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Appellate Court No. 58039-6-1
Washington State Court Case No.: 02-2-32464-9 SEA

COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

DAVID STEVENS, DONALD A. GOINES AND
JEFFREY R. PORTER, on behalf of all others similarly situated,
Plaintiffs,

v.

BRINK'S HOME SECURITY, INC.,
Appellant.

**BRIEF OF APPELLANT
BRINK'S HOME SECURITY, INC.**

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DIVISION 1
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I. ASSIGNMENTS OF ERROR

A. Rulings in Which the Trial Court Erred.

1. The Trial Court erred by denying Defendant's Cross-Motion for Partial Summary Judgment (CP 116-134), by Order entered on September 13, 2005 (CP 613-615), to the extent that the Court failed to dismiss the Plaintiff class's claim under the Washington Minimum Wage Act (the "WMWA") for time spent commuting in company vehicles between home and work (the "Commuting Time Claim").

2. The Trial Court erred by granting Plaintiffs' Motion for Partial Summary Judgment on Liability (CP 60-70), by Order entered on September 13, 2005 (CP 613-615), to the extent the Court entered summary judgment of liability in favor of the Plaintiff class as a whole and against Defendant Brinks on the Commuting Time Claim.

3. The Trial Court erred by granting Plaintiffs' Motion for Partial Summary Judgment of Liability for Exemplary Damages, Straight-Time Damages, and Pre-Judgment Interest (CP 703-727), by Order entered on January 13, 2006 (CP 827-829), to the extent the Court ruled that Plaintiffs were entitled to recover pre-judgment interest on the Commuting Time Claim.

4. The Trial Court erred by entering a Judgment on March 7, 2006 (CP 882-884), that included damages awarded by the jury on the Commuting Time Claim, and awarded pre-judgment interest on the Commuting Time Claim recovery, thus incorporating the Court's errors noted above.

5. The Trial Court further erred in its entry of Judgment on March 7, 2006, to the extent it awarded pre-judgment and post-judgment interest at a 12% rate, rather than at the 2% over six-month T-bill rate specified in RCW 4.56.110(3) for claims “founded on tortious conduct.”

6. The Trial Court erred in its Order Awarding Plaintiffs’ Attorneys Fees and Costs, entered on April 18, 2006 (CP 1106-1107), to the extent the Court awarded attorney fees and costs based on the Plaintiff class’s recovery on the Commuting Time Claim. This incorporated and compounded the Court’s error in granting summary judgment of liability on the Commuting Time Claim.

B. Standard of Review

This Court reviews summary judgment decisions *de novo*, engaging in the same inquiry as the trial court. *Hartley v. State*, 103 Wn.2d 768, 774, 698 P.2d 77 (1985).

C. Issues Pertaining to Assignments of Error

1. When an employer offers a home dispatch program – that is, provides to employees the voluntary option of using an employer-provided vehicle to commute between home and the work site, with the understanding that commuting time in the company vehicle will not be compensated – does the WMWA require that the commuting time be treated as “hours worked” for which minimum wages and overtime compensation must be paid?

2. When an employer offers a home dispatch program, does the determination of whether the commuting time is “hours worked” turn on

whether the time is being spent predominantly for the benefit of the employer?

3. In interpreting the meaning of “hours worked” under the WMWA, is it proper for a trial court to defer to an agency interpretative statement that has not been promulgated using notice and comment rulemaking, has not been published in the Washington Administrative Code, and interjects a new legal standard that is not supported by other Washington or federal law?

4. When a Plaintiff class seeks recovery under the WMWA, claiming that time spent commuting under a home dispatch program is “hours worked,” and if the facts regarding whether the commuting time is predominantly for the benefit of the employer vary materially between the class members, is the Plaintiff class required to establish a triable issue with respect to each member of the class in order to avoid summary judgment of dismissal of the class-wide claim?

5. When a Plaintiff class seeks recovery under the WMWA, claiming that time spent commuting under a home dispatch program is “hours worked,” and if the facts regarding whether the commuting time is predominantly for the benefit of the employer vary materially between the class members, does a trial court err by granting summary judgment of liability in favor of the entire plaintiff class?

6. When a plaintiff class is awarded minimum wages and overtime based on estimates of time worked that required the finder of fact to

exercise discretion in determining what amounts to award, is the claim unliquidated, such that pre-judgment interest may not be awarded?

7. Is a claim under the Washington Minimum Wage Act “founded on tortious conduct” within the meaning of RCW 4.56.110(3), such that the applicable rate for any interest awarded is 2% over six-month T-bill rates, rather than 12%?

8. When a single award of attorney fees and costs is made on a recovery based on multiple claims, and when the claim that resulted in the largest recover is reversed on appeal, should the award of attorney fees and costs be reversed and remanded with directions to allocate the fee and cost recoveries between the successful and unsuccessful claims?

II. STATEMENT OF THE CASE

A. Summary of the Case and Proceedings Below

Brink’s Home Security, Inc., sells, installs and services home security systems across the United States. Plaintiffs are a certified class of approximately 70 installation and service technicians who were employed by Brinks in Western Washington to install and service these systems in customer’s homes. The class period certified by the Court was from November 1999 until July 2005. CP 886 [Jury Verdict].

The Plaintiff class asserted claims under the Washington Minimum Wage Act (“WMWA”) for minimum wages and overtime. The class asserted two types of claims. First, the class asserted that time spent by technicians commuting between the technician’s homes and customer work sites in vehicles provided by Brinks, pursuant to Brinks’ voluntary

home dispatch program, was compensable time (the “Commuting Time Claim”). CP 12 [Amended Complaint ¶4.3]. Second, the class asserted that technicians performed certain work tasks outside of their regular work hours for which they allegedly were not paid. *Id.*

The parties cross-moved for summary judgment as to whether the commuting time was compensable under the WMWA. The trial court denied Brinks’ motion for summary judgment, but granted summary judgment to the Plaintiff class on this issue of liability. CP 613-615. The parties later cross-moved for summary judgment as to whether Brinks’ failure to pay for this commuting time was a willful withholding of wages in violation of RCW 49.56.050, which would have made Brinks liable for double damages. The trial court granted summary judgment to Brinks, ruling as a matter of law that there was a bona fide dispute regarding whether the commuting time was compensable under the WMWA. CP 827-829. Plaintiffs did not appeal this ruling. The Trial Court also ruled on summary judgment that Plaintiffs’ Commuting Time Claim was a liquidated claim, such that the class would be entitled to recover pre-judgment interest on the claim. CP 828.

The case proceeded to a jury trial to determine damages on the Commuting Time Claim, and liability and damages on the other claims. The jury awarded damages of \$706,000 on the Commuting Time Claim. CP 886-889. On the other claims, the jury found no liability or no damages on three of five claims, rejected all claims that wages were willfully withheld, and awarding total damages of \$45,020. *Id.* Brinks

has elected not to challenge the award of these damages on the non-commuting time claims.

On post-trial motions, the trial court awarded an additional \$294,115.64 as pre-judgment interest (calculated at 12% interest), \$575,081.52 as attorney fees, and \$78,849.55 as costs, and ordered that post-judgment interest would accrue at a 12% rate. CP 882-84, 1046, 1106-07. The Court did not segregate its awards of fees or costs between the Commuting Time Claim and the other claims. CP 1043-1046.

