NO. 43427-0-II

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

STEPHEN MYNATT and ANITA ELAINE MYNATT,

Appellants,

v.

GORDON TRUCKING, INC.

Respondent.

BRIEF OF APPELLANTS

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I. INTRODUCTION

The Mynatts are long-term employees of Gordon Trucking, Inc. ("GTI") employed as team interstate long-haul truck drivers. Prior to the Washington State Supreme Court's ruling in *Bostain v. Food Exp., Inc.*, 154 Wn.2d 780, 153 P.3d 846, *cert. denied*, 128 S.Ct. 661 (2007), that interstate truck drivers must receive extra compensation for all hours worked over 40 per week, regardless of whether they worked inside or outside the state, GTI did not pay overtime or the reasonable equivalent of overtime to its long-haul truck drivers. GTI made no changes to the way it pays its long-haul drivers post-*Bostain*.

This extra compensation can be included in drivers' per-unit rate of pay, such as their mileage rate, spreading the extra compensation across each unit of work and all hours worked. The employer must, however, establish this composite mileage rate before the work is performed. GTI never established an alternative method of payment that included any overtime compensation.

The trial court initially denied GTI's Motion for Summary Judgment as to the Mynatts' overtime claims, but later granted GTI's motion on reconsideration. The trial court also denied the Mynatts' Cross-Motion for Summary Judgment. This Court should reverse.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in denying the Mynatts' Cross-Motion for Summary Judgment. CP 3549-52.

2. The trial court erred in granting GTI's Motion to Reconsider related to the Court's March 2, 2012 Order Denying GTI's Motion for Summary Judgment. CP 3549-52.

3. The trial court erred in granting GTI's Motion for Summary Judgment with regard to the Mynatts' overtime claims and their predicate claims stemming from the overtime claims. CP 3549-52.

III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Did the trial court err in denying the Mynatts' Cross-Motion for Summary Judgment, where GTI simply failed to establish a composite mileage rate that includes any compensation for overtime?

2. Did the trial court err in granting summary judgment, where the Mynatts raised genuine issues of material fact on whether GTI's compensation scheme is reasonably equivalent to overtime?

3. Did the trial court err in granting summary judgment based on an L&I REOT ("reasonable equivalent to overtime") determination letter issued to GTI, where the letter was based on GTI's material misrepresentations to L&I?

4. Did the trial court err in granting summary judgment, where L&I followed protocols outlined in ES.A. 8.3 that are contrary to statute and L&I's own regulations?

5. Did the trial court err in granting summary judgment, where expert calculations raised a genuine issue of material fact as to whether the Mynatts received compensation reasonably equivalent to what they were entitled to under RCW 49.46.130(1)?

6. Did the trial court err in granting summary judgment on the Mynatts' predicate claims under RCW 49.46.030, RCW 49.52.050, RCW RCW 49.52.070, 49.46.090, and the Washington Consumer Protection Act, RCW 19.86?

IV. STATEMENT OF THE CASE

A. Summary judgment review is *de novo.*

This Court reviews summary judgments *de novo. Fiore v. PPG Indus., Inc.,* 169 Wn. App. 325, 333; 279 P.3d 972, 977 (2012), (citing *Cerrillo v. Esparza*, 158 Wn.2d 194, 199, 142 P.3d 155 (2006)). "Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Id.* ("quoting *Cerrillo*, 158 Wn.2d 200). The facts are taken in the light most favorable to the non-moving party. *Id.*

B. The Mynatts are Washington-based long-haul drivers.

The Mynatts are husband and wife long-haul team drivers who are dispatched out of GTI's Pacific, Washington terminal. CP 62. As long-haul team drivers, the Mynatts spend anywhere from 14 to 28 days away from home, making pickups and deliveries throughout the United States before returning home for two to three days off. CP 1367-68, 1374, 1863-64, 1870.

C. GTI paid The Mynatts under a "per mile" compensation plan and that plan never changed after *Bostain*.

Chief Operating Officer Steve Gordon stated GTI made no changes in the way it paid its interstate drivers as a result of the 2007 *Bostain* decision. CP 1077-78, 1648-49. GTI's compensation plan pays a certain number of cents per mile for time spent driving, plus certain rates (accessorial pay) for non-driving related activities. CP 1309, 1322-23, 1346-49, 1103-04, 1268-74, 1832, 1841-46, 1667-68, 1807-13. These miles are computer generated and do not reflect the "actual miles" driven but, instead, the "practical miles" the drivers are likely to drive. CP 1168-70, 1722-24. The Mynatts track their odometer miles driven and compare them to the "practical miles" they are paid and, on average, "practical miles" are five percent (5%) less than the actual miles driven. CP 1370, 1866, 1377, 1873. The Mynatts are paid under GTI's Pluss plan. When

hauling short hauls (less than 150 miles), the Mynatts receive their mileage pay plus an additional $10-$30. CP 1104-05, 1113-14, 1407, 1409-11, 1668, 1932-34.

The Mynatts understood completing a load included a variety of both driving and non-driving activities for which GTI's pay plan compensated them for some, but not all, work-related activities. CP 1105, 1304, 1324, 1828. As the Mynatts explained, there are many activities for which they do not receive compensation. *Id.*

GTI does not maintain records of the actual hours worked by the Mynatts for payroll purposes. CP 1081, 1158-59, 1652, 1713-14.

GTI's Washington Based long-haul truck drivers are non-union and not subject to a collective bargaining agreement. CP 1367-68, 1863-64.

D. GTI executives responsible for the mileage-based pay plans asserted that GTI's mileage rate is their "base rate" and that GTI did not pay interstate drivers overtime prior to December 2010.

GTI designated Steve Gordon and Patrick Gendreau as the individuals most familiar with GTI's compensation practices. CP 1568, 1884. Steve Gordon, Scott Gordon, Patrick Gendreau, Robert Goldberg and Dave Gibbs were all responsible for establishing the compensation plans for the drivers. CP 1074, 1645.

Gordon has been GTI's Chief Operating Officer since 1994. CP 1072, 1644. Patrick Gendreau is Executive Vice President of Human Resources, responsible for all aspects of HR, recruiting, and orientation. CP 1152-53, 1707-08. Robert Goldberg has been GTI's Chief Financial Officer for almost eleven years. CP 1166-67, 1720-21. Susan Geving has been GTI's Director of Payroll since 1994. CP 1805-06. Recruiter Schmidt has recruited drivers across the country since 2003. CP 1352-56, 1849-53.

COO Gordon asserted that prior to 2010, GTI did not pay overtime for work done outside Washington State and that prior to the 2007 *Bostain* decision, GTI did not believe it had to pay overtime to drivers who worked outside Washington. CP 1079-80, 1650-51. COO Gordon also maintained that GTI has made no changes in the way it pays its drivers as a result of the 2007 *Bostain* decision. CP 1077-78, 1648-49. In fact, CFO Goldberg cannot recall a single conversation in which any employee of GTI discussed whether interstate drivers' pay rates include a reasonable equivalent to overtime prior to 2009. CP 1190, 1742.

