No. 43427-0-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

STEPHEN MYNATT AND ANITA ELAINE MYNATT

Appellants,

v.

GORDON TRUCKING, INC.

Respondent/Cross-Appellant.

JOINT BRIEF OF RESPONDENT/CROSS-APPELLANT

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I.
INTRODUCTION

Respondent/Cross-Appellant, Gordon Trucking, Inc. ("GTI"), is a Washington-based motor carrier employing Appellants, Stephen and Anita Mynatt ("Mynatts" or "Appellants") as long-haul team drivers. The trial court granted GTI judgment on all six claims asserted by the Mynatts. The Mynatts are asking this Court to reverse the trial court's decision as to their overtime claim and three other causes of action predicated on the overtime claim.[1]

The trial court granted GTI judgment on the Mynatts' overtime and associated derivative claims based on the Washington Department of Labor and Industries' ("L&I") determination that the pay plan under which GTI pays the Mynatts contains the reasonable equivalent of overtime. CP 143-145. L&I's determination is fatal to the overtime claim unless the Mynatts can prove the determination was "arbitrary, capricious, and contrary to law" and that L&I's action was "willful and unreasoning,

[1] The six claims asserted under Washington law in the Mynatts' Complaint are: (1) failure to pay overtime; (2) failure to pay all wages due; (3) failure to provide meal and rest breaks; (4) willful failure to pay wages; (5) violations of Washington's Consumer Protection Act; and (6) failure to pay all wages due at termination. The Mynatts seek recovery for the period March 30, 2007 through trial (the "Claims Period") on these claims. CP 8-14. Appellants may only prevail on the Second, Fourth, and Fifth claims if they are able to prove their overtime claim. The Mynatts originally asserted a minimum wage claim, but abandoned that claim at summary judgment, conceding Appellants "do not dispute they have received at least the minimum wage for all hours worked." CP 1049.

and taken without regard to attending facts or circumstances." *Schneider v. Snyder's Foods, Inc.*, 116 Wn. App. 706, 716-17, 66 P.3d 640, 645-46 (2003).

Since at least 1998, GTI compensated its long-haul drivers on a piece-rate compensation system that included a factor for overtime. Drivers paid under this system received additional compensation to reasonably approximate overtime from the first mile they drove. After the Washington Supreme Court's decision in *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 153 P.3d 846 *cert. denied,* 128 S. Ct. 661 (2007), GTI submitted its pay plans to L&I seeking a determination that they complied with Washington's requirement that such plans compensate employees with the reasonable equivalent to overtime.

During the pendency of this case, L&I determined that the pay plan under which the Mynatts were paid contained the reasonable equivalent of overtime. L&I did not declare that its reasonably equivalent finding is preclusive of overtime claims. However, this Court has recognized that L&I has the "specialized expertise" to determine "whether a compensation scheme constitutes the reasonable equivalent of statutory overtime." *Schneider*, 116 Wn. App. at 716-17. As a result, this Court should only overturn the L&I determination if the Mynatts demonstrate that it was

completely unsupported by the evidence and was an implausible interpretation of the statute. *Id.* at 716.

The trial court properly rejected the Mynatts' efforts to make this showing, because the record precludes a finding that L&I's finding was "willful and unreasoning," or "taken without regard to the attending facts and circumstances." The data submitted to L&I included, serendipitously, 26 weeks of the Mynatts' work and compensation. That data demonstrated 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.

Moreover, while the Mynatts claimed that *a single document* GTI submitted to L&I was misleading, they presented *no evidence* that L&I was in fact misled by the document. To the contrary, the uniform testimony demonstrated that GTI compensated its piece-rate mileage-based drivers uniformly using a rate that included a factor for overtime. Having failed to demonstrate any basis on which to conclude that L&I's determination was arbitrary and capricious, the trial court granted GTI judgment on the Mynatts' Washington overtime claim and the remaining derivative causes of action.

Even if the Mynatts had been able to demonstrate that L&I's finding was arbitrary and capricious, GTI was still entitled to judgment on

the Mynatts' overtime and derivative claims. Specifically, in order to recover *damages* under their overtime and derivative claims, the Mynatts would have had to have proffered admissible evidence from which the finder of fact could conclude (1) that they in fact worked overtime during the Claims Period; (2) that the compensation GTI paid them was not reasonably equivalent to overtime; and (3) the compensation they should have received for those weeks in which they *in fact* worked overtime. In other words, while L&I's determination precludes the Mynatts' claims, even if that finding is disregarded, in order to recover *anything* the Mynatts must still demonstrate *the elements of their claims.*

As demonstrated in GTI's cross-appeal, the Mynatts' expert's testimony, the only evidence on which they relied to establish the elements of their overtime claims, is irrelevant and inadmissible. Specifically, the Mynatts' expert, William Brandt, testified that he did not review or analyze any information regarding the work the Mynatts performed or the compensation they received *during the Claims Period.* He therefore conceded that he had no basis or opinions regarding whether the Mynatts worked overtime at all during the Claims Period and if so, whether GTI paid them the reasonable equivalent of overtime. Mr. Brandt cannot, therefore, establish any of the three elements of the Mynatts' claim.

Similarly, while Mr. Brandt did perform a calculation based on the 26 weeks of data GTI submitted to L&I, he conceded that the data was not statistically sufficient to support the extrapolation he performed, that he could not *calculate a margin of error* for his extrapolation, that he could not express any degree of confidence in its accuracy and that he performed no external checks to test its accuracy. Even if the trial court ignored the fact that Mr. Brandt did not purport to offer opinions that would establish the Mynatts' claims, the calculations that he did perform are nothing more than guesswork.

Washington does not allow the admission of such evidence. GTI respectfully requests on cross-appeal that this Court determine the trial court abused its discretion in failing to exclude Mr. Brandt's report under ER 401, 403, 702, and 703. The fact that the Mynatts had no basis on which to prove their overtime claims provides this Court another basis on which to affirm the trial court's grant of summary judgment on the Mynatts' overtime and derivative claims.

II.
CROSS-ASSIGNMENTS OF ERROR AND ISSUES PERTAINING TO CROSS-ASSIGNMENT OF ERROR

A. Cross-Assignment of Error

The trial court erred in its April 16, 2012 Order denying GTI's Motion to Strike the Mynatts' Expert Report. CP 3230-3231.

B. Issues Pertaining to Cross-Assignment of Error

1. The Mynatts retained Mr. Brandt to provide an opinion on the amount of overtime owed during the Claims Period. Did the trial court err in refusing to strike Mr. Brandt's testimony where he did not analyze any work or compensation data for the Mynatts during the Claims Period?

2. Did the trial court err in refusing to strike Mr. Brandt's testimony where he testified that he could not calculate a margin of error or express any confidence in his damage estimates?

III. STATEMENT OF THE CASE

GTI is a third-generation, family-owned interstate motor carrier headquartered in Pacific, Washington. From its headquarters in Washington State and its terminals and service centers around the country, GTI provides each of its customers with services designed to meet customer specific demands. Depending on the customer's requirements, these services may include local, regional, or long haul truckload services in dry van or refrigerated units; dedicated fleets; direct store delivery; expedited delivery; heavy haul delivery; or on-site logistics and transportation management.

