S 241655

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

JAZMINA GERARD, KRISTIANE MCELROY, AND JEFFREY CARL,
Plaintiffs-Appellants

vs.

ORANGE COAST MEMORIAL MEDICAL CENTER,
Defendant-Respondent.

AFTER DECISION BY THE COURT OF APPEAL,
FOURTH APPELLATE DISTRICT, DIVISION THREE,
CASE NO. G048039

FROM THE SUPERIOR COURT, COUNTY OF ORANGE
CASE NO. 30-2008-00096591, ASSIGNED FOR ALL PURPOSES
TO JUDGE NANCY WIEBEN STOCK, DEPT. CX 105

APPELLANTS' ANSWER BRIEF TO AMICUS CURIAE BRIEF FILED BY CALIFORNIA HOSPITAL ASSOCIATION

Unfair Competition Case, Service on Attorney General and District Attorney required by Bus. & Prof. Code § 17209

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I. INTRODUCTION

The California Hospital Association ("CHA") has filed an amicus curiae brief in support of Defendant-Respondent Orange Coast Memorial Medical Center ("OCMMC"). Nothing in CHA's brief assists OCMMC.

First, CHA argues that in enacting Senate Bill 60 ("SB 60"), the Legislature intended to empower the Industrial Welfare Commission ("IWC") with authority to adopt wage orders *inconsistent* with Labor Code Section 512. As the tale goes, when the Legislature enacted Senate Bill 88 ("SB 88") shortly thereafter, as emergency legislation, SB 88 "took away" the authority to adopt wage orders inconsistent with the statute, but only prospectively. As discussed *infra*, the assertion is plainly wrong as it contradicts the language of the Labor Code and its legislative history.

Second, to distract from the real issues, CHA argues that the IWC determined that the meal period waiver in Wage Order 5 section 11(D) was consistent with the health and welfare of workers. It is not disputed that the IWC made such a determination. However, its determination conflicts with the parameters of its authority as conveyed by the Legislature, which had different ideas as to the welfare of workers as is evidenced by Section 512.

Third, CHA presents support for the Court of Appeal's determination that Wage Order 5 was always valid because it was "adopted" before Senate Bill 88 ("SB 88") was effective. As discussed below, the argument is contrary to legislative history,

illogical, and without legal support.

Fourth, CHA argues that a decision invalidating the meal period waiver cannot be given retroactive effect because hospitals relied on the wage order. The argument ignores that this Court's interpretation of the former law – i.e. what the law *was* – is to be given retroactive effect and CHA and its members did not rely on any contrary decision or body of law. Nor are CHA's concerns about "retroactive liability" and "due process" valid. Requiring payment of wages owed does not violate an employer's due process rights.

Finally, CHA argues that it is "permissible and appropriate" to enforce Senate Bill 327 (SB 327) retroactively to wipe away millions of dollars of premium pay owed to thousands of healthcare workers. Obviously, it is not. It is healthcare workers' due process rights that are at jeopardy here, not the hospitals'.

II. ARGUMENT

A. The IWC Never Had Authority to Enact Wage Order 5 Section (D)

In their opening brief, Appellants argue that the IWC's authority to adopt meal period waivers under the Assembly Bill 60 ("AB 60") has *always* been limited and SB 88 *confirmed* that legislative intent. (AOB at pp. 20-26.) Appellants summarized their argument as follows: "the Senate third reading analysis for Senate Bill No. 88 confirmed that it was the Legislature's intent that the IWC *never had authority* to adopt or amend work orders inconsistent with the specific provisions of section 512." (AOB at

p. 26.)[1]

CHA's amicus curiae brief presents three arguments in response. First, CHA argues that the language "notwithstanding any other provision of law" in the original (AB 60) version of section 516 indicates that the Legislature originally intended to authorize the IWC to adopt meal period waivers inconsistent with Section 512 but changed the law in SB 88 after Wage Order 5 was "adopted." (Amicus Br. pp. 14-15, 17.) The argument fails because it is inconsistent with AB 60 and the legislative history of SB 88 clarifies that was not the Legislature's intent when it enacted Sections 512 and 516 in AB 60.

Second, CHA argues that Appellants' position – that the IWC never had authority to adopt wage orders inconsistent with Section 512 – "ignores this Court's guidance in *Brinker*." (Amicus Br. pp. 15-16.) However, no portion of *Brinker* states or implies that this Court found that in enacting AB 60 the Legislature intended to authorize the IWC to adopt or amend work orders inconsistent with the provisions of section 512.

