applicable IWC order is entitled to no weight and no deference by this Court in deciding the case before it.

If wage and hour case law teaches us anything, it is that it is the courts, not the DLSE, that ultimately get the final word in the interpretation of IWC orders and Labor Code provisions. Courts have not hesitated to reach opposite conclusions from the DLSE based on the courts' interpretation of controlling legal authority. (See, e.g., *Livadas v. Bradhsaw* (1994) 512 U.S. 107 [holding that DLSE enforcement policy of refusing to process statutory wage claims of employees covered by collective bargaining agreements violated those employees' rights under NLRA], *Cuadra v. Millan* (1998) 17 Cal.4th 855 [holding that DLSE enforcement policy of applying statute of limitations from date of Berman hearing, rather than from date wage claim initially filed, violated Labor Code § 98], *Murphy v. Kenneth Cole Productions, Inc.,* (2007) 40 Cal.4th 1094 [holding that

remedy provided by Labor Code §226.7 for extra hour of pay for failure to provide meal or rest period in accordance with applicable IWC order was a wage subject to a three-year statute of limitations; rejecting then current DLSE enforcement policy that it was a penalty subject to a one-year limitations period], *Hudgins v. Neiman Marcus Group, Inc.* (1995) 34 Cal.App.4th 1109 [holding that deductions from salesperson's commissions to recoup unidentified returns violates Labor Code § 221; rejecting Labor Commissioner's enforcement policy allowing for such deductions], *Amaral v. Cintas Corporation No. 2* (2008) 163 Cal.App.4th 1157, 1209-1211 [holding that imposition of civil penalties under Labor Code §§210 and 225.5 is mandatory upon finding that employer failed to pay wages or unlawfully withheld wages due; rejecting DLSE enforcement policy stating that such penalties are discretionary and should not be assessed when there is evidence of a good faith dispute], *Church v. Jamison* (2006) 143 Cal.App.4th 1568 [holding that employee filing timely claim under Labor Code § 227.3 for unpaid vacation wages following termination can seek vacation wages earned as far back as start of employment, without limit on how long ago wages were earned, rejecting DLSE enforcement policy, and prior case that had upheld that DLSE enforcement policy, limiting recovery to vacation wages earned in the 2 or 4 year period prior to the filing of the

claim].)

In not a single one of these cases did courts defer to, or give any weight to, the challenged DLSE enforcement policies. Regardless of whether DLSE adopted an enforcement policy in 2003 of approving CPS's compensation scheme (on the basis of the facts set out in the MOU as to that compensation scheme), any such enforcement policy is entitled to no weight in the proceedings before this Court.

IV. Neither *Overton* Nor Any Other Case Supports CPS's Contention That Its Trailer Guards Were Free From Employer Control During the So-Called "On-Call" Shifts

There are two fundamental errors underlying CPS's assertion that "the Trailer Guard are [sic] like the employees in *Overton* [*v. Walt Disney Co.* (2006) 136 Cal.App.4th 263], who were held not to be under the control of the employer while riding the employer's bus from the Disney parking lot to their jobs at Disneyland because their decision to take the employer's shuttle was voluntary." (CPS Answer Brief, p. 27.)

The first error is that CPS is comparing a non-required activity with a required activity. Disney employees were not required to take the employer-provided shuttle as part of their commute, but CPS's trailer guards *are required to remain on the worksite during the so-called "standby" or "on-*

call" hours of 9 p.m. to 5 a.m. unless and until they obtain permission from CPS to leave, and that such permission need not be granted, and that even when permission is granted, the trailer guard cannot leave the worksite until a reliever arrives. **(CITE)**

The second error is that CPS is comparing an activity that take place away from the worksite outside of the employee's regularly scheduled shift with an activity that takes place at the worksite during the employee's regularly scheduled shift. The activity at issue in *Overton* – commuting to work – took place away from the worksite, outside the employee's regularly scheduled shift, whereas the activity at issue here – remaining at the worksite for the entire standby shift in order to deter potential vandalism or theft and to immediately respond to any alarms or suspicious sounds – takes place at the worksite during a regularly scheduled shift.

Overton, in short, has no bearing on the facts of this case. Moreover, CPS has not pointed to a single case that lends support to its contention that its trailer guards were not subject to employer control during the so-called "on-call" shifts. CPS's entire argument is based on a gross fallacy – that employees who are required to be at the worksite during specified hours for the benefit of the employer are somehow not really under their employer's control unless and until they request permission to leave the worksite, and

that unless and until the employee makes such a request, his or her presence at the worksite is "voluntary" and hence, noncompensable. It is not surprising that CPS has failed to provide a single case in support of its exercise in sophistry.

CPS's argument is rooted in conflating time during which employees are subject to employer control (so as to fall within the definition of "hours worked") and time during which employees are free from employer control. In its Answer Brief, CPS confuses time during which employees on out-of-state business travel are free to do whatever they wish to do, and with whomever they wish to be with, not responsible for any work duties until a business meeting the next day, with time during which CPS's trailer guards are required to remain at the work site at night – alone and prohibited from having their friends or family visit them – and to get up and immediately respond to any alarms or suspicious sounds. CPS suggests that because DLSE does not require payment of sleep time for employees on out-of-state travel, the same result should apply for CPS's trailer guards. In the former situation, the worker on the out-of-state business trip is not subject to the employer's control once he or she has checked in to the hotel until the scheduled business meeting the next day. He or she is not on-call or otherwise on-duty during that time. He or she is free to go to a restaurant, go

sightseeing or shopping, see a movie, visit friends, etc. There is nothing about this scenario that applies to CPS's trailer guards.