In a memo, effective January 1998 (the "1998 Memorandum"), GTI explained that its compensation plan for "mileage runs" contains a 20

percent factor for overtime. CP 152. Specifically, the 1998 Memorandum—entitled "Description of Driver Compensation for work performed within the State of Washington"—stated the "combination of mileage pay and accessorial pay rates include a 20 percent factor for anticipated overtime up to a workweek of 65 hours." *Id.*

GTI's Director of Payroll, Susan Geving, submitted an affidavit confirming that, since at least 1994, GTI has not differentiated between mileage-based work performed within Washington State and interstate work. CP 2397. GTI's COO, Steve Gordon, confirmed the same in his deposition. When asked why he believed GTI paid all of its drivers, including those who worked outside of Washington, the reasonable equivalent of overtime, he responded, "Because our drivers are generally paid the same all across the network." CP 2389.

The Mynatts are husband and wife long haul team drivers who are dispatched out of GTI's Pacific, Washington terminal. GTI compensated Appellants through a mileage-based piece-rate compensation plan known as PLUSS. CP 156. That plan pays Appellants a certain number of cents per dispatched mile associated with each load. CP 115. These miles are computer-generated, and reflect the "practical miles" from city center to city center, as opposed to the odometer miles that the GTI driver travels. CP 1723-1724. Because the miles are computer generated, GTI

compensated Appellants by multiplying their rate times all of the miles associated with each dispatch, without regard to how many miles each actually drove. CP 119. In addition to the mileage-based pay, the GTI PLUSS plan paid the Mynatts accessorial compensation associated with certain non-driving related activities that might attend a dispatch (e.g., loading and unloading). CP 1932-1934; 147-163; 165-384. Appellants understood this. CP 1837; 115. As a result, the Mynatts could determine how much compensation they would receive as soon as they accepted a particular dispatch.

On January 16, 2009, GTI submitted a request for a determination that its pay plans, including the PLUSS plan under which the Mynatts were paid, compensated Washington-based drivers the reasonable equivalent of overtime. CP 146-313. GTI made the request pursuant to WAC 296-128-012(3) and L&I's Administrative Policy ES.A.8.3 ("*Administrative Policy* ES.A.8.3"), which was amended after the Washington Supreme Court clarified in *Bostain* that State overtime laws applied to Washington based truck drivers traveling in both intrastate and interstate commerce.

The January 16, 2009 letter and subsequent supplemental data submitted at L&I's request included estimates of hours worked (including estimates of time spent on non-driving activities on each dispatch), total

compensation, miles driven, and average speed information for 30 randomly selected Washington-based drivers who were compensated through the six pay plans GTI submitted for review. CP 146-384; 1932-1934. Those six play plans included two plans in place prior to the *Bostain* decision, and four plans for which GTI sought prospective approval.[2] CP 166. The Mynatts were part of the 30 driver sample.

GTI submitted a detailed explanation of the manner in which it calculated the hours each of its employees worked. CP 1743-1750, 1932-1934. GTI used the actual compensation that those employees received for that work. CP 1743-1750, 1932-1934. In order to establish that the pay plans compensated the reasonable equivalent of overtime, *Administrative Policy* ES.A.8.3 instructed GTI to compare the compensation that the mileage-based drivers received to the rates GTI pays "local drivers who are paid hourly under traditional overtime." *Administrative Policy* ES.A.8.3(B)(3)(c)(iii).

In accordance with *Administrative Policy* ES.A.8.3, GTI used the hourly rates it paid local drivers with the same level of experience as the

[2] The Mynatts were paid under GTI's PLUSS Plan. CP 156. GTI also requested and received a reasonably equivalent determination on its Miles Pay plan in effect prior to March 1, 2007. While L&I determined that the PLUSS and the Miles Plus plan compensated drivers with the reasonable equivalent of overtime, it declined to issue a prospective determination on the other four plans that had not yet been implemented. CP 143-145. Neither the four prospective plans nor the Miles Plus plan are at issue in this case.

Mynatts as a basis for comparing their compensation under the PLUSS plan to their hourly counterparts. CP 147-163. GTI advised L&I that it paid hourly drivers with the equivalent level of experience as Anita and Steven Mynatt rates of $13.75 and $14.25, respectively. CP 254. By comparison, as demonstrated in the chart below,[3] the GTI PLUSS plan paid the Mynatts an effective regular rate of between $20.41 and $26.55 per hour for the first 40 hours of work (reflected in the column "Uniform Rate of Pay Calculations". CP 1249-1250. The data also demonstrated that the PLUSS plan paid the Mynatts at least 1.5 their regular rate for every week in the 26-week sample in which they worked more than 40 hours, regardless of how many hours they worked (reflected in the column "OT Rate").

[3] The chart included here is a condensed version of the spreadsheet GTI provided as part of its L&I submission. For ease of reference, GTI has deleted irrelevant columns. The entire document with all columns included is available at CP 1249-1250. MYNA entries refer to Mrs. Anita Mynatt, MYNS entries refer to Mr. Stephen Mynatt.