B. Brinks' Home Dispatch Program

1. Brinks Offered a Voluntary Option to Commute from Home

The Plaintiff class members – installation and service technicians – installed and serviced home security systems at customers' homes in Western Washington. CP 12 [Amended Complaint ¶¶4.1, 4.2]. All class members drove Brinks-supplied pickup trucks to and from the customer homes. CP 143-144 [Goakey Dec. ¶3].

Brinks offered its technicians two options for commuting to work. First, they could commute between home and the Brinks office in Kent, Washington, in their own private vehicles. *Id.* In that case, the technician picked up a Brinks pickup at the Kent office in the morning, dropped the pickup back at the Kent office each night, and was not compensated for the time spent commuting between home and the office. CP 143-145 [Goakey Dec. ¶¶3, 7]. Plaintiffs did not seek compensation for this

commuting time, agreeing that this home to work commute was ordinary, uncompensated commuting time.

Brinks also offered to the technicians the option to voluntarily elect to participate in Brinks' home dispatch program, and it is this program that Plaintiffs attacked in this lawsuit. Under the home dispatch program, the technician was allowed to take the Brinks pickup home each day and be dispatched from home. That is, the technician would drive directly from home to the customer worksite in the morning, without first coming to the Kent office, and would drive directly home from the customer worksite in the evening, again without coming into the Kent office. CP 143-144 [Goakey Dec. ¶3]. Employees who chose to participate in the home dispatch program agreed that the morning and evening commutes would be unpaid, subject to Brinks' agreement to provide compensation for certain longer commutes. CP 61, 71-73. (Throughout the class period, Brinks provided compensation for commuting time to the extent a customer site was located more than 45 minutes from both the employee's home and Brinks' Kent facility. CP 61, 71-73. Further, for much of the class period (from November 1999 until September 2002, and from January 2005 until July 2005), Brinks provided compensation for all commuting time exceeding 45 minutes from the employee's home. *Id.*)

Whether or not participating in the home dispatch program, all technicians were required to report to the Kent branch office for a weekly meeting. CP 61 [Plaintiffs' Motion for Partial Summary Judgment at 2:24-25]. Prior to the weekly meeting, technicians stocked the pickup

truck at the branch office to meet the week's inventory needs. *Id.* All drives to a customer site from the branch office were compensated. CP 145 [Goakey Dec. ¶ 7]. Technicians who participated in the home dispatch program were never required to stock their trucks at home and no inventory was shipped to or stored at their homes. *Id.*

Plaintiffs admitted that participation in the home dispatch program was voluntary on the part of the class members. CP 593 [Representative Plaintiff Stevens Admission]; CP 588 [Representative Plaintiff Porter Admission]; CP 578-579 [Goakey Dec. ¶¶ 2-3]. The majority of the class members voluntarily opted to participate. CP 138 [Christopher Dec. ¶¶ 3-4]. The class members were free to switch from one commuting option to the other at any time. CP 138 [Christopher Dec. ¶¶ 4, 6].

Brinks' home dispatch program was an option it offered nationwide. CP 71-73. As discussed below, offering this option is lawful under federal law, and counsel is unaware of any other state in which this option has been determined to be unlawful under state law.

2. The Benefits of the Home Dispatch Program to the Technician Employees

It was uncontested that the Brinks technicians received substantial benefits from the home dispatch program. By participating in this program, the technicians were relieved of the time it would otherwise take to travel to and from the Kent facility to pick up and drop off the pickup. Further, Brinks paid for the gas, maintenance, and wear and tear on the vehicles, and, therefore, employees did not. CP 310-311, 376 [Stevens Tr.

at 111:22 – 112:6, 112:17 – 113:11], 364 [Porter Tr. at 148:6-18], 384 [Pringle Tr. at 46:2-22]. The technicians would have had to put many thousands of miles on their personal vehicles if they had had to commute to the Kent office. CP 51 [Evans Dec. ¶4].

Class member technicians testified that they chose to participate in the home dispatch program because it was more convenient or desirable for them for various reasons:

Technician Evans: He preferred taking the Brinks truck home because “if I did not have that option, I would have to put many thousands of miles per year on a personal vehicle,” and, that “I only have one reliable car that my wife has to drive.” CP 51 [Evans Dec. ¶4].

Technician Ashbaugh: “I live in Spanaway and I would spend a minimum of 1 hour commuting to the Brinks office.” CP 47 [Ashbaugh Dec. ¶4].

Technicians Kirk and Gordon: Driving to the Kent office “is not as convenient for me as driving directly to the job site in my truck.” CP 26 [Kirk Dec. ¶3], 30 [Gordon Dec. ¶4].

Technician Bakken: “My personal vehicle is not in very good condition.” CP 37 [Bakken Dec. ¶4].

Technician Kennedy: “I only have one personal vehicle.” CP 19 [Kennedy Dec. ¶4].

Two of the three class representatives testified that the home dispatch program had allowed them to avoid purchasing an additional vehicle, such that during a period of time when they chose to opt out of the home dispatch program they had to buy additional vehicles in order to commute to the Kent office. Class representative Porter testified:

Q. Did you have to buy a second vehicle in order to drive down to the Kent branch?

A. Yeah.

CP 364 [Porter Tr. at 148:14-16]. Likewise, class representative Stevens testified that, to drive to the Kent office while still allowing his son to drive the family Dodge station wagon and his ex-wife to drive the Ford Probe, he had to purchase a vehicle:

Q. What vehicle did you buy just before you started commuting to the Kent branch?

A. I bought a Honda Elontra [sic].

CP 376 [Stevens Tr. at 113:17-19]. The remaining class representative, Donald Goines, readily conceded that he benefited financially from the commute policy:

Q. So is it fair to say that you saved money by taking the Brinks truck home?

A. Yes.

CP 319 [Goines Tr. at 53:24 – 54:1]. Other technicians testified similarly:

Q. You agree that you benefit financially from the policy of allowing you to take the Brinks company truck home with you?

A. I'd say I benefit from the policy, yes.

Technician Ashbaugh, CP 393 [Ashbaugh TR. at 40:4-7].

Q. You agree there's financial benefit to you of at least \$5,000 correct? Isn't that what you testified to several minutes ago?

A. Yeah.

Technician Gray, CP 396-397 [Gray Tr. at 45:23 – 46:1].

3. The Limited Burdens of the Home Dispatch Program on the Technician Employees

Plaintiffs presented only limited evidence that commuting in the Brinks pickup truck was more burdensome to the employees than commuting in the employees' personal vehicles. The vehicles Brinks used were ordinary pickup trucks. CP 581 [Goakey Dec. ¶8]. As such, the driving task was no more burdensome than commuting in a personal vehicle. Plaintiffs pointed out merely that Brinks' policy restricted use of the Brinks pickups to going to customer sites, required obedience to traffic laws and prohibited consumption or transportation of alcoholic beverages. CP 329 [Plaintiffs' Opposition to Defendant's MSJ at 1:9-11].

4. The Alleged Benefits of the Home Dispatch Program to Brinks.

Plaintiffs claimed that Brinks received three benefits from class members' elections to commute in Brinks pickups.

