S232607

SUPREME COURT COPY

CRC 8.25(b)

IN THE SUPREME COURT OF CALIFORNIA

SUPREME COURT
FILED

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HECTOR ALVARADO

Plaintiff, Appellant and Petitioner

vs.

DART CONTAINER CORPORATION OF CALIFORNIA

Defendant and Respondent

AFTER A DECISION BY THE COURT OF APPEAL
FOURTH APPELLATE DISTRICT
CASE NO. E061645

PETITIONER'S REPLY TO RESPONDENT'S ANSWER TO PETITION FOR REVIEW

(Service on Attorney General and District Attorney required by Bus. & Prof. Code §§ 17209, 17536.5)

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HECTOR ALVARADO

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This Reply is written in response to Dart Container's Opposition to the Petition for Review in the case of *Alvarado v. Dart* 243 CA4th 1200. Dart misapprehends how the Court of Appeal decision undermines and conflicts with decades of California overtime law.

I. ARGUMENT

A. Review is Warranted To Secure Uniformity of Decision and to Settle an Important Question of Law.

The Court of Appeal decision herein, by adopting a definition of "regular rate" that allows for the division of a flat sum portion of wages by total hours worked in a week, instead of by forty hours, assures that the more overtime an employee works in a week, where such a flat rate is paid as part of wages, the lower the rate he or she is paid for each overtime hour worked. The Court of Appeal decision, if allowed to stand, licenses employers to avoid the purpose of California overtime laws, as discerned in *Skyline Homes, Inc. v. Department of Industrial Relations* (1985) 165 Cal.App.3d 239, to discourage employers by penalizing them from working employees long hours.[1]

The *Skyline* Court was confronted with the question of what does

[1] Although Dart's flat amount sum was $30 in any week in which an employee worked Saturday and Sunday, the decision would give free reign to employers to make so called flat sum bonuses hundreds of dollars per week while reducing hourly rates substantially. Such bonuses would effectively cut overtime rates significantly.

regular rate mean under California overtime law in the context of the legal requirement that employees be paid one and a half or double their *regular rate* when they work overtime. The *Skyline* court defined "regular rate'" to preclude a definition which causes the amount paid per hour to decrease with each hour worked. It held that determining a regular rate by dividing a fixed amount of wages by the total hours worked in a week, rather than a fixed forty hours of work, is not what the quasi-legislative body, the IWC, had in mind when it used the words "regular rate". *Skyline* found this to be the case because the effect of defining regular rate pursuant to the "fluctuating workweek methodology" of dividing the fixed sum by all hours worked, meant that the amount per hour paid to employees decreased the more hours an employee worked. California employers would not be discouraged from working employees more hours, but would be encouraged to do so. *Skyline, supra* 165 Cal.App.3d at 246-250.

Dart's opposition to the Petition for Review fixates on the characterization, in its payment scheme, of the fixed amount of wages used in calculating "regular rate", as a "bonus", not a "salary". (Ans. to Review Petition p. 18-23). The substance of the two cases, *Alvarado,* and *Skyline*, involve the same basic question irrespective of "bonus" or "salary" names: When an employee's wages include a fixed amount paid in a pay period irrespective of total hours worked, and an employee works over forty hours in a week or over eight hours in a day, how does one determine

the "regular rate" to be used as the multiplier in determining overtime compensation under California law? Is the *regular rate* determined by a formula which involves dividing the fixed amount of wages by forty hours, or by dividing the fixed amount by the total hours worked in the week? Review herein is unwarranted because the question of whether form should supersede substance must be addressed to both secure uniformity of decision and to settle an important question of law. CRC 8.500(b) (1). *Alvarado's* embrace of the fluctuating workweek methodology, with diminishing regular rates the more hours worked, conflicts with *Skyline*'s repudiation of the fluctuating workweek methodology of calculating overtime. *Skyline*'s determination of the IWC's intent in using the words "regular rate" does not turn on a "salary" as opposed to "bonus" distinction, but rather on the effect of the methodology used by the employer in *Skyline*, an effect replicated in *Alvarado*--- a decreasing so-called regular rate with each hour worked.

FACT COMPARISON:

Dart's Opposition to the Petition for Review makes an apples to oranges argument throughout, claiming the *Skyline* pay scheme involves a *salary* and the *Dart* pay scheme a *bonus*; and therefore, the method used for calculating regular rate in the two cases can vary. Upon close scrutiny, such a superficial analysis is a distinction that does not make a difference; and therefore, review is appropriate.