Pay wk	Driver Code	Pay Week Begins	Pay week ends	Uniform Rate of Pay Calc	OT Rate	Regular	OT Hrs	Weekly Base Pay	Weekly Overtime Pay	Total Wkly Pay
1	MYNA	8/20/06	8/26/06	$ 22.46	$ 33.70	40.00	11.11	$ 898.56	$ 374.40	$ 1,272.96
2	MYNA	8/27/06	9/2/06	$ 23.77	$ 35.66	40.00	8.83	$ 950.61	$ 314.98	$ 1,265.59
3	MYNA	9/3/06	9/9/06	$ 26.25	$ 39.38	30.19	-	$ 792.64	$ -	$ 792.64
4	MYNA	9/10/06	9/16/06	$ 25.34	$ 38.01	22.27	-	$ 564.24	$ -	$ 564.24
5	MYNA	9/17/06	9/23/06	$ 22.01	$ 33.01	40.00	16.45	$ 880.31	$ 543.17	$ 1,423.48
6	MYNA	9/24/06	9/30/06	$ 21.73	$ 32.60	40.00	21.11	$ 869.07	$ 688.26	$ 1,557.82
7	MYNA	10/1/06	10/7/06							
8	MYNA	10/8/06	10/14/06	$ 23.37	$ 35.05	40.00	8.61	$ 934.75	$ 301.93	$ 1,236.72
9	MYNA	10/15/06	10/21/06	$ 21.69	$ 32.44	40.00	19.96	$ 867.64	$ 648.16	$ 1,515.80
10	MYNA	10/22/06	10/28/06	$ 25.44	$ 38.16	2.60	-	$ 66.24	$ -	$ 66.24
11	MYNA	10/29/06	11/4/06	$ 20.92	$ 31.38	40.00	28.26	$ 836.80	$ 887.03	$ 1,723.82
12	MYNA	11/5/06	11/11/06	$ 23.40	$ 35.10	40.00	7.13	$ 935.99	$ 250.33	$ 1,186.32
13	MYNA	11/12/06	11/18/06	$ 22.93	$ 34.40	40.00	8.45	$ 941.27	$ 227.77	$ 1,169.04
14	MYNA	11/19/06	11/25/06	$ 20.84	$ 31.27	40.00	16.54	$ 833.77	$ 517.07	$ 1,350.84
15	MYNA	11/26/06	12/2/06	$ 24.14	$ 36.21	9.76	-	$ 235.68	$ -	$ 235.68
16	MYNA	12/3/06	12/9/06	$ 23.36	$ 35.04	40.00	7.84	$ 934.42	$ 257.18	$ 1,191.60
17	MYNA	12/10/06	12/16/06	$ 22.71	$ 34.07	40.00	9.08	$ 908.54	$ 309.52	$ 1,218.06
18	MYNA	12/17/06	12/23/06	$ 21.24	$ 31.86	40.00	26.21	$ 849.47	$ 834.85	$ 1,684.32
19	MYNA	12/24/06	12/30/06							
20	MYNA	12/31/06	1/6/07	$ 26.02	$ 39.02	26.04	-	$ 677.40	$ -	$ 677.40
21	MYNA	1/7/07	1/13/07	$ 21.07	$ 31.60	40.00	15.80	$ 842.85	$ 502.31	$ 1,344.96
22	MYNA	1/14/07	1/20/07	$ 24.01	$ 36.02	40.00	17.61	$ 960.55	$ 634.44	$ 1,595.00
23	MYNA	1/21/07	1/27/07							
24	MYNA	1/28/07	2/3/07	$ 20.41	$ 30.61	40.00	31.56	$ 816.28	$ 965.96	$ 1,782.24
25	MYNA	2/4/07	2/10/07	$ 25.44	$ 38.16	15.05	-	$ 382.80	$ -	$ 382.80
26	MYNA	2/11/07	2/17/07							
1	MYNS	8/20/06	8/26/06	$ 22.93	$ 34.40	40.00	11.11	$ 917.28	$ 382.20	$ 1,299.48
2	MYNS	8/27/06	9/2/06	$ 24.27	$ 36.40	40.00	8.83	$ 970.81	$ 321.52	$ 1,292.13
3	MYNS	9/3/06	9/9/06	$ 26.79	$ 40.19	30.19	-	$ 808.95	$ -	$ 808.95
4	MYNS	9/10/06	9/16/06	$ 25.87	$ 38.80	22.27	-	$ 576.00	$ -	$ 576.00
5	MYNS	9/17/06	9/23/06	$ 22.48	$ 33.69	40.00	16.45	$ 898.93	$ 554.28	$ 1,453.62
6	MYNS	9/24/06	9/30/06	$ 22.19	$ 33.28	40.00	21.11	$ 887.34	$ 702.47	$ 1,589.81
7	MYNS	10/1/06	10/7/06							
8	MYNS	10/8/06	10/14/06	$ 26.75	$ 38.62	40.00	8.61	$ 1,029.85	$ 332.64	$ 1,362.49
9	MYNS	10/15/06	10/21/06	$ 22.03	$ 33.11	40.00	19.96	$ 883.08	$ 661.67	$ 1,544.75
10	MYNS	10/22/06	10/28/06	$ 25.97	$ 38.96	2.60	-	$ 67.62	$ -	$ 67.62
11	MYNS	10/29/06	11/4/06	$ 21.96	$ 32.94	40.00	28.26	$ 854.33	$ 935.51	$ 1,789.84
12	MYNS	11/5/06	11/11/06	$ 23.89	$ 35.83	40.00	7.13	$ 955.49	$ 255.95	$ 1,211.04
13	MYNS	11/12/06	11/18/06	$ 24.02	$ 36.03	40.00	8.45	$ 960.88	$ 232.51	$ 1,193.40
14	MYNS	11/19/06	11/25/06	$ 21.27	$ 31.90	40.00	16.54	$ 850.79	$ 527.83	$ 1,378.62
15	MYNS	11/26/06	12/2/06	$ 24.64	$ 36.96	9.76	-	$ 240.59	$ -	$ 240.59
16	MYNS	12/3/06	12/9/06	$ 23.85	$ 35.77	40.00	7.34	$ 953.88	$ 262.54	$ 1,216.43
17	MYNS	12/10/06	12/16/06	$ 23.18	$ 34.78	40.00	9.08	$ 927.36	$ 315.86	$ 1,243.22
18	MYNS	12/17/06	12/23/06	$ 21.68	$ 32.52	40.00	26.21	$ 867.17	$ 852.24	$ 1,719.41
19	MYNS	12/24/06	12/30/06							
20	MYNS	12/31/06	1/6/07	$ 26.55	$ 39.82	26.04	-	$ 691.20	$ -	$ 691.20
21	MYNS	1/7/07	1/13/07	$ 21.50	$ 32.25	40.00	15.80	$ 860.05	$ 512.68	$ 1,372.73
22	MYNS	1/14/07	1/20/07	$ 22.14	$ 33.20	40.00	17.61	$ 885.43	$ 584.82	$ 1,470.25
23	MYNS	1/21/07	1/27/07							
24	MYNS	1/28/07	2/3/07	$ 20.83	$ 31.25	40.00	31.56	$ 833.28	$ 986.09	$ 1,819.37
25	MYNS	2/4/07	2/10/07	$ 25.97	$ 38.96	15.05	-	$ 390.78	$ -	$ 390.78

On December 16, 2010, L&I issued its determination that the PLUSS plan under which the Mynatts were paid contained the reasonable equivalent of overtime under RCW 49.46.130(2)(f). CP 142-145.

Subsequently, GTI sought summary judgment on each of Appellants' claims. CP 55-85; 2359-2404.

Notwithstanding L&I's determination, Appellants retained Mr. Brandt to offer testimony bearing on whether the Mynatts were properly compensated for those weeks in which they worked overtime. Mr. Brandt did not analyze any data relating the work the Mynatts performed or the compensation they received during the Claims Period. CP 3092. As a consequence, Mr. Brandt testified that he had no opinions regarding whether the Mynatts in fact worked overtime or whether GTI compensated them correctly if they did. CP 3092.

Mr. Brandt testified that he estimated that the Mynatts were undercompensated $18,625 (Mr. Mynatt) and $18,000 (Mrs. Mynatt). CP 3398. Mr. Brandt testified that his estimate was predicated on two assumptions, (1) that extrapolating the 26 weeks of work GTI submitted to L&I would reflect the work they performed during the Claims Period and (2) that GTI's PLUSS plan did not include a factor for overtime. CP 2471-2475. While Mr. Brandt was asked to make both assumptions, he testified that, in his opinion, the 26 week sample was not a statistically sufficient basis to support his extrapolation. CP 2474. As a consequence, Mr. Brandt testified that he was unable to calculate a margin of error for

his estimate or express any opinion regarding his confidence in the accuracy of his estimate.

Mr. Brandt testified that calculations GTI submitted to L&I as reflected in the spreadsheet above were correct. CP 2471. He testified that he had no expertise in evaluating whether a compensation plan contained the reasonable equivalent of overtime and that he did not have a basis on which to challenge L&I's expertise. CP 3608. Mr. Brandt also testified that he had no basis on which to opine that the effective hourly rate Mynatts received was higher, lower or the same as the hourly rate that a comparably experienced over-the-road driver would receive. CP 3626-3627. GTI moved to strike Mr. Brandt's report based on these analytical frailties. CP 2651-2655; 3113-3125.

Discovery closed on March 26, 2012. On April 16, 2012, the trial court entered: (1) an Order Granting GTI's Motion for Reconsideration; Granting GTI's Motion for Summary Judgment; and Denying Plaintiffs' Cross-Motion for Summary Judgment and (2) an Order Denying GTI's Motion to Strike Appellants' Expert Report. CP 3549-3552. This appeal followed.