Finally, CHA argues that Appellant's position is "at odds with *Bearden*"[2] because the *Bearden* court supposedly found that

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[1] CHA argues Appellants raised the argument that Wage Order 5 Subdivision 11(D) was "void at its inception" "[f]or the first time in their reply brief." (Amicus Br. pp. 13, 14.) However, Appellants argued "[a]dministrative regulations that alter or amend the statute or enlarge or impair its scope are void ..." (AOB p. 22) and then concluded, as stated above, that "the IWC never had authority to adopt or amend work orders inconsistent with the specific provisions of section 512. (*Id.* p. 26)

[2] *Bearden v. U.S. Borax Inc.* (2006) 138 Cal.App.4th 429 ("*Bearden*").

the IWC originally had authority to adopt wage orders inconsistent with Section 512 and then "lost" that authority as a result of SB 88. (Amicus Br. pp. 15-16.) The argument fails because the issue of the IWC's authority prior to SB 88 was not before the *Bearden* court and the court made no determination that the IWC "lost" any previously-held authority.

1. The "Notwithstanding Any Other Provision of Law" Language in Section 516 as Originally Enacted is Irrelevant Because the Legislature Clarified the Law in SB 88

Labor Code section 516, as originally enacted, provided:

> **Notwithstanding any other provision of law**, the Industrial Welfare Commission may adopt or amend working condition orders with respect to break periods, meal periods, and days of rest for any workers in California consistent with the health and welfare of those workers.

(Stats. 1999, ch. 134 § 10, added emphasis.)

In September 2000, Section 516 was amended by SB 88 to read as follows:

> **Except as provided in Section 512**, the Industrial Welfare Commission may adopt or amend working condition orders with respect to break periods, meal periods, and days of rest for any workers in California consistent with the health and welfare of those workers.

(Stats. 2000, ch. 492, § 4, eff. Sept. 19, 2000. added emphasis.)

CHA argues that the term "[n]otwithstanding any other provision of law" in former Section 516 establishes that the Legislature intended in enacting AB 60 to authorize the IWC to adopt meal period orders "'despite the existence of' Section 512."

(Amicus Br. p. 15.) According to CHA's theory, SB 88 changed the law, but did not affect wage orders already "adopted" under AB 60. (Amicus Br. pp. 17, 25-30.)[3]

CHA's argument is contradicted in the first instance by the language of AB 60, which only allowed the IWC to "adopt regulations consistent with this measure." The introduction to the bill states:

> Existing wage orders of the commission prohibit an employer from employing an employee for a work period of more than 5 hours per day without providing the employee with a meal period of not less than 30 minutes, with the exception that if the total work period per day of the employee is no more than 6 hours, the meal period may be waived by mutual consent of both the employer and employee.
>
> This bill would codify that prohibition and also would further prohibit an employer from employing an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, **with a specified exception.**

(Stats. 1999, ch. 134, added emphasis.) The "specified exception" referenced in the bill is the prohibition against second meal period waivers in shifts over 12 hours contained in Section 512. AB 60 provides: "... except that if the total hours worked is no more than 12 hours, the second meal period may be waived by

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[3] The IWC "adopted" Wage Order 5 subdivision 11 (D) on June 30, 2000, which the appellate court held was "under the AB 60 version of section 516(a)." (*Gerard v. Orange Coast Memorial Medical Center* (2017) 9 Cal.App.5th 1204, 1211.)

mutual consent of the employer and the employee only if the first meal period was not waived.) (Stats. 1999, ch. 134 § 10.) Thus, just as the Legislature intended AB 60 to prohibit employers from failing to provide first and second meal periods, it also intended to prohibit employers from obtaining waivers of second meal periods from employees on shifts over 12 hours. It did not intend to authorize the IWC to adopt regulations *inconsistent* with that scheme.

CHA argues that this reading of AB 60 would render the "notwithstanding any other provision of law" phrase in Section 516 "superfluous." (Amicus Br. p. 15.) It was not. SB 88 "clarified" that the IWC had authority to adopt working conditions and orders with respect to meal periods notwithstanding other laws *except* Section 512. As Appellants have already explained, SB 88 was passed on September 19, 2000, soon after IWC's improper adoption of Wage Order 5 subdivision 11(D) on June 30, 2000. (See AOB at pp. 25-26. 29, 30; ARB at pp. 12, 13.) Briefly, the Senate third reading analysis for SB 88 states:

> This bill **clarifies** two provisions of the Labor Code enacted in Chapter 134. Labor Code Section 512 codifies the duty of an employer to provide employees with meal periods. Labor Code Section 516 establishes the authority of IWC to adopt or amend working condition orders with respect to break periods, meal periods, and days of rest. This bill provides that IWC's authority to adopt or amend orders under Section 516 must be consistent with the specific provisions of Labor Code Section 512. ...