Drivers' "base rate" of pay is their "mileage rate" of pay. CP 1081-84, 1652-55. In fact, when potential drivers ask Recruiter Schmidt what their base rate of pay will be, she says it is the mileage rate. CP 1364, 1861.

E. GTI's Vice-President of Human Resources responsible for the mileage based pay plans said he was not aware that drivers' pay rates allegedly included the reasonable equivalent to overtime.

Vice-President of Human Resources Patrick Gendreau had never heard any reference to whether GTI pays the reasonable equivalent to overtime until CFO Goldberg discussed it with him sometime in 2010. CP 1160, 1716. The Gordon brothers never discussed it with him. CP 1074, 1161, 1645, 1717. When asked whether he believed GTI paid drivers a reasonable equivalent to overtime, Gendreau said he had no opinion or basis for answering the question. CP 1715.

F. If GTI paid overtime to its Washington based interstate drivers prior to December 2010, GTI would have advised its drivers and recruits they do so for the competitive advantage in recruiting and retention.

GTI does not notify drivers or recruits that their pay supposedly includes overtime compensation. Recruiter Schmidt testified she has never been told Washington-based drivers receive the reasonable equivalent to overtime, that she is unaware of any advertising that makes such a representation, and that she is unaware of any extra compensation interstate drivers earn for hours worked in excess of 40 in a week. CP 1357-63, 1854-60. Patrick Gendreau stated that GTI, in its recruiting, does not notify or advertise that the mileage rate paid to interstate truck drivers includes the "reasonable equivalent" to overtime. CP 1154, 1709.

This is confirmed by COO Gordon and Elaine Mynatt. Both testified that prior to December 2010, GTI had never advised its drivers that they receive a "reasonable equivalent" to overtime. CP 1106-07, 1375, 1669-70, 1871.

GTI's employee manuals and driver manuals do not say that drivers receive the "reasonable equivalent" to overtime. CP 1107-08, 1670-71. In fact, COO Gordon is unaware of any company document that states drivers receive the "reasonable equivalent" to overtime. CP 1108-09, 1671-72. Patrick Gendreau, too, is unaware of any company document or communication that would notify drivers that their mileage pay includes a "reasonable equivalent" to overtime. CP 1156-57, 1711-12. Lastly, Payroll Director Geving cannot recall GTI ever representing to drivers that they receive the reasonable equivalent to overtime. CP 1276-77, 1815-16.

G. In spite of GTI's assertion it never paid or meant to pay overtime to interstate drivers prior to 2010, in 2009 GTI petitioned L&I for a retroactive determination back to July of 2005 that its compensation plans for interstate drivers paid the "reasonable equivalent" to overtime.

On December 16, 2010, almost six months after the Mynatts filed this litigation, L&I issued its opinion that GTI's self-proclaimed piece-rate compensation plan paid the Mynatts the true reasonable equivalent to overtime. CP 1429-31. The genesis for L&I's decision was GTI's

January 16, 2009 request for a determination that its pay plans paid Washington based drivers the reasonable equivalent to overtime. CP 1433-49, 1912-28. GTI made the request pursuant to WAC 296-128-012(3), which was amended after *Bostain*, and L&I's Administrative Policy ES.A.8.3. CP 64-65, 1413, 1421-22, 1895, 1903-04. The January 16, 2009 letter and subsequent supplemental data submitted at L&I's request included estimates of hours worked, compensation, and average speed information. CP 65. GTI submitted six pay plans for review, including two plans in place prior to the *Bostain* decision and four plans implemented in 2008 and 2009 for which GTI sought prospective approval. After reviewing the data GTI submitted, L&I approved only the two pre-*Bostain* plans, including the Mynatts' pay plan, as being reasonably equivalent to the payment of overtime under RCW 49.46.130(2)(f). 1426-27. GTI's analysis was the same for all six plans with similar results. CP 1112-13, 1119, 1429.

H. GTI misrepresented to L&I that it had developed a mileage compensation plan for interstate drivers that included overtime compensation when, in fact, it had only developed a plan for intra-state drivers, pre-*Bostain*.

In petitioning L&I for review of its pay plans, GTI represented to L&I that it gives all drivers reasonably equivalent pay:

> "Gordon Trucking pays its line haul drivers an alternative mileage based pay on a weekly basis. Notice to drivers of this pay policy is attached hereto as *Exhibit A* - Reasonably Equivalent Pay Policy, which was mailed to drivers and published internally."

CP 1433, 1675, 1912.

Yet, COO Gordon ultimately said that this policy applied "just" to drivers and miles within Washington. CP 1086. CFO Goldberg confirmed the 1998 Reasonably Equivalent Pay Policy only applied to intrastate truck drivers. CP 1176-87, 1207, 1730-41, 1778. Payroll Director Geving does not recall ever seeing the Reasonably Equivalent Pay Policy prior to her preparing the pay plan submission for L&I in 2009. CP 1275, 1814.

In fact, Elaine Mynatt was hired as a long-haul driver in 1998, after the Reasonably Equivalent Pay Policy was allegedly issued. When she specifically asked during her orientation why she wouldn't receive overtime when she could work as many as 70 hours in a week, GTI told her that the Commerce Clause prevented it. CP 1316-17, 1835-36. GTI trainer Brad Odgen also told Steve Mynatt in 1996 that as a long-haul driver he would not receive overtime, and Steve Mynatt was present when Elaine Mynatt was told the same thing by George McAllister in 1998. CP 1368, 1864.

I. GTI's reason for claiming the Mynatts' pay includes the reasonable equivalent to overtime is that long-haul drivers make more money than local drivers, but that is an invalid comparison.

GTI believes it pays the reasonable equivalent to overtime, not because the mileage rate includes overtime compensation spread over all hours worked as required under the regulations, but, rather, because long-haul drivers make more money than hourly paid local drivers, assuming each worked the same number of hours. CP 1076-77, 1647-48. At the time of the L&I REOT submission, GTI did not have any hourly pay plans applicable to team drivers, only to solo drivers. CP 1188-89. Local delivery drivers return to their home every night after making local runs, which are usually short dispatches (less than 150 miles) in and around the terminal. CP 1084, 1109, 1655, 1672. In addition to being home every night, GTI's local delivery drivers are generally home every weekend, receiving two days a week off. CP 1110. GTI's local delivery drivers in Washington are paid hourly plus overtime. CP 1109, 1672.

The terms "long-haul driver," "line haul driver" and "over the road driver" are synonymous and interchangeable terms that GTI uses to describe interstate drivers. CP 1173, 1368, 1375, 1727, 1864, 1871. According to GTI executives, long-haul drivers typically require greater compensation than local delivery drivers due to the amount of time long-

haul drivers spend away from their homes. CP 1111-12, 1171-72, 1174-75, 1278-79, 1673-74, 1725-26, 1728-29, 1817-18. Drivers will trade off home time for higher compensation. *Id.* GTI's pay plans evidence the longer a driver is out on the road and away from home, the higher his per mile base rate of pay. CP 1543-46, 1890-93. Ironically, and contrary to GTI's central theme, interstate drivers based in the Midwest receive a higher rate per mile than Washington based interstate drivers, even though GTI is unaware of any state other than Washington that requires interstate drivers to receive overtime or the reasonable equivalent to overtime. CP 1119.