First, they pointed out that the technicians needed tools and parts to do their jobs at the customers' homes. Driving the Brinks pickup from home had the effect of delivering the tools and parts (which were already in the pickup) to the first work location of the day. CP 329. Plaintiffs did not allege, however, that the technician had to undertake any task or burden, other than normal driving in a standard pickup truck, to cause this to occur. (The stocking of the pickup occurred weekly, at the Kent branch, prior to a regular weekly meeting. Plaintiffs' allegation that the technicians were not paid for all of their pre-meeting stocking activities was resolved by a separate claim for "pre-meeting work," on which the

jury awarded the class a total of \$6,750. CP 843-846 [Jury Verdict, p. 3, question 9d].) Further, although Plaintiffs recovered compensation for both their morning and their evening commutes, Plaintiffs did little to allege any benefit to Brinks from a technician's transportation of tools and equipment to the technician's home each night. Plaintiffs claimed only that this occasionally allowed the company's on-call technician to more efficiently respond to after-hours calls. CP 333.

Second, Plaintiffs pointed out that, for technicians who participated in the home dispatch program, Brinks did not have to pay wages for what would otherwise have been compensable driving time to and from the first and last jobs of the day. But the question of whether Brinks should be obligated to compensate the technicians for this time – or conversely, whether this was non-compensable commuting time – was precisely the question in dispute in the lawsuit.

Finally, Plaintiffs claimed that Brinks benefited because the technicians, by taking the pickups home, distributed them throughout the Puget Sound area, thereby allegedly allowing more efficient scheduling of technicians to jobs near their homes. This allegation of increased scheduling efficiencies was sharply contested by contrary evidence submitted by Brinks. Plaintiffs submitted evidence indicating that such scheduling efficiencies occurred in some instances. CP 333. But Brinks responded with evidence that it received no net or overall benefit from any such scheduling efficiencies, because (a) the broad geographic distribution of the technicians' residences throughout the Puget Sound area did not

match well with the more compact distribution of the work, which was concentrated in and near the Seattle metropolitan area, and (b) because of the expense to Brinks of providing the home dispatch program. For example, supervisor Howard Goakey testified:

Q. . . . Is there any advantage to the company to having the technicians bring a truck home with them and then service customers from their home?

A. You know, what I would probably say, *I don't see it in our area* because these technicians go just because all over the Puget Sound. I mean, I've got technicians that live south that work in Redmond all week or month.

* * *

Q: Especially I assume if they're bringing the trucks home, they're going to be more productive for the company, correct, they're going to be able to cover more jobs if they're spending less time in the truck?

A. We have customers everywhere in the service area. No matter where they live, we have customers. *As far as looking at that, it doesn't matter.*

* * *

Q: The purpose would be then if I apply to Brink's to be a technician and I live in a town that is in the Brink's service area, you can assume that it is likely that I will be taking a truck home and be able to be in easy access to customers, new and old, who live in my general area; is that correct?

A. I would assume it?

Q. Yes.

A. No. I've had technicians in the past live far away and don't want to park their vehicle at home because they live in a bad area or don't have room for it.

CP 407-410 [Goakey Tr. at 86:3-15; 81:23 – 82:6; 84:6-17] (emphasis added).

Brinks submitted testimony that jobs were generally allocated and dispatched based upon the individual technicians' skill and customer needs, not technician home location. Brinks was seldom able to schedule technicians to jobs close to their homes, due to both geographic and skill-set issues. CP 139-40 [Christopher Dec. ¶¶8-9], 376-377 [Sevens Tr. at 111:9-11], 400 [Gilmore Tr. at 11:6-15], 446 [Kennedy Dec. ¶4]. On those occasions where technicians are assigned to work close to home, it is frequently at the request of the technician or for the benefit of the technician. CP 401 [Gilmore Tr. at 37:4-7].

The testimony of Brinks' witnesses supported the proposition that Brinks would have gained better productivity from the technicians if it had required them all to commute in their personal vehicles to the Kent office (as Brinks currently requires in Washington). CP 138 [Christopher Dec. ¶¶5-6], 145 [Goakey Dec. ¶7]. This was so because of the concentration of customers in the greater Seattle metropolitan area, near the Kent facility, and the dispersed locations of the employees' residences. CP 139-140 [Christopher Dec. ¶¶7-9]. Brinks would have obtained greater efficiencies if the technicians had commuted to, and were then dispatched from, the Kent facility, close to the principal service area, rather than from such far-flung communities as Shelton, Tenino and Lake Stevens, where a

number of the technicians lived. CP 139-140 [Christopher Dec. ¶9]; 441 [Evans Dec. ¶4], 446 [Kennedy Dec. ¶4]. Indeed, one of the technicians, Gary Kennedy, who lives in Shelton, Washington, confirmed that fact in his declaration in which he stated: “Also, I am rarely assigned to travel to job sites near Shelton.” CP 446 [Kennedy Dec. ¶4]. For the same reason, Brinks would have incurred less vehicle mileage, and thus lower vehicle cost for gas, depreciation and maintenance, if the technicians were dispatched from the Kent facility. CP 365 [Porter Tr. at 151:1-4], 378 [Stevens Tr. at 120:3-7].

In fact, on the one occasion when Brinks had been able to observe the effect of large numbers of technicians picking up their pickups at the Kent office, the result was that more work was accomplished, with less dispatching effort. CP 386 [Pringle Tr. at 55:6-16], 411-412 [Goakey Tr. at 91:3 – 92:13]. Brinks was able to observe this during a period of time when most of the technicians chose to opt out of the home dispatch program, and instead commuted to and from the Kent branch. As explained by Supervisor Paul Pringle, when most of the technicians were parking at the Kent branch:

A. For me, you know, my side, I was fine with it. Then I started everybody from the office and ended everybody, so mapping out the days for me, I had one guy that was still, that lived north that was still driving his truck home, so I'd keep him up on the north end. Then I had another guy that was down in the south end over in Shelton, and I'd try and keep him out on the peninsula, keep those guys busy there. Other technicians

parking in the office got all the central part.
Actually for me, it worked out fairly well.

CP 384 [Pringle Tr. at 48:6-15].

C. The Trial Court’s Rulings Which Brinks Contests

The trial court entered its Order Granting Plaintiffs’ Motion for Partial Summary Judgment on Liability (and denying Defendant’s Cross-Motion for Partial Summary Judgment), on September 13, 2005. CP 613-615.

The trial court entered Judgment on the jury verdict on March 7, 2006. CP 882-884. Brinks filed a timely Notice of Appeal on April 6, 2006. CP 1047-1065. The trial court entered an award of attorney fees and costs on April 18, 2006. CP 1106-1107. This award is brought up for review by Brinks’ appeal of the decision on the merits. RAP 2.4(g).

