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No. 65077-7

**COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON**

BRINK'S, INCORPORATED,

Appellant,

v.

MEGAN PELLINO, ON BEHALF OF
HERSELF AND ALL OTHERS SIMILARLY SITUATED,

Respondents.

**BRIEF OF APPELLANT
BRINK'S, INCORPORATED**

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I. Introduction

Imagine a world where “on-duty” police officers are allowed to daydream, where “on-duty” security guards can ignore their own safety, where “on-duty” corrections officers can ignore the activity of convicted criminals while inside a prison. Imagine that not only are these types of employees instructed to completely disassociate themselves from their workplace reality every few hours, putting their lives and the lives of others at risk, they are *paid* to do so. This world is Washington unless the decision below is reversed.

This case should not have been certified as a class action nor survived summary judgment, much less yielded a judgment in favor of the class following trial. Yet because the lower court misconstrued Washington’s meal-and-rest-period regulations and did not consider the unique nature of Brink’s, Incorporated’s (“Brink’s”) operations, Brink’s finds itself on appeal.

Washington Administrative Code § 296-126-092 (“Code”) anticipated that certain work situations do not allow for rigidly scheduled, duty-free meal periods and uninterrupted rest periods. The Department of Labor and Industries (“DLI”) implemented the Code to provide employers and employees with the flexibility of paid, on-duty meal periods and intermittent rest periods as one option. The Department of Corrections, the armored-vehicle industry, and the construction industry embrace this on-duty option to meet the reality in certain work environments in order to enhance safety.

Employers utilizing this option must pay employees during meal periods. Whereas an employer is not required to compensate employees for “off-duty” meal periods allowing total freedom to leave the workplace, it must compensate employees when employees remain “on duty” within the workplace. That is the mutual trade-off the Code demands—one that Brink’s and its employees have always honored.

The court’s misinterpretation of the Code as to the meaning of the concept of “on duty” is a fundamental error, but is not the only one. The court also misunderstood or ignored the Brink’s system of street operations, and how this allows employees’ work experiences to vary dramatically from day to day and employee to employee, due to each employee’s use of individual discretion. Brink’s crews work on the streets of Washington where, because of their status as Brink’s employees, their safety is paramount to Brink’s and individual judgment is critical.

Brink’s has devised a discretionary system of street operations (“Start System”). Under the Start System, Brink’s armored-vehicle personnel begin their workday at a designated time at the terminal but Brink’s does *not* require them to finish the workday at a designated time. The end time of the workday is determined by the continuous employee exercise of field discretion within the Start System, including how to sequence stops, and when and where to take breaks. The Start System, and the exercise of employee discretion run-by-run, leads to employee break practices too diverse to satisfy the commonality needed for class certification.

If the lower court's interpretation of the Code stands, employers and employees will be forced to eliminate employee choices and discretion, compelling employers to "require" employees to take breaks at scheduled times and places. And if the decision on class certification stands, it will undermine the settled law that class treatment is inappropriate when individual differences predominate, particularly where the differences are caused by the employees, not by the employer.

II. Assignments of Error

1. The court erred when it denied summary judgment for Brink's on the meal-and-rest-period claim.

2. The court erred when it certified this case as a class action and refused to decertify after the evidence showed a lack of commonality.

3. The court erred when it found in favor of Plaintiff at trial.

4. The court erred in awarding damages based on flawed expert testimony.

III. Issues Pertaining to Assignments of Error

1. Does the Code require an employer to place a defined limit on the amount of "work" an employee may choose to perform during an on-duty meal period when it is the employee who decides the work, if any, to be performed and who is outside the supervision of the employer?

2. By advising Messengers and Drivers to remain "vigilant," or to act with care and common sense, during all break periods, does Brink's require class members to "work" beyond a prohibited limit during "on duty" breaks?

3. Did Brink's fail to "allow" unscheduled, intermittent rest and meal periods by advising class members to remain "vigilant," or to act with care and common sense?

4. Did the court err in certifying this case as a class action when, due to the employee-driven discretionary nature of the Start System, the break practices of crew members varied greatly from day to day, run to run, and person to person?

5. Did the court err in its approach to damages where Plaintiff's "experts" relied on faulty assumptions and incomplete data?