(Stats. 2000, ch. 492, § 5, added emphasis.)

Material changes in language of a statute, such as in the amended Section 516, can simply indicate an effort by the Legislature to clarify the statute's true meaning. (*Carter v. California Dept. of Veterans Affairs* (2006) 38 Cal.4th 914, 923, citing *Western Security Bank* (1997) 15 Cal.4th 232, 243.) "One such circumstance is when the Legislature promptly reacts to the emergence of a novel question of statutory interpretation[.]" (*Ibid.*) A legislative enactment "which in effect construes and clarifies a prior statute must be accepted as the legislative declaration of the meaning of the original act, where the amendment was adopted soon after the controversy arose concerning the proper interpretation of the statute ...."

Here, the Legislature moved promptly after Wage Order 5 was "adopted," and even before the wage order was effective, and clarified the true meaning of Section 516. Thus, Section 516 as amended "must be accepted as the legislative declaration of the meaning of the original act."

2. *Brinker* Does Not Support CHA's Position That the Legislature Intended to Authorize the IWC to Adopt Wage Orders Inconsistent with Section 516

CHA next argues that Appellants' position – that the IWC never had authority to adopt wage orders that contradict Section 512 – "ignores this Court's guidance in *Brinker*." (Amicus Br. pp. 15-16, quoting *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1038 ("[t]he declared intent in enacting section 512 was not to revise existing meal period rules but to codify them *in part*," emphasis added by CHA.) CHA's cherry-picking of

this sentence and unwarranted stress on the words "in part" does not signal "guidance" supporting CHA's position.

The Court's discussion of the enactment of AB 60 in *Brinker* does not state or in any way imply that when AB 60 was enacted, the Legislature intended that the IWC be authorized to adopt wage orders that contradict the meal period requirements of Section 512. On the contrary, *Brinker* explains that the Legislature was "[t]roubled by [the IWC's] weakening of employee protection" and "[a]s part of its response to the IWC's rollback of employee protections, the Legislature wrote into statute various guarantees that previously had been left to the IWC, including meal break guarantees. (§ 512, subd. (a).)" (*Brinker*, 53 Cal.4th at pp. 1037-1038.) Thus, the legislative history described in *Brinker* supports the position of Plaintiffs.

3. *Bearden* Does Not Support CHA's Position that Prior to SB 88 the IWC Had Authority to Adopt Wage Orders Contrary to Section 512

Finally, CHA argues that Appellants' position that the IWC never had authority to adopt wage orders contrary to section 512 is "at odds with *Bearden v. U.S. Borax, Inc.* (2006) 138 Cal.App.4th 429." (Amicus Br. p. 16.) According to CHA, *Bearden* recognized that before SB 88 the IWC had "broad authority to adopt meal period provisions," but "lost the authority to adopt meal period provisions inconsistent with Section 512" after the enactment of SB 88. (*Id.* at pp. 16-17.) *Bearden* made no such determination.

First, *Bearden* simply does not state that the IWC had

authority prior to SB 88 to adopt meal provisions inconsistent with Section 512, or that the IWC "lost" that authority because of SB 88. (See *Bearden*, 138 Cal.App.4th at pp. 437-438.) *Bearden* simply does not contain any such observation.

Second, *Bearden* had no occasion to consider whether the IWC had authority prior to SB 88 to adopt wage orders inconsistent with Section 512 and then "lost" that authority. As CHA itself points out, the wage order in *Bearden* was adopted *after* the enactment of SB 88. (Amicus Br. p. 17 fn.1.)

In fact, *Bearden* simply explained that Borax's reliance on the original version of Section 516 containing the "notwithstanding any other provision of law" language was misplaced because the amended version of the statute with the "[e]xcept as provided in Section 512" language by then applied. (*Bearden*, 138 Cal.App.4th at pp. 437-438.) The issue of the IWC's authority prior to SB 88 simply was not before the *Bearden* court and "it is axiomatic that cases are not authority for propositions not considered." (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1176.)