Relevant to California overtime jurisprudence is the fact that the "salary" in *Skyline* and the "bonus" in *Alvarado*, are both fixed amounts of wages that must be factored into the "regular rate" when calculating overtime each week that they are part of the wages, and overtime is worked. A comparison of the facts at issue in *Skyline*, to the facts at issue in this matter is telling:

In *Skyline* employees worked different amounts of time each week. *Skyline*, *supra* 165 Cal.App.3d at 243-44. In this matter, employees similarly work different amounts of time each week. *Alvarado, supra* 243 CA4th at 1205. In other words, workweek lengths "fluctuate" from week to week.

In *Skyline,* there was a flat amount element to wages paid in exchange for a week's labor. Irrespective of the amount of hours worked, whether 40 in a week, over 40 in a week, or over 8 in a day, employees received a fixed minimum amount of pay per week they worked. *Skyline*, *supra* 165 Cal.App.3d at 244. Here, there is similarly a fixed minimum amount paid in exchange for a week's labor, irrespective of the number of hours worked during the week, in weeks when an employee works on a Saturday or Sunday. (e.g. $30 for a week in which an employee works both Saturday and Sunday no matter the total hours worked during the week). *Alvarado, supra* 243 CA4th at 1204-1205.

The employer in *Skyline* employed a methodology for determining

overtime that involved dividing the fixed amount of wages by the total hours worked in the week, not by the standard non-overtime 40 hour work week. *Skyline*, *supra* 165 Cal.App.3d at 245-246. Dart did the same thing here, dividing the fixed amount payment by the actual hours worked, not by the standard non-overtime forty hours in a week. *Alvarado, supra* 243 CA4th at 1205 Step 2.

HOLDING COMPARISON:

In *Skyline* the court held that the regular rate is to be determined by dividing the fixed amount of wages by forty hours. It rejected the Federal fluctuating workweek methodology of dividing the fixed amount by actual hours worked in the week. The court pointed out that under the rejected Federal "method of calculating overtime for fluctuating workweek employees, the 'regular rate of pay' is reduced as the number of overtime hours is increased in a given workweek." *Skyline*, *supra* 165 Cal.App.3d at 246.

The court then concluded that such a methodology, where the cost of overtime to the employer decreases as more overtime is worked, is incompatible with the meaning and purpose of California overtime law which is to discourage employers from compelling workers to work long hours in any day or week by penalizing the employers. *Id,* 165 Cal.App.3d at 247-248. It is axiomatic that a regular rate that decreases with each extra minute of overtime rewards employers by lowering their costs per overtime

hour worked, and does not penalize them.

"If, as seems obvious, the IWC intended to employ an eight hour day standard *and to discourage the use of longer work days,* the fluctuating workweek [system where per hour wages are reduced as overtime worked increases] *would not effectuate* this purpose." *Id,* 165 Cal.App.3d at 248 (emphasis added).

"Premium pay for overtime is the primary device for enforcing limitations on the maximum hours of work. (*California Manufacturers Assn. v. Industrial Welfare Com.* (1980) 109 Cal.App.3d 95, 111, 167 Cal.Rptr. 203 Remedial statutes should be liberally construed to promote the general object sought to be accomplished. (*Industrial Welfare Com. v. Superior Court, supra,* 27 Cal.3d at p. 713, 166 Cal.Rptr. 331, 613 P.2d 579 In view of the dissimilar language [FLSA and California law] and purpose of the California statute and regulation, we conclude that the DLSE has correctly interpreted wage order 1–76 to preclude the use of the fluctuating workweek method of overtime compensation." *Id,* 165 Cal.App.3d at 250.

The Court of Appeal decision herein, in stark contrast to *Skyline*, held that the *Skyline* methodology does not apply in a context where the fixed amount divided by the total hours worked in a given week is called a "bonus". The decision herein, *Alvarado, supra* 243 CA4th at 1207 in conjunction with 1218, approves a Federal formula that results in what *Skyline* condemned, a decrease in hourly rate with each extra minute of

overtime worked because a fixed amount wage is divided by actual hours worked in the week, not forty hours.