J. Procedural History.

The Mynatts sued GTI on June 2, 2010, seeking compensation for unpaid overtime wages, denied meal and rest breaks, wages due at termination, unpaid minimum wages, and CPA violations. CP 1-15.

On or about January 13, 2012, GTI sought summary judgment on all of the Mynatts' claims, attaching voluminous documentation. CP 55-386. The Mynatts timely responded, submitting substantial evidence. CP 402-1008, 1009-1615. GTI replied, and the Mynatts sought leave for a sur-reply. CP 2359-2404, 2405-11, 2416-23. The trial court never ruled on the Mynatts' request for a sur-reply because it granted GTI's motion dismissing the meal and rest breaks claims, minimum wage claims, and

wages due at termination and denied GTI's motion with regard to the Mynatts' overtime claims. CP 3546-3548.

On February 22, 2012 the Mynatts sought summary judgment against GTI on their overtime claims. CP 1616-1618, 1619-1947. GTI responded and the Mynatts replied. CP 2429-2505, 3235-3542. The trial court denied the Mynatts' motion. CP 3549-3552.

On March 12, 2012 GTI requested the court reconsider its ruling on the Mynatts' overtime claim. CP 2424-2428. The Mynatts responded, attaching rebuttal evidence, and GTI replied. CP 2506-2625, 2626-36. The trial court ultimately granted GTI's request for summary judgment and granted it in its entirety. CP 3549-52.

On April 2, 2012 GTI untimely requested the court strike the Mynatts' expert's report. CP 2651-55. The Mynatts responded and GTI replied. CP 2682-3101, 3113-25, 3126-3229. The trial court denied GTI's motion to strike. CP 3230-31.

The Mynatts' are not appealing the trial courts' order regarding their meal and rest break claims.

IV. ARGUMENT

A. The Mynatts were entitled to Summary Judgment because the undisputed facts show GTI violated existing law and regulations.

i. GTI was required to establish a mileage rate of pay that includes an overtime component reasonably equivalent to traditional overtime.

In order for an employer to establish it pays interstate drivers the reasonable equivalent of overtime, an employer must first establish, in advance of the work performed, a non-hourly per-unit rate of pay that includes a "base rate" and overtime calculated at one and one-half (1-1/2) the base rate for hours worked in excess of 40. WAC 296-128-011 and 012. CP 1903-04, 1936. This overtime compensation for hours worked in excess of 40 in a week is spread across each unit of work and all hours worked. *Id.* Drivers then must receive notice that they are being paid the reasonable equivalent to overtime. *Id.*

WAC 296-128-011(1), defines the terms "base rate" and "overtime" as they apply to WAC 296-128-012. Base rate is defined as:

> "...the amount of compensation paid...per unit of work in a workweek of forty hours or less."

Overtime is defined as:

> "...the amount of compensation paid for hours worked in excess of forty hours per week and shall be at least one and one-half times the base rate of pay."

Id.

The administrative code's special recordkeeping requirements and its requirement that a "base rate of pay" be established in advance of the

work to be performed is particularly important to prevent employers from manipulating their compensation plans, after the fact, to make it look like they intended to pay the reasonable equivalent to overtime. WAC-296-128-011. For instance, it has always been the case that driver applicants' and current Washington based long-haul drivers' base rate of pay is their mileage rate of pay. CP 1652-55, 1861. Now, after *Bostain*, and the filing of this litigation, through its submission to L&I, GTI is attempting, after the fact, to establish a base rate of pay that is something less than their mileage rate in an attempt to make it look like their mileage rate included the reasonable equivalent of overtime all along.

An example of a legally compliant composite mileage rate is shown in WAC 296-128-012, where a driver working 45 hours per week receives a composite rate of 21.1 cents per mile, of which 20 cents per mile (base rate) is meant to compensate the driver for hours worked 40 and under in a week and the remaining 1.1 cents per mile is allocated to compensate the driver for hours worked over 40 (overtime) spread across all hours worked. No published decision since *Bostain* has held that an employer pays the reasonable equivalent of overtime where the employer did not, in advance of the work performed, allocate a portion of the drivers' pay to specifically compensate the drivers for hours worked in excess of 40 in a week.

a. The Supreme Court held interstate drivers must receive extra compensation for all hours worked over 40 in a week; and such compensation can be distributed across all hours worked.

The Supreme Court held RCW 49.46.130(2)(f) mandates that interstate truck drivers must obtain extra compensation, in the form of overtime, for all hours worked over 40 hours per week, regardless of where worked (*Bostain*, 159 Wash. 2d at 710). Utilizing a recommended formula, this extra compensation to which the Supreme Court referred is distributed across all hours projected to be worked, as a component of the driver's unit of pay. WAC 296-128-012(a), CP 1903-04. L&I's Administrative Policy ES.A.8.3, requires companies submitting pay plans for "reasonably equivalent to overtime" review to comply with this requirement and substantiate that drivers' rate of pay includes compensation for overtime pay.[1] CP 1895-96. WAC 296-128-012, which implements the provisions of RCW 49.46.130(2)(f), contains the same provision for establishing a non-hourly basis compensation system; *i.e.*, mileage based system, and requires L&I to ensure drivers receive the reasonable equivalent to one and one-half the base rate of pay for actual

[1] ES.A.8.3 states, "...with notice to a truck or bus driver...establish a rate pay that is not on an hourly basis and that includes compensation for overtime in the rate of pay," and WAC 296-128-012, states, "...Basis for the company's assertion that the rate of pay for each employee includes compensation for overtime...".

hours worked in excess of forty hours per week.[2] CP 1903-04. As such, if an employer fails, in advance of the work to be performed, to establish a base rate less than the drivers per unit rate of pay, the per unit rate of pay is the base rate by default.

ii. GTI failed to establish a mileage rate that includes an overtime component.

In this context, L&I, pursuant to administrative policy ES.A.8.3 and by specific direct request to GTI, required GTI to provide evidence that its long-haul drivers' per unit rate of pay included an overtime component. CP 1895-1901, 1906-10. In response to this request, GTI directed L&I to *Exhibit A* – Reasonably Equivalent Pay Policy – and represented that it pays its long-haul drivers an alternative mileage-based pay on a weekly basis, and that long-haul drivers previously received notice of this policy via mail and internal publication. CP 1912-28, 1930. The Reasonably Equivalent Pay Policy submitted to L&I as Exhibit A is titled Description of Compensation for Work Performed Within the State of Washington, with an effective date of January 1, 1998, ten years prior to *Bostain;* and it sets forth that drivers' mileage rate and accessorial pay combined includes a twenty percent (20%) factor for anticipated overtime up to a workweek of 65 hours within the State of Washington. CP 1930.

The title of the plan itself evidences this policy was not applicable to long-haul interstate drivers where it sets forth the language "performed within the state." Such language is indicative of a pre-*Bostain* plan that was not established to compensate long-haul drivers for work outside the state.