III. ARGUMENT

A. Commuting Time Under the Voluntary Home Dispatch Program Was Not “Hours Worked”; As Such, the Commuting Time Claim Should Have Been Dismissed on Summary Judgment

Voluntary home dispatch programs, which are in common use throughout the country, are lawful under federal overtime law. *Baker v. GTE North Inc.*, 110 F.3d 28 (7th Cir. 1997). In no other state has state law been interpreted as prohibiting them. And no Washington case law, statute or regulation expressly prohibits them. A ruling by this Court that this commuting time must be treated as “hours worked” would make Washington the only state in the Country in which this is the law. For the reasons discussed below, there is no basis in the WMWA statute or

regulations, in analogous Washington case law, or in the case law in other jurisdictions, to suggest that Washington law should be interpreted in this unique fashion.

It is undisputed that ordinary commuting time is not “time worked” under the Washington Minimum Wage Act. Indeed, Plaintiffs concede that if the technicians had commuted to and from the customer home worksites in their own cars, this would have been ordinary commuting time that would not have been compensable. What changes the equation, Plaintiffs say, is that the commutes occurred – at the technician’s voluntary choice – in Brinks vehicles. Plaintiffs say that Brinks’ provision of this benefit converted what would otherwise have been uncompensated commuting time into “time worked,” for which Brinks was liable for overtime wages.

Plaintiffs are wrong. The appropriate standard for determining whether an activity is “time worked” is whether it is an activity that is predominantly for the benefit of the employer. Here, the uncontested facts established that the overriding character of this activity was the satisfaction of the technicians’ personal needs to commute to work. As such, it was not predominantly for the benefit of Brinks, and was not time worked.

Further, the courts have recognized the significant advantages to employees of having the option to participate in a home dispatch program. As noted by the Seventh Circuit Court of Appeals in the course of upholding the lawfulness of GTE’s home dispatch program, these

programs “can save employees a lot of time, not to mention wear and tear on their own cars.” *Baker v. GTE North Inc.*, 110 F.3d 28, 29 (7th Cir. 1997). A determination that these programs are unlawful in the state of Washington, unless the employees’ commuting time is compensated at overtime rates, will jeopardize their availability to Washington residents. Employers are unlikely to be able to justify these programs if they are required to pay overtime wage rates for their employee’s commuting time, on top of paying for all fuel, vehicle maintenance, and vehicle depreciation associated with the vehicles’ use for commuting. Brinks, for example, found it necessary to discontinue its home dispatch program in this state after the Trial Court’s summary judgment ruling finding that this commuting time had to be paid for as hours worked.

For these reasons, and for the further reasons discussed below, this Court should reverse the Trial Court and enter judgment in favor of Brinks, dismissing Plaintiffs’ Commuting Time Claim.

1. Washington Law Does Not Require Compensation For This Commute Time

Pursuant to the Washington Minimum Wage Act, RCW 49.46 (the “WMWA”), an employer must compensate a non-exempt employee for all “hours worked.” The issue here is whether the class members’ time spent commuting in a Brinks pickup constitutes “hours worked.”

The sole definition of “hours worked” under the WMWA is contained in WAC 296-126-002(8), a regulation duly promulgated by the

Department of Labor & Industries using notice and comment rulemaking.

Pursuant to this regulation, “hours worked” constitute:

all hours during which the employee is authorized or required by the employer to be on duty on the employer’s premises or at a prescribed workplace.

The courts generally give great weight to L&I’s interpretation of the WMWA when expressed in regulations properly promulgated pursuant to notice and comment rulemaking. Such a regulation is presumed valid, and given great weight. *Wash. Water Power Co. v. Wash. State Human Rights Comm’n*, 91 Wn.2d 62, 68-69, 586 P.2d 1149 (1978). As such, this Court may properly use this regulation as an aid in determining the legislative intent of the statute.

The commuting time at issue here does not qualify as “hours worked” under the terms of WAC 296-126-002(8). None of the time spent commuting in the Brinks pickup is “on duty” time at a Brinks’ premises or at any prescribed workplace. Brinks does not suggest that the WMWA requires payment only for work that occurs on an employer’s premises. But the fact that the activity in question here does not come within the literal terms of Washington’s only definition of “hours worked” is instructive nonetheless.

Moreover, the only Washington case law on the subject establishes the fundamental rule that time spent commuting between home and work is not “time worked.” In *Anderson v. State of Washington*, 115 Wn. App. 452, 63 P.3d 134, *rev. denied*, 149 Wn.2d 1036 (2003), the court rejected

the plaintiff corrections officers' claims that they should be paid for their daily 40 minutes of commute time in an employer-provided vehicle -- a Department of Corrections ferry --that took them to and from the McNeil Island Corrections Center where they performed their work duties. In rejecting plaintiffs' claim, the court relied on the regulatory definition of "hours worked" and stated that:

Plaintiffs are not on duty on the SCC's premises during their commute, nor are they at a prescribed workplace. Thus, under WAC 296-126-002(8), they are not entitled to compensation for their commute.

Washington case law addressing the context of "on call" time further supports the conclusion that this commute time is not compensable. The case at bar presents the question of whether time an employee spends on the personal pursuit of commuting to work is converted to "hours worked" if the employer is also benefited. The "on call" context is analogous because, when an employer requires an employee to be "on call," to come into work when called, the question is likewise presented as to whether time the employee spends on personal pursuits while "on call" has been converted to "time worked" because the time also benefits the employer. In the on-call context, the Washington Supreme Court has adopted the federal standard that time spent "on call" is compensable only if the employee's time is being spent *predominantly* for the benefit of the employer. *Chelan County Deputy Sheriff's Ass'n v. County of Chelan*, 109 Wn.2d 282, 292, 745 P.2d 1 (1987). And at least one court has held that this "predominant benefit" standard is

appropriately applied when determining whether commuting time is compensable. *Smith v. Aztec Well Servicing Co.*, 321 F. Supp. 2d 1234, 1237 (D. New Mexico 2004).

The “predominant benefit” test turns principally on the degree to which an on-call program restricts the employee’s ability to use time effectively for personal pursuits. *Chelan County*, 109 Wn.2d at 292-96. Applying the predominant benefit test here leads to the conclusion, based on the undisputed facts presented on summary judgment, that commuting under Brinks’ voluntary home dispatch program was not compensable because it was not predominantly for Brinks’ benefit. The uncontested facts demonstrate that the technicians were able to use this time effectively to commute to work. The restrictions Brinks placed on the use of the vehicle – that it be used only for the intended commuting purpose, that traffic laws be respected, and that alcohol not be used – were only minimally intrusive, and did not interfere with use of the vehicle for commuting. *Bobo v. United States*, 37 Fed. Cl. 690, 700 n.13, 3 Wage & Hour Cas.2d (BNA) 1587 (1997), *aff’d*, 136 F.3d 1465 (Fed. Cir. 1998); *see also Adams v. United States*, 65 Fed. Cl. 217, 232, 10 Wage & Hour Cas.2d (BNA) 1000 (2005) (requiring employee to take vehicle home to facilitate emergency responses by employee from home does not burden commute or make commute compensable time). Moreover, the fact that participation in the home dispatch program was entirely voluntary ensured that the participating employees each made their own judgment that participation in the program was sufficiently to their own personal benefit.

