

1           **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 Opinion Number: \_\_\_\_\_

3 Filing Date: June 25, 2015

4 **NO. 33,801**

5 **JULIAN SEGURA, CHRISTOPHER DIXON,**  
6 **and KEVIN J. MEYN, in their own behalf and**  
7 **in behalf of similarly situated persons,**

8           Plaintiffs-Appellants,

9 v.

10 **J.W. DRILLING, INC., a New Mexico corporation,**

11           Defendant-Appellee.

12 **APPEAL FROM THE DISTRICT COURT OF EDDY COUNTY**

13 **Raymond L. Romero, District Judge**

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1 **OPINION**

2 **BUSTAMANTE, Judge.**

3 {1} Julian Segura, Christopher Dixon, and Kevin J. Meyn (Workers), in their own  
4 behalf and on behalf of similarly situated persons, filed a complaint alleging that J.W.  
5 Drilling, Inc. (Employer), failed to pay them for overtime wages for the time spent  
6 traveling from their homes to Employer’s job sites. Employer moved for summary  
7 judgment on the ground that such time was not compensable under New Mexico’s  
8 Minimum Wage Act (MWA), NMSA 1978, §§ 50-4-19 to -30 (1955, as amended  
9 through 2013). Workers appeal the district court’s grant of summary judgment in  
10 favor of Employer. We affirm.

11 **BACKGROUND**

12 {2} Workers are former employees of Employer, a contractor that performed oil  
13 field drilling and related work in the Permian Basin in southeastern New Mexico and  
14 west Texas. Workers were paid hourly wages as non-exempt employees. Based in  
15 Artesia, New Mexico, Employer hired employees there and “dispatch[ed] them on day  
16 trips requiring travel to and from the job sites of at least one hour per day.”

17 {3} Workers brought suit against Employer seeking unpaid overtime compensation,  
18 liquidated damages, injunctive relief, and attorney fees for themselves and other  
19 employees similarly situated under the MWA. Workers’ complaint alleged that

1 “[Employer’s] method of operation made travel a part of their employees’ duties and  
2 a term of their employment relationship” and that Employer “engaged in a continuing  
3 course of conduct . . . pursuant to which they only paid employees from the arrival  
4 time to the departure time at the remote work locations, even though travel time  
5 caused the employees to work more than 40 hours per week.” Workers asserted that  
6 they were “ ‘traveling employees’ within the meaning of New Mexico common  
7 law[.]” Workers asserted that under Section 50-4-22(D) of the MWA, they “had a  
8 right to compensation at one and one-half times their regular[] hourly rates for all  
9 hours worked in excess of 40 hours” during a seven day period. *See* Section 50-4-  
10 22(D) (“An employee shall not be required to work more than forty hours in any week  
11 of seven days, unless the employee is paid one and one-half times the employee’s  
12 regular hourly rate of pay for all hours worked in excess of forty hours.”). Since  
13 Employer had not paid Workers for the time spent traveling to the job sites, they  
14 asserted that Employer is “liable to them for their overtime compensation and also the  
15 mandatory liquidated damages” provided for in the MWA.

16 {4} Employer moved for summary judgment. *See* Rule 1-056 NMRA. For purposes  
17 of the motion, Employer accepted the basic facts set out in Workers’ complaint. After  
18 a hearing, the district court granted the motion and dismissed the complaint. This  
19 appeal followed.

1 **DISCUSSION**

2 {5} “When a party actually admits, for purposes of the summary judgment motion,  
3 the veracity of the allegations in the complaint, a reviewing court should consider the  
4 facts pleaded as undisputed and determine if a basis is present to decide the issues as  
5 a matter of law.” *GCM, Inc. v. Kentucky Cent. Life Ins. Co.*, 1997-NMSC-052, ¶ 13,  
6 124 N.M. 186, 947 P.2d 143 (alteration, internal quotation marks, and citation  
7 omitted). Generally, “New Mexico courts . . . view summary judgment with disfavor,  
8 preferring a trial on the merits.” *Romero v. Philip Morris Inc.*, 2010-NMSC-035, ¶  
9 8, 148 N.M. 713, 242 P.3d 280.

10 {6} The parties agree that the essential legal question posed by the complaint is  
11 “whether travel time is compensable under the [MWA].” Because Workers’ complaint  
12 states that the travel at issue is “travel to and from the job sites,” and their briefs do  
13 not mention travel between job sites, we understand their argument to be focused on  
14 travel from their homes to one job site and back each day. Workers make two  
15 arguments. First, they argue that the district court erred in relying on case law  
16 construing a federal statute to construe the MWA. Second, they argue under the  
17 MWA their travel time to the job sites is compensable when it exceeds the “normal  
18 commute” time. We address these arguments in turn.