IV. Statement of the Case

This case is based on the notion that armored-vehicle crew members working out of the Brink's Seattle and Tacoma Branches are not "allowed" meal and rest periods, because employees are reminded to be vigilant (or to act with care and common sense) during meal and rest periods, even though the periods are on duty and paid. The Code as to meal and rest breaks is as follows:

(1) Employees shall be *allowed* a meal period of at least thirty minutes which commences no less than two hours nor more than five hours from the beginning of the shift. Meal periods shall be on the employer's time when the employee is required by the employer to remain on duty on the premises or at a prescribed work site in the interest of the employer.

(2) No employee shall be *required* to work more than five consecutive hours without a meal period. . . .

(4) Employees shall be *allowed* a rest period of not less than ten minutes, on the employer's time, for each 4 hours

of working time. . . . No employee shall be required to work more than three hours without a rest period.

(5) Where the nature of the work allows employees to take *intermittent rest periods* equivalent to ten minutes for each 4 hours worked, scheduled rest periods are not required. WAC § 296-126-092.

The trial court certified this case as a class action on June 3, 2008. It defined the class as “all drivers and messengers who were employed by Brink’s Incorporated in its Seattle or Tacoma branches during the class period of April 26, 2004 through October 31, 2007.” *See* Exhibit 1 to Appendix to Appellant’s Brief (hereinafter “Ex. _____”), at 7.

A. Background

Since its founding in 1859, Brink’s has been synonymous with safety and security. Though its operations have evolved over time, its core values—trust, integrity, and safety—have remained constant. *See* Ex. 2, at 1. These values are reflected in part in the discretion provided employees operating out of the Seattle and Tacoma Branches within this Start System of street operations.

1. Duties and Training

Armored-vehicle crews consist of two individuals, a Driver and a Messenger. The fundamental responsibility of a Driver, who is separated from the Messenger by a bulkhead, is to drive the vehicle from stop to stop. Ex. 3, at 6. The fundamental responsibility of a Messenger is to conduct the transactions at these stops, operating from the rear compartment of the vehicle between stops. Ex. 2, § 9.020 at 34; RP

11/10/09 at 60. Messenger transactions include delivering and receiving cash, coin, and other valuables (“liability”) at customer stops. RP 11/10/09 at 57. While in the armored vehicle, Messengers often complete paperwork in the rear compartment and then “sit[] and wait[] for the next stop.” RP 11/19/09 at 12. Throughout the run, the workplace is the armored vehicle, the safest place in street operations. *See Stevens v. Brink’s Home Security, Inc.*, 162 Wn.2d 42, 47 (2007).

There is no such thing as a “typical” workday for crew members. Under the Start System, the only component that is scheduled is the start time, Ex. 2, §§ 1.060 & 1.062, but even that changes regularly depending on the assigned route. RP 11/19/09 at 6. There is *no* scheduled end time, Ex. 2, § 1.063, and crew members are often “moved around from run-to-run.” RP 11/19/09 at 72-73.

A Guide Sheet is provided to each armored vehicle each workday that lists the transactions the crew should accomplish for the entire workday. RP 11/10/09 at 92. The number of stops “change[s] f[rom] day to day,” ranging from 10 to 80. RP 11/10/09 at 97; RP 11/16/09 at 11-12. The Guide Sheet is not a “schedule of stops.” It is simply a “to-do list”; crews have the discretion to sequence the stops as they collectively decide *without consultation with management*. RP 11/16/09 at 168-69; RP 11/19/09 at 46, 84. For security reasons, Brink’s intentionally *avoids* telling customers when crews will arrive. RP 11/10/09 at 96.

Crew member field discretion fundamental to the Start System not only alters the times stops are made but allows crew members discretion to

decide when and where they take their breaks, which are unscheduled. Through training and bulletin postings, Brink's instructs Messengers and Drivers that they are allowed two 10-minute rest periods and one 30-minute meal period for every eight hours worked. RP 11/16/09 at 28; RP 11/19/09 at 88; Ex. 4, at 1; Ex. 5, at 1; Ex. 6, at 5; Ex. 7, at 2; Ex. 8, at 2.

To ensure that crews know how to be safe on breaks, Brink's provides extensive training on the proper way for a Messenger to relieve a Driver without sacrificing employee safety. RP 11/10/09 at 64, 72-73; RP 11/19/09 at 14; RP 11/17/09 at 129-31; Ex. 9, at 48. Because the Driver's fundamental responsibility is to operate the vehicle, Drivers have no reason, other than taking breaks, to exit the armored workplace and leave the front compartment during the run. To allow Drivers the discretion to safely do so, Brink's has trained all Drivers with a detailed procedure entitled "Vehicle Security-Relieving Driver of Duties." Ex. 2, at 44-45.