IV.
ARGUMENT

A. Standard of Review

1. Appellants' Appeal

The trial court's granting of GTI's Motion to Reconsider is reviewed *de novo*. *Washington Imaging Services, LLC v. Wash. State Dept. of Revenue*, 171 Wn.2d 548, 555, 252 P.3d 885 (2011).

2. GTI's Cross-Appeal

The trial court's denial of GTI's Motion to Strike is reviewed for an abuse of discretion. *Safeco Ins. Co. v. McGrath*, 63 Wn. App. 170, 178, 817 P.2d 861, 866 (1991) (holding trial court abused its discretion in admitting expert's affidavit lacking an adequate foundation).

B. The Trial Court Correctly Entered Summary Judgment Dismissing the Mynatts' Overtime Claim

1. L&I Determined That The Pay Plan Under Which The Mynatts Were Paid Contained The Reasonable Equivalent Of Overtime

Since 1989, Washington has authorized motor carriers to compensate truck drivers the reasonable equivalent of overtime through piece-rate compensation plans. WAC 296-128-012(c) (1989); *see also Westberry v. Interstate Distrib. Co.*, 164 Wn. App. 196, 200, 263 P.3d 1251, 1253 (2011). Prior to 2007, L&I interpreted Washington's overtime laws as applying only to work performed within the state of Washington.

In 2007, the Washington Supreme Court in *Bostain v. Food Express, Inc.* clarified this obligation extended to both intrastate and interstate drivers. 159 Wn.2d at 713. Subsequently, L&I amended its regulations to comport with the *Bostain* holding. *Westberry*, 164 Wn. App. at 201. This amendment also gave motor carriers the opportunity to submit data to L&I for a formal determination of whether compensation schemes in place prior to the March 1, 2007 *Bostain* decision satisfied the reasonably equivalent standard for both intrastate and interstate hours drivers worked. *Id.*

GTI availed itself of this amended regulation on January 16, 2009, submitting to L&I a request for a formal determination that six of GTI's pay plans, including the plan under which the Mynatts were paid, included the reasonable equivalent of overtime. GTI tracked the requirements and instructions that L&I laid out in *Administrative Policy* ES.A.8.3, which included submission of the hours worked and compensation received by 30 randomly selected employee drivers over a 26 week period. CP 147-163; 315-319; 165-384. In addition, GTI provided a detailed explanation of how it calculated the number of hours "each employee worked in each workweek," as well as an explanation of the terms of art used in the compensation system. CP 147-163; 315-319; 165-384; ES.A.8.3(B)(1) (ii), (iv). By happenstance, the Mynatts were two of the 30 randomly selected

drivers whose work and compensation L&I considered in making its determination. CP 156. In addition, GTI responded to questions L&I posed and submitted additional data and information L&I requested. CP 146-384.

With respect to the Mynatts, that data showed Mr. Mynatt earned an effective hourly rate of between $20.83-$26.79 for the first 40 hours of work. CP 1249-1250. For the same pay periods, the data showed that Mr. Mynatt earned a corresponding effective overtime rate of between $31.25-$40.19. CP 1249-1250.[4] These effective hourly rates were significantly greater than the hourly rate ($14.25), including overtime ($21.37), that GTI paid its hourly drivers with the same level of experience as Mr. Mynatt. CP 1249-1250; 138. Similarly, the data L&I considered demonstrated that Mrs. Mynatt earned an effective hourly rate of between $20.41-$26.25 for the first 40 hours of work. CP 1249-1250. For the same

[4] Appellants attempt to muddy the record by suggesting that GTI's pay plan only included a factor to approximate up to 65 hours of overtime. This assertion is factually and legally unsupported. First, as the chart reprinted above demonstrates, GTI paid the Mynatts 1.5 times their effective regular rate for *every overtime hour*, including those weeks when they worked more than 65 hours. *See, e.g.*, CP 1249-1250 (reflecting compensation paid to Mrs. Mynatt for the week ending 11/4/06). Second, the assertion is legally unsupported because the statute allows employers to adopt a compensation plan that is "reasonably equivalent to overtime." As Appellants concede, they "are not asserting they have to receive exactly the amount of pay they would have received if paid overtime traditionally . . . [just] an amount commensurate to traditional overtime." Appellants' Opening Br. at 32. The evidence demonstrates that this is *precisely* what GTI's compensation plan did.

pay periods, the data showed that Mrs. Mynatt earned a corresponding effective overtime rate of between $30.61-$39.38. Again, these effective hourly rates were significantly higher than the hourly rate ($13.75), including overtime ($20.62), that GTI paid its hourly drivers with the same level of experience as Mrs. Mynatt.[5] CP 1249-1250; 138.

Based on this data and the data GTI submitted for the other drivers, on December 16, 2010, L&I issued its determination that the play plan under which the Mynatts were paid contained the reasonable equivalent of overtime. CP 143-145.

Appellants do not challenge the accuracy of the calculations GTI submitted. CP 2468-2469; 2471. Nor do Appellants offer any evidence of a higher hourly rate to which their work should have been compared. Mr. Mynatt testified that he had no idea how much a driver with his equivalent level of experience would be paid. CP 3591. Similarly, Mr. Brandt testified that he has no basis on which to challenge the hourly rates to which the Mynatts work was compared. CP 3626-3627.

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[5] Nothing in Appellants' observation that GTI did not have "hourly pay plans applicable to team drivers," alters the conclusions to be drawn from GTI's data. Appellants' Opening Br. at 11. GTI submitted data showing the *actual compensation* each of the Mynatts received and compared it to what drivers with equivalent levels of experience would have received on an hourly basis with overtime. *Precisely* the comparison that L&I requested. ES.A.8.3.

The calculations GTI submitted to L&I are the *only evidence* in the record that (1) calculates the Mynatts' effective regular rate of pay for the first 40 hours and their effective overtime rate of pay; and (2) compares those amounts to what an hourly driver with comparable experience would earn. As noted above, those calculations show that for *each and every week* the Mynatts actually earned effective hourly rates and corresponding effective overtime rates substantially higher than their corresponding hourly counterparts. CP 1249-1250. This evidence supports L&I's determination that the pay plan under which the Mynatts were compensated contains the reasonable equivalent of overtime.

2. The Mynatts Fail to Demonstrate the L&I's Reasonably Equivalent Determination Is Arbitrary and Capricious or Contrary to Law

L&I's determination is fatal to the Mynatts overtime claims unless they can prove that L&I's determination is "arbitrary, capricious and contrary to the law." *Schneider*, 116 Wn. App. at 716. Washington courts are reluctant to overturn an L&I finding because the "determination of whether a compensation scheme constitutes the reasonable equivalent of statutory overtime is within the Department's specialized expertise." *Schneider*, 116 Wn. App. at 717. Indeed, the absence of any case, reported or unreported, ever overturning an L&I reasonable equivalent determination is a testament to the high burden attending the request.

