NO. 43427-0-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

STEPHEN MYNATT and ANITA ELAINE MYNATT,

Appellants/Cross-Respondents,

v.

GORDON TRUCKING, INC.

Respondent/Cross-Appellant.

JOINT BRIEF OF APPELLANTS/CROSS-RESPONDENTS

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I. INTRODUCTION

The primary question before this Court with regard to unpaid overtime compensation is whether, the Washington Supreme Court, in issuing the *Bostain* decision, expected companies to start paying interstate drivers overtime, or the reasonable equivalent thereof, for all actual hours worked inside and outside the state, where they had not done so prior to its decision, or if the Court merely wanted companies to maintain the status quo and "spin" their pay plans in such a manner as to attempt to give the appearance that their pay plans include overtime or the reasonable equivalent thereof. What the Court has before it is evidence of a motor carrier who did not pay overtime or the reasonable equivalent to overtime to its interstate drivers prior to the Washington Supreme Court's decision in *Bostain* because it wasn't required to, it made no changes post *Bostain* and, nearly two years after that decision, attempted to avail itself of an alleged safe harbor that L&I did not intend to extend to motor carriers who did not pay the reasonable equivalent to overtime prior to *Bostain*.

As a result of misrepresentations made to L&I, GTI was able to obtain a REOT determination opinion letter and it now seeks to supplant the summary judgment standard for an administrative process with no procedural safeguards. Upholding the trial courts decision granting GTI's Motion for Summary Judgment and denying the Mynatts' Cross Motion

for Summary Judgment only emboldens employers to make material misrepresentations to the state.

In sustaining the trial court's orders, the Court will have to find the undisputed facts establish that GTI intended to and did pay the reasonable equivalent to overtime to interstate drivers years before any legal requirement to do so and, as a result, the Washington State Supreme Court's *Bostain* decision had no effect on GTI. The Court will have to make such a finding in the face of executive and managerial testimony to the contrary, and the existence of a corporate policy established in 1998 (which, on its face, does not apply to interstate drivers or their work) and was never revised. GTI's opposition brief and its brief in support of its appeal, are nothing more than misleading and disingenuous arguments which are not supported by the record evidence. As such, the trial court's decisions with regard to the Mynatts' Cross Motion for Summary Judgment and GTI's Motion for Summary, are due to be reversed and the trial court's decision regarding GTI's Motion to Strike is due to be upheld.

II. STATEMENT OF THE CASE

GTI appeals the trial court's Order denying GTI's Motion to Strike the Report of the Mynatts' expert witness, William Brandt. CP 3230-3231. GTI filed its Motion with Exhibits on April 2, 2012. CP 2651-2681. The Mynatts submitted their Response with Exhibits on April

11, 2012 (CP 2682-3101, CP 3102-3112) and their Amended Response on April 12. (CP 3126-3229). GTI submitted its Reply on April 12, 2012. CP 3113-3118. After hearing and consideration of these submissions, the trial court denied GTI's Motion on April 16, 2012. CP 3230-3231.

GTI contends that in the absence of Brandt's reports, the Mynatts cannot meet their prima facie burden of evidence. To the contrary, the Mynatts can and did meet their prima facie burden of establishing that: (1) the Mynatts worked overtime during the claims period; (2) GTI's compensation did not include the reasonable equivalent of overtime (REOT); and (3) the amount of unpaid compensation due during the weeks of the claims period.

Brandt's initial February 21, 2012 report and February 23, 2012 addendum that utilized representative data as the basis for damage estimates are not, contrary to GTI's contention, the only evidence submitted and relied upon to establish the elements of the Mynatts' overtime claim. CP 2707-2745, 2749-2763. Although those reports do provide reliable damage evidence that satisfy the Mynatts' evidentiary burden, the Mynatts also timely presented supplemental responses to discovery requests that provided direct documentary evidence of weeks the Mynatts worked overtime during the claim period, as well as the number of hours worked overtime during those weeks, and provided direct

calculations from this data to demonstrate the amount of unpaid overtime compensation for those weeks in the claim period. CP 2765-2913. This evidence containing the data and the analysis of the data that was presented to the Trial court more than satisfy the Mynatts' prima facie burden.

Brandt's analysis and calculations are reliable and would be helpful to a jury in determining the extent of damages and, therefore, is relevant and probative of the issues pursuant to ERs 401 and 403, and admissible pursuant to ERs 702 and 703. Brandt used the same methodology recommended by L&I in determining the proper rate of pay to account for the REOT and used the same data submitted by GTI to L&I that was certified by GTI to accurately reflect the hours worked by the Mynatts (and other drivers) during applicable periods. CP 2697-2700. Irrespective of GTI's selective deposition excerpts and arguments to the contrary, Brandt's analysis and methodology is not flawed, his calculations are accurate, his testimony and report are based on reliable data and are reliable, relevant and useful to the trier of fact and, therefore, admissible. As Brandt explained in his April 9, 2012 Affidavit, the only thing not tested in terms of his analysis for his initial report and addendum was the reliability of the 26 weeks of data that he based his analysis on,

which was assumed to be reliable based on GTI's representations. CP 2697-2700.

Brandt's March supplemental report, although essentially ignored by GTI, contains indisputable accurate calculations of damages, providing direct evidence of damages for all weeks' data that was available during the claims period. CP 2765-2913. Those direct calculations on actual records of hours worked, as opposed to representative sampling of hours worked, are not subject to the statistical criticisms highlighted by GTI involving margins of error and standard deviations. As Brandt explained, the results from the calculations using this data was "highly reliable" from a forensic economists perspective. CP 2697-2700. Those calculations also provide the Mynatts' prima facie proof of damages. The Mynatts' arguments below will demonstrate that the Trial court did not abuse its discretion in denying GTI's Motion to Strike Brandt's report.

III. ARGUMENT

A. CONTRARY TO DEFENDANT'S ASSERTIONS, STEVE GORDON AND SUSAN GEVING DID NOT TESTIFY THAT THE MYNATTS' MILEAGE RATE INCLUDES AN OVERTIME COMPONENT, REGARDLESS OF WHETHER THEY WORKED INSIDE OR OUTSIDE WASHINGTON STATE.

Here, the undisputed facts show that GTI failed to establish a mileage rate for interstate drivers that includes an overtime component, as required by WAC 296-128-011 and 012. Here, as COO Gordon and

others confirmed, the Mynatts' "base rate" of pay is their mileage rate of pay. CP 1628, 2429-2440. Therefore it is impossible that the mileage rate included a base rate plus one and one half times that base rate for hours worked in excess of 40 per week, because the "base rate" is the mileage rate for all miles paid and, as such, there is no room for the "plus" factor. GTI attempts to undo and distract from its Chief Operating Officer's damaging testimony, related to the inapplicability of the 1998 policy to interstate drivers, asserting COO Gordon was simply acknowledging the context of the 1998 letter and the explicit language found within the 1998 policy. GTI's Appellate Brief at 23. In light of this assertion, a closer look at COO Gordon's testimony is required.

In his deposition, Steve Gordon at first testified the 1998 Reasonable Equivalent Pay Policy applied to interstate drivers; however, when pushed on the issue, he ultimately caved and admitted the 1998 policy applied only to drivers and miles within the state of Washington. CP 1079-1080, 1650-1651. Gordon was specifically asked three times whether the 1998 Reasonable Equivalent Pay Plan applied to work outside the state of Washington. The first two times Gordon was asked he responded "Yes" and on the third time he apologized and said it applied to just drivers within the State of Washington. CP 1085-1086, 1656-1657. Interestingly, at no time during COO Gordon's deposition did he change

his testimony regarding the inapplicability of the 1998 policy to interstate drivers, nor did Defense Counsel ask questions to try to rehabilitate Gordon's testimony on this issue. In fact, GTI only attempted to distance itself from COO Gordon's testimony and attempt to offer an explanation as to the content of his testimony after the trial court's denial of its motion for summary judgment. GTI offers no evidence which supports such a narrow and limited interpretation of Gordon's deposition testimony with regard to the 1998 letter and this was not a simple slip of the tongue or a single line of questioning, as GTI asserts. GTI's Appellate Brief at 24.