The more choice the employee has with respect to undertaking a particular commuting option, the less likely the activity will be found to be compensable. *Reich v. New York City Transit Authority*, 45 F.3d 646, 650 (2nd Cir. 1995); *see also Smith, supra*, 321 F. Supp. 2d at 1237 (evidence that rig hands commuted to and from well sites with the company foremen “for their own convenience, to save wear and tear on their own vehicles, and to save the expense of traveling to and from their work site,” undercut conclusion that time was spent predominantly for the employer’s benefit). Under the predominant benefit standard, Brinks is entitled to summary judgment in its favor.

All applicable Washington statutory, regulatory and case law authority supports the conclusion that time spent commuting under Brinks’ home dispatch program was not compensable time.

2. Parallel Federal Law Likewise Supports the Conclusion that Washington Law Does Not Require Compensation for This Commute Time.

The Washington courts regularly look to federal law under the Fair Labor Standards Act in interpreting the WMWA. *Inniss v. Tandy Corp.*, 141 Wn.2d 517, 523, 7 P.3d 807 (2000). The federal law in this area further supports the conclusion that commuting time under a voluntary home dispatch program is not “hours worked.”

In the Trial Court, Plaintiffs relied in part on the federal standard for “hours worked” that existed before Congress passed the Portal-to-Portal Act. That standard, however, undercuts Plaintiffs’ position, because like the standard adopted by the Washington Supreme Court in

the *Chelan County* case, it requires that the time be spent “predominantly for the employer’s benefit.” *Armour & Co. v. Wantock*, 323 U.S. 126, 133, 65 S.Ct. 165, 89 L.Ed. 118 (1944); *see also Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers*, 325 U.S. 161, 164-66, 65 S.Ct. 1063, 89 L.Ed. 1534 (1945) (exertion must be “pursued necessarily and primarily for the benefit of the employer). As already noted, this standard leads to the conclusion that commuting under Brinks’ home dispatch program was not “hours worked” because it was not predominantly for Brinks’ benefit.

Plaintiffs also relied below on the “integral and indispensable” standard that the federal courts have applied to FLSA claims since the passage of the Portal-to-Portal Act. Under this standard, an activity is “hours worked” if it is “integral and indispensable” to the principal activity for which the employee is employed. *IBP, Inc. v. Alvarez*, 126 S.Ct. 514, 521 (2005). There are three problems with Plaintiffs’ argument on this score.

First, Plaintiffs failed to explain why the “integral and indispensable” standard is an appropriate analytical tool for determining what is “hours worked” under the WMWA. The “integral and indispensable” standard was developed by the federal courts specifically as a tool for interpreting certain aspects of the Portal-to-Portal Act. *IBP*, 126 S.Ct. at 519-21. The Washington legislature has not adopted language parallel to the Portal-to-Portal Act. *Anderson*, 115 Wn. App. at 457.

Second, the U.S. Supreme Court’s recent *IBP* decision undercuts the way in which Plaintiffs’ seek to use the “integral and indispensable” standard to support their position. Plaintiffs’ principal argument below was that driving the Brinks pickup to the customer home worksite was “integral and indispensable” because having the pickup at the worksite was necessary in order for the work to proceed. However, the Supreme Court has made clear that “the fact that certain preshift activities are necessary for employees to engage in their principal activities does not mean that those preshift activities are ‘integral and indispensable’ to a ‘principal activity’” 126 S.Ct. at 527.

Third, the weight of the federal case law that has applied the “integral and indispensable” test to determine the compensability of commuting time supports the conclusion that commuting time under a voluntary home dispatch program is not compensable time. The federal courts have ruled that time commuting to work is not converted to “hours worked” under the “integral and indispensable” test even if the employer *requires* the employee to carry with him or her on the commute items that are necessary and essential in order for the employee to perform the job. *Bobo v. United States*, 136 F.3d 1465 (Fed. Cir. 1998) (Border Patrol agent dog handlers were not working when commuting, despite employer’s requirement that the agents keep the dogs at home and transport them to work with them in specially-equipped vehicles); *Kavanagh v. Grand Union Co., Inc.*, 192 F.3d 269 (2nd Cir. 1999) (refrigerator and utility mechanic was not working when making long

drives from home to various work sites, despite employer's requirement that he carry with him "all of the equipment he needed to make repairs"); *Reich v. New York City Transit Authority*, 45 F.3d 646 (2nd Cir. 1995) (commutes of police officer dog handlers were not hours worked even though they were required to transport their dogs, which were essential to their work); *Singh v. City of New York*, 418 F. Supp. 2d 390 (S.D.N.Y. 2005) (fire alarm inspectors' commutes from home to inspection sites were not time worked, despite employer's requirement that they carry with them 15 to 20 pounds of files necessary to their inspection work); *Dooley v. Liberty Mutual Insurance Co.*, 307 F. Supp. 2d 234, 246 (D. Mass 2004) ("as a general rule, commuting is not a principal activity, even if the employee is also transporting equipment for the employer's benefit.").

Plaintiffs relied heavily below on the case of *Baker v. GTE North, Inc.*, 927 F. Supp. 1104 (N.D. Ind. 1996), in which the trial court, applying the "integral and indispensable" test, found that commuting time under a home dispatch program was compensable. But this decision was reversed by the Seventh Circuit because, the Court stated, Congress had "clarified" the law, thereby resolving a potential "ambiguity" in the statute. 110 F.3d at 30. *Baker v. GTE North Inc.*, 110 F.3d 28, 29 (7th Cir. 1997). The District Court decision in *Baker* having been reversed, and with the Seventh Circuit having expressed its opinion that the District Court's reading of the law was inconsistent with legislative intent, the opinion does not provide support for Plaintiffs' position.

3. Plaintiffs' Reliance on a Washington Department of Labor & Industries Administrative Policy Fails

Below, Plaintiffs relied on Administrative Policy ES.C.2, prepared by the Washington Department of Labor & Industries (hereinafter, "L&I"). That Administrative Policy states, in relevant part (emphasis added):

An employee who travels from home before the regular workday and returns home at the end of the workday is engaged in ordinary home-to-work travel. This is true whether the employee works at a fixed location or at different job sites. Normal travel from home to work is not work time and does not require compensation.

* * *

Time spent driving from home to the job site, from job site to job site, and from job site to home is considered work time *when a vehicle is supplied by an employer for the mutual benefit of the employer and the worker to facilitate progress of the work.*

Plaintiffs relied below on this "mutual benefit" standard to argue that commuting time in a company vehicle is always compensable if the employer is benefited in any way by the arrangement. But Plaintiffs' reliance on this Administrative Policy is unavailing. The Administrative Policy has no legal standing and cannot, and should not, be used to determine the proper interpretation of the WMWA.

The issue of what weight, if any, a court should provide to an "Administrative Policy," as contrasted with a regulation promulgated pursuant to notice and comment rulemaking, has been addressed both by

statute and Washington Supreme Court precedent. Oddly, despite this existing law, litigants and even some decisions in the Washington Court of Appeals sometimes refer broadly (and inaccurately) to “deference” to be granted to an agency’s “expertise,” without having first analyzed the type of agency action that may be at issue, *i.e.*, formal rulemaking vs. informal agency opinion.