To overcome this burden the Mynatts' paper attacks the validity of evidence GTI submitted to L&I and the efficacy of L&I *Administrative Policy* ES.A.8.3 that provides the procedure for motor carriers like GTI to obtain a reasonably equivalent determination. Specifically, the Mynatts argue the trial court's summary judgment finding should be overturned and judgment entered in the Mynatts favor because (1) GTI allegedly failed to establish a mileage rate that includes an overtime component and (2) L&I allowed GTI to use an improper method for substantiating its deviation from hourly pay and did not adhere to L&I's own recordkeeping requirements in making the reasonable equivalent determination.

As discussed below, there is *no evidence* in the record that GTI paid its mileage-based drivers, including the Mynatts, at a different rate for interstate work from the work they performed within Washington State. Because Appellants do not and cannot challenge the fact that GTI's mileage-based compensation for intrastate work has contained a 20 percent factor for overtime since 1998, there is no evidence that would support Appellants' first argument.

Moreover, even if there were such evidence, Appellants would still be unable to rely on this theory to overturn L&I's determination. Appellants' theory would require that the finder of fact conclude that GTI *defrauded* L&I and that *L&I* relied on GTI's deception. Appellants

offered no evidence that anything GTI submitted was inaccurate and offered no evidence that would allow the trial court to conclude that *L&I* in fact relied on the alleged misrepresentation. Appellants did not submit any testimony from anyone at L&I and offered no other witness who could competently testify to what L&I relied upon.

Appellants' second attack on L&I's determination is similarly unavailing. Appellants have failed to cite any authority or advance any "compelling" argument that would render *Administrative Policy* ES.A.8.3 in "conflict with legislative intent or is in excess of the agency's authority." *Litchfield v. KPMG, LLP*, 170 Wn. App. 431, 285 P.3d 172, 177 (2012) (internal citation omitted). Neither of Appellants' arguments satisfy the Mynatts' burden on appeal. *See Dep't of Revenue v. Nord Nw. Corp.*, 164 Wn. App. 215, 223, 264 P.3d 259, 262 (2011) ("The burden of demonstrating the invalidity of agency action is on the party asserting invalidity.").

a. GTI's Mileage Rate Includes an Overtime Component

Evidence in the record conclusively establishes that, since at least 1998, GTI has paid its mileage-based drivers with a rate that includes a 20 percent factor for overtime for work performed within Washington State.[6]

[6] As a result, Appellants' base rate – their mileage rate – contained a factor for overtime, which GTI paid the Mynatts from the first mile that they drove.

CP 1917. Appellants make no challenge to this fact. Of course, the record also conclusively establishes that GTI does not differentiate between the compensation it provides its mileage-based drivers for work they perform within the state of Washington from the work they perform outside the state of Washington. Rather, Sue Geving testified that GTI does not pay separate rates for interstate and intrastate work. CP 2397. Steve Gordon similarly testified that he believes GTI pays all drivers the reasonable equivalent to overtime because, "our drivers are generally paid the same all across the network." CP 2389. *No one testified differently*, and Appellants offered *no evidence* of a separate pay plan for interstate work.

Appellants' failure to adduce any evidence of a separate pay plan for interstate work eviscerates their challenge to L&I's determination. Appellants do not challenge that GTI compensates its mileage-based drivers for intrastate work with the reasonable equivalent of overtime. And there is no evidence in the record that would support such a challenge. In order to conclude that GTI used a mileage-based compensation system that did not include an overtime factor, there would have to be evidence that *GTI used a separate compensation* system to pay drivers for interstate work. GTI did not have a separate compensation

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Incorporating this overtime factor into the mileage rate is exactly what the regulation authorizes. WAC 296-128-012.

system for interstate work and there is no evidence that would support an assertion that it did.

Nothing in Appellants' circular argument regarding the absence of changes to GTI's pay plans after *Bostain* changes this fact. Specifically, the fact that "GTI did not believe it owed drivers overtime for work outside Washington before *Bostain*" does not change the fact that GTI paid those drivers on the same compensation system for interstate work as intrastate work, using a mileage-based rate that Appellants concede contains a 20 percent factor for overtime. Nor, of course is there any moment to the fact that GTI "did not make changes to the way it compensated drivers after *Bostain*" as the rates it paid interstate drivers already contained a factor for overtime because it was the same as the rates it paid for intrastate work.

In other words, GTI did not make changes to the way it compensates the Mynatts post-*Bostain* because—as the L&I determination confirms—the method GTI used pre-*Bostain* effectively paid the Mynatts the reasonable equivalent of overtime. CP 143-145. Accordingly, GTI was not required to change its compensation structure as a result of the *Bostain* decision. In fact, pursuant to WAC 296-128-012(3), Washington law explicitly provides for the potential that a pre-*Bostain* compensation plan will pay employees the reasonable equivalent of overtime.

The Mynatts' theory that GTI misrepresented information in the 1998 Memorandum provided to L&I to obtain the favorable reasonable equivalent determination is also without evidentiary support. First, there is no basis on which to characterize the 1998 Memorandum as deceptive regarding its scope. GTI cannot misrepresent what the 1998 Memorandum said, when, as the Mynatts note, GTI submitted the 1998 Memorandum to L&I. CP 147-152. In other words, L&I was able to read it just as Appellants were. L&I undoubtedly understood that the 1998 Memorandum applied to interstate work as well because there were no separate pay plans for interstate versus intrastate work, a point the Mynatts cannot dispute. Advancing an evidentiary narrative to the contrary would require *someone from L&I* to testify that GTI misled L&I *and* that L&I predicated its determination on GTI's deception. The fact that no one from L&I offered any such testimony precludes Appellants from demonstrating that GTI did anything misleading, let alone that L&I relied on the misrepresentation.

Appellants' citation to a single line of questions that their attorney asked Steve Gordon regarding the 1998 Memorandum does nothing to establish any deception. After repeatedly testifying that GTI's compensation applied to inter as well as intrastate work, Mr. Gordon acknowledged that the 1998 Memorandum only mentions work performed

within the State of Washington. CP 1657. What Steve Gordon did not say, was that there was any different pay scale for Washington-based interstate drivers. Indeed he testified precisely to the contrary—that all drivers are paid the same across the system and that, because GTI had built-in a 20 percent factor for overtime into its mileage rate, GTI effectively paid all of its drivers the reasonable equivalent of overtime. CP 2389. Both Sue Geving (GTI's Director of Payroll) and Patty Schmidt (GTI's Director of Recruitment) echoed Steve Gordon's testimony that only one pay scale exists, and the record contains no evidence to the contrary.[7] CP 2397; 2382; 2389.

The absence of any evidence of a difference between the pay scales that GTI used to compensate interstate and intrastate drivers, or any witness who will challenge that the pay scale referenced in the 1998 Memorandum contained a factor for overtime, defeats any basis on which the Appellants could challenge the efficacy of L&I's determination under any standard, let alone the arbitrary and capricious standard applicable here. *Schneider*, 116 Wn. App. at 716.

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[7] Whether GTI told drivers, including the Mynatts, that their compensation included a factor for overtime, does not change the fact *that it did,* and also does not alter the efficacy of L&I's determination that the compensation was reasonably equivalent to overtime.