1 {7} In their first argument, Workers contrast the MWA with its federal counterpart,  
2 the Fair Labor Standards Act (FLSA). 29 U.S.C. §§ 201 to 219 (1938, as amended  
3 through 2012). They note that a portion of the FLSA, the Portal-to-Portal Act,  
4 excludes from compensable time the time spent traveling from home to the place of  
5 an employee’s “principal activity.” *See* 29 U.S.C § 254(a). Specifically, the Portal-to-  
6 Portal Act provides that

7 Except as provided in subsection (b) of this section, no employer shall  
8 be subject to any liability or punishment under the [FLSA] . . . on  
9 account of the failure of such employer to pay an employee minimum  
10 wages, or to pay an employee overtime compensation, for . . .

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

14 (2) activities which are preliminary to or postliminary to said  
15 principal activity or activities[.]

16 *Id.*

17 {8} Workers argue that the district court erred “by engrafting onto the [MWA] the  
18 [Portal-to-Portal Act] making all travel non-compensable, even round trips nearly  
19 equal to a day of work[.]” They maintain that the MWA, passed eight years after the  
20 Portal-to-Portal Act, has no similar express exclusion, and thus the district court erred  
21 in relying on federal case law interpreting the Portal-to-Portal Act.

1 {9} Workers’ claims are based entirely on the MWA. Although several New  
2 Mexico cases refer to federal law as persuasive authority in interpreting the MWA,  
3 in those cases the MWA and the FLSA had similar provisions. *See, e.g., Garcia v.*  
4 *Am. Furniture Co.*, 1984-NMCA-090, ¶ 13, 101 N.M. 785, 689 P.2d 934 (stating that  
5 because the definitions in the MWA “are similar to definitions in the Fair Labor  
6 Standards Act of 1938. . . . it is appropriate to look to decisions of federal courts  
7 determining the meaning of ‘employ’ in the federal statute, and to consider those  
8 federal decisions as persuasive authority in deciding the meaning of ‘employ’ in the  
9 New Mexico statute”); *Sinclair v. Elderhostel, Inc.*, 2012-NMCA-100, ¶ 6, 287 P.3d  
10 978 (discussing the FLSA and the MWA provisions related to the definition of a work  
11 week). However, when the language of the MWA and the FLSA differ, we treat  
12 federal case law differently. In *New Mexico Department of Labor v. Echostar*  
13 *Communications Corp.*, for example, this Court declined to rely on cases interpreting  
14 the FLSA in part because the language in the MWA and FLSA differed. 2006-  
15 NMCA-047, ¶ 12, 139 N.M. 493, 134 P.3d 780. Here, the exclusions in the Portal-to-  
16 Portal Act are completely absent from the MWA. There being no analogue in the  
17 MWA, the interpretations of the Portal-to-Portal Act in case law are unhelpful. Thus,  
18 to the extent the district court relied on federal law interpreting the Portal-to-Portal

1 Act to decide this case, we agree that it erred. Federal law does not answer the issue  
2 presented by this case.

3 {10} We turn to Workers’ argument that their travel time is compensable under the  
4 MWA. Workers first argue that employees like them are entitled to compensation for  
5 their travel time because they are “traveling employees.” The “traveling employee”  
6 concept to which Workers refer is derived from workers’ compensation law. Under  
7 that body of law, employees generally are not considered within the course of their  
8 employment when they are on their way to work or returning home from work. *See*  
9 NMSA 1978, § 52-1-19 (1987). This is known as the “going and coming rule.”  
10 *Ramirez v. Dawson Prod. Partners, Inc.*, 2000-NMCA-011, ¶ 7, 128 N.M. 601, 995  
11 P.2d 1043. However, when travel is an integral part of the employee’s duties and a  
12 benefit to the employer, the employee will be considered within the course of  
13 employment the entire time he or she is traveling. *Id.* ¶ 11. This is known as the  
14 “traveling employee” exception to the “going and coming rule.” *Id.* Workers urged  
15 the district court and now urge this Court to import the traveling employee exception  
16 from workers’ compensation law into the context of wage and hour law. They note  
17 that the rationale for the traveling employee exception is that the travel is occasioned  
18 by and solely for the benefit of the employer. They argue that their travel here is  
19 similarly for the benefit of the employer and, therefore, should be compensable.