Gordon confirmed, in a separate line of questioning, his understanding of the inapplicability of the 1998 policy, when he testified that GTI did not pay overtime compensation for work done outside the state of Washington prior to L&I's determination in 2010. CP 1079-80, 1650-1651. This testimony is not open to interpretation. In yet another line of questioning, Gordon stated that interstate drivers' "base rate" of pay is their mileage rate of pay. CP 1081-84, 1652-55. A fact that confirms Gordon's understanding that the Mynatts' mileage rate did not include a 20% factor for overtime for work, inside or outside the state, because, if that was actually the case, the Mynatts' base rate for hours worked 40 or less would be something less than the mileage rate to accommodate the 20% factor referenced in the 1998 policy. As WAC

296-128-011 sets forth, the base rate is the per unit rate of pay for hours worked 40 or less in a week and, here, that rate is the mileage rate.

GTI asserts COO Gordon testified "precisely to the contrary," and that all drivers had a built-in 20% factor for overtime. GTI also states the Director of Payroll Sue Geving and Recruiter Patty Schmidt stated the same. GTI's Appellate Brief at 21 and 24. Both these assertions are complete and utter fabrications and at no time did COO Gordon, Geving, or Schmidt reference the 20% factor for overtime or its applicability to long haul drivers. Contrary to GTI's assertions, Gordon's testimony was, instead, as follows (objections omitted):

Q. Are you required to pay drivers outside of Washington State the reasonable equivalent to overtime?
A. We've mostly focused on Washington.
Q. Okay. But are you required to pay drivers outside of Washington state overtime at a reasonable equivalent to overtime?
A. Depends on the jurisdiction
Q. What jurisdictions in the West do you feel that you pay drivers overtime at a reasonable equivalent?
A. Washington is the only state where we've had to go through that and pay overtime.
Q. Then why is it that you feel that you pay drivers outside of Washington State the reasonable equivalent to overtime?
A. Because our drivers are generally paid the same all across the network so the same analysis would generally apply.

CP 3293-3294. In describing the analysis that was applied across all networks, Gordon does not once reference the 1998 policy or a 20% factor for overtime but, instead, asserts GTI pays the reasonable equivalent to

overtime because mileage paid drivers make more than local delivery drivers. The testimony was as follows (objections omitted):

Q. Why do you think the company pays the reasonable equivalent to overtime?
A. Well, mostly because of the analysis that we've done looking at mileage pay and looking at that in a reasonably equivalent format with hourly and overtime.
Q. Can you tell me what that analysis was?
A. We took those mileage plans and looked at them, what a driver would be paid under a mileage pay plan then compared it with what we thought they would be paid in an hourly and overtime setting and compared them.
Q. So you basically – it's your basis for contending that they – you pay a reasonable equivalent to overtime is that the mileage people, the people paid by the mile, make equal to or as much as the hourly paid people?
A. Yeah, we believe that our mileage-based drivers actually do better overall than what they would be paid hourly and overtime.

CP 1647-1648, 3295-3296. As such, the record evidence shows that GTI believes it pays the reasonable equivalent to overtime not because drivers' mileage rate includes an overtime factor, but, instead, because long haul drivers make more money than hourly paid local drivers. Thus, COO Gordon's testimony is unavailing and does not dispute his direct testimony regarding the inapplicability of the 1998 memorandum.

With regard to Payroll Director Geving, nowhere in her affidavit or deposition does she state that GTI established a per unit rate for interstate long haul drivers or that the 20% factor for overtime referenced in the 1998 letter applied to long haul drivers. Instead, Geving states only that

GTI does not pay separate rates for interstate and intrastate work. Given her testimony in its totality, the only inference that can be drawn from this statement is that drivers are paid the same per mile rate whether driving inside or outside the state. The Court cannot infer from this statement that Geving believed or had knowledge that the 1998 Reasonably Equivalent Pay Plan applicable to intrastate drivers and work also applied to interstate line-haul drivers performing work outside the state, because her own deposition testimony forecloses such a conclusion. In her deposition Geving states she had never seen or had any knowledge of the 1998 Reasonably Equivalent Pay Plan. CP 1275-1276, 1814-1815. Geving also testified she was never told prior to 2009, when she started to work on the L&I submission, that line-haul drivers were to receive the reasonable equivalent to overtime. *Id.* Thus, the idea that Geving can substantiate that intrastate and interstate drivers work was paid under the 1998 plan is without merit because as of August 31, 2011, the date of her deposition, she had never seen or heard of the 1998 plan. Geving's testimony is unavailing and does not dispute Gordon's direct testimony regarding the inapplicability of the 1998 memorandum to interstate drivers. The same is true for Recruiter Patty Schmidt. When asked if she was aware or had she been told that Washington based drivers were supposed to receive the reasonable equivalent to overtime, she stated, "I don't know anything

about that." CP 1854, 3316. When asked if she had ever seen the 1998 policy, she said, "No." CP 1855, 3317.

Ignoring COO Gordon's own testimony and the evidentiary record, GTI also asserts no one testified to the contrary that interstate drivers' mileage rates doesn't include a 20% factor for overtime; however, this is also factually inaccurate. It is factually accurate, however, that no one testified the 20% factor did apply to interstate drivers, as evidenced by GTI's failure to point to any testimony establishing such. Gordon's statement that the 1998 policy did not apply to interstate drivers was also corroborated by Executive Vice President of Finance Robert Goldberg when he testified the 1998 Reasonably Equivalent Pay Policy only applied to intrastate truck drivers. CP 1176-1186, 1206-1207, 1730-1740, 1777-1778. CFO Goldberg, like COO Gordon, is one of the five individuals GTI admits was responsible for crafting GTI's driver pay plans. The testimony of these two men clearly establishes that GTI internally, even if not evident externally, held intrastate and interstate drivers to two completely different standards with regard to overtime compensation. Also indicative of this is the undisputed fact that Executive Vice President of Human Resources, Patrick Gendreau, the individual other than COO Gordon deemed by GTI to be most familiar with its driver pay plans, has no opinion or basis upon which to state that he believes GTI pays the

reasonable equivalent to overtime and that he never heard any reference to GTI paying the reasonable equivalent of overtime until 2010. CP 1155-1157, 1710-1712, 1715-1717. There is no way for GTI to credibly argue interstate drivers' mileage rates include an overtime component when three of the individuals it designated most familiar with drivers' plans can substantiate such. Amazingly, GTI does not even dispute the fact that in 1998, after the so called Reasonably Pay Plan was implemented for intrastate work, it told both the Mynatts they would not receive overtime compensation because of the commerce clause, a factor noted by the Washington Supreme Court in *Bostain.* 159 Wash.2d 700, 706, 153 P.3d 846, 849 (Wash.,2007)

B. CONTRARY TO GTI'S ASSERTIONS, THE MYNATTS HAVE SHOWN TWO SEPARATE PAY PLANS WERE IN EFFECT, ONE FOR INTRASTATE DRIVERS AND ONE FOR INTERSTATE DRIVERS.

i. GTI's assertion that no one testified that separate pay plans exist is without merit.