Despite lacking any evidence that another pay scale exists, or any witness challenging that the 1998 Memorandum contains a factor for overtime, the Mynatts submit that had "L&I followed up with GTI and been afforded all the safeguards of an adjudicative hearing" it would have discovered "the 1998 policy submitted to L&I could not have applied to interstate drivers." Appellants' Opening Br. at 27-28. As noted above, *there is no evidence* that would support Appellants' speculation about what might have happened if L&I had asked the questions Appellants think L&I should have asked. Moreover, the only evidence in the record establishes, contrary to Appellants' counterfactual assertion, that the 1998 Memorandum *did apply to interstate drivers.* CP 2397; 2389. The fact that the Mynatts disagree with L&I's conclusion is not sufficient to render it arbitrary and capricious. "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 Wn. App. at 717 (internal citation omitted).

The Mynatts present no evidence to dispute that interstate and intrastate drivers were paid under the same pay plan that contained a 20 percent factor for overtime the L&I determined was reasonably equivalent to overtime pay, or that the data submitted to L&I showed the Mynatts earned a substantially higher effective hourly and overtime rates than the

hourly rates GTI paid drivers with similar experience. CP 1249-1250. In sum, L&I's determination is completely consistent with the record evidence and nothing in the record would allow a court to conclude that L&I's determination was "willful and unreasoning, and taken without regard to attending facts or circumstances."[8] *Schneider*, 116 Wn. App. 716 (internal citation omitted). Under the applicable arbitrary and capricious standard, the trial court properly upheld L&I's determination.

b. L&I's Analysis Comported With the Law

Because it is within the "L&I's specialized expertise" to determine whether a compensation scheme constitutes the reasonable equivalent of overtime Washington courts give great deference to L&I's interpretations of the overtime regulation—WAC 296-128-012—it promulgated. *Litchfield*, 170 Wn. App. at 441. Accordingly, Washington courts will uphold the administrative agency interpretation "absent a compelling indication that the agency's regulatory interpretation conflicts with legislative intent or is in excess of the agency's authority." *Id.* The Mynatts have failed to make any such showing.

[8] Appellants' argument does nothing to demonstrate that L&I's analysis was "willful and unreasoning, and taken without regard to the attending facts or circumstances." Instead, Appellants pepper their paper with so-called "red flags," which they claim L&I could have relied upon to reach a different conclusion. Appellants' assertion will not justify overturning L&I's determination. "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 Wn. App. at 717.

The Mynatts argue L&I's *Administrative Policy* ES.A.8.3 interpretation conflicts with the intent of the Washington Minimum Wage Act and exceeds L&I's authority (1) by allowing L&I to compare an interstate drivers work and compensation to local drivers as part of the reasonable equivalent of overtime analysis, and (2) not requiring records of actual hours worked in making the reasonable equivalent determination. Appellants' Opening Br. at 34-40. To support the initial argument, the Mynatts insist the Washington legislature (through RCW 49.46.130(2)(f)) requires L&I to utilize a driver's own "regular rate" of pay in making the reasonable equivalency determination as opposed to "a hypothetical regular rate of pay of another so-called 'similarly situated' comparator." *Id.* at 34-35. According to the Mynatts, the "'regular rate' is not a hypothetical construction, but an 'actual fact,'" and anything less than "requiring companies to perform their substantiation utilizing a" driver's own "regular rate" violates RCW 49.46.130(1). Appellants' Opening Br. at 35 (citing *149 Madison Ave. Corp. v. Asselta*, 331 U.S. 199, 204 (1947).[9]

[9] Appellants' argument is factually unsupported. Sue Geving testified, GTI paid Mr. Mynatt $12 per hour when he performed hourly work. CP 138. Mr. Mynatt confirmed that GTI paid him $12 per hour for hourly work. CP 127. The rate that GTI used for comparison, $14.25 per hour, was *higher* than the rate he actually received. CP 138.

In contrast to the rigid definition proposed by the Mynatts, the Washington Supreme Court has held that the legislature "intended to allow a broad and flexible interpretation of the term" regular rate. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 861, 93 P.3d 108, 112 (2004) (internal citation omitted). As explained in *Hisle*, the Washington legislature did not define "regular rate" in the Washington Minimum Wage Act; rather, a regulation promulgated by L&I does. WAC 296-128-550.

That the Act does not define "regular rate" disposes of Appellants' assertion that L&I's interpretation of that term conflicts with the language of the statute. A regulation cannot conflict with something the statute does not say. Rather, the Mynatts are asking this Court to find *that the agency that defined "regular rate"* interprets the term *it defined* in violation of the legislature's intent, despite the fact that *the legislature's only intent* regarding the term "regular rate," was to delegate the definition of regular rate to L&I. The Mynatts' paper provides no indication, much less a compelling one, why L&I's interpretation of regulations it wrote and terms it was tasked with defining conflict with the legislature's intent or exceeded its authority; L&I's interpretation should therefore be given proper deference here. *Silverstreak, Inc. v. Dep't of Labor & Industries*, 159 Wn.2d 868, 884, 154 P.3d 891, 900 (2007) (noting great deference

granted to L&I's "interpretation of its regulations because the agency has expertise and insight gained from administering the regulation that we, as the reviewing court, do not possess.").

Likewise, while the Mynatts disagree with L&I's regular rate comparison calculations between interstate and local drivers, their dissatisfaction with the comparison does not render *that comparison* that L&I conducted "willful and unreasoning, and taken without regard to attending facts or circumstances." *Schneider*, 116 Wn. at App. 716 (internal citation omitted). As the Mynatts have offered no authority that would support the overturning of L&I's determination and have failed to satisfy the arbitrary and capricious standard, there is no basis to reverse the trial court's dismissal of their overtime claims.

Similarly without merit is the Mynatts contention that L&I's *Administrative Policy* ES.A.8.3's recordkeeping protocol ignores the Minimum Wage Act's requirements for maintaining records. Appellants' Opening Br. at 39-41. According to the Mynatts, allowing GTI to certify the accuracy and validity of its records in lieu of providing the actual records runs contrary to L&I's own regulations that "demand GTI submit actual hours worked." Appellants' Opening Br. at 40.

Here again, Appellants have offered no compelling indication that the L&I's regulatory interpretation—which required GTI to certify that

their estimate was "reflective of the actual number of hours worked"—conflicts with the legislative intent. Notwithstanding that L&I and not the legislature promulgated the recordkeeping requirement (and therefore by definition no conflict with legislative intent exists) there is nothing inconsistent with the general recordkeeping requirement and L&I requiring only a certified statement of accuracy in *Administrative Policy* ES.A.8.3 for purposes of the reasonable equivalent determination.

At best, Appellants' challenge is a complaint that *Administrative Policy* ES.A.8.3 represents a technical deviation from the language of L&I's recordkeeping requirements. This technical deviation is not, however, "a compelling indication that the agency's regulatory interpretation conflicts with legislative intent or is in excess of the agency's authority." *Litchfield*, 170 Wn. App. at 441 (internal citation omitted).

"An agency's interpretation will be upheld if it is a plausible construction of the statute or rule." *Schneider*, 116 Wn. App. at 716 (internal citation omitted). The Mynatts have proffered no evidence or legal authority supporting their assertion that L&I's interpretation of its own regulations should be overturned.