Not all agency action is entitled to deference. That analysis is fundamental and a prerequisite to determining whether deference may be lawfully afforded to any agency’s particular action. As we demonstrate below, well established Washington law precludes Plaintiffs’ reliance on L&I’s Administrative Policy ES.C.2.

a. The Administrative Policy Was Not Promulgated Using Notice and Comment Rulemaking

The Administrative Policy was not promulgated using notice and comment rulemaking – a public process allowing input from stakeholders, and after which review of the agency’s rulemaking action is available in the courts. Rather, it is a mere interpretive statement issued, without public process, by L&I. Plaintiffs do not contend otherwise.

The Washington Administrative Procedures Act (“APA”) expressly provides that agency interpretive statements, which have not been promulgated as rules, are not entitled to deference by the courts: “Current interpretive and policy statements are advisory only.” RCW 34.05.230. Likewise, the Washington Supreme Court has held that interpretive guidelines have no legal effect. *Washington Education Ass’n*

v. Washington State Public Disclosure Comm'n, 150 Wn.2d 612, 80 P.3d 608 (2003). In *WEA*, the Washington State Public Disclosure Commission (“PDC”) issued guidelines interpreting the meaning and applications of rules and regulations pertaining to the use of public facilities in political campaigns. Specifically, the PDC’s guidelines sought, among other things, to limit the distribution of campaign-related information in classrooms and via school e-mail systems. The Washington Education Association (“WEA”) filed suit challenging the PDC guidelines on behalf of its affected members. The Washington Supreme Court held that the guidelines could not be enforced against the WEA and its members because the guidelines were not issued using the formal rulemaking process. The Washington Supreme Court specifically held that the PDC guidelines “have no legal or regulatory effect.” 150 Wn.2d at 623. Further, the Court held that an individual cannot be subjected to a sanction for its failure to abide by an interpretive statement. “A person cannot violate an interpretive statement, and conduct contrary to the agency’s written opinion does not subject a person to penalty or administrative sanctions.” 150 Wn.2d at 619. *See also Wingert v. Yellow Freight*, 146 Wn.2d 841, 851 n.1, 50 P.3d 256 (2002) (declining to consider L&I guideline ES-026 for numerous reasons, including that it was not a formally adopted regulation and that it was not a matter of which the court could take judicial notice).

b. L&I Failed to Comply with Mandatory Publication Requirements Applicable to Policy Guidance

A further reason Plaintiffs may not rely on the Administrative Policy is that it has not been properly published in full in the Washington Administrative Code, as required by the Washington Public Disclosure Act. In 1972, as part of an Initiative amending Washington's Public Disclosure Act, the voters specified:

[E]ach state agency shall separately state and currently publish in the Washington Administrative Code ... (d) Substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency ...

* * *

Except to the extent that he has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published or displayed and not so published or displayed.

RCW 42.17.250(1)(d), (2) (emphasis added).

Plaintiffs presented no evidence that the Administrative Policy was published in the Washington Administrative Code. While a "notice" that merely referring to the existence of the policy was published in the Washington Register (W.S.R. 02-07-022), this failed to comply with the mandate in the Washington Public Disclosure Act that agency interpretive statements be published in full in the Washington Administrative Code. Thus, pursuant to this specific provision adopted by the voters, Plaintiffs

may not rely on the Administrative Policy. *Cf. Cerrillo v. Cipriano Esparza*, ___ Wn.2d ___, 2006 Wash. LEXIS 621, *17 n. 4 (August 31, 2006). (noting but not resolving this issue).

c. The Court Should Not Rely on the L&I Administrative Policy Because it Lacks Persuasive Force.

Even those Court of Appeal decisions that have (incorrectly) referred to agency “interpretations” have cautioned that “[t]he weight given an administrative policy depends upon the thoroughness evidenced in its consideration, the validity of its reasoning, and all those factors that give it power to persuade, if lacking power to control.” *White v. Salvation Army*, 118 Wn. App. 272, 277, 75 P.3d 990 (2003). *Cf. Cerrillo v. Cipriano Esparza*, ___ Wn.2d ___, 2006 Wash. LEXIS 621 (2006) (agency interpretation is not properly referred to if statute is unambiguous).

Plaintiffs are unable to point to any basis in Washington law for concluding that L&I’s “mutual benefit” standard should be thought to be a persuasive interpretation of the WMWA. There is no context in which the WMWA statute, the WMWA regulations, or courts interpreting the WMWA have applied a “mutual benefit” standard to evaluate whether particular time spent by an employee should be treated as “hours worked.” To the contrary, as explained above, the Washington courts have employed a “predominate benefit” test in analogous circumstances – a test which Plaintiffs’ evidence did not satisfy. *Chelan County Deputy Sheriff’s Ass’n v. County of Chelan*, 109 Wn.2d 282, 292, 745 P.2d 1 (1987). The

“mutual benefit” standard in the L&I Administrative Policy appears to be something that L&I constructed out of whole cloth, unguided by any established aspect of Washington law under the WMWA.

Moreover, more recently L&I has blessed the lawfulness of voluntary home dispatch programs in some circumstances. On April 23, 2003, Richard Ervin, the Program Manager for L&I’s Employment Standards Program, wrote to Verizon Wireless regarding Verizon’s home dispatch program. Mr. Ervin wrote that L&I would suspend its investigation of Verizon’s home dispatch program in order to take a fresh look at the lawfulness of these programs, in light of the substantial benefits they provide to employees and the lack of “clear guidelines” on the subject:

The purpose of this letter is to inform you that we have decided to suspend the decision concerning your Home Dispatch Program (HDP) pending further review and reconsideration.

* * *

We would like to thank both you and Mr. Carroll of the International Brotherhood of Electrical Workers (Local 89), representing the workers utilizing this program, for meeting with the department and providing us with a great deal of information about Verizon’s HDP and both labor and management’s support of this program. *Because of this information we now have a better understanding of the benefits that the voluntary HDP provides to both the management and the employees of Verizon.*

I have made this decision for several reasons. First, we believe that based on the information that you provided we should review our policy and practices relating to HDP. Second, you informed us that several other employers are currently utilizing HDP programs similar to Verizon, which may be exposing them to similar legal liability. *And lastly, we recognize the need to provide clear guidelines* so as to ensure that workers are provided adequate protections and employers fully understand their responsibilities under the law.

CP 770 [Richard Ervin letter to Dave Jacobsen, April 23, 2003] (emphasis added).

And on February 18, 2005, in a subsequent letter to a different employer, Mr. Ervin confirmed that L&I had found home dispatch programs to be lawful under certain circumstances:

The Department has not changed its position that travel time by employees driving company vehicles from home to the designated worksite is compensable travel time. However, in the past, the Department has approved a written plan that is mutually agreeable that the travel time in the company's vehicle from home to the first jobsite and from the last worksite to home is commute time if the plan is in compliance with IRS regulations when treated as a benefit.

CP 772-773 [Richard Ervin letter to Blaine Justesen, February 18, 2005].

The differing positions that L&I has taken regarding this subject undermine any force that might otherwise be attributed to the Administrative Policy.

For these reasons, L&I's Administrative Policy lacks any persuasive force.

d. The L&I Administrative Policy Was Not Adopted Until January 1, 2002.