Moreover, in making its argument about out-of-town business trips, CPS cites the section of the DLSE Manual, rather than the opinion letter which it summarizes. The opinion letter, issued on February 21, 2002, is attached as Exhibit H to Mendiola's MSJN, filed herewith. It is instructive, as it clearly set out the DLSE's enforcement policy regarding the non-applicability of less protective federal regulations to California's definition of "hours worked." To quote from this opinion letter:

> State wage and hour law differs in many respects from federal law, including the extent to which various activities are treated as "hours worked" under state law, or as compensable worktime under federal law. The federal FLSA povides the floor below which no employer may go, but when California law provides greater protections to employees, the more protective provisions of California law will apply. *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575; See also *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785. Every one of the industrial and occupational orders adopted by the California Industrial Welfare Commission (IWC) defines "hours worked" to include "the time during which an employee is subject to the control of an employer" *and* "all the time the employee is suffered or permitted to work, whether or not required to do so."..... And as the Supreme Court observed in both *Ramirez* and *Morillion*, federal regulations which have no counterpart in state law, and which would have the effect of undercutting protections provided by state law to employees, do not apply and will not be used to interpret state law.

The letter went on to explain why certain time spent on out-of-state

travel that was not compensable under federal regulations nonetheless constitute "hours worked" and thus, must be paid under state law. To the extent the letter states that sleep time after arriving at the out-of-town destination need not be paid, it is important to note that there were absolutely no facts presented to DLSE that would have indicated that the employee was subject to any restrictions during this sleep time (such as a prohibition on having a spouse or significant other accompany the employee on the trip, or a prohibition on leaving the hotel room during the sleep time hours) or that the employee was subject to any job requirements (such as an obligation to respond to phone calls from the employer) during his or her sleep time. Consequently, there is nothing in this opinion letter that lends any support to CPS's assertions as to the legality of its failure to pay its Trailer Guards for the eight hours each night during which they were required to remain at the worksite, charged with the duty to immediately respond to any alarms or suspicious sounds, and prohibited from spending that time with any other person.

CONCLUSION

Associate Justice Johnson authored a concise and powerful dissent in *Monzon* that anticipated exactly how this Court would come to analyze the question of whether less protective provisions of federal law or regulation

should be imported to state law to interpret IWC wage orders that, according to their express terms, offered greater protection to employees than the federal law or regulation at issue. Justice Johnson criticized the majority's "convoluted reading of these federal interpretations or federal law," observing that by importing this federal law, the majority "overlooks the well-settled, common sense principle that federal interpretations of the federal labor laws are not controlling in any sense where, as here, the language and intent of the IWC orders differ in language and intent from the federal statutes and regulations." (*Monzon v. Schaefer Ambulance Co.*, supra, 224 Cal.App.3d at 49.)

Justice Johnson then analyzed the three ways in which California's IWC orders differ from federal law in regards to the compensability of "sleep time" for employees on 24-hour shifts. First, there is a different definition of "hours worked." Second:

> California and federal law ... differ in the types of employees permitted to agree to exclude sleep and meal time. The California provision is expressly limited to ambulance drivers and attendants. (IWC 9-80, §3(G).) The federal regulation contains no such limitation. (29 C.F.R. §785.22.) Language and interpretations aimed at authorizing agreements in a wide range of occupations and employment situations have little relevance in construing a narrow exception targeted on a single category of employee working in a single industry.... Third ... the California and federal law differ in the requirement the exclusion of sleep and meal time from "hours worked" [by such ambulance drivers and attendants] be in the form of a

> written agreement. The comparable federal regulation (29 C.F.R. §785.22 contains no requirement the agreement be in writing. The California one does – in no uncertain terms. (IWC Order 9-80, §3(G).)

(*Id.*, at 49-50.)

This was the correct way to analyze both issue of immediate issue of whether the federal sleep time regulation applies to California wage and hour law, and the broader issue of whether it is appropriate to import any less protective regulation into California wage and hour law. The Court of Appeal, below, erred in its conclusion that 29 C.F.R. § 785.22 applies to California law, but properly analyzed the issue in reaching its conclusion that a different federal regulation, 29 C.F.R. § 785.23, is inapplicable to California law. We respectfully ask this Court to reverse the Court below on the issue of the applicability of the former regulation, and uphold the Court below on the issue of the applicability of the latter.

Dated: February 3, 2014

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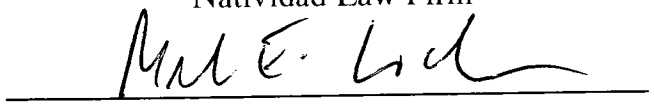

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CERTIFICATION OF WORD COUNT

The text of this Reply Brief on the Merits consists of 7,763 words as counted by the Corel Word Perfect X4 word processing program used to generate this document.

Date: February 3, 2014

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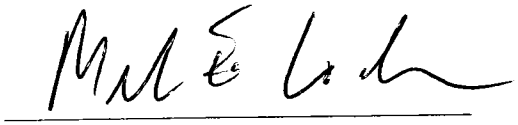
PROOF OF SERVICE

I, Miles E. Locker, hereby state and declare:

I am a partner with the law firm of Locker Folberg LLP, with a business address at 71 Stevenson Street, Suite 422, San Francisco, California 94105. I am not a party to the above-entitled action. I am an attorney licensed to practice law in the State of California.

On the date hereof, I caused to be served the foregoing REPLY BRIEF ON THE MERITS on the interested parties, by depositing copies thereof in the mail at a U.S. Postal Service facility in San Francisco, California, with each said copy enclosed in a sealed envelope, with first class postage fully prepaid, addressed to the persons listed on the following Service List attached hereto.

I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 3rd day of February, 2014 at San Francisco, California.



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