GTI asserts the Mynatts present no evidence to dispute that interstate and intrastate drivers were paid under the same plan that contained a 20 percent factor for overtime and that the Mynatts concede they were paid overtime for work inside Washington under the 1998 policy. GTI's Appellate Brief at 21-25. Nothing could be further from the truth. In making such an assertion, GTI ignores the fact that COO Gordon

himself established that a separate pay plan applied to interstate drivers when he testified GTI did not pay overtime compensation for work done outside the state of Washington prior to L&I's determination in 2010 and that the 1998 policy applied to just drivers and miles within Washington state. CP 1079-80, 1086, 1650-1651, 1657. CFO Gordon confirmed this existence of a separate pay plan for interstate drivers when he testified the 1998 policy only applied to intrastate drivers. CP 1176-87, 1207, 1730-1741, 1778. Further, COO Gordon's and Schmidt's statements confirm interstate drivers' base rate of pay for 40 hours or less of work is their mileage rate and, thus, there is no room in that mileage rate for the overtime factor. CP 1081-84, 1652-55. Lastly, the undisputed facts show that a separate policy existed for interstate drivers because both the Mynatts were told they would not receive overtime compensation because of their interstate status. CP 1316-17, 1368, 1835-36, 1864. GTI, in its opposition, flippantly states "Whether GTI told drivers, including the Mynatts, that their compensation included a factor for overtime, does not change the fact that it did . . ." GTI's Appellate Brief at 24. Such irrational arguments are difficult to reconcile with the law and certainly GTI telling the Mynatts that they are not going to receive overtime compensation is evidence that their compensation did not include such.

ii. GTI's assertion that the existence of a single mileage rate establishes the 1998 plan was applicable to interstate drivers is without merit.

GTI also asserts that because the Mynatts received the same mileage rate, i.e., cents per mile, for work inside and outside the state, this establishes the Mynatts were paid under the 1998 plan. While it's true their cents per mile did not change, neither Gordon's, Geving's or Schmidt's testimony allow the Court to make such a finding based on this fact, especially given their direct testimony to the contrary. GTI ridiculously asserts it is not what COO Gordon said, but what he didn't say.[1] GTI's Appellate Brief at 24. GTI goes on to argue COO Gordon testified "precisely to the contrary" that all drivers are paid under the same system across all networks, because GTI built in a 20 percent factor for overtime. *Id.* The Mynatts have already dispelled this myth above in Section A, showing the only thing COO Gordon testified to is that GTI believes drivers across all networks receive the reasonable equivalent to overtime because they earn more money than local delivery drivers, not because their pay includes overtime compensation. A comparison in itself is fatally flawed, as discussed in the Mynatt's Appellate Brief (pp. 34-39).

Even in light of the evidence to the contrary, if the Court were somehow to conclude the 1998 policy applied to interstate drivers' intra-

[1] Rule 56 specifically acknowledges the fact that mere allegations or denials not supported by evidence do not create a genuine issue for trial.

state work, given the undisputed testimony and the inapplicability of the 1998 policy to interstate work outside Washington, the Mynatts should be entitled to summary judgment. In the least a factual issue exists precluding Summary Judgment in favor of GTI. It makes no difference whether the Mynatts were paid the same rate per mile, i.e. cents per mile, for miles driven inside or outside the state, because the Mynatts, like all other interstate drivers, would receive two different "base rates" of pay for 40 hours of work or less, depending on the geographic type of work performed. For intrastate work, the Mynatts would have a base rate that is less than their mileage rates to accommodate the 20 percent factor for overtime called for under the 1998 policy, and for their work outside the state, their base rate would be their mileage rate, as confirmed by COO Gordon and Schmidt. As such, there would be no room in the mileage rate for an overtime factor and the mileage rate remains the same but the base rates differ. In essence, GTI would have a compensation plan that is a *per se* violation of *Bostain*; a plan where only work done within the state includes overtime compensation. Which is exactly the Mynatts' point. Whether the Court believes GTI applied the 1998 policy to interstate drivers' miles worked within Washington, or the Court believes the Mynatts' assertion that GTI did not apply the 1998 policy to any of the interstate drivers miles worked, inside or outside the state; the Mynatts are

still entitled to summary judgment since GTI has not offered a single document or testimony that supports its assertion and representation to L&I that the 1998 policy applied to work outside the state.

iii. GTI's inconsistent representations before the United States Supreme Court support the Mynatts assertion that their mileage rate does not include overtime compensation.

While GTI now asserts it did not have to change its compensation plan after the Washington Supreme Court's *Bostain* decision because its mileage rates already included an overtime component, it made inconsistent statements before the nations highest court. In its amicus brief submitted to the United States Supreme Court, in an attempt to overturn the Washington Supreme Court's *Bostain* decision, GTI through its general counsel, Theresa Pruett, clearly represented to the United States Supreme Court that if *Bostain* was to stand, its labor costs would increase 16%, thus indicating the current compensation plan under which it was operating would change. *Food Express, Inc. v. Bostain*, 2007 WL 3196728 *18-19 (2007). CP 1574-1582. Theresa Pruett is also the GTI representative corresponding with L&I who misrepresented that the 1998 policy applied to interstate drivers. CP 1433-1438. GTI's two divergent positions, one in which they already pay the requisite overtime compensation pre-*Bostain*, and one in which if it has to pay the reasonable

equivalent to overtime its labor costs will increase 16% post *Bostain* are irreconcilable and represent disputed facts which justified the denial of summary judgment.

C. CONTRARY TO GTI'S ASSERTIONS, THE MYNATTS OFFERED EVIDENCE THAT THE INFORMATION SUBMITTED TO L&I BY GTI WAS INACCURATE AND THAT L&I WAS MISLED DURING REOT PROCESS.

Based on evidence set forth above and additional statements from GTI executives' showing that they were unaware mileage rates included the reasonable equivalent to overtime, prior to 2009 GTI did not possess documents which evidence interstate drivers are to receive the reasonable equivalent to overtime. Furthermore, interstate drivers were never advised that their pay rate included overtime prior to 2010. It is clear the information submitted by GTI was inaccurate and that GTI misled L&I if not overtly, by omission. CP 1084-1087, 1108-1109, 1154-1157, 1160-1161, 1176-1187, 1190, 1206-1207, 1275-1277, 1281-1282, 1316-1317, 1367-1372, 1374-1378; CP 1655-1658, 1671-1672, 1709-1712, 1716-1717, 1730-1741, 1742, 1777-1778, 1814-1816, 1835-1836, 1863-1868, 1870-1875. Nowhere within GTI's correspondence with L&I does it disclose these facts and GTI certainly does not disclose to L&I that the 1998 memorandum did not actually apply to interstate drivers or their work outside the state. Quite the opposite.

L&I, by specific direct written request to GTI, required GTI to provide evidence that interstate long haul drivers' per unit rate of pay included an overtime component. CP 1413-1419, 1452. In response to this request, GTI, in writing, directed L&I to *Exhibit A* – Reasonably Equivalent Pay Policy – and represented that it pays its long haul drivers an alternative mileage based pay on a weekly basis in which long haul drivers previously received notice of this policy via mail and internal publication. CP 1433-1438, 1675-1680. Within these specific communications GTI misrepresents the applicability of the 1998 policy.

D. CONTRARY TO GTI'S ASSERTIONS, THE MYNATTS OFFERED EVIDENCE THAT L&I RELIED ON GTI'S MISREPRESENTATIONS.

As a threshold matter, GTI raises, for the first time in its appellate brief, the new argument that the Mynatts failed to prove L&I relied upon any misrepresentation of GTI's and that to do so the Mynatts would have to come forward with testimony from representatives of L&I. Contrary to this newly raised argument, the Mynatts showed that L&I relied on GTI's representation as evidenced in L&I's written communications to GTI, as well as L&I's own internal checklist, in which it notes the 1998 policy was provided to satisfy L&I that interstate drivers' rates include an overtime component. CP 1429, 1457-1458, 1675. L&I specifically states in writing it made its determination based on information that GTI provided it and

that in approving these plans L&I relied on the data GTI submitted. *Id.* L&I's reliance on GTI's representations is also evident in its own internal checklists. A review of the checklist shows on the left there is a criteria to be satisfied or answered, in the middle there is a box to check if the requirement was satisfied or answered, and on the right a place for specific comments regarding the applicants evidentiary support and response. In this case, Mona Rodriguez at L&I completed the checklist memorializing the fact that GTI represented the 1998 letter included an overtime component and that it was communicated to its drivers:

Extent to which the compensation system includes compensation for overtime in the rate for each employee	☒	☐	☐	✓ Per Exhibit A in a letter dated 1/16/09, the "the combination of mileage and accessorial pay rates include a 20% factor for anticipated overtime up to a workweek of 65 hours

CP 1389.

and,

e) If the compensation plan was previously implemented, the letter must identify whether, when, and how the rate of pay was communicated to employees. If the compensation system is not yet in effect, the letter must identify how the company intends to communicate the rate of pay to its employees.	☒	☐	☐	Per letter dated, 1/16/09, rate communicated by the following, means: • MILES plan implemented 10/01/2000 • PLUSS plan implemented 9/15/2004 Notice to drivers was submitted as Exhibit A-Reasonably Equivalent Pay Policy, which was mailed to drivers and published internally. Effective January 1,1998

CP 1383.