Third, CHA seizes on the statement in *Bearden* that "[t]he impact of the 2000 amendment was significant" to argue that the court's use of the sole word "significant" somehow telegraphs a finding in *Bearden* that the IWC had authority to adopt wage orders inconsistent with Section 512 prior to SB 88. The argument is not persuasive. The 2000 amendment was "significant" because it foreclosed Borax's argument that former Section 516 applied in that case.

In sum, Appellants' position that the IWC never had authority to adopt wage orders inconsistent with Section 512 is well supported by the legislative history and case law. CHA's contrary position lacks any support.

B. The Language of Labor Code Section 516 Regarding the Health and Welfare of Workers is Not Relevant to the Analysis

CHA argues that the IWC was required to adopt only meal period provisions that it determined, after public review and comment, to be consistent with worker health and welfare. It further argues that it the meal period waiver provision was consistent with the health, safety and welfare of employees in the healthcare industry. CHA concludes, "Plaintiffs *do not contest* the IWC's findings. It is, therefore, undisputed that the Waiver Provision is consistent with worker health and welfare." (Amicus Br. p. 19.) CHA then presents a "historical record" of the meal period waiver spanning the period from 1993 to the enactment of SB 327 in 2015. (Amicus Br. pp. 20-25.)

To be clear, Plaintiffs do not contest that the IWC *made* such findings at the behest of health care representatives. (See *Brinker*, 53 Cal.4th at p. 1047 ["health care representatives persuaded the IWC to at least preserve expanded waiver rights for their industry."]) However, those findings directly contradict the Legislature's conflicting determination in enacting AB 60 and SB 88 that employers should not be permitted to obtain second meal period waivers from employees on shifts of more than 12

hours.[4]

The objective truth or falsity of the IWC's findings in June of 2000, however, is a moot point. As already discussed, the Legislature originally intended in enacting section 516 that the IWC not have authority to enact wage orders inconsistent with section 512. Therefore, whether or not the meal period waivers were truly consistent with the health, safety and welfare of employees is irrelevant to the analysis of whether they violated the law prior to the enactment of SB 327.

C. CHA'S Argument That Wage Order 5 Section (D) is Valid Because It Was "Adopted" Prior to the Enactment of SB 88 is Without Merit

1. CHA's Argument is Contrary to the Reasoning in *Lazarin*

CHA presents an argument that because the IWC "adopted" Wage Order 5 on June 30, 2000, before SB 88 amended Section 516 on September 19, 2000 to restrict the IWC's authority to adopt wage orders that conflict with Section 512, the meal period waiver in section 11(D) was within the IWC's authority. (Amicus Br. pp. 25-30.) A similar argument was rejected in *Lazarin v. Superior Court* (2010) 188 Cal.App.4th 1560.

Lazarin, like *Bearden*, involved the issue of whether the IWC exceeded its authority when it adopted Wage Order 16

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[4] Section 512 provides in pertinent part, "An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.

section 10(E). Similar to Wage Order 5 section 11(D), Wage Order 16 section 10(E) contained an additional exception to the meal period provisions in Section 512 by allowing employees under collective bargaining agreements to waive second meal periods on shifts over 12 hours. (*Lazarin*, 188 Cal.App.4th at 1564.) As *Lazarin* explained, the *Bearden* court had already correctly determined that Section 10(E) conflicts with Section 512 and is therefore invalid. (*Id.* at 1575.) The defendant urged the court to reconsider *Bearden* and find that it had erred based on the "adoption" of Section 514. (*Id.*)

The defendant's argument was that Wage Order 16 section 10(E) was valid when it was "adopted" on October 23, 2000, because it was authorized by former Section 514, which exempted employees under collective bargaining agreements from the entire chapter (i.e. the Eight-Hour-Day Restoration and Workplace Flexibility Act of 1999, Stats. 1999, ch. 134.)[5] Thus, "[f]ar from being an act in excess of its authority, when it adopted wage order 16, section 10(E), the IWC was simply including the identical exemption already contained in former Section 514." Similar to Section 516 in this case, Section 514 was later amended by SB 1208 on December 2, 2002, *after the adoption of*

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[5] Former Section 514 then provided in pertinent part: "[t]his chapter does not apply to an employee covered by a valid collective bargaining agreement ..." Wage Order 16 Section 10(E) provides in pertinent part: "Subsections (A), (B), and (D) of Section 10, Meal Periods, shall not apply to any employee covered by a valid collective bargaining agreement ..." Subsection (B) refers explicitly to the prohibition of second meal periods on shifts over 12 hours in Section 512.