Alvarado, adopts a "regular rate" formula that is contrary to what *Skyline* determined was the legislative intent of the Industrial Welfare Commission notwithstanding the IWC's continuous use of the words "regular rate" in wage orders it enacted after *Skyline* was decided.

The holding herein, in direct opposition to *Skyline's* position, makes this case ripe for review under CRC 8.500 (b) (1) . Either "regular rate" is to be determined consistent with *Skyline*, and fixed portions of wages are to be divided by forty hours, and the "regular rate" does not decrease as overtime hours increase, or regular rate is to be determined consistent with *Alvarado*, where fixed portions of wages are to be divided by the total hours worked during the week, and the "regular rate" decreases as overtime hours increase.

Calling a fixed amount a *bonus* in one context and a *salary* in another does not eliminate the issue of what the IWC meant in using the expression "regular rate".

Dart takes the position, in its Opposition to the Petition for Review, that review is not necessary because one case's fixed amount was a "salary", and in the other case, the fixed amount is a "bonus". To deny review on account of a variant in the characterization of fixed amounts, would have extraordinary ramifications, incentivizing employers to modify wage

schemes, create and emphasize fixed "bonuses" per week, and limit and deemphasize hourly pay and salaries in wage packages for non-exempt employees. Absent review, it does not take much to imagine a future of employers instituting different types of fixed amount bonuses of hundreds of dollars per week, such as fixed sum day or night shift "bonuses", daily show up to work fixed "bonuses", fixed weekend "bonuses", showing up to work fixed "bonuses", etc., all effectively reducing overtime obligations on account of the Court of Appeal decision herein; a decision that benefits employers by reducing the per hour rate payable with each extra minute and hour of overtime worked.

Respondent's opposition to the grant of review offers no substantive rationale warranting treatment herein of a *fixed part of* weekly wages different than *Skyline* treated a *fixed weekly wage*.

Skyline interpreted "regular rate" in a manner that did not except any system that resulted in a progressive decrease in per hour payments for overtime. Nowhere did Respondent's Opposition to Review, or the Court of Appeal decision explain how the *Skyline* position on what was intended by the IWC only applies when all of a weekly wage is a fixed amount, but does not apply when some part of a weekly wage, called a "bonus", is a fixed amount.

B. Respondent Confuses "New Issues" With Extensive Briefing On Existing Issues.

Respondent's opposition to the Petition For Review claims that Petitioner has raised new issues. (Ans. to Review Petition 8-14). There is an obvious distinction between raising new issues, and buttressing arguments on pending issues with more authority.

The issue at the heart of this case, as briefed in the Court of Appeal, is how the regular rate should be calculated, in determining overtime pay. Respondent acknowledges that Petitioner relied in its briefing in the Court of Appeal, on *Skyline* analysis of the IWC's intent in determining "regular rate" (Ans. to Review p.9). Respondent then goes on to assert that references in the Petition for Review raise new issues (Ans. to Review p.12-14), when those references simply buttress the *Skyline* argument raised in the Court of Appeal. For example, calling a fixed "bonus" the equivalent of a salary component of a wage package does not raise a new issue, it highlights that the payment at issue, a fixed amount paid during a workweek is a de facto "salary" element in a pay scheme, distinct from hourly pay, commission, or piece work pay, and akin to the fixed minimum amount at issue in *Skyline*.

Respondent next contends that raising the 1957 Attorney General Opinion, and the 1963 findings of the Industrial Welfare Commission in the Petition, similarly raises new issues (Ans. Pet. For Review p. 12-14). This

position is absurd. These authorities clearly buttress the *Skyline* analysis. They do not raise new issues. The A.G.'s Opinion is even referenced in *Skyline*, *supra* 165 Cal.App.3d at 253. The "findings" of the IWC in 1963 are pertinent to the matters briefed in the Court of Appeal because the findings reinforce *Skyline's* take on what the IWC intended, confirming that *Skyline's* analysis was right, not an aberration.

Respondent further attacks reference in the Petition to the case law. post-*Skyline*, that cites *Skyline* favorably (Ans. to Review Petition p. 13). The State Court authorities cited in the Petition do not raise new issues, but rather, they establish that *Skyline* is not an anomaly. The Federal cases of *Walling v. Hardwood Co.* (1945) 325 U.S. 419, ,and *Reich v. Midwest Body Corp.* (N.D.Ill.1994) 843 F.Supp. 1249, that appear in the Petition similarly do not raise new issues. They were relied on by the Court of Appeal in *Huntington Memorial v. Superior Court* (2007) 131 Cal.App.4th 893, 904-905, a case that stands in further support of the proposition articulated in *Skyline*, that California *regular rate* analysis does not countenance a system that generates diminishing hourly rates as the number of overtime hours of work increases.