GTI also asserts there is no evidence that supports the Mynatts' conclusion that had L&I been afforded all the procedural safeguards of an adjudicative hearing, L&I would have discovered the 1998 policy submitted to L&I didn't apply to interstate drivers. GTI's Appellate Brief at 25. GTI misses the point. The reason L&I's determination is not binding on the courts or the Mynatts is this very lack of procedural safeguards. From L&I's position, all it can do is rely on the representations of the company; here, garbage in – garbage out. The fact is, utilizing procedural safeguards, i.e. discovery, the Mynatts were able to flush out the truth and obtain material facts that are clearly inconsistent with representations made to L&I. Whether or not L&I relied on these misrepresentations does not affect the ultimate outcome. If L&I did, in fact, rely on GTI's material misrepresentations that the 1998 policy applies to interstate drivers, then, as GTI admits, L&I's determination letter is due no deference. GTI's Appellate Brief at 19. Alternatively, if L&I ignored GTI's misrepresentations or GTI actually informed L&I that the 1998 plan did not apply to interstate drivers, and L&I still approved GTI's plan, the determination is still due no deference because it is arbitrary and capricious based on the facts evaluated by L&I.

E. AN EVALUATION OF THE EVIDENCE SUBMITTED BY THE MYNATTS SHOWS L&I'S REASONABLE EQUIVALENT DETERMINATION IS ARBITRARY AND CAPRICIOUS.

The Court can defer to the agency's interpretation of the law where the agency has special expertise in the relevant field; however, it is not bound by the agency's interpretation and may substitute its interpretation of the law for that of the agency. *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.,* 136 Wash.2d 38, 45, 959 P.2d 1091 (1998). Although the courts give due deference to the specialized knowledge and expertise of the administrative agency, such deference does not extend to agency actions that are arbitrary, capricious, and contrary to law. *Schneider v. Snyder's Foods, Inc.*, 116 Wn. App. 706, 716-17, 66 P.3d 640, 645-46 (2003). Evaluating whether an agency's decision was arbitrary and capricious involves evaluating the evidence considered by the agency in making its decision. *Id.* at 716–17; *Westberry v. Interstate Distributor Co.*, 164 Wash.App. 196, 207, 263 P.3d 1251, 1256 (Wash.App. Div. 2,2011). Where there is room for two opinions, action is not arbitrary and capricious, even though one may believe an erroneous conclusion has been reached.' " *Schneider,* 116 Wash.App. at 717.

Defendant relies heavily on the case *Schneider v. Snyder's Foods, Inc.* and *Westberry v. Interstate Dist. Co.*; however, GTI uses these cases out of context. With regard to the pre-*Bostain Schneider* case, the drivers'

collective bargaining agreement set forth the employees' "base rate of pay;" *i.e.* salary, and compensation for overtime in the form of premium pay, and commissions reasonably equivalent to overtime. 116 Wn.App. 706, 711-15 (2003). The employees alleged they were promised an enhanced system (promised by whom the court does not say); however, they did not receive such a system. *Id.* at 715. After first establishing that the collective bargaining agreement included provisions for the reasonable equivalent of overtime, the Appellate Court then ruled the statute does not require the enhanced system the employees felt they had been promised. *Id.* This case is distinguishable from the case at hand because *Snyder Foods* and the union had actually established, in advance of the work to be performed, a base rate of pay and overtime compensation which they communicated such to the employees. GTI failed to do the same here. Therefore, the *Schneider* case actually supports Plaintiffs' assertions that the Court, in determining if GTI paid the reasonable equivalent to overtime, must first evaluate whether GTI established, in advance of the work to be performed, a per unit rate of pay that includes overtime compensation for work performed in excess of 40 hours each week. As to the *Westberry* case, it is important to note that the defendant moved for summary judgment relying solely on its favorable reasonable equivalent determination that L&I issued prior to litigation and that Plaintiff

Westberry failed to even file a response to that summary judgment motion. *Westberrry v. Interstate Distrutor Co.,* 164 Wash.App. 196, 204 (Oct. 4, 2011). As such, there were no genuine issues of fact in dispute upon which the lower court could deny the defendant's motion and, pursuant to Rule 56(e) of the Washington State Superior Court Rules, judgment had to be entered against Westberry. Furthermore, this left the appellate court with no record upon which to overturn the lower court's decision. The appellate court noted *Westberry* did not argue, nor does the record suggest, L&I's review of defendant Interstate's submitted materials was in any way deficient. *Id.* at 208.

i. The undisputed facts show the evidence L&I relied upon was inaccurate.

Here, there is room for just one opinion based on the evidence presented: The 1998 Reasonable Equivalent Pay policy did not apply to interstate drivers or their work outside the state as such they could not have received the reasonable equivalent to overtime. This premise causes GTI's house of cards to collapse because without that policy, GTI cannot show it established, in advance of the interstate work performed, a mileage rate that includes both a base rate and overtime component in compliance with the requirements of WAC 296-128-011 and 012.

In evaluating the evidence considered by the agency in making its decision, this Court must find that the L&I determination letter was arbitrary and capricious because the undisputed underlying evidence shows the 1998 Reasonably Equivalent Pay Policy did not apply to interstate drivers as GTI had represented to L&I, that interstate drivers' base rate of pay is their mileage rate, that GTI represented to the United States Supreme Court its compensation plan would have to change if *Bostain* stood, and as discussed more fully below, the spreadsheets submitted to L&I do not accurately reflect the sample drivers' effective hourly rates and overtime when substantiating GTI's deviation from paying traditional overtime.

Furthermore, L&I's determination letter rests on the assumption that local delivery drivers are similarly situated to interstate long haul drivers for purposes of their regular rate of pay; however, as the Mynatts' brief shows at pp. 34-39, the evidence presented Court shows that local delivery drivers are dissimilar and, as such, a reliance on such a comparison is arbitrary and capricious. Each of these reasons justifies the Court giving no deference to L&I's REOT determination letter issued to GTI.

ii. Contrary to GTI's assertions, The Mynatts did not receive as their effective hourly rate plus time and a half that rate for compensation.

GTI argues that the data it submitted to L&I demonstrates that the Mynatts earned more than their hourly counterparts' regular rate of pay and that the Mynatts received the equivalent of 1.5 times their effective regular rate for every overtime hour they worked (pp. 3, 10). This, however, is not factually accurate and certainly does not represent the analysis utilized by L&I in issuing GTI's REOT determination letter. A review of the letter from GTI requesting a REOT determination and the favorable determination letter from L&I evidences both parties focused on just whether interstate drivers ultimately earn more than local delivery drivers, an analysis which is fatally flawed, as discussed in the Mynatts' brief at 34-39. CP 1430, 1675-78.

Furthermore, as established above, the Mynatts' "base rate" was their mileage rate and, therefore, there is no room within the mileage rate for an overtime component, a fact which is supported by GTI executives' and managements' testimony that the 1998 policy did not apply to interstate drivers. Under WAC 296-128-011, the base rate is the per unit rate for hours worked less than 40 in a week. This is important because a review of the effective rates GTI presents for the Mynatts in weeks in which they worked in excess of 40 hours are artificially reduced by this

twenty percent factor. GTI's Appellate Brief at 11. Thus, not representing the Mynatts' true effective rate.