Finally, Administrative Policy ES.C.2 was not adopted by L&I until January 1, 2002, as shown by the issuance date stated on the policy. CP 732-736. The policy can have no impact on the class's claims that accrued before that date, particularly because L&I's policy on the subject prior to the adoption of ES.C.2 was that time spent commuting in a company vehicle, such as that at issue here, was compensable only if the employer *required* the employee to take the employer's vehicle home. CP 738-745 [L&I Interpretive Guideline ES-016 (7/92), p. 5].

B. At a Minimum, the Evidence Brinks Presented at Summary Judgment Raised a Triable Question as to Whether the Commuting Time Was "Hours Worked" for the Class as a Whole.

Plaintiffs pursued the Commuting Time Claim on a class basis, on behalf of all technicians who elected to participate in the home dispatch program. In a class action, of course, the plaintiffs bear the burden of proving a class-wide claim on which all members of the class are entitled to recover. *Oda v. State*, 111 Wn. App. 79, 44 P.3d 8 (2002) (plaintiff must prove a "common course of conduct in relation to all potential class members"). As a result, to establish their Commuting Time Claim on summary judgment, it was necessary for Plaintiffs to show that, based on the uncontested facts, the commuting time was "hours worked" for every single member of the class.

Applying this standard, Plaintiffs failed to establish that they were entitled to summary judgment of liability on behalf of every member of

the class. Among the legal standards for “hours worked” that Plaintiffs proposed, the one most favorable to them was L&I’s “mutual benefit” standard. For the reasons discussed above, it is not appropriate to apply that standard. But even if the Court were to apply it, the L&I guideline requires that the employer have supplied the vehicle “for the *mutual benefit* of the employer and the worker *to facilitate progress of the work.*” (emphasis added). The evidence Brinks submitted created, at a minimum, genuine issues (a) as to whether there were in fact material, non-incidental benefits to Brinks from the program as a whole, and in respect to each class member, and (b) as to whether Brinks’ provision of the vehicles was motivated to facilitate the progress of the work, with respect to the class as a whole, and in respect of each class member.

Indeed, Brinks presented evidence that it actually obtained greater efficiency from its technicians overall if they commuted to the Kent facility rather than directly to the customer site from home. CP 138 [Christopher Dec. ¶¶5-6], 145 [Goakey Dec. ¶7]. This was because of the concentration of customers in the greater Seattle metropolitan area, near the Kent facility, and the dispersed locations of the employees’ residences. CP 139-140 [Christopher Dec. ¶¶7, 9]. Brinks’ evidence also demonstrated that the arrangement was particularly disadvantageous for Brinks as to particular class members who resided far from the Seattle metropolitan area and were seldom dispatched to jobs near their homes. CP 139-140 [Christopher Dec. ¶9], 441 [Evans Dec. ¶4], 446 [Kennedy Dec. ¶4]. At a minimum, there were disputed facts regarding whether the

program was of benefit to Brinks, or facilitated the progress of the work, with respect to portions of the class, thus barring entry of summary judgment in favor of the class as a whole.

Further, as explained above, the appropriate legal standard for determining whether this commuting activity was “hours worked” required Plaintiffs to prove that the activity was “predominantly” for Brinks’ benefit. Applying this more appropriate legal standard, it is even more evident that, at a minimum, Brinks’ evidence created genuine questions for trial as to whether the home dispatch program was “predominantly” for Brinks’ benefit with respect to every member of the Plaintiff class. “[T]he determination of what constitutes work is necessarily fact-bound.” *Reich v. Southern New England Telecommunications Corp.*, 121 F.3d 58, 64 (2nd Cir. 1997). It was error for the Trial Court to have granted summary judgment of liability in favor of the class.

C. The Court Erred in Ruling that Damages on the Commuting Time Claim were Liquidated, And Thereby Awarding Prejudgment Interest.

Plaintiffs presented their damages case on the Commuting Time claim through the expert testimony of Robert Abbott, Ph.D. RP 3-58 [Trial Proceeding Excerpt – Testimony of Robert Abbott, Ph. D. – February 1, 2006]. Dr. Abbott estimated the amount of time each class member spent commuting under the home dispatch program by using information about the routes driven by the class members and then applying estimated driving times to those routes derived using a computer

program called MapPoint, which is similar to MapQuest. RP 14:3-19 [Abbott Testimony]. This program produces an estimated driving time between two given addresses. Of course, this could provide only an estimate. Moreover, as Dr. Abbott testified, the estimate was affected by assumptions about driving rates to use that were supplied to Dr. Abbott by Plaintiffs' counsel. As Dr. Abbott testified:

Q. . . . Could you arrive at these results without using the assumptions that were given to you by plaintiffs' counsel?

A. No.

Q. So in that sense these results are only as good as the assumptions that were given to you by plaintiffs' counsel?

A. They're only as good an approximation, that correct, as the assumptions.

Q. And they are only assumptions. You are not trying to tell the jury to award that amount of money, correct?

A. That's correct.

Q. Now, these assumptions that you were given, Dr. Abbott, for example, let's talk about drive speeds. . . . Isn't it true that you were given directions by plaintiffs' counsel to run it again using lower drive speeds?

A. To run it again, yes, yeah.

Q. They saw the first results and they told you to run it again using lower speeds, correct?

A. Well, I don't know whether they saw the results or not. I just know that, you know, we were asked to run it again with the other set of assumptions about the drive speed.

RP 50:16 – 51:18 [Abbott Testimony].

Because the damages testimony Plaintiffs presented was plainly based on estimates, involving the exercise of discretion as to such subjects as the appropriate driving speed assumptions to use, the jury likewise was required to exercise discretion in determining an award of damages. By admitting this testimony as the basis upon which the jury was allowed to calculate a damages award for the class, the Trial Court followed the Ninth Circuit’s reasoning that a court hearing a class action wage case may adopt “a compensation measure based on a ‘reasonable’ quantification of plaintiffs’ work time, thereby avoiding countless individual plaintiff-specific quagmires while directing the parties to individualize the damages to the extent possible nevertheless.” *Alvarez v. IBP, Inc.*, 339 F.3d 894, 914 (9th Cir. 2003). While this may have been a permissible method for allowing the efficient presentation and calculation of damages in a class action, it does not yield a result consistent with the exactness required to find that the damages are “liquidated” such that pre-judgment interest may be awarded. Prejudgment interest is available only “when a claim is liquidated . . . where the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance on opinion or discretion.” *Dautel v. Heritage Home Ctr., Inc.*, 89 Wn. App. 148, 153, 948 P.2d 397, 400 (1997), *review denied*, 135 Wn.2d 1003 (1998) (citation omitted). By contrast, the claim here was a quintessential unliquidated claim—“where the exact amount of the sum to be allowed cannot be definitely fixed from the facts proved, disputed or undisputed,

but must in the last analysis depend upon the opinion or discretion of the judge or jury as to whether a larger or a smaller amount should be allowed.” *Prier v. Refrigeration Engineering Co.*, 74 Wn.2d 25, 33, 442 P.2d 621 (1968) (quoting *C. McCormick, Damages 54* (1935)).

Division III has ruled contrary to Brinks’ position on this issue in a similar case. *McConnell v. Mothers Work, Inc.*, 131 Wn. App. 525, 535, 128 P.3d 128 (2006). Brinks submits that that case failed properly to take into account the inherent elements of discretion that a jury is obligated to exercise when asked to determine a “reasonable” damages recovery for an entire class based on evidence of estimated time worked. Brinks submits *McConnell* is wrongly decided under the standard established in *Prier* and *Dautel*.