GTI executives responsible for crafting and most familiar with the Mynatts' and long-haul drivers' compensation plans maintain that this Reasonably Equivalent Pay Policy, in fact, did not apply to long-haul interstate drivers' work outside the state of Washington but, rather, it applied to Washington intrastate drivers' work. CP 1655-58, 1730-41. These statements are reinforced by the fact that GTI executives said they were unaware mileage rates included the reasonable equivalent to overtime, that interstate drivers were never advised their pay rate included overtime and there were no known communications with drivers which would have put them on notice that their mileage rate of pay included overtime compensation or the reasonable equivalent thereof prior to 2010. CP 1716, 1645, 1715, 1717. Telling is the fact that Elaine Mynatt, who was hired as an interstate long-haul driver after the alleged effective date of the Reasonably Equivalent Pay Policy, was told in her new hire orientation that she was not entitled to overtime compensation. CP 1835-36. Steve Mynatt was also told he would not receive overtime compensation as a long-haul driver. CP 1864.

This is consistent with COO Gordon's assertions that prior to the Supreme Court's decision in *Bostain*, GTI did not believe it had to pay overtime to drivers for work performed outside Washington. CP 1650-51. He also said GTI made no changes to the way it paid its drivers as a result of the *Bostain* decision and, prior to December 2010, GTI did not pay overtime to drivers for work performed outside Washington. CP 1648-49, 1650-51. Consistent with those statements, COO Gordon said interstate drivers' "base rate" of pay is their mileage rate of pay. CP 1652-55. As stated above, under WAC 296-128-011, a driver's "base rate" is his per unit rate of pay for hours worked 40 or less in a week. WAC 296-128-011 specifically provides that job applicants seeking employment may ask for the base rate of pay and when an applicant does so, GTI's recruiters advise applicants the "base rate" is their mileage rate. CP 1861. The Mynatts showed that they, respectively, earned $18,625 and $18,000 less than they would have been paid under traditional overtime during the applicable liability period. CP 3398.

The Mynatts were entitled to summary judgment because viewing these facts and reasonable inferences in the light most favorably to GTI, there is still but one conclusion: GTI's composite mileage rates applicable to the Mynatts does not include an overtime component of one and one-half (1-1/2) their "base rate" for hours worked in excess of 40 per week.

How could it, where GTI never established a REOT policy for long-haul drivers? To summarize the evidence set forth above in this section:

A. GTI did not believe it owed drivers overtime for work outside Washington before *Bostain*; (CP 1650-51)

B. GTI did not make changes to the way it compensated drivers after *Bostain*; (CP 1648-49, 1650-51)

C. Prior to 2010, GTI did not pay drivers overtime for work outside Washington; *Id.*

D. Long haul drivers' "base rate" is their "mileage rate"; (CP 1652-55, 1861)

E. Defendant's Reasonably Equivalent Pay Policy establishing a 20% factor for overtime did not apply to interstate, long-haul drivers, such as the Mynatts; (CP 1655-58, 1730-1741) and

F. The Mynatts were both told by GTI they were not entitled to overtime compensation as interstate drivers. (CP 1835-36, 1864)

It is therefore impossible for the Mynatts' composite mileage rate to include a base rate plus overtime compensation for hours worked over 40 per week, because their "base rate" is their mileage rate for all miles paid and, as such, there is no room for the "plus" or "extra" factor. CP 1652-55, 1861. GTI's pay plans clearly violate the overtime requirements of RCW 49.46.130(2)(f) and WAC 296-128-011 and 012.

iii. GTI's failure to maintain required records corroborates the fact that GTI never established a pay plan for interstate drivers that includes the reasonable equivalent to overtime.

As further evidence that GTI never paid or intended to pay the Mynatts the reasonable equivalent to overtime, the Mynatts point to the fact that GTI failed to comply with the special recordkeeping requirements applicable to employers who assert they pay the reasonable equivalent to overtime. GTI violated regulations by not maintaining records of actual hours worked by interstate drivers.[3] WAC 296-128-011 and 012 clearly require GTI to maintain the actual hours worked by the Mynatts and when seeking a REOT determination from L&I, GTI must provide such records. WAC 296-128-12(c) states:

> The department may evaluate alternative rates of pay and formulas used by employers in order to determine whether the rates of pay established under this section result in the driver receiving compensation reasonably equivalent to one and one-half times the base rate of pay for actual hours worked in excess of forty hours per week.

This requirement is also evidenced in Administrative Policy ES.A.8.3, Section 3(d), where L&I requires that GTI certify the data provided is reflective of the actual hours worked. Here, the only evidence GTI has submitted to satisfy this requirement is estimates of hours worked. These estimates clearly are not reflective of actual hours worked because GTI, in estimating hours worked, does not use actual miles driven but, instead,

[3] Steve Gordon testified the Long Haul Drivers Job Description evidencing the Mynatts' "exempt" classification is accurate. CP 2389.

uses practical miles driven. Practical miles are, on average, five percent (5%) less than actual miles driven. CP 1866, 1873. Thus, the average number of hours submitted to L&I are undervalued by five percent (5%), resulting in a lower number of estimated hours worked compared to actual, because the average speed of the truck was divided into an artificially reduced number of miles driven. In addition, the estimated hours worked are undervalued further due to the fact that GTI's calculations do not account for hours worked related to performing non-driving activities, including, but not limited to, time spent performing pre- and post-trip inspections, safety inspections, time spent securing the load before departure, time spent cleaning out the trailer, time spent waiting for a load if less than two hours, time spent completing DOT logs, time spent completing trip sheets, etc., all of which GTI considers to be work. CP 1659-66, 1933. As the calculations GTI submitted to L&I show, the only non-driving time figured into GTI's estimates of hours worked were related to detentions in excess of two hours, loads, unloads and border crossings. *Id.*

Providing hours worked by the Mynatts should not be a difficult proposition for an employer who pays a reasonable equivalent to overtime to interstate drivers because, under WAC 296-128-011(1), such employers must maintain records indicating the driver's base rate of pay, overtime

rate of pay and actual hours worked, as well as the time periods in which each apply. Interestingly, although not surprising, COO Gordon and H. R. Exec. Gendreau both testified that GTI does not maintain records of the actual hours worked by its long-haul drivers, for payroll purposes, thus bolstering the Mynatts' previous assertion that GTI never intended to establish a reasonable equivalent pay plan for interstate drivers. CP 1652, CP 1713-14.

Based on the foregoing, the Mynatts have shown there are no material issues of fact in dispute and that reasonable minds could reach but one conclusion: GTI violated RCW 49.46.130(2)(f) and the regulations related to its implementation and enforcement when it failed to establish a non-hourly rate of pay that includes overtime compensation for hours worked in excess of 40 in a week. For this reason, the Court should reverse the trial court's order granting GTI's Motions for Reconsideration and Summary Judgments and remand this matter to the trial court for trial on the damages.

B. The Mynatts raised genuine issues of material fact that precluded the trial court from granting GTI's Motion for Summary Judgment.