Case in point, in pay weeks Nos. 3 and 4 of GTI's chart on page 11 of its brief, MYNA (Elaine Mynatt) worked less than 40 hours in those weeks. Dividing MYNA's "Total Weekly Pay" by her total hours worked in those yields an effective rate of $26.25 and $25.34, respectively. This is consistent with the fact that the Mynatts' compensation for hours worked 40 or less in a week does not include overtime compensation, because the intent of WAC 296-128-012 is to spread overtime across all units of work, not just those over 40. Thus, if the Mynatts' mileage rate did have an overtime component built into it, as GTI asserts, you would expect to see overtime compensation even in weeks in which the Mynatts did not work in excess of 40 hours because the overtime is allegedly embedded in each and every per unit of pay. Such is not the case at hand.

If you apply the same analysis to weeks in which the Mynatts worked in excess of 40 hours, you get different results. For example, in weeks Nos. 1 and 2, MYNA worked in excess of 40 hours in each week. If you perform the same calculations as above, the result of those calculations evidence an effective rate of $24.91 and $25.92, respectively; however, GTI's chart evidences a lower effective rate of $22.46 and $23.77 respectively. Thus, GTI's results do not represent the Mynatts'

true effective rates of pay but, instead, an artificially reduced effective rate to accommodate for the 20 percent factor for overtime found within the inapplicable 1998 policy. Consequently, the overtime rate GTI submitted for these two weeks is also artificially reduced. This fact was demonstrated by Brandt in his calculations used to show the Mynatts earned substantially less than they would have if paid hourly plus traditional overtime pursuant to RCW 49.46(130)(1). Brandt, for each week GTI submitted to L&I for the Mynatts, determined their actual effective regular rate of pay and unpaid overtime compensation in accordance with the requirements of WAC 296-128-012, ES.A 8.1 and ES.A.8.2. His calculations prove that under traditional overtime, Elaine Mynatt would have earned an additional $3,182.33 and Steve Mynatt would have earned an additional $3,233.60 for the submitted six month period. CP 1517, 1523-24, 2519, 2525-26. As such, GTI's assertion that the Mynatts did not challenge the accuracy of the calculations GTI submitted is untrue.[2]

iii. Contrary to GTI's assertion, there is only one way to substantiate an employer's deviation from the payment of traditional overtime.

[2] The Mynatts do not challenge that the spreadsheet's software itself performed the calculations accurately; however, as the evidence shows, the Mynatts did challenge the spreadsheet's results based on its flawed methodology incorporated into the formulas of the spreadsheet. In other words, if GTI asked the spreadsheet to calculate "cell one" plus "cell two", the Mynatts don't dispute the software program did such calculation accurately but, instead, asserts the reason for the request was flawed.

GTI relies heavily on the *Schneider* Court's holding that where there is room for two opinions, action is not arbitrary and capricious, even though one may believe an erroneous conclusion has been reached.' 116 Wash.App. at 717. However, here there is no room for two opinions because there is but just one way for GTI to substantiate its deviation from the payment of traditional overtime, and the Mynatts substantiation reflects that methodology.

RCW 49.46.130(2)(f) requires the substantiation to be based on what the driver would have received under RCW 49.46.130(1):

> "...if the compensation system under which the truck or bus driver is paid includes overtime pay, reasonably equivalent to that required by this subsection, for working longer than forty hours per week."

The meaning of this statute is plain and this same interpretation has been confirmed by the Supreme Court, and is expressed by L&I in WAC 296-128-012 and in Section B(3)(c) of Administrative Policy ES.A.8.3. Where the meaning of a statute is unambiguous, the agency interpretation is entitled to no deference. *Bostain,* 159 Wash.2d 700, 716, 153 P.3d 846, 854 (Wash., 2007). As such, the calculation has to consider what the driver would have been paid under the provisions of RCW 49.46.130(1) versus what he or she was actually paid. However, in Section B(3)(c)(iii) of the Administrative Policy ES.A. 8.3, L&I arbitrarily abandons this

position and, instead of requiring companies to perform their substantiation utilizing driver's "regular rate" of pay as required under RCW 49.46.130(1), L&I allowed GTI to utilize a hypothetical regular rate of pay of another so-called "similarly situated" comparator. Defendant asserts the Mynatts' argument, that the regular rate of pay cannot be a hypothetical and must reflect an actual fact, is too strict an interpretation, citing to WAC 296-128-550 in support. However, the methodology set forth in that regulation is the same methodology the Mynatts assert is applicable here to determine the Mynatts' regular rate of pay when substantiating GTI's deviation from the payment of traditional overtime.

iv. L&I has demonstrated it has no special expertise with regard to administering RCW 49.130(2)(f).

For nearly a twenty year period between the Washington Supreme Court's decision in *Labor & Industries v. Common Carriers, Inc.*, 111 Wash.2d 586 (1988) and the Washington Supreme Court's 2007 decision in *Bostain*, L&I wrongly interpreted the provisions of RCW 49.130(2)(f). In fact, L&I so vehemently believed its wrongly held interpretation was actually correct, it filed an amicus brief in the *Bostain* case at the appellate level, not supporting the worker it is charged with protecting but, instead, supporting the company. *Bostain*, 159 Wash.2d 700, 716. The agency's

wrongly held interpretation for so many years evidences it has no special expertise in administering the provisions of RCW 49.46.130(2)(f).

L&I's administrative policy E.S.A. 8.3 demonstrates this fact even further for, as discussed previously, it allows companies submitting pay plans for review to deviate from the requirements of RCW 49.46.130(1) when substantiating their deviation from the payment of traditional overtime. Based on the forgoing, the Mynatts have demonstrated L&I has no special expertise in interpreting RCW 49.130(2)(f).

F. THE TRIAL COURT ACTED WITHIN ITS BROAD DISCRETION ON APRIL 16, 2012 IN DENYING GTI'S MOTION TO STRIKE BRANDT'S EXPERT REPORT.

GTI selectively highlights Brandt's testimony pertaining to his methodology to paint a false picture of Brandt's findings as totally unreliable, based on flawed methodology and unreliable data. However, the Trial court, in denying GTI's Motion, had the benefit of the entire relevant record that clearly evidenced Brandt's methodology was sound, his data was reliable, and his conclusions were relevant, probative and admissible. The Trial court acted well within its broad discretion in denying GTI's Motion.

"The trial court has a broad discretion in ruling on the qualifications and the admission of testimony of an expert witness." *Ball v. Smith*, 87 Wash.2d. 717, 725; 556 P.2d 936, 941 (1976). "[R]ulings on

such matters will not be disturbed except for manifest abuse of discretion." Abuse of discretion will not be found "unless no reasonable person would take the position adopted by the trial court." *Stevens v. Gordon,* 118 Wash.App 43, 51; 74 P.3d 653, 658 (2003). *Id.*

The Mynatts' witness, William Brandt, was engaged to analyze data produced by GTI and retained by the Mynatts to determine, among other things, the amount of unpaid overtime to which they are entitled under Washington state law. CP 2697-2700, 2707-2745, 2749-2763, 2765-2913. Based on his training and experience, Brandt was able to apply widely accepted accounting principles to data extracted from the records maintained by the parties to determine the amount of overtime work for which the Mynatts have not been compensated. (CP 2697-2700). Brandt's methodology and conclusions, as indicated in his testimony and report, are reliable and should be allowed because: (1) his qualifications, methodology, and use of the underlying data in this case meet and surpass the requirements set forth in the Washington Rules of Evidence; and (2) his findings meet and exceed the Mynatts' burden of proof required to establish damages in a claims for unpaid overtime under Washington law.

G. BRANDT'S ANALYSIS AND FINDINGS ARE BOTH RELEVANT AND HIGHLY PROBATIVE OF THE DAMAGE ISSUES AND WERE PROPERLY ADMITTED IN OPPOSITION TO GTI'S MOTION FOR SUMMARY JUDGMENT, WITHIN THE BROAD DISCRETION OF THE TRIAL COURT.