1 {11} We decline to apply the traveling employee concept in this context. Workers  
2 compensation law is “sui generis” and New Mexico courts have repeatedly declined  
3 to mingle its principles with those in other areas of law. For instance, in *Lessard v.*  
4 *Coronado Paint & Decorating Center, Inc.*, this Court stated that although “similar  
5 principles may support [applying the going and coming rule] in [the context of  
6 workers’ compensation and tort law],” the going and coming rule in workers’  
7 compensation law was inapplicable to scope of employment analyses in tort law  
8 because “the policies served by the two areas of law differ, and application of the rule  
9 in each context has produced analyses that differ from each other.” 2007-NMCA-122,  
10 ¶ 9, 142 N.M. 583, 168 P.3d 155. Similarly, this Court declined to import principles  
11 related to traveling employees from workers’ compensation law into vicarious  
12 liability analyses, concluding that “workers’ compensation cases involving ‘traveling  
13 employees’ are not helpful to our analysis of common-law vicarious liability.”  
14 *Ovecka v. Burlington N. Santa Fe Ry. Co.*, 2008-NMCA-140, ¶ 13, 145 N.M. 113,  
15 194 P.3d 728; *see also Rivera v. N.M. Highway & Transp. Dep’t*, 1993-NMCA-057,  
16 ¶¶ 14-15, 115 N.M. 562, 855 P.2d 136 (stating that the “rationale for allowing  
17 workers’ compensation benefits for accidents arising from horseplay is unique to  
18 workers’ compensation cases” and that the “rationale does not apply outside the  
19 workers’ compensation context”); *Aragon v. Furr’s, Inc.*, 1991-NMCA-080, ¶ 4, 112

1 N.M. 396, 815 P.2d 1186 (stating that statutes of limitation related to other causes of  
2 action were irrelevant because workers' compensation law is "sui generis"); *Wampler*  
3 *Foods, Inc. v. Workers' Comp. Div.*, 602 S.E.2d 805, 817-18 (W. Va. 2004) (stating  
4 that workers' compensation law "stands alone from all other areas of the law, causing  
5 decisions rendered in the workers' compensation realm to be almost wholly unusable  
6 in any other area of the law, and vice-versa"); *cf. Olson v. Trinity Lodge No. 282, A.*  
7 *F. & A. M.*, 32 N.W.2d 255, 257 (Minn. 1948) ("Compensation acts are sui generis,  
8 and care must be taken not to defeat their purpose by applying, through long judicial  
9 habit, concepts belonging to fundamentally different fields of litigation.").

10 {12} In a more general argument, Workers ask this Court to hold that "all employee  
11 travel beyond a normal commute [i]s compensable, regardless of who owns the  
12 vehicle." As support, Workers direct us to the Employee Commuting Flexibility Act  
13 (ECFA), a 1996 amendment to the Portal-to-Portal Act, which states that

14 the use of an *employer's vehicle* for travel by an employee and activities  
15 performed by an employee which are incidental to the use of such  
16 vehicle for commuting shall not be considered part of the employee's  
17 principal activities if the use of such vehicle for travel is within the  
18 *normal commuting area* for the employer's business or establishment  
19 *and the use of the employer's vehicle is subject to an agreement* on the  
20 part of the employer and the employee or representative of such  
21 employee.

22 29 U.S.C. § 254(a) (emphasis added); Small Business Job Protection Act of 1996,  
23 Pub. L. No. 104-188, §§ 2101-2103, 110 Stat. 1755. They also cite a U.S. Department

1 of Labor (DOL) opinion letter issued in 1999 interpreting the ECFA, in which the  
2 DOL addressed whether “time spent in driving [in the employer’s vehicle] between  
3 the [employee’s] home and the job site [would] constitute hours worked.” Opinion  
4 Letter Fair Labor Standards Act (FLSA), 1999 WL 1002360, at \*\*1-2. In the letter,  
5 the DOL stated that

6       where a[n employee’s] commute to the first job site in the morning takes  
7       four hours, we would consider the greater portion of travel time  
8       compensable under the principles described in 29 CFR 785.37. That rule  
9       allows a portion of the total commute time to be considered non-  
10       compensable home-to-work travel. If the employer treated three of the  
11       four hours as compensable travel, we would not question such practice.

12 *Id.* at \*2. Workers argue that the MWA should be interpreted consistently with the  
13 DOL’s interpretation of the ECFA.