C. The Trial Court Abused its Discretion in Failing to Strike Mr. Brandt's Report

Even if the Mynatts could demonstrate L&I's reasonable equivalent determination was "arbitrary, capricious, or manifestly unreasonable" or that the agency action was "willful, unreasoning, and taken without regard to attending facts or circumstances,"[10] allowing the overtime claim to proceed is futile. The Mynatts—through Mr. Brandt—concede they cannot offer reliable proof of injury or damages emanating from the alleged overtime violations. Without proof of these *prima facie* elements, the Mynatts cannot prevail on their overtime claim or any of the claims predicated thereon. RCW 49.46.130(f); *see also Pryor v. Aerotek Scientific, LLC*, No. cv 10-06575 MMM, 2011 WL 6376703, at *15 (C.D. Cal. Nov. 15, 2011) (recognizing that whether compensation structure failed "to pay overtime . . . is not merely a question of damages, it is a question of liability.").

The only evidence proffered by the Mynatts to establish their overtime claim—that is, to show they worked over 40 hours in a week and during those weeks did not receive the reasonable equivalent of overtime—is Mr. Brandt's report. As the party proffering the expert under Washington law, the Mynatts have the burden to establish that the

[10] *Schneider*, 116 Wn. App. at 716 (internal citation omitted).

"factual, informational, or scientific basis of [Mr. Brandt's] opinion, including the principle or procedures through which the conclusions are reached, [are] sufficiently trustworthy and reliable to remove the danger of speculation and conjecture and give at least minimal assurance that the opinion can assist the trier of facts." *Griswold v. Kilpatrick*, 107 Wn. App. 757, 761-62, 27 P.3d 246, 248 (2001). Mr. Brandt's testimony precludes such a showing.

Specifically, Mr. Brandt acknowledged that he (1) did not analyze any data regarding the Mynatts' work during the Claims Period; (2) has no basis on which to conclude that the Mynatts worked more than 40 hours in a week during the Claims Period; (3) has no basis on which to evaluate whether GTI paid the Mynatts the reasonable equivalent of overtime during the Claims Period; (4) has no basis on which to ascribe a margin of error to the calculations he performed; (5) cannot say how confident he is in his damage estimate; and (6) did not perform any external checks or tests to validate the accuracy of his estimates. CP 2473-2474, 3092, 2480-2481, 2484-2488. Because Mr. Brandt's testimony establishes that his opinions are immaterial (as they are based on dates outside the Claims Period) and unreliable (as he could not ascribe a margin of error or express any confidence in his calculations), the trial court abused its discretion

when it denied GTI's Motion to Strike. This Court should accordingly reverse.

1. Brandt's Findings Are Neither Relevant Under ER 401 Nor Probative Pursuant to ER 403

Admissible evidence must be relevant and probative. ER 401; ER 403. Appellants' appeal challenges only the trial court's order granting summary judgment on Appellants' claim that they were not compensated the reasonable equivalent of overtime during those weeks that they *in fact* worked overtime and the three derivative claims predicated on this claim. To prevail on these claims, Appellants would have to offer admissible evidence that during the Claims Period, they (1) worked more than 40 hours in a week; and (2) that the compensation they received was not reasonably equivalent to overtime. *See* RCW 49.46.130(f). Mr. Brandt testified that he had no opinions on either of these issues.

- **Mr. Brandt has no opinions regarding whether the Mynatts worked overtime**

Q: How many weeks of work that the Mynatts have performed since March 30, 2007 have you actually analyzed?

A: I haven't analyzed any specific data for that time frame.

CP 3092.

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Q: So you are not, as you sit here today, able to quantify the amount of overtime that the Mynatts in fact performed for the period March 30, 2007 through the present?

A: Correct.

CP 2473.

- **Mr. Brandt has no opinions regarding whether the Mynatts received the reasonable equivalent of overtime**

Q: And as a corollary, you have no way of saying whether GTI paid [the Mynatts] the reasonable equivalent of overtime for the work they performed from March 30, 2007 to the present, correct?

A: That would follow.

Q: That's correct?

A: Yes.

CP 2473-2474.

While Mr. Brandt did perform a calculation of the damages the Mynatts *might* have suffered, he testified that he had no basis on which to opine as to the accuracy of his estimate. Rather, he explained, "I would not be able to state with a high degree of precision what the actual damage amount would be." CP 2480-2481. When asked to elaborate, Mr. Brandt said he had no way of calculating a margin of error for his estimate.

Q: All right. With that understanding, what is the margin of error for your estimate of the compensation that is due for the Mynatts?

A: I don't know the precise margin for error.

Q: Could it be 5 percent?

A: I don't know.

Q: Could it be 95 percent?

A: I don't know.

***

Q: So you couldn't offer any guidance to the Court about how accurate your calculation is, correct?

A: Correct. All I could say is that given the information I looked at, this is the best estimate that we can come up with.

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CP 2484-2485; 2486.

Mr. Brandt also explained that he had done nothing to test the accuracy of his work and had no basis on which to assure the court that he had any confidence in his calculations. CP 2487-2488.

Q: What is your degree of confidence in your damage estimate for the Mynatts?

A: Again, I don't have the data to quantify that.

Q: So you have no degree of confidence; is that correct?

A: I can't calculate the specific degree of confidence, correct.

Q: So as you take the stand and the judge were to ask you, "Mr. Brandt, how confident are you in your damage analysis," you would say, "I can't tell you, Judge?"

A: I can't give him a specific number.

***

Q: So the court would be left to guess at what those two numbers [margin of error and degree of confidence] are, correct?

A: Yes. The trier of fact would have to determine the degree to which that would factor into their decision.

CP 2486-2487. (Objection to form omitted).

Mr. Brandt's testimony demonstrates that his opinions are not only irrelevant, but also not trustworthy. Mr. Brandt could not offer any opinions about whether the Mynatts worked overtime or were improperly compensated. Moreover, his inability to offer any guidance on the accuracy of his opinions renders them nothing more than guesses. *See State v. Huynh*, 49 Wn. App. 192, 197, 742 P.2d 160, 164 (1987) (expert's report not relevant because "samples were few and randomly chosen and there was no evidence they were representative of the source population."); *Herold v. Hajoca Corp.*, 864 F.2d 317, 321-22 (4th Cir.), *cert. denied*, 109 S. Ct. 3159 (1989) (finding that the district court did not abuse its discretion in excluding statistical evidence on relevancy grounds because the defendant did not use the relevant labor market); *Washington v. Vogel*, 880 F. Supp. 1545, 1548 (M.D. Fla. 1995) (stating that "[s]tatistics ... must be supported by appropriate validation -- i.e., 'good grounds,' based upon what is known.") (quoting *Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579, 591 (1993)). Lacking these evidentiary tenets, it was an abuse of discretion for the trial court to deny GTI's request to strike Mr. Brandt's report and testimony.

2. Brandt's Testimony is Unreliable under ER 702 and 703

Even if Mr. Brandt had purported to offer opinions that would tend to demonstrate whether the Mynatts worked overtime or whether they were improperly compensated when they did, his opinions would still be inadmissible under ER 702 and 703. Specifically, ER 702 requires the party introducing evidence to first demonstrate the basis for the opinion is sound and will be helpful to the trier of fact, while ER 703 requires that the trial court "assess the reliability of the underlying facts or data upon which the expert's opinion is based" before admitting the opinion into evidence. *State v. Maule*, 35 Wn. App. 287, 295, 667 P.2d 96, 100 (1983); s*ee also Huynh*, 49 Wn. App. at 195. Mr. Brandt's report does not meet either criterion for admissibility.