GTI contends the evidence provided by Brandt is irrelevant. A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Salas v. Hi-Tech Erectors*, 168 Wash. 2d 664, 668, 230 P.3d 583, 585 (2010) (*citing State v. Stenson,* 132 Wash.2d 668, 701, 940 P.2d 1239 (1997)).

> A trial court abuses its discretion when its decision "is manifestly unreasonable or based upon untenable grounds or reasons." *Id.* "A trial court's decision is manifestly unreasonable if it 'adopts a view "that no reasonable person would take." ' " *In re Pers. Restraint of Duncan,* 167 Wash.2d 398, 402–03, 219 P.3d 666 (2009) (quoting *Mayer v. Sto Indus., Inc.,* 156 Wash.2d 677, 684, 132 P.3d 115 (2006) (quoting *State v. Rohrich,* 149 Wash.2d 647, 654, 71 P.3d 638 (2003))).

Salas v. Hi-Tech Erectors, 168 Wash. 2d 664, 668-69, 230 P.3d 583, 585

> All relevant evidence is admissible unless its admissibility is otherwise limited. ER 402. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. "The threshold to admit relevant evidence is low, and even minimally relevant evidence is admissible." *State v. Gregory,* 158 Wash.2d 759, 835, 147 P.3d 1201 (2006) (citing *State v. Darden,* 145 Wash.2d 612, 621, 41 P.3d 1189 (2002)).

Salas v. Hi-Tech Erectors, 168 Wash. 2d 664, 669, 230 P.3d 583, 585 (2010). "The relevance requirement is not a high hurdle. Relevance is defined as evidence that has "any tendency" to make the existence of a consequential fact more or less likely than it would be if the evidence did

not exist. ER 401." *Salas v. Hi-Tech Erectors*, 168 Wash. 2d 664, 670, 230 P.3d 583, 585-86. Obviously, evidence of the extent of the Mynatts' damages based on their hours worked in excess of 40 each week, as Brandt's report and testimony provides, is relevant in this matter and meets the minimal relevance threshold to admit evidence in spite of GTI's insistence that the evidence is unreliable and therefore immaterial. As the following discussion will demonstrate, GTI's premise that the evidence is unreliable is incorrect at best.

GTI erroneously contends that any probative value of the evidence provided by Brandt is substantially outweighed by its unfair prejudice. For the same reasons, the probative value of the evidence clearly outweighs any unfair prejudice claimed by GTI. The evidence involves an element of the case (damages) and is highly probative with little if any unfair prejudice.

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." ER 403. [...] Trial courts enjoy "wide discretion in balancing the probative value of evidence against its potentially prejudicial impact." *Stenson,* 132 Wash.2d at 702, 940 P.2d 1239 (citing *State v. Rivers,* 129 Wash.2d 697, 710, 921 P.2d 495 (1996))."

Salas v. Hi-Tech Erectors, 168 Wash. 2d 664, 671, 230 P.3d 583, 586. Brandt's damage analysis and calculations are highly probative and therefore relevant and, as the following argument demonstrates, is reliable.

No unfair prejudice can be demonstrated from the consideration and admission of this data.

GTI's relevance and probative value argument is based on its erroneous assertion that Brandt used faulty methodology that resulted in unreliable conclusions, therefore rendering his conclusions immaterial. All of the excerpts from Brandt's deposition that GTI cites to in support of its argument ignore the fact that Brandt was asked to make an assumption concerning the validity of the data he used in his analysis. Because Brandt was asked to assume the data was representative, he was not asked to conduct statistical analysis on the validity of the data as representative. Since it was assumed to be representative, the statistical analysis was not necessary for Mr. Brant to do his calculations to estimate damages during the claims period.

GTI also totally ignores Brandt's supplemental analysis that was performed on direct evidence of hours worked during the claims period and not subject to the reliability questions raised for the initial representative data analysis. In fact, contrary to GTI's assertion on page 32 of its brief, Brandt, as a part of his supplemental analysis: (1) did analyze data regarding the Mynatts' work during the claims period; (2) has a definitive basis on which to conclude that the Mynatts worked more than 40 hours in a week during the claims period (the direct documentary

evidence); (3) has an evidentiary basis on which to evaluate whether GTI paid the Mynatts the REOT during the claims period (the documents themselves and testimony from GTI and the Mynatts; (4) has a basis to conclude there is no margin of error in the direct calculations he performed on the Mynatts' data from the claims period; (5) has absolute confidence in his damage calculations (calculations and results are "highly reliable"); and (6) confirmed the accuracy of the formulas and calculations to validate the accuracy of his damage calculation on the direct data. CP 2697-2700. Consequently, the trial court did not abuse its broad discretion on admissibility of evidence in denying GTI's Motion to Strike Brandt's report and damage testimony on the basis of ER 401 and 403.

H. THE TRIAL COURT PROPERLY ACTED WITHIN ITS DISCRETION IN DENYING GTI'S MOTION TO STRIKE ON THE BASIS OF ER 702 AND 703. BRANDT'S QUALIFICATIONS, METHODOLOGY, AND USE OF THE UNDERLYING DATA MET AND SURPASSED THE REQUIREMENTS OF THE WASHINGTON RULES OF EVIDENCE 702 AND 703.

GTI, in its Motion to Strike, contends that the methodology used by Brandt to reach his findings is flawed. In fact, in reaching his conclusions, Brandt used principles generally accepted in the field of accounting and methodology specifically prescribed by the state for determining the uniform rate of pay which includes the reasonable equivalent of overtime compensation applicable to the Mynatts. He then

used that calculated rate of pay to determine the Mynatts' damages by utilizing representative data. CP 2697-2700.

For the initial estimate of damages reflected in Brandt's initial report, he was asked to assume that the 26 weeks of data he was provided that documented the hours worked, the mileage driven, and the rates of pay for the Mynatts was representative of the Mynatts' experience during the claims period. CP 2697-2700, 2707-2745, 2749-2763. The data Brandt assumed to be reliable was the same purportedly reliable, relevant data GTI submitted to L&I as representative of two years of typical driver experience and included 26 weeks of the Mynatts' actual data. CP 2941-3089.

GTI's criticisms of Brandt's analysis can be boiled down to one issue, whether the data relied on in Brandt in his initial February 21 and February 23 Addendum Reports adequately represented hours worked by the Mynatts and the class during the claim period. If that data is representative as GTI held out to L&I, then the criticisms of Brandt's findings in his initial reports evaporate.

i. The findings contained in Brandt's initial report were determined using accepted methodology utilizing data assumed to be reliably representative of hours worked within two years of the submission date, as certified by GTI.

The primary issue in this matter is whether, following the *Bostain* decision of March 1, 2007, GTI complied with the change in the law to pay its interstate long haul drivers the reasonable equivalent of overtime pay in GTI's mileage pay plans. And if not, the next step is to determine the appropriate rate of pay that would have amounted to the reasonable equivalent of overtime during the claims period. The difference in the rates of pay would serve as the basis for determining the damages for past underpayment during the applicable claim period.

In addition to the assumption regarding the reliability of the representative data, the analysis of the data that Brandt performed, as reflected in his reports and his testimony, is based on the primary assumption (from testimony of key GTI executives) that the mileage rate paid to the Mynatts and the potential class members does not reflect a per unit or uniform rate of pay that includes a factor equating to the reasonable equivalent of overtime, i.e., drivers' base rate of pay is their mileage rate of pay. This fact was undisputed as evidenced in the Mynatts' Cross-Motion for Summary Judgment. CP 1619-1947, 1654-1655, 1861.

Utilizing this assumption and using the data GTI submitted to L&I, Brandt's initial report dated February 21, 2012 demonstrated the amount of underpayment as compared to traditional overtime under RCW 49.130(1) for the specific drivers sampled during the sample period for the

two pay plans that had a total of 26 weeks of data. CP 2705-2745. The amount underpaid if the drivers had been paid hourly was determined and the amount underpaid had the drivers been paid an overtime factor was determined. Assuming the L&I sample data was representative of the fleet of drivers at issue, Brandt extrapolated the total underpayment for the entire fleet of long haul drivers. This calculation under RCW 49.36.130(1) is necessary to substantiate GTI's deviation from payment of traditional overtime.