The trial court erred in granting GTI's Motion to Reconsider and Motion for Summary Judgment because the Mynatts raised and disputed genuine issues of material fact which precluded the entry of summary

judgment. GTI's Motion relied almost solely on its attainment of a Reasonably Equivalent Determination letter from L&I, which stated the Mynatts' pay plan paid the reasonable equivalent to overtime. Nowhere in GTI's statement of facts in support of summary judgment, nor in its argument for that matter, did GTI actually allege it paid or intended to pay the Mynatts overtime or the reasonable equivalent thereof. Instead, GTI only asserts L&I made the determination that GTI's compensation plans pay the reasonable equivalent to overtime, leading the trial court to infer that GTI intended and did pay the Mynatts the reasonable equivalent of overtime, without GTI actually submitting the plans to judicial scrutiny. In response, the Mynatts pointed to executive testimony evidencing misrepresentations were made to L&I in obtaining the determination, executive testimony showing GTI never paid or intended to pay the reasonable equivalent to overtime, that GTI's calculations and the manner in which it substantiated its deviation from the payment of traditional overtime was invalid, and they attacked the protocols established by L&I for REOT determinations as contrary to statute and existing regulations.

i. GTI's reasonably equivalent determination from L&I is arbitrary, capricious and contrary to law because the underlying evidence in the case does not support the agency's final conclusions.

The trial court erred in not denying GTI's Motion for Summary Judgment where GTI argued the court should rely solely upon L&I's determination in support of its motion, to establish that its plans are "reasonably equivalent" to overtime. The Mynatts, in their response, showed the underlying facts upon which the determination was made were untrue. As stated above, the Mynatts put forth evidence that of the two individuals most familiar with GTI's driver pay plans:

1. One (COO Gordon) of the two testified the 1998 Reasonable Pay Plan letter did not apply to long-haul interstate drivers and that GTI did not pay overtime for work outside the state prior to 2010; (See above, Summary of the Case, Sections D and H) and,

2. The other (H. R. Exec. Gendreau) testified he had no basis whatsoever upon which to testify GTI paid the reasonable equivalent to overtime. (See above, Summary of the Case, Section E).

Of the five individuals GTI said were responsible for crafting GTI's pay plans:

1. Two (COO Gordon and CFO Goldberg) of the five testified that the 1998 Reasonable Pay Plan letter did not apply to long-haul interstate drivers. (See above, Summary of the Case, Section H)

2. One (H.R. Exec. Gendreau) of the five testified he had no basis whatsoever upon which to testify that GTI paid the reasonable equivalent to overtime. (See above, Summary of the Case, Section E)

3. One (H. R. Exec. Gendreau) of the five testified he had never heard three (COO Gordon, CIO Scott Gordon, CFO

Goldberg) of the five discuss or reference that GTI pays the reasonable equivalent to overtime prior to 2010. (See above, Summary of the Case, Section E)

4. Three (COO Gordon, H. R. Exec. Gendreau and CFO Goldberg) of the five testified there are no GTI documents that evidence long-haul drivers receive the reasonable equivalent of overtime and prior to 2010 drivers have never been informed they are paid the reasonable equivalent to overtime. (See above, Summary of the Case, Section F)

5. Two (Scott Gordon and Dave Gibbs) of the five offered no testimony whatsoever.

These are material and undisputed facts which contradict and negate the conclusions of L&I because under no scenario, given these assertions, could the Mynatts' mileage rate of pay include compensation for overtime throughout the entire liability period starting March 30, 2007. As evidence that these misrepresentations were material to the L&I determination, the Mynatts directed the trial court to numerous requests made by L&I for such information. CP 1383, 1389, 1393, 1398, 1413, 1419, 1452.

L&I, pursuant to administrative policy ES.A.8.3 and by specific direct request to GTI, required GTI to provide evidence that long-haul drivers' per unit rate of pay included an overtime component. CP 1413-19, 1452. These requests were especially important due to L&I's heavy reliance on GTI's response as evidenced in its communications to GTI. CP 1457-58 and 1429.

In response to L&I's request, GTI directed L&I to *Exhibit A* – Reasonably Equivalent Pay Policy. As discussed above, this was a misrepresentation because the policy was inapplicable to interstate long haul drivers. See above, Summary of the Case, Section H). The title of the plan itself should have raised red flags at L&I because the language, "performed within the state," is indicative of a plan that was not established to compensate long-haul drivers for work outside the state. Also, the policy clearly provides a method for calculating hours worked for Washington miles, but makes no such arrangement for miles worked outside Washington – yet another red flag ignored by the department. Further, the policy became effective more than ten years prior to the Supreme Court's decision in *Bostain*. Despite clear evidence that the policy was promulgated to comply with L&I's interpretation of the law before *Bostain*, L&I made no further inquiries as to the legitimacy of the reasonably equivalent pay policy. L&I's Reasonable Equivalent Overtime (REOT) Review Records Checklists dated 1/13/10 evidences the agency relied heavily upon GTI's representation that the 1998 letter applied to interstate drivers. See attached pages CP 1383, 1389.

Had L&I followed up with GTI and been afforded all the safeguards of an adjudicative hearing, it would have learned GTI did not apply the Reasonably Equivalent Pay to long-haul drivers, that GTI

executives were unaware mileage rates included the reasonable equivalent to overtime, that interstate drivers were never advised their pay rate included overtime, and that there were no known communications with drivers which would have put them on notice that their mileage rate of pay included overtime compensation or the reasonable equivalent thereof.

The fact that there were no known communications with drivers that their mileage rate of pay included overtime further calls into question the legitimacy of the 1998 policy because, as GTI represented to L&I, the 1998 letter was provided to long-haul drivers via mail and internal publication. Given the executives' statements and the date of the 1998 letter, it is painfully clear that the 1998 policy submitted to L&I could not have applied to interstate drivers. It was arbitrary and capricious for L&I to determine that GTI paid the reasonable equivalent to overtime dating back to July 1, 2005, when GTI's own Chief Operating Officer said he did not intend to pay overtime to interstate drivers from July 1, 2005 until sometime in 2010. (See above, Summary of the Case, Sections D and H).

GTI was not entitled to summary judgment because, viewing these facts and reasonable inferences in the light most favorable to the Mynatts, there is but one conclusion: the Mynatts' composite mileage

rates did not include time and one-half their base rate for hours worked in excess of 40 hours per week, and L&I's determination to the contrary is arbitrary and capricious because it is based on erroneous factual support.

ii. GTI's receipt of a REOT determination letter from L&I did not entitle it to Summary Judgment.

The trial court erred in granting GTI's Motion for Reconsideration and Motion for Summary Judgment where GTI argued its L&I REOT determination was entitled to deference by the court. The Washington Supreme Court has made clear that the courts have ultimate authority to interpret a statute and deference to an agency's interpretation is never appropriate if the agency's interpretation conflicts with a statutory mandate. *Bostain*, 159 Wash. 2d 700, 706. As a result, the only "safe harbor" L&I can give GTI is safety from prosecution by the agency itself, not immunity from civil litigation such as this. L&I places employers such as GTI on notice of this fact in its Administrative Policy ES.A.8., which states:

> "As a practical matter, this interpretation may be further scrutinized by courts."

L&I has also taken this position formally in Court stating:

> "Neither workers nor courts are bound by such determination by the Department..."

CP 1487,

> "...The rule does not provide a 'safe harbor' to employers who did not pay a reasonable equivalent to time and a half all hours worked..."

CP 1501, and

> "The Department does not assert its determination letter...is binding upon employees."

CP 1507.