C. Review Should Be Granted As To The One New Issue Raised by Petitioner, The Proper Application of the Federal Regulatory Scheme To Dart's Fixed Amount "Bonus" Program

The final "New Issue" argument Respondent raises is that Petitioner

should not have referenced Federal law and Federal Regulations in support of an alternative argument that the Federal Regulation the Court of Appeal relied on, 29 C.F.R. 778.209 (a), is inapplicable.(Ans. to Review Pet. p. 13-14, indirectly alluding to the argument that commences at Page 32 of the Petition For Review). To the extent challenging the analysis of Federal Law and Regulations relied on by the lower courts in this case is a new issue, not briefed below, its status as such should, preliminarily, not diminish the propriety of review of the threshold issue. At a minimum, the Court should resolve the conflict between *Skyline* and this matter irrespective of the separate new issue. However, if the court does not reverse *Alvarado*, or denies review on the threshold issue, workers and their employers need this Court to take a careful look at the Federal Regulations referenced in the Petition for Review. This court needs to decide if the Court of Appeal's application of 29 C.F.R. 778.209 (a) is sound in light of the other Federal regulations that comprise part of the same integrated regulatory scheme, and necessarily inform application of 29 C.F.R. 778.209 (a). The newness of the issue should not prevent its review in the context of this case.

The implications of the possible wrong application of the operative Federal Regulations throughout California creates an untenable situation. If the Court of Appeal decision is allowed to stand, employers throughout California will readily rely on it in the design of wage programs in an effort to reduce the amount paid out in overtime premium pay. They will

necessarily believe that calculation of overtime in conformance with the Court of Appeal decision herein complies with both Federal and State law. Depending on the number of employers that adopt weekly fixed rate bonus programs, millions of California's working men and women could be adversely impacted. The United States Department of Labor or a Federal Court, can ultimately come along and rule, consistent with the position on the Federal Regulations Petitioner has taken in the Petition for Review--that 29 C.F.R. 778.209 (a), as applied by the Court of Appeal was wrongly applied because it was read in a vacuum, and not in conjunction with 29 CFR § 778.203, and 29 CFR § 778.502. This makes the secondary issue--Did the Court of Appeal properly interpret and apply federal regulations--too important to ignore if Petitioner does not prevail on the applicability of *Skyline* analysis.

Cedars-Sinai Medical Center v. Superior Court (1998) 18 Cal.4th 1, and cases cited therein are instructive. In *Cedars-Sinai,* the court held, that where an issue of law does not turn on the facts of a case, it is a significant issue of widespread importance, and it is in the public interest to decide the issue at the time, the court can decide it notwithstanding a failure on the part of the parties to raise it in the Court of Appeal. *Id,* 18 Cal.4th 6-7. Those factors are all present here.

The consequences of a misapplication of the Federal Regulations can be profound if employers mistakenly rely on the Court of Appeal decision

herein, and a Federal tribunal, thereafter, takes the position that application of 29 C.F.R. 778.209 (a) to the facts of fixed payments like the one at issue here, in the manner applied by the Court of Appeal, is erroneous. Given the opportunities employers may feel they have to reduce overtime pay to their employees based on a court sanctioned erroneous application of Federal regulations, careful review is necessary.

D. Petitioner's Reframing Of Issues Should Not Impact This Court's Review Decision.

In the Petition for Review, Petitioner defined the issues as:

1. Under California law, how must an employer calculate the "regular rate" for the purpose of determining overtime pay when a weekly wage has an hourly wage component and fixed amount component that is payable irrespective of whether or not overtime hours are worked?

2. Can an employer, under California law, divide a flat sum component of a weekly wage by total hours worked each week (apply "fluctuating workweek" methodology) to arrive at the "regular rate" for purposes of calculating overtime, where the number of hours varies from week to week, causing the overtime rate to decrease each week that the amount of overtime work increases?

3. Does California law require an employer to divide a flat sum component of a weekly wage by the maximum number of non-overtime hours for the week (e.g. 40 hours) in determining the "regular rate" to be

utilized in calculating overtime?