The February 23 Addendum to Brandt's report advanced the analysis further by applying the calculation methodology recommended in WAC 296-128-012 to determine a uniform rate of pay, for damages purposes, again assuming that the mileage rate actually paid does not include the 20 percent factor in the 1998 Reasonable Equivalent Pay policy to meet the reasonable equivalent of overtime requirement. These calculations were performed on all of the same 26 weeks of data submitted by GTI to L&I as representative of the fleet. And again, the final shortfalls for the drivers sampled were reported and the total estimate of damages for the fleet were extrapolated from this data. CP 2749-2763.

On March 26, 2012, Brandt submitted a final supplement of calculations expounding on the damage calculation for the Mynatts in particular, using all available data produced and utilizing the same WAC

296-128-012 methodology. Those damage calculations reflect only pay shortages during the claims period for the weeks where data was actually available. CP-2697-2700, 2765-2913. The supplemental determinations are discussed in more detail below.

Again, all of GTI's evidentiary submissions criticizing Mr. Brant's methodology can be condensed down to one issue: whether the 26 weeks of data used by Brandt was sufficiently reliable on which to base his calculations. Brandt was asked to assume the reliability of the data as representative of actual hours worked during the claim period and performed his analysis and calculations accordingly. However – although Brandt did verify and confirm the accuracy of his calculations – because he could not personally verify the validity of the underlying 26 weeks of data, he could not and did conduct the statistical analysis that GTI bases its argument on. CP 2697-2700. But GTI ignores the fact that simply because Brandt did not test the reliability of the underlying data as representative, and therefore could not provide answers concerning statistical analysis, does not make the calculations and analysis performed by Brandt unreliable if the underlying assumption is proved correct. The central question is whether sufficient evidence was presented to show that the underlying data Brandt was asked to assume was representative was, in fact, reliable for that purpose. That is the case here and the trial court

properly refused to Strike Brandt's evidentiary submissions on the basis proposed by GTI.

ii. Brandt based his initial report on data certified reliable. Therefore, Brandt's reliance on that data and his analysis and calculations based on that data was reliable and properly allowed within the trial court's discretion.

Brandt conducted an analysis of the "raw payroll records" submitted by GTI to L&I under EA.S.8.3(B)(3)(b). Brandt's analysis relied on the assumption that the data submitted to L&I by GTI was representative of the hours worked by the Mynatts. CP 2697-2700, 3091-3095. GTI's argument that Brandt's findings are unreliable because they are based on insufficient underlying data is flatly contradicted by GTI's certification of the very same data to the Washington State Department of Labor and Industries as accurate and valid and in compliance with EA.S.8.3(B)(3)(b), representative of the typical hours worked by the Mynatts. CP 2941-3089, 2950.

Administrative Policy EA.S.8.3 addresses the processes and protocols for the evaluation of reasonably equivalent overtime compensation for truck and bus drivers in Washington. EA.S.8.3(B)(3) required GTI to submit (a) a description of their compensation system, (b) *raw payroll records*, (c) comparison calculations, and (d) certification of accuracy and validity of the information submitted. Specifically,

Administrative Policy EA.S.8.3(B)(3)(b) establishes a number of guidelines required of the "raw payroll records" necessary for the L&I evaluation.

> ... If a random sample of employee records are provided, the data provided must be representative of the actual number of hours worked and work units projected to be accomplished by persons performing the same type of work over the time period for which records are submitted. The period for which records are supplied, if less than all records for the two years preceding the request for approval, must be a representative period for those two years of not less than 26 consecutive weeks.

CP 2917.

Pursuant to EA.S.8.3, GTI submitted the information required by L&I in a letter on April 20, 2009 and certified that the payroll records given to L&I were "accurate, valid and complete" in compliance with EA.S.8.3; i.e., that the records were representative of the actual hours worked by their over-the-road drivers for the two years prior to the submission. CP 2950, 2923-2939, 2941-3089.

If GTI's April 2009 data submission was, in fact, representative of drivers' work hours for the two prior years as certified, then it is representative of hours worked by the Mynatts within the claims period. Two years prior would go back to April 2007, squarely within the Mynatts' damage period (March 2007 to present).

Likewise, L&I's December 16, 2010 letter approving two pay plans indicated that the "approval of these pay plans is effective dating back to July 1, 2005 and continues into the future for so long as the above-described data submitted for L&I's review is reflective of the actual number of hours worked and work units accomplished by persons performing the same type of work under the "Miles Pay" and "Pluss Pay" plans." CP 3097-3099, 3099. L&I's referenced period of applicability of this data set includes the Mynatts' claim period in total. The data referenced by L&I is the same data GTI contends Brandt cannot rely on for the same purpose L&I relied upon it; i.e., to show the typical hours and units of work the Mynatts performed in the claim period.

GTI has not submitted anything to L&I suggesting that the data submitted was no longer "reflective of the actual number of hours worked and work units accompanied by persons performing the same type of work." And if the data is good enough for GTI and L&I to reflect hours worked during the two years prior, it should be sufficiently reliable for Brandt's use to extrapolate damages during the claims period. GTI can't have it both ways.

Consequently, Brandt's reliance on this data and his extrapolations from the data is reasonable and not baseless, as suggested by GTI, and his conclusions as expressed in his initial report and addendum are well-

founded, based on the application of sound methodology to reliable data, and should be considered by the finder of fact pursuant to ER 702 and 703. The trial court recognized that fact and acted within its discretion to deny GTI's Motion on that basis.

iii. Brandt's seasonally supplemented report provided direct evidence of overtime hours worked during the claims period and directly and reliably calculated actual damages during the claims period.

The seasonably supplemented data and analysis was provided to GTI prior to the close of discovery, pursuant to CR 26(e)(2), although ignored by GTI in its Motion to Strike a week later, and was properly considered by the trial court and allowed within the Court's discretion.[3]

The extrapolated damage estimates provided by Brandt in his initial report and addendum were sufficiently reliable to the extent that the data provided by GTI was truly representative, as GTI certified it to be. Because the underlying data was assumed to be representative and reliable, Brandt did not perform the statistical tests that GTI contends should have been done. Moreover, the statistical analysis GTI contends Brandt should have done is not applicable to the calculations Brandt

[3] Contrary to GTI's assertion, ample evidence was submitted and considered by the trial court confirming the Mynatts worked in excess of 40 hours in the weeks during the claim period, including the Mynatts' own testimony, the records submitted by Gordon to L&I and the actual logs and pay records provided in the Mynatts' supplemental information to Gordon and Brandt's Affidavit testimony confirming that fact after review of the records.

performed using the direct (non-representative) data for the Supplemental Report, and GTI's argument fails accordingly. CP 2697-2700.

Brandt's March supplemental report eliminates GTI's statistical analysis criticisms since it considered and utilized only direct records of actual weeks and hours worked by the Mynatts, as memorialized in driver's logs and pay records. CP 2765-2913. GTI's criticisms of the reliability of the data used in the initial reports that extrapolated damage estimates from representative data are simply inapplicable to Brandt's supplemental analysis. No extrapolations were made as a part of that analysis. As Brandt expressed in his affidavit, these calculations reflect 100% accuracy based on data that has a very high degree of reliability. CP 2702-2703.