For safety reasons, Brink's also provides guidance to crew members regarding the times and places for appropriate breaks. As stated in the Handbook, "[i]t is the messenger's responsibility to see that lunch and comfort stops are not routinely taken at the same time and place." Ex. 2, at 45-46; *see also* Ex. 9, at 48-49.¹ Brink's does not schedule meal and rest periods within the Start System of operations. Messengers and Drivers have the discretion to take these breaks when and where they

¹ The breaks allowed are also reflected in the rule that "[a] messenger . . . is not allowed to sit in the front compartment *during lunch or other breaks.*" Ex. 2, at 18. Likewise, breaks are assumed in the instruction that "[u]se and/or possession of alcoholic beverages . . . while on duty, *including during coffee or lunch breaks,*" may result in discharge. Ex. 2, at 3.

choose. *See* RP 11/19/09 at 74; RP 11/12/09 at 4-5; RP 11/16/09 at 103-04. Because crews have field discretion to sequence stops and are “on [their] own” during the run, RP 11/12/09 at 97; RP 11/19/09 at 84, management can not and does not require crews to stop at a given place or time. Indeed, it is impossible to predict where a crew might be, RP 11/16/09 at 100, let alone whether they might be in a position and mood to take a break. It is far more sensible for Brink’s to allow crews the discretion to take breaks when, where, and how they like. Not only does the field discretion within the Start System enable employees to tailor their breaks to their individual preferences, it prevents predictability, thereby promoting safety and security. RP 11/10/09 at 96; RP 11/12/09 at 97.

The structure of the Start System provides enough time for all allowed breaks. In Seattle, Harry Graham designed routes to give crews time for all breaks, and then some. Ex. 10, at 17:1-13. Though crews were free to sequence stops as they liked, Graham set the travel speed on the MapPoint program to the slowest setting, adding 30 to 45 minutes to the estimated travel time for a day’s run. *Id.* at 33:23-35:13. On top of this, Graham built in 30 minutes for a meal period and two 10-minute blocks for rest periods. *Id.* at 53:15-54:13.

The Brink’s Start System does not schedule, require, or indicate a run end-time. Crews are asked to complete their runs safely and efficiently but are not required to return to the Branch at a particular time. *See* RP 11/10/09 at 124-25. To the extent management advises crews to “keep the vehicle moving” by telephone during a run, it is because

management doesn't even know where the crew is at any given time. Also, it reflects the basic idea that "[t]he longer a truck sits in one location," the more it "poses a security risk." RP 11/10/09 at 127. It is only responsible for Brink's to "check in" with crews by telephone occasionally during a run to locate the armored vehicle, particularly given the amount of valuables on the armored vehicle. RP 11/19/09 at 39. Indeed, it is in each crew member's safety interest to complete runs quickly, as it minimizes time on the street, thereby enhancing personal safety. *See* RP 11/16/09 at 104.

Another advantage from the crew member's perspective of completing runs quickly is the availability of another crew to assist in "bank-outs," eliminating extra work for them at the end of the workday so that they can go home as early as possible. Contracts with certain customers require that liability received during a run be deposited at their own vaults on the same day. These transactions, known as "bank-outs," can be performed in one of three ways. If the crew receiving the liability during a run earlier in the workday arrives at the Brink's Branch between 5:00 and 5:30 p.m., another crew will continue the delivery of the liability to the bank vault. If the crew receiving the liability does not arrive at the Brink's Branch between 5:00 and 5:30 p.m. it can either (a) perform the bank-out itself (extending the workday, and receiving extra wages), RP 11/16/09 at 127, 142; or (b) exchange liability with another crew on the street, which will then perform the bank-out. There is no evidence of a class member ever being disciplined for returning to the Brink's Branch

after 5:00 to 5:30 p.m. and missing a bank-out. The only “consequence” of consistently missing bank-outs is reassignment of the run to a more efficient crew, and of the crew missing the bank-outs to a different route. RP 11/19/09 at 19; RP 11/10/09 at 126.