As demonstrated above, Mr. Brandt has no opinion regarding whether the Mynatts worked overtime or, if they did, whether GTI compensated them the reasonable equivalent of overtime pay. These admissions preclude a finding, under ER 702, that his opinions would be helpful to the trier of fact to determine the merits of the Mynatts' overtime claim.

Mr. Brandt's testimony about the infirmity and limitations of the damage estimate he prepared preclude a finding that it is sufficiently

reliable to justify admission under ER 703. Specifically, rather than examine data bearing on the work the Mynatts performed during the Claims Period, Mr. Brandt took the 26 weeks of data that GTI submitted to L&I and *assumed,* without foundation, that it contained no factor for overtime.[11] Mr. Brandt then extrapolated the work performed during these 26 weeks to calculate his damage estimate based on his guess regarding how much the Mynatts worked and how much they were paid. CP 2470. As noted above, because Mr. Brandt could not ascribe a margin of error to his calculations, they are inadmissible conjecture and speculation. *ESCA Corp. v. KPMG Peat Marwick*, 86 Wn. App. 628, 639, 939 P.2d 1228, 1233 (1997) ("To be competent, the evidence or proof of damages must be established by a reasonable basis and it must not subject the trier of fact to mere speculation or conjecture."); s*ee also Tagatz v. Marquette Univ.*, 861 F.2d 1040, 1045 (7th Cir. 1988) (holding failure to control for explanatory variables makes expert's analysis "essentially worthless."); *Griswold*, 107 Wn. App. at 761-62; *Safeco Ins. Co.*, 63 Wn. App. at 170, 177 n. 18 ("It is well established that conclusory or speculative expert opinions lacking an adequate foundation will not be admitted."); *see also Queen City Farms,*

[11] Mr. Brandt confirmed that, if his assumption in this regard were incorrect, his opinions would be meaningless. CP 2464-2466. As discussed above, the uncontested evidence demonstrated that the Mynatts were paid on a piece rate that contained a factor to reasonably approximate overtime.

Inc. v. Cent. Nat'l Ins. Co. of Omaha, 126 Wash. 2d 50, 102-104, 882 P.2d 703, 731-32 (1994) ("Where there is no basis for the expert opinion other than theoretical speculation, the expert testimony should be excluded.").

Mr. Brandt explained that the reason he was unable to calculate a margin of error or opine on his confidence in his calculations is that they were not statistically sound or reliable. Specifically, Mr. Brandt testified that the fact that L&I used a 26 week sample as a basis to conclude that GTI's compensation was reasonably equivalent to overtime had no bearing on whether his *5-year damage extrapolation* was statistically appropriate.

> Q: So in other words, the fact that the 26 week sample for the drivers that were sampled was sufficient to allow L&I to conclude that the pay plans contained the reasonable equivalent of overtime does not necessarily mean that that sample would be sufficient to establish a damage theory for the subsequent five years, correct?
>
> A: Correct. I would be able—let me try and state this as succinctly as possible. I would not be able to state with a high degree of precision what the actual damage amount would be.
>
> CP 2480-2481. (Objection to form omitted).
>
> ***
>
> Q: Is there anything in those 26 weeks that allowed you to conclude that that was a statistically sufficient basis on which to extrapolate their experience in those 26 weeks to the next 5 years?

A: No. I did not have any of the specific records for that subsequent period of time.

***

Q: So, as you sit here today, you can't say that the 26 week sample on which you based your extrapolation is statistically sufficient to support your extrapolation, correct?

A: I can't state that with certainty. (Objection to form omitted).

CP 2474-2475.

The fact that Mr. Brandt testified that his 26 week sample was not statistically sufficient to support his extrapolation also renders his opinions inadmissible. *ESCA Corp.*, 86 Wn. App. at 639 ("To be competent, the evidence or proof of damages must be established by a reasonable basis and it must not subject the trier of fact to mere speculation or conjecture."); *Melville v. State*, 115 Wn.2d 34, 41, 793 P.2d 952, 956 (1990) ("The opinion of an expert must be based on facts. An opinion of an expert which is simply a conclusion or is based on an assumption is not evidence which will take a case to the jury.") (citing *Theonnes v. Hazen*, 37 Wn. App. 644, 681 P.2d 1284 (1984)); *see also Guidroz-Brault v. Mo. Pac. R.R. Co.*, 254 F.3d 825, 830-32 (9th Cir. 2001) (excluding expert testimony because "no factual support in the record" existed for arrived at conclusions).

The Mynatts' effort to spackle the evidentiary holes left in the wake of Mr. Brandt's deposition testimony by "supplementing" on the last day of discovery their interrogatory responses with a new damage model does not change the outcome. The amended interrogatory response still fails to identify what margin of error attends the calculations or the degree of confidence Mr. Brandt has in them. CP 3394-3398. The amended interrogatory answers also do not state that Mr. Brandt now believes that the 26 week sample was statistically sufficient to support the revised extrapolation. *Id.* As a result there is no basis on which to conclude the revised calculations are any more reliable or admissible than the ones Mr. Brandt now disavows. Such an admittedly deficient analysis containing more indicia of speculation and guesswork than reliability has no place in evidence, and the trial court abused its discretion in finding otherwise. GTI therefore respectfully requests that this Court overturn the trial court's ruling on the Motion to Strike Appellants' Expert Report.

V.
CONCLUSION

The trial court properly determined no factual basis exists for rejecting L&I's determination that GTI paid the Mynatts the reasonable equivalent of overtime, and the Mynatts offered no evidence to the contrary, much less sufficient to demonstrate the L&I determination was

"arbitrary, capricious, and contrary to law." *Schneider*, 116 Wn. App. at 716. Moreover, allowing the Mynatts' overtime claim to proceed would be an empty exercise as the Mynatts have admitted—through Mr. Brandt—they have no admissible evidence allowing them to prove their claim.

GTI therefore respectfully requests that this Court uphold the trial court's decision on GTI's Motion to Reconsider holding the Mynatts were paid the reasonable equivalent of overtime under Washington law, and granting GTI judgment on that claim and the Mynatts' derivative claims. GTI also asks that the Court grant its cross-appeal, strike Mr. Brandt's report, and dismiss the Mynatts' overtime claim and causes of action predicated thereon because no evidence exists to prove those claims.

DATED this 23rd day of January, 2013.

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Transmittal Letter

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Case Name: Stephen Mynatt, et al. v. Gordon Trucking, Inc.

Court of Appeals Case Number: 43427-0

Is this a Personal Restraint Petition? ○ Yes ◉ No

The document being Filed is:

- ○ Designation of Clerk's Papers ☐ Supplemental Designation of Clerk's Papers
- ○ Statement of Arrangements
- ○ Motion: ____
- ○ Answer/Reply to Motion: ____
- ◉ Brief: Respondent Cross-Appellant's
- ○ Statement of Additional Authorities
- ○ Cost Bill
- ○ Objection to Cost Bill
- ○ Affidavit
- ○ Letter
- ○ Copy of Verbatim Report of Proceedings - No. of Volumes: ____
  Hearing Date(s): _____
- ○ Personal Restraint Petition (PRP)
- ○ Response to Personal Restraint Petition
- ○ Reply to Response to Personal Restraint Petition
- ○ Petition for Review (PRV)
- ○ Other: _____

Comments:

No Comments were entered.

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