Given GTI's failure to maintain records memorializing the actual number of hours worked by the Mynatts, as required by Administrative Policy ES.D.1, Brandt used the information in the Mynatts' driver logs to reconstruct the number of hours actually worked by the Mynatts and analyzed the underpayment over the course of the liability period. Brandt's March supplemental report reflects an analysis of (1) data collected directly from the Mynatts' driver logs created during the proposed class period, covering a period from August 19, 2007 through March 19, 2012 and (2) from the Mynatts' pay data during the proposed

class period, covering a period from August 26, 2006 through March 10, 2012. CP 2765-2913. Brandt ultimately analyzed and performed damage calculations on 213 weeks of available data out of the total of 270 weeks of the claims period. CP 2768. Brandt confirmed that the Mynatts did, in fact, work overtime hours during numerous weeks during the claims period. CP 2697-2700. Brandt applied the same calculation methodology used in his initial report and recommended by the state in determining the mileage rates that should be paid, but based on actual hours worked during the claim period. The results of this direct analysis of the number of hours actually worked by the Mynatts were consistent with and bolstered Brandt's initial conclusions and extrapolated damage estimates, offering additional proof of the reliability of his initial findings.

GTI's contention that the supplemental calculations are unreliable and inadmissible ignores Brandt's sworn affidavit testimony, the results of Brandt's supplemental analysis, and the fact that the results consist of direct calculations from actual hours worked. All of GTI's criticisms fail accordingly. Consequently, GTI's argument that the trial court abused its discretion when it denied GTI's Motion to Strike is totally without merit. The trial court acted well within its broad discretion in refusing to grant GTI's Motion to Strike on this basis. No manifest abuse of discretion is demonstrated.

iv. Brandt's findings meet and exceed the Mynatts' burden of proof required to establish damages in a claim for unpaid overtime under Washington law and the trial court acted within its broad discretion denying GTI's Motion to Strike on this basis.

GTI claims Brandt's findings do not meet the requirements under Washington law to establish damages suffered by the Mynatts. In a claim for unpaid overtime, when an employer maintains inadequate records of the hours worked by any given employee, and the employee proves by "sufficient evidence" that the pay was insufficient, the employee only need prove the amount and extent of the unpaid work "as a matter of just and reasonable inference" based on the facts available. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946).

Additionally, "uncertainty as to the quantum of damages is not fatal" to the Mynatts' right to recover. *Wenzler & Ward Plumbing & Heating Co. v. Sellen*, 330 P.2d 1068 (1958). Even if the Mynatts could not determine damages with "reliable specificity," they are still entitled to a recovery so long as there is evidence sufficient to "afford a reasonable basis for estimating loss." *Jacqueline's Washington, Inc. V. Mercantile Stores, Co.*, 498 P.2d 870 (1972). Damages need not be proven with mathematical certainty, but must be supported by evidence that provides a reasonable basis for estimating loss and does not amount to mere

speculation or conjecture. *Pellino v. Brinks, Inc.,* 164 Wash.App. 688, 669, 267 P.3d 383, 400 (Nov. 7, 2011); *Shinn v. Thrust IV, Inc.,* 56 Wash. App. 827, 840, 786 P.2d 285, 293 (Feb. 12, 1990).

GTI has not maintained adequate records of the hours worked by the Mynatts, as required by Administrative Policy ES.D.1 and WAC 296-128-011. GTI has not disputed this fact. The Mynatts provided evidence that GTI failed to establish a per unit rate of pay that includes base rate of pay plus overtime compensation in conformity with WAC 296-128-011 and WAC 296-128-012. Accordingly, the Mynatts are only required to prove the amount and extent of the unpaid work "as a matter of just and reasonable inference" based on the facts available. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946).

The data relied on by Brandt in his initial report and addendum that GTI certified as representative of work performed during the claims period more than satisfy the requirement for a "reasonable basis" for estimating the loss. And the data used in Brandt's direct damage calculations the weeks in the claims period that data was available, far exceed the minimum "reasonable basis" to show the Mynatts' damages. Under any standard, and certainly under the legal standard that applies in this case, Brandt's findings regarding the amount of uncompensated overtime pay owed to the Mynatts meet and exceed the requirements of Washington

law. The trial court acted within its discretion in denying GTI's Motion to Strike on this basis.

v. Brandt's findings would assist the trier of fact and the trial court properly denied GTI's motion to the contrary within the trial court's broad discretion.

GTI does not contest Brandt's qualifications and Brandt's methodology was accepted by the trial court and the results accepted as sufficiently reliable. However, GTI maintains that Mr. Brant's findings in his reports would not be helpful to the trier of fact. To the contrary, Brandt's findings will be very helpful in explaining the complex issues in this case; including the calculations used in determining the reasonable equivalent of overtime pay and the subsequent extrapolations of damages and the direct calculations of damages for all weeks data was available.

Washington Rule of Evidence 702 requires expert testimony to be helpful to the fact finder to be considered at trial. *State v. Farr–Lenzini,* 970 P.2d 313 (1999). Testimony is considered "helpful" to a jury when it concerns "matters beyond the common knowledge of the average layperson." *Moses v. Payne*, 555 F.3d 742, 756 (9th Cir. 2009). Generally, courts have interpreted "possible helpfulness to the trier of fact broadly and will favor admissibility" of the testimony even in "doubtful cases." *Moore v. Hagge*, 158 Wash. App. 137, 155 (2010), quoting

Linkstrom v. Golden T. Farms, 883 F.2d 269, (3d Cir. 1989) (Finding that the testimony of a so called "farm safety expert" would be helpful to the jury that included non-farmers).

Brandt's testimony is based on mathematical analyses of voluminous sets of records and is grounded in the specialized field of forensic economics. Brandt himself underwent years of training, both in higher education and through his professional experience as an accountant, to understand the application of the methodology and principals used to reach his determinations in this case. Average jurors are not readily familiar with the principles common to Brandt's highly technical area of expertise. Brandt's specialized knowledge and ability to explain complex economic determinations are beyond the common knowledge of the average lay person and will certainly assist the trier of fact in the evaluation of evidence.

Obviously, assuming the reliability of Brandt's determinations, his findings testimony explaining his methodology would be very helpful to the trier of fact in this matter. No manifest abuse of discretion has been demonstrated by GTI on this issue.

CONCLUSION

GTI failed to meet the post-*Bostain* requirements to start paying its interstate drivers overtime, or the reasonable equivalent thereof, for all

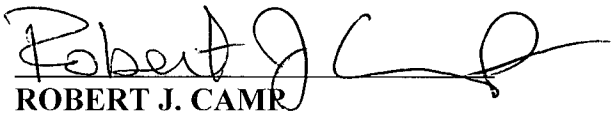
actual hours worked inside and outside the state. Instead, GTI has been allowed to merely maintain the status quo with regards to its overtime pay for interstate drivers by deceptively spinning its pay plans (with the blessing of the Department of Labor & Industry) in such a manner so as to attempt to give the appearance that its pay plans include overtime compensation. The underlying facts support the conclusion that L&I's REOT determination was arbitrary and capricious.

GTI's Cross-Appeal seeking a reversal of the trial court's denial of GTI's Motion to Strike Plaintiffs' Expert Witness (Brandt) Report is without merit. The trial court acted well within its broad discretion in denying GTI's Motion.

Consequently, the Mynatts have more than met their evidentiary prima facie burden. The trial court's Order denying GTI's Motion to Strike Plaintiffs' Expert Report should be affirmed. Likewise, the Mynatts have shown disputed and undisputed facts exist and the trial court's Order Granting GTI's Motion for Summary Judgment should be reversed and the Mynatts' Cross Motion for Summary Judgment is due to be granted.

Respectfully submitted this 25th day of March, 2013.

JACOBY & MEYERS, LLC



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CERTIFICATE OF SERVICE BY MAIL

I certify that I caused to be mailed, a copy of the foregoing **JOINT BRIEF OF APPELLANTS/CROSS-RESPONDENTS** postage prepaid, via U. S. Mail, on the 25th day of March, 2013, to the following counsel of record at the following addresses:

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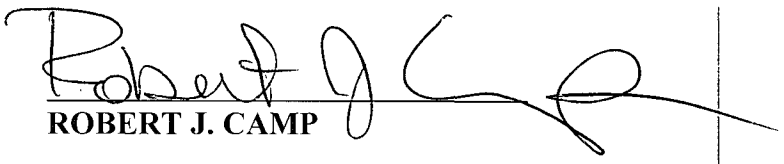

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