14 {13}    The problem for us with this argument is that it is based on explicit language  
15 in the federal statute. As already discussed, there simply is no similar language in the  
16 MWA. Instead, the MWA is silent on travel time, whether within a “normal  
17 commute” or otherwise. *See, e.g.*, § 50-4-21 (not defining “travel time,” “hours  
18 worked,” or “work” in the definitions); Section 50-4-22 (not addressing travel time).

19 {14}    Although Workers argue that the absence of language similar to the Portal-to-  
20 Portal Act in the MWA indicates that travel time is compensable under the MWA,  
21 Workers also appear to acknowledge the general rule that commuting time to and  
22 from a job site is not compensable absent an agreement to the contrary.

1 Even the United States Supreme Court cases they cite in their favor distinguish  
2 between travel from home to the employer’s property and travel once on the property.  
3 *See Tenn. Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 599 (1944)  
4 (stating that the travel at issue took place on the employer’s property and “[bore] no  
5 relation whatever to [the employees’] needs or to the distance between their homes  
6 and the mines.”), *superseded by statute as stated in Ford v. Houston Indep. Sch. Dist.*,  
7 \_\_\_ F. Supp. 3d \_\_\_, 2015 WL 1246780; *Jewell Ridge Coal Corp. v. Local No. 6167*,  
8 *United Mine Workers of Am.*, 325 U.S. 161, 166 (1945) (distinguishing “[t]hose who  
9 are forced to travel in underground mines in order to earn their livelihood” from “the  
10 ordinary workman on his way to work”); *Anderson v. Mt. Clemens Pottery Co.*, 328  
11 U.S. 680, 691 (1946) (stating that “the walking time [on the employer’s property,  
12 which was at issue] differed vitally from the time spent in traveling from workers’  
13 homes to the factory”); *see also* 1 Wage & Hour Law § 6:38 (2015) (“Ordinary travel  
14 from home to work does not require compensation. This is still true even if the  
15 employer’s worksite is a moving site.” (footnote omitted)). Since the MWA is silent  
16 on this issue, Workers are, in essence, asking this Court to fashion out of whole cloth  
17 a new scheme, similar to the ECFA, that alters the general rule and declares some  
18 commuting time compensable.

1 {15} Under our rules of construction, “[i]f the Legislature is silent on an issue, we  
2 look at the overall structure and function of the statute, as well as the public policy  
3 embodied in the statute.” *Delfino v. Griffio*, 2011-NMSC-015, ¶ 12, 150 N.M. 97, 257  
4 P.3d 917. The purpose of the MWA is “to safeguard existing minimum wage and  
5 overtime compensation standards which are adequate to maintain the health,  
6 efficiency and general well-being of workers against the unfair competition of wage  
7 and hours standards which do not provide adequate standards of living.” Section 50-  
8 4-19. Holding that some portion of employees’ travel time is compensable would  
9 likely further this goal. But to do what Workers ask would require us to resolve a  
10 number of policy questions as to the scope of compensable time. The effect of such  
11 an effort—in the face of legislative silence—would be to amend the current statutory  
12 language. This we are loath to do. “ ‘Courts must construe statutes as they find them  
13 and may not amend or change them under the guise of construction.’ ” *Jones v.*  
14 *Holiday Inn Express*, 2014-NMCA-082, ¶ 19, 331 P.3d 992 (quoting 82 C.J.S.  
15 *Statutes* § 370 (2014)); *Gonzalez v. Performance Painting, Inc.*, 2013-NMSC-021,  
16 ¶ 53, 303 P.3d 802 (Daniels, J., specially concurring) (stating that “judges are not  
17 legislators”); *Martinez v. Sedillo*, 2005-NMCA-029, ¶ 7, 137 N.M. 103, 107 P.3d 543  
18 (“We will not rewrite a statute.”); *City of Albuquerque v. Sanchez*, 1970-NMCA-023,  
19 ¶ 5, 81 N.M. 272, 466 P.2d 118 (“[T]his is a situation which calls for legislative

1 therapy and not judicial surgery.”), *overruled on other grounds by State v. Ball*, 1986-  
2 NMSC-030, ¶ 39, 104 N.M. 176, 718 P.2d 686.

3 **CONCLUSION**

4 {16} For the foregoing reasons, we affirm the district court’s grant of summary  
5 judgment to Employer.

6 {17} **IT IS SO ORDERED.**

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**MICHAEL D. BUSTAMANTE, Judge**

9 **WE CONCUR:**

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**MICHAEL E. VIGIL, Chief Judge**

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**RODERICK T. KENNEDY, Judge**