4. If California law is indeed silent on how to calculate overtime when flat sums called "bonuses" are paid as part of a weekly wage, was the Court of Appeal's application of 29 CFR 788.209 (a) wrong, given the provisions of 29 CFR 778.502 and 29 CFR 778.203.

In Respondent's answer to the Petition, Respondent takes issue with Petitioners statement of issues, claiming that the issue in the case is the one articulated by the Court of Appeal: "This appeal raises the sole question of law of whether defendant's formula for calculating overtime on flat sum bonuses paid in the same pay period in which they are earned is lawful." (Ans. to Petition for Review p.14-17).

In substance, the issues as articulated in the Petition and the Issue identified by the Court of Appeal are the same, the only difference being that the Petition "issues" utilize language that describe what the Company policy word "bonus" is in fact--" a flat sum component of a weekly wage".

Employers and employees in the State need a definitive controlling answer to the questions raised going forth. If this court granted review, and then ruled only as to " flat sum components of weekly wages" called "bonuses", there would be future cases where employers did not use the word "bonus" to describe a "flat sum component of a weekly wage", but used words like "premium", "retention compensation", "weekend duty pay" etc., and litigation would ensue.

One has to look no further than this matter and *Skyline*. *Skyline* unequivocally found that the IWC did not intend its concept of *regular rate* to ever be understood to endorse a regular rate that decreases the more hours an employee works. It came to this conclusion in a case where the improper formula used was applied to something characterized a "salary". Here, Respondent, the trial court and Court of Appeal embraced the formula that was rejected in *Skyline* simply because the formula that caused a decreasing *regular rate* was applied to something called a "bonus". In reframing the issues, Petitioner was merely attempting to encapsulate the universal issue, applicable irrespective of the nomenclature used for the variety of fixed payment schemes: Under California law, was *Skyline* correct? Are overtime formulas legal when the formula results in a diminishing regular rate as hours worked increase? Tying the issue only into circumstances where fixed payments are deemed bonuses, will just invite future litigation where the fixed payments are deemed something else.

II. CONCLUSION

Respondent's Answer to the Petition for Review does not undermine the obvious conclusion that Review is necessary to secure uniformity of decision and to settle an important question of law. Ultimately billions of dollars of overtime pay is in the balance. This court needs to decide if "regular rate" analysis can ever allow for a regular rate that decreases as the

number of hours of work increases. Was *Skyline's* analysis of the IWC's intent in using the language "regular rate" erroneous. If not, the formula approved by the Court of Appeal herein is unlawful, and the decision it rendered must be reviewed and reversed.[2]

Dated: March 25, 2016

Respectfully Submitted,

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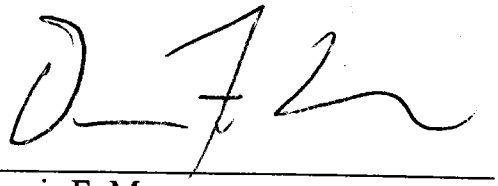
By: DENNIS F. MOSS
Attorneys for Plaintiff, Appellant and Petitioner
HECTOR ALVARADO

[2] The final two Arguments made by Respondent in its Answer regarding the supposed irrelevance of the A.G. Opinion and IWC findings are not addressed in the body of this reply. These positions completely misapprehend the utility of both the A.G. Opinion and IWC findings as tools properly employed to discern the IWC's Quasi-Legislative intent in using the ambiguous words "regular rate".

RULE 14 CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) or 8.260(b)(1) of the California Rules of Court, the enclosed brief of Appellant is produced using 13-point Roman type including footnotes and contains approximately 3,792 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: March 25, 2016



Dennis F. Moss

PROOF OF SERVICE

1, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 15300 Ventura Boulevard, Suite 207, Sherman Oaks, California 91403.
2. That on March 25, 2016 declarant served the REPLY TO DEFENDANT'S ANSWER TO PETITION FOR REVIEW by depositing a true copy thereof in a United States mail box at Sherman Oaks, California in a sealed envelope with postage fully prepaid and addressed to the parties listed on the attached service list.
3. That there is regular communication by mail between the place of mailing and the places so addressed.

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

Executed this 25th day of March, 2016 at Sherman Oaks, California.

Lea Garbe

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