Wage Order 16, to "clarify" that *only* two sections of chapter 134 did not apply to unionized workers, neither of which were Section 512. (See SB 2308 "Sections 510 and 511 do not apply to an employee covered by a valid collective bargaining agreement ...".)

The *Lazarin* court was not persuaded that the "adoption" of Wage Order 16 under the former Section 514 before it was amended in 2002 validated the IWC's wage order allowing second meal period waivers on shifts over 12 hours. First, "even if adoption of the section 10(E) exemption had at one point been within the authority of the IWC, subsequent to January 1, 2002 that provision was invalid because of its conflict with the express provisions of sections 512 and 516." *Lazarin*, 188 Cal.App.4th at 1575.

Second, the court relied on the legislative history of SB 1208. Like the legislative history of SB 88, the third reading analysis of SB 1208 states, "[t]his bill clarifies existing law." The court ultimately found "both the language of [SB 1208] and its legislative history confirm that it had never been the Legislature's intent to exclude union-represented employees from any of the protections of the 1999 Restoration Act other than the overtime and alternative workweek provisions of sections 510 and 511." (*Lazarin*, 188 Cal.App.4th at p. 1575.) Moreover, "[t]hat legislative declaration significantly reinforces the *Bearden* court's conclusion the IWC exceeded its authority when it adopted Wage Order 16, section 10(E), excluding union-represented employees from the protections of section 512." (*Id.* at p. 1576.)

The reasoning in *Lazarin* is persuasive here. Even if Wage Order 5 section 11(D) had at one point been within the authority of the IWC, after SB 88's enactment it was invalid because of its conflict with sections 512 and 516. Moreover, the third reading analysis for Senate Bill No. 88, like the third reading analysis for Senate Bill No. 1208, confirms that the IWC exceeded its authority when it adopted Wage Order 5 section 11(D) in the first place.

2. CHA's Argument is Illogical and Without Legal Support

Because the IWC never had authority to adopt Wage Order 5 section 11(D) to the extent it conflicts with the provisions of Section 512, CHA's attempt to distinguish between when the wage order was "adopted" and when it was supposedly "effective" in order to validate the order is irrelevant. Nonetheless, CHA presents two arguments in support of its position that the IWC had authority to enact the wage order prior to the enactment of SB 88.

CHA's primary argument is that unless the Court finds that the wage order was validly adopted, and that its second meal period waiver provision on shifts over 12 hours survived SB 88, there will be cataclysmic results. Specifically, a decision that the meal period waiver in Wage Order 5 section 11(D) was not valid when it was adopted would "upend California's administrative law scheme," "create an irreconcilable tension in the field of administrative law" and "create[] conflict among rulemaking statutes." (Amicus Br. pp. 25-26, 30.)

The argument defies logic. CHA asks the Court, in

construing the statutes at issue here, to abandon the rules of statutory construction and ignore legislative history based on imaginary dire consequences. Although CHA fails to explain exactly what those consequences are or how a decision in favor of Plaintiffs could lead to such calamities, it appears that CHA is suggesting it would "upend" the California's Administration Procedures Act ("APA"). (Amicus Br. p. 26.) However, IWC regulations (i.e. wage orders) are explicitly exempted from the APA. (*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 569; Labor Code § 1185.)

CHA's other argument appears to be that because the date a statute or ordinance is "adopted" may be different than the date it becomes "effective," the Legislature must have intended that the illegal meal period waiver in Wage Order 5 survive the enactment of SB 88. (Amicus Br. pp. 26-30.) The two cases cited by CHA do not lend any support to this theory. CHA first cites *Ross v. Board of Retirement of Alameda County Emp. Ret. Ass'n* (1949) 92 Cal.App.2d 188, 193 for the bare proposition that the date of "adoption" of a law may be different than the law's "effective date." However, *Ross* simply observed that the date of adoption or passage of an ordinance or statute is not necessarily its effective date. The court made this observation in connection to its analysis of whether the petitioner's right to retirement benefits had vested. (*Id.* at195.) *Ross* is of no assistance in divining the Legislatures intent in enacting AB 60 and SB 88.

Gleason v. City of Santa *Monica* (1962) 207 Cal.App.2d 458 is similarly unavailing. *Gleason* was essentially a declaratory