Recognizing its inherent shortcomings compared to adjudication in the Court system, L&I states:

> "While the Department's process of evaluating compensation systems involves a certain degree of safeguards to ensure reliability, it does not necessarily include all safeguards of an adjudicative hearing. The Departments reasonably equivalent approvals affect employees only to the extent a court agrees with the Department's conclusions."

Id.

iii. GTI's material misrepresentations to L&I invalidated its calculations in support of GTI's alleged payment of the reasonable equivalent to traditional overtime.

Because GTI failed to establish a composite mileage rate for long-haul drivers that includes compensation at one and one-half the drivers' "base rate" of pay, and drivers' "base rate" is their mileage rate, the spreadsheets submitted to L&I to substantiate its deviation from the

payment of traditional overtime are inaccurate because GTI manipulates the data to backdoor in a base rate that is less than the mileage rate of pay. WAC 296-128-012 requires motor carriers to pay drivers the reasonable equivalent of overtime required by RCW 49.46.130. RCW 49.46.130(1) sets forth the overtime required and the Supreme Court confirmed that the legislature, in writing the exemption in RCW 46.49.130(2)(f) as it did, recognized that truck drivers are subject to the overtime provisions of RCW 49.46.130(1). *Bostain,* 159 Wash.2d 700, 710. To that end, Administrative Policy ES.A.8.3 requires GTI to submit a spreadsheet that calculates the difference between what each employee was paid under its compensation system relative to what the employee would have been paid under the traditional overtime requirements of RCW 49.46.130(1). Thus, under ES.A.8.3, in satisfying the requirements of RCW 49.46.130(2)(f), the requisite comparison requires an analysis of what the Mynatts actually made under GTI's plan using their mileage rate as the base rate, compared to what the drivers would have been paid if they received one and one-half their "regular rate" of pay consistent with RCW 49.46.130(1) CP 1426-27.[4] The results of this analysis are strikingly different than those

[4] As set forth in ES.A.8.1, the "regular rate" of pay for other than strictly hourly pay plans or practices is determined by dividing the total weekly compensation received by the total number of hours the employee worked during the workweek. CP 1461. GTI's compensation plan is a self described piece rate compensation plan. CP 64.

presented to L&I.[5] The Mynatts did not receive the reasonable equivalent to overtime because their pay was not commensurate to what they would have received under traditional overtime. If paid traditional overtime under RCW 49.46.130(1), Elaine Mynatt would have earned an additional $3,182.33 and Steve Mynatt would have earned an additional $3,233.60 for the submitted six month period. CP 1517, 1523-24, 2519, 2525-26. The Mynatts are not asserting they have to receive exactly the amount of pay they would have received if paid overtime traditionally under RCW 49.46.130(1) but, instead, that they must receive an amount commensurate to traditional overtime. Whether the Mynatts, in receiving pay thousands of dollars less annually compared to what they would have received under traditional overtime constitutes pay commensurate to overtime is a disputed question of fact for the jury, requiring the jurors' meeting of the minds as to what is reasonable. As the Supreme Court stated, a worker must be paid an amount of compensation commensurate to overtime pay. *Bostain*, 159 Wash.2d 700, 715.

This difference is even greater if GTI had used the Mynatts' actual miles driven versus their practical miles driven because, on average, practical miles driven are five percent (5%) less than actual miles driven.

[5] For overtime purpose under a "piece rate" plan, ES.A.8.2 states the employee is entitled to ½ his regular rate of pay for each hour worked over 40. CP 1472.

CP 1370, 1377. The Mynatts' expert confirmed that shortage is greater if GTI did not account for all hours actually worked. CP 1515-41. Thus, the average number of hours submitted to L&I are undervalued by five percent (5%), resulting in a lower number of hours worked because the average speed of the truck was divided into a reduced number of miles actually driven. In addition, the shortages are undervalued further due to the fact that GTI's calculations do not account for hours worked performing non-driving activities, including but not limited to, time spent performing pre and post trip inspections, safety inspections, time spent securing the load before departure, time spent cleaning out the trailer, time spent waiting for a load if less than two hours, time spent completing DOT logs, time spent completing trip sheets, etc., all of which GTI considers to be work. CP 1090-97, 1410 (GTI's calculations submitted to L&I only account for non-driving work related to detentions in excess of two hours, loads, unloads and border crossings). CP 1520, 2522. This failure to capture all hours worked by drivers in the sample, both driving and not driving, was yet another red flag ignored by L&I. As such, reasonable minds could determine that GTI's mileage plan does not pay the Mynatts the reasonable equivalent to overtime compared to what they would have received under RCW 49.46.130(1).

iv. GTI's reasonably equivalent determination from L&I is arbitrary and capricious because the manner in which it allowed GTI to substantiate its deviation from the payment of traditional overtime is contrary to law.

a. L&I allowed GTI to use an improper method for substantiating its deviation from hourly pay.

Section B(3)(c)(iii) of Administrative Policy ES.A.8.3 allows companies submitting pay plans for review to deviate from the requirements of RCW 49.46.130(1). RCW 49.46.130(2)(f) requires the comparison when determining reasonable equivalency to be based on what the driver would have received under RCW 49.46.130(1):

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

The meaning of this statute is plain and this same interpretation has been confirmed by the Supreme Court, and is expressed by L&I in WAC 296-128-012 and in Section B(3)(c) of Administrative Policy ES.A.8.3. The calculation has to consider what the driver would have been paid under the provisions of RCW 49.46.130(1) versus what he or she was actually paid. However, in Section B(3)(c)(iii) of the Administrative Policy ES.A. 8.3, L&I arbitrarily abandons this position and instead of requiring companies to perform their substantiation utilizing driver's "regular rate" of pay as

required under RCW 49.46.130(1), L&I allows companies to utilize a hypothetical regular rate of pay of another so-called "similarly situated" comparator. In essence, L&I allows GTI to swap the regular rate of pay of one man for the regular rate of pay of another. A driver's "regular rate" is not a hypothetical construction, but an "actual fact." *Madison Ave. Corp. v. Asselta*, 331 U.S. 199, 204, 67 S.Ct. 1178, 1181, 91 L.Ed. 1432 (1947).[6] L&I arbitrarily strays even further from the path by going on to explain in Section B(3)(c)(iii) that it deems local drivers who are paid hourly plus traditional overtime as "similarly situated" to long-haul drivers and, as such, companies should compare for each workweek, each long-haul driver's actual gross pay relative to what the gross pay would have been if each long-haul driver was paid hourly as a local driver. CP 1416. Such a comparison for purposes of substantiating whether a long-haul driver receives a reasonable equivalent to traditional overtime is contrary to the statute and arbitrary and capricious because L&I makes an *apples to oranges* comparison that does not comport with RCW 49.46.130(1). Nowhere in RCW 49.46.130(1) or (2)(f) does the statute allow an employer to calculate an employee's overtime based on another

[6] When construing provisions of the Washington Minimum Wage Act, this Court may consider interpretations of comparable provisions of the Fair Labor Standards Act of 1938 as persuasive authority. *Inniss v. Tandy Corp.*, 141 Wash. 2d 517, 524, 7 P.3d 807, 811 (2000); *Weeks v. Chief of the Wash. State Patrol,* 96 Wash.2d 893, 897, 639 P.2d 732 (1982); *Chelan County Deputy Sheriffs' Ass'n v. County of Chelan,* 109 Wash.2d 282, 291-92 n. 3, 745 P.2d 1 (1987).

employee's regular rate of pay, and especially not based on the lower regular rate of pay of a dissimilar employee. In fact, not a single WAC regulation allows such calculation under RCW 49.46.130(1). Furthermore, allowing an *apples* to *oranges* comparison between local delivery drivers and long-haul drivers is arbitrary and capricious because local drivers are not similar to long-haul drivers.