D. If Interest was Recoverable, the Appropriate Interest Rate was 2% Over the Six-Month T-Bill Rate, Not 12%

The Trial Court entered judgment for pre-judgment and post-judgment interest on the Commuting Time Claim at 12%. CP 882-884. But because that claim for damages under the WMWA was one for “tortious conduct,” the applicable interest rate was two percent over the six-month T-Bill rate, as provided by RCW 4.56.110(3), not 12%. Thus, the appropriate rate (to the extent any award of interest was appropriate) was 6.53%. CP 868-870 [Cooper Dec. ¶7].

Judgments in tort cases bear interest at a special rate established by RCW 4.56.110(3). This statute, amended in 2004, states that:

Judgments founded on tortious conduct of individuals or other entities. . . shall bear

interest from the date of entry at two percentage points above the equivalent coupon issue yield, as published by the board of governors of the federal reserve system, of the average bill rate for twenty-six week treasury bills

Thus, whereas RCW 4.56.110 previously applied a 12% interest rate to all judgments, it now applies a different interest rate – 2% above the yield on six-month T-bills -- to claims founded on “tortious conduct.” RCW 4.56.110(3) (as amended by Ch. 185, Laws of 2004).

RCW 4.56.110 does not define “tortious conduct.” However, Black’s Law Dictionary defines a “tort” as:

A private or civil wrong or injury, other than breach of contract, for which the court will provide a remedy in the form of an action for damages. A violation of a duty imposed by general law or otherwise upon all persons occupying the relation to each other which is involved in a given transaction. There must always be a violation of some duty owing to plaintiff, and generally such duty must arise by operation of law and not by mere agreement of the parties.

Black’s Law Dictionary 1335 (5th Edition 1979) citation omitted.

Likewise, the Washington Supreme Court has broadly defined a tort as a “legal wrong” causing a foreseeable injury. *Christensen v. The Swedish Hospital*, 59 Wn.2d 545, 548, 368 P.2d 897 (1962)(“A tort is a legal wrong and, if foreseeable injury results from the unlawful act, the tortfeasor is liable in damages to the party injured.”). In other words, a tort is a claim based on a duty imposed by law, as opposed to a duty imposed by contract.

A tort is not limited to common law claims. Rather, a tort includes a cause of action, or civil wrong, based on a duty imposed by statute. For example, the Supreme Court has ruled that statutory discrimination claims are statutory torts, as to which a plaintiff must comply with the Tort Claims Act before suing the State. *Blair v. Washington State University*, 108 Wn.2d 558, 740 P.2d 1379 (1987).

Plaintiffs' claims under RCW 49.46 similarly are "statutory tort" claims. The WMWA creates a statutory duty to pay employees minimum wage for all hours worked, and further provides an action for damages in the event this duty is breached. This claim is not based in contract, and indeed the rights granted to an employee by the WMWA cannot be varied by contract.

Plaintiffs argued below that claims under the WMWA are akin to contract claims, based on the Supreme Court's decision in *Seattle Professional Engineering Employees Association (SPEEA) v. The Boeing Co.*, 139 Wn.2d 824, 991 P.2d 1126 (2000). In *SPEEA*, however, the Court did not decide the general question of whether a WMWA claim is based on tortious conduct. Rather, the Court decided a more narrow issue of which statute of limitations applies to these claims. In doing so, the Court felt it was obligated to avoid ruling that any claim for a legal wrong is for an "invasion of a personal right" within the meaning of RCW 4.18.080 (2), because any such ruling would eviscerate the "catch all" statute of limitations in RCW 4.16.130. *SPEEA*, 139 Wn.2d at 837. This

ruling does not address the more general question of whether a violation of the WMWA is “tortious.”

The legislature adopted the “2% over T-Bill rate” for tortious conduct to avoid the imposition of an above-market, penalty rate of 12% to tort claims during periods of low interest rates such as we have experienced in recent years. There is no indication that, in doing so, the legislature intended to impose any narrow definition to “tortious conduct.” It is entirely consistent with the legislature’s ameliorative intent to apply this lower interest rate to statutory tort claims such as those presented here.

Finally, the interest rate for *pre*-judgment interest is borrowed from the statutory *post*-judgment interest rate. *Mahle v. Szucsr*, 135 Wn.2d 398, 429, 957 P.2d 632 (1998). Thus, the post-judgment interest rate for tortious conduct also defines the applicable pre-judgment interest rate.

E. The Award of Attorney Fees and Costs Must be Segregated Between Successful and Unsuccessful Claims.

Washington law requires that the trial court segregate and deny recovery for attorney fees and costs devoted to unsuccessful claims. *Hume v. American Disposal*, 124 Wn.2d 656, 672-73, 880 P.2d 988 (1994). Here, the Trial Court’s award of attorney fees and costs was determined on the basis that Plaintiffs had been successful on the Commuting Time Claim as well as the class’s other off-the-clock claims. Because the judgment in favor of the class on the Commuting Time Claim should be reversed, the award of fees and costs should be remanded with

instructions to the Trial Court to segregate and deny recovery of fees and costs devoted to the unsuccessful Commuting Time Claim.

IV. CONCLUSION

For the foregoing reasons, the judgment in favor of Plaintiffs on the Commuting Time Claim should be reversed, and summary judgment of dismissal of that claim should be entered in favor of Brinks. Also, the Trial Court's award of attorney fees and costs should be reversed and remanded with instructions to segregate and deny recovery of fees and costs incurred in connection with the Commuting Time Claim.

Dated: September 25, 2006 Respectfully submitted,



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Appellate Court No. 58039-6-1
Washington State Court Case No.: 02-2-32464-9 SEA

COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

DAVID STEVENS, DONALD A. GOINES AND
JEFFREY R. PORTER, on behalf of all others similarly situated,
Plaintiffs,

v.

BRINK'S HOME SECURITY, INC.,
Appellant.

CORRECTED
CERTIFICATE OF SERVICE
TO BRIEF OF APPELLANT BRINK'S HOME SECURITY, INC.

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*Filed
COA
9-28-06
KW*

CORRECTED

CERTIFICATE OF SERVICE

I am a resident of the State of Washington, over the age of eighteen years, and not a party to the within action. My business address is Columbia Center, 701 Fifth Avenue, Suite 6500, Seattle, WA 98104-7097. On September 25, 2006, I served the following document(s):

BRIEF OF APPELLANT BRINK'S HOME SECURITY, INC.

- | | |
|---|--|
| <input type="checkbox"/> | by facsimile transmission at or about _____ on that date. The transmission was reported as complete and without error. A copy of the transmission report, properly issued by the transmitting machine, is attached. The names and facsimile numbers of the person(s) served are as set forth below. |
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| Martin S. Garfinkel
Schroeter Goldmark & Bender
810 Third Avenue, Suite 500
Seattle, WA 98104.1657 | |

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I declare under penalty of perjury under the laws of the State of Washington that the above is true and correct. Executed on this 27th day of September, 2006, at Seattle, Washington.



Sally Swearing

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