According to GTI, local delivery drivers are dissimilar to long-haul drivers because they return home every night after making short hauls which are usually dispatches (less than 150 miles) in and around the terminal. CP 1084, 1109-10. GTI's local delivery drivers are generally home every weekend and receive two full days off each week. *Id.* On the other hand, long-haul drivers are away from their homes nightly and often on the road 7-28 days. CP 62, 1367, 1374, 1310-11, 1293. This is relevant because, as GTI's executives put it best, long-haul drivers require greater compensation compared to local delivery drivers due to the amount of time long-haul drivers spend away from their homes; *i.e.*, drivers will trade home time for higher compensation. CP 1173, 1368, 1375, 1111-12, 1171-72, 1174-75, 1278-79, 1543-46. This fact is consistent with GTI's submission to L&I. Under GTI's Pluss plan, which is also the Mynatts' pay plan, out of the 312 pay periods for twelve drivers submitted to L&I for review, in 99.01% of those weeks the effective hourly rate of pay for

40 hours of work or less (i.e., regular rate of pay) is, on average, 25.9% higher than the comparable local driver's hourly rate of pay. CP 1519, 2521, 1475-84. (*Compare generally* columns titled Uniform Rate of Pay to Comparable WA. Hrly Rate). The idea that drivers who are away from home for longer periods of time demand higher pay is also consistent with GTI's pay matrixes in which drivers with at least 90 days plus experience who are home on the weekend receive a lower base rate per mile than drivers who are out on the road 7-10 days and those drivers, in turn, make less per mile than drivers who are out on the road 10-14 days. CP 1543-46. This also explains why, when the Mynatts on the rare occasion make short hauls similar to those made by local drivers, GTI pays long-haul drivers extra compensation on top of their mileage rate. CP 1105, 1104, 1113-14, 1407, 1410. In this way GTI ensures that long-haul drivers continue to achieve the higher compensation they demand compared to local drivers. If long-haul drivers' mileage rates are truly equivalent to the local drivers' lower hourly rates, there would be no need for GTI to pay the long-haul drivers' the additional short haul accessorial pay on top of their mileage rate for equivalent work. More telling is the fact that GTI's recruiter testified that if she had to recruit drivers using a per mile rate equivalent to the hourly rate paid to local delivery drivers, she would be ineffective. Recruiter Schmidt was asked if she normally recruited long-

haul drivers at .40 per mile and she was forced to recruit drivers for .26 per mile would she be effective and she responded her recruiting would not be "effective at all." CP 1364-65. This is important because according to Exhibit B of GTI's January 19, 2009 letter to L&I, a seven year driver who earns .40 cents per mile is compared to a local driver earning only $14.25 per hour. CP 1440. Steve Mynatt is a seven year driver under the submission and using the average miles per hour submitted to L&I, this would yield an effective per mile rate of pay for the local driver of only .26 per mile ($14.25/54 mph), a rate that would be ineffective in recruiting long-haul drivers, as GTI's recruiter stated.[7] This further demonstrates that the labor market demands long-haul drivers receive much higher compensation than local delivery drivers. The effect, of course, of L&I's *apples to oranges* comparison is that in comparing long-haul drivers' compensation to that of local delivery drivers, hours worked being the same, the analysis will always show long-haul drivers making more money than local drivers. This is not because the long-haul driver is receiving the reasonable equivalent to overtime, but, instead,

[7] According to Exhibit B, a 7yr. solo driver earns .40 per mile driven compared to a 7 yr. local delivery driver earning $14.25. CP 1440. At the time of the L&I submission Steve Mynatt was being paid at the 7 year mileage rate for team drivers. CP 1440, 1477-78. Because Steve Mynatt receives mileage pay for all miles the truck travels, he receives .49 per mile he drives. As such, the discrepancy between a team long-haul driver is even greater than that of a solo long-haul driver. As GTI testified, there were no so-called similarly situated team drivers paid on an hourly basis. CP 1188-89.

because the long-haul driver inherently receives higher compensation for being out on the road for long periods away from home. This explains why GTI's submission letter represents to L&I the individualized data for each long-haul driver each week shows the total mileage pay exceeded total local hourly pay on average by 21%. CP 1548-55. This is no shock and is wholly consistent with the Mynatts' argument because, as previously shown, GTI's own calculations of long-haul drivers' effective hourly rate of pay, the uniform rate of pay for 40 hours or less, is on average 25.9% more than local driver's hourly regular rates, thus showing the difference in total compensation is not due to overtime but, instead, simply to market demand; *i.e.*, trade off between home time and compensation. Therefore, any conclusion that the Mynatts receive the reasonable equivalent of overtime based solely on the fact that they earn more money on average than a local delivery driver is erroneous.

b. In granting GTI's REOT determination, L&I ignored GTI's special recordkeeping violations applicable to motor carriers who pay the reasonable equivalent to overtime.

It stands to reason, if GTI intended to claim the reasonable equivalent exemption under (2)(f) during the liability period, it would have ensured its compliance with the regulatory requirements related to the exemption. In amending WAC 296-128-012 to comport with the

Bostain decision, and allowing motor carriers to submit plans in place prior to *Bostain* for retroactive approval, L&I should have been cognizant that some motor carriers, such as GTI, would attempt to submit plans for approval that never considered hours worked outside Washington for purposes of overtime. One such indicia as to whether a company truly intended to pay interstate drivers the reasonable equivalent to overtime for work performed outside the state is whether the motor carrier maintained records in compliance with the special recordkeeping requirements of WAC 296-128-011, applicable to motor carriers paying a "reasonable equivalent pay plan." L&I ignored these requirements with regard to GTI, as evidenced by the fact that GTI failed to maintain records of actual hours worked by its interstate drivers. Instead of further questioning the legitimacy of GTI's application, contrary to its own regulations, L&I allowed motor carriers with pay plans existing prior to March 1, 2007 to submit the estimated number of hours worked by the Mynatts and other drivers, despite the fact that the requirements of WAC 296-128-011 and 012 clearly demand GTI submit actual hours worked. WAC 296-128-12(c) states:

> The department may evaluate alternative rates of pay and formulas used by employers in order to determine whether the rates of pay established under this section result in the driver receiving compensation reasonably equivalent to one

and one-half times the base rate of pay for actual hours worked in excess of forty hours per week.

Such a requirement is not difficult for an employer who pays a reasonable equivalent to overtime under RCW 49.46.130(2)(f) because, under L&I's rule WAC 296-128-011(1), such employers must maintain records indicating the driver's base rate of pay, overtime rate of pay and actual hours worked, as well as the time periods in which each apply. GTI does not maintain records of the actual hours worked by its long-haul drivers, thus bolstering the Mynatts' previous assertions. CP 1081, 1158-59. L&I's issuance of a reasonable equivalent determination in the face of evidence that the employer did not maintain the requisite records when asserting they pay the reasonable equivalent to overtime, is further evidence that L&I's determination with regard to GTI was arbitrary and capricious.

v. L&I's REOT determination was arbitrary and capricious because, even if the 1998 REOT policy was applicable to long-haul drivers, GTI still failed to pay the Mynatts the reasonable equivalent to overtime under that policy.

Defendant's own Excel spreadsheet submitted to L&I evidences that interstate drivers are not receiving the reasonable equivalent to overtime for all actual hours worked in excess of 40 per week because there are numerous occasions in which drivers work in excess of 65 hours

in a week. CP 1475-84. As a result, the Mynatts were still denied the reasonable equivalent to overtime because even if the Court accepts GTI's contention that the 1998 REOT policy applied to hours worked outside the state, despite the evidence to the contrary, the record shows and COO Gordon said, GTI's 1998 policy only includes the reasonable equivalent to overtime for a work week of 65 hours or less. CP 1120, 1084-87, 1275, 1316-17, 1368, 1513. Therefore, by default, if a driver works over 65 hours in a week, each hour in excess of 65, by admission, does not include the reasonable equivalent to overtime. This is consistent with WAC 296-128-011, which defines overtime under the reasonable equivalent standard as receiving at least time and one half base rate of pay for hours worked over 40; thus, establishing a floor that the employer cannot go below for each and every hour of overtime. WAC 296-128-012 states the same but, instead of stating "at least" to establish the compensation floor, it states drivers must receive a minimum that compensates hours worked in excess of 40 equivalent to that received under RCW 49.46.130. In this instance, under GTI's pay plan, the 65th hour of the week is the last hour of the week that would include the reasonable equivalent to overtime.

Of the 312 pay periods under the Pluss plan submitted to L&I by GTI, the sample drivers actually worked 304 weeks and a review of each weeks' hours worked reveals that in 48 pay periods, drivers worked over

65 hours in a week or 15.79 % of the time. CP 1475-84; 1520, 2522. In these weeks, drivers worked on average 8.46 hours in excess of 65 in that week. *Id.* This percentage is also in line with the data for the Mynatts. Out of the 54 payroll periods submitted for the Mynatts combined, they actually only worked 47 of those weeks and, out of those 47 weeks, there were seven weeks in which they worked in excess of 65 hours, or 14.89% of the time (seven weeks divided by 47 weeks). *Id.* Therefore, under GTI's own policy, as submitted to L&I, the Mynatts did not receive the reasonable equivalent to overtime roughly 15% of the time. Thus, the Mynatts have raised a genuine issue of material fact in which a jury could reasonably conclude that GTI's pay plan does not pay an amount commensurate to the overtime that would be earned under RCW 49.46.130(1).

C. The Mynatts' predicate claims should be remanded for trial.

In arguing its Motion for Summary Judgment, GTI argued if the Mynatts' overtime claims do not survive the motion, the Mynatts' predicate claims must fail as well. The Mynatts have shown the trial court erred in not granting their Cross-Motion for Summary Judgment and/or the trial court erred in granting GTI's Motion for Summary Judgment with regard to their overtime claims. As such, the trial court erred in dismissing the

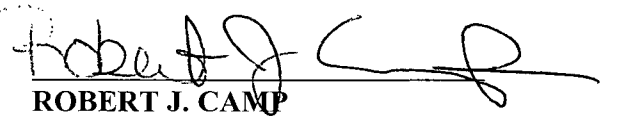
Mynatts' predicate claims under RCW 49.46.030, RCW 49.52.050, RCW 49.52.070, 49.46.090, and the Washington Consumer Protection Act, RCW 19.86. In reversing one or all the trial court's orders at issue, the Mynatts' predicate claims should be remanded for trial.

V. CONCLUSION

Wherefore, based on the forgoing, Steve Mynatt and Elaine Mynatt request this Court enter an Order reversing the trial court's orders on their Cross-Motion for Summary Judgment, GTI's Motion for Reconsideration and GTI's Motion for Summary Judgment.

Respectfully submitted this 21st day of November, 2012.

JACOBY & MEYERS, LLC



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CERTIFICATE OF SERVICE BY MAIL

I certify that I caused to be mailed, a copy of the foregoing **BRIEF OF APPELLANT** postage prepaid, via U. S. Mail, on the 21st day of November, 2012, to the following counsel of record at the following addresses:

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e) If the compensation plan was previously implemented, the letter must identify whether, when, and how the rate of pay was communicated to employees. If the compensation system is not yet in effect, the letter must identify how the company intends to communicate the rate of pay to its employees.	☒	☐	☐	Per letter dated, 1/16/09, rate communicated by the following, means: • MILES plan implemented 10/01/2000 • PLUSS plan implemented 9/15/2004 Notice to drivers was submitted as Exhibit A-Reasonably Equivalent Pay Policy, which was mailed to drivers and published internally. Effective January 1,1998
Misc Comments	The company needs to substantiate their payment system to the Departments satisfaction Work with an employer using the protocol as guidelines. They were established to assist the Department in making a recommendation. The Department needs to be reasonably satisfied.			

Date: 1/13/2010 Company: Gordon Trucking Inc.Agent: Mona Rodriquez				
Records Checklist Items	**Complete**	**Partial**	**Not Supplied**	**Comments**
Does company have team or solo drivers? Both?	☒	☐	☐	Both solo and team drivers per letter dated 1/16/2009
Are there separate calculations for team and solo drivers?	☒	☐	☐	✓ Different mileage rate but not a separate calculation
Solo calculations and data supplied?	☒	☐	☐	✓ Solo calculations and data supplied?
Team calculations and data supplied?	☒	☐	☐	✓ team data and calculations provided
Intrastate hours verification for work before 3/1/07	☒	☐	☒	✓ Exhibit A in letter dated 4/20/09

Extent to which the compensation system includes compensation for overtime in the rate for each employee	☒	☐	☐	✓ Per Exhibit A in a letter dated 1/16/09, the "the combination of mileage and accessorial pay rates include a 20% factor for anticipated overtime up to a workweek of 65 hours
How did you arrive at this figure?	☐	☐	☐	
Has minimum wage been met?	☒	☐	☐	✓ yes

Date: 01/13/2010 Company: Gordon Trucking Inc Agent: Mona Rodriquez				
Records Checklist Items	**Complete**	**Partial**	**Not Supplied**	**Comments**
Size of the company and the number of drivers subject to the plan	☒	☐	☐	219 Washington domiciled line haul truck drivers. Nationwide, Gordon Trucking employs 1434 truck *drivers.* Information received on 24 out of 219 drivers employed in 2006/2007.
The process being used-is it consistent? Explain	☒	☐	☐	✓ The process being used is consistent, since all drivers are paid by a compensation schedule by rate and experience.
How did employer select the sample group?	☒	☐	☐	✓ drivers were randomly selected.