2. Meal and Rest Breaks

The exercise of field discretion under the Start System to complete a run as early as possible is understandable, however, and it leads many crew members to decide to take shorter breaks *voluntarily*. As Plaintiff put it, “[w]hile you are on your own, you are free to get in and out of the vehicle, however you want—whenever you want.” RP 11/12/09 at 97. Some crews take long breaks; others do not. Either way, it is their own personal choice. RP 11/19/09 at 50-51, 74; RP 11/10/09 at 169; RP 11/16/09 at 103-04.

The ways in which crew members took allowed breaks varied considerably. For instance, although Plaintiff usually brought food and coffee from home, she occasionally bought lunch from a restaurant, including Brink’s client McDonald’s, where she received food for free. RP 11/10/09 at 170; RP 11/12/09 at 13. Some days she filled a travel mug at a coffee stand along the route; other days she did not. As a Driver, Plaintiff would eat after the Messenger went into a secure location and she was sitting alone in the armored vehicle workplace; as a Messenger, she would eat in the rear of the armored vehicle between stops. At times, Plaintiff smoked four or five cigarettes a day—either inside or outside the vehicle, depending on the circumstances. RP 11/10/09 at 149-55, 177-78;

RP 11/12/09 at 7-10, 13. She even exercised her discretion to make personal calls from the armored vehicle workplace on her cell phone. RP 11/12/09 at 80-81.

Another crew member, Neil McCracken, routinely visited a “teriyaki joint”—away from any customer location—so often he had a special system. He would call ahead during work time from the armored-vehicle workplace utilizing his mobile phone to submit his food order, and then pick up and enjoy that food during break time. As a Driver, he decided to eat the food (which he had previously picked up) while his Messenger was inside a customer stop or while driving between stops. As a Messenger, he decided to eat the picked-up food in the back of the vehicle. He smoked in the vehicle, and usually used the bathroom once or twice per day, spending three or four minutes each time. RP 11/17/09 at 113-14, 116-17, 123, 154, 162-64, 167.

Michael Jaquish chose a 50-50 split between bringing lunch and buying food on the run. Unlike McCracken, however, Jaquish purchased his food after completing a customer stop, at locations that were part of the run (e.g., McDonald’s, QFC, and Safeway). Although Jaquish indicated he urinated in a cup on a few occasions in the armored-vehicle workplace, he instructed crew members that such was against Brink’s policy and encouraged them to use a restroom outside of the workplace. RP 11/16/09 at 35. David Bargman, the Seattle Branch Manager, delivered the same message. RP 11/10/09 at 148-49. .

On the other end of the spectrum, Carl Boyd *always* packed a lunch—not for lack of time to buy food, but “because it is too expensive to buy food every day.” RP 11/19/09 at 15. Boyd also avoided busy restaurants and the waste of allowed break-period time, because “you don’t want to wait 20 minutes in line.” *Id.* at 17. Still, he recognized under the Start System he had the discretion to stop and buy a sandwich, and did so, *id.* at 10, and that he had the ability to “stop at a stop that wasn’t on [his] guide sheet . . . to get something to eat.” *Id.* at 17. Boyd never lacked time to purchase and eat a meal. Nor was he rushed while taking restroom breaks, which he took as often as needed. *Id.* at 18. He also admitted that “it is fair to say that on occasions when [he] or the crew did not take meal or rest periods, it was because [he or they] chose not to take them.” *Id.* at 71.

Darryl Bartlett preferred not to exit the workplace and purchase food. He worked with crew members who stopped the vehicle to purchase and eat food, regardless of his personal exercise of discretion to eat in the armored-vehicle workplace. These stops lasted around ten minutes. As a Driver, he stopped to allow the Messenger an opportunity to purchase food. RP 11/17/09 at 181-82, 185. Bartlett also observed crew members “[s]top and go shopping at a store . . . spending 20 minutes inside.” *Id.* at 204.

The evidence of taken meal periods was literally strewn throughout the armored vehicles, which was known to management. At the end of the day, “there [wa]s lots of garbage” in the vehicles, including “[w]rappers,

cups, left-over food, ketchup packets,” and so on. RP 11/19/09 at 90-91. In contrast, there was *no* evidence of a Messenger denying a Driver—or vice versa—a break. *See, e.g.*, RP 11/16/09 at 154. Again, breaks were always determined in the course of field discretion among crew members within the Start System:

Q. When you were a driver, were you ever denied any coffee, food, drinks while you were on the run?

A. No. The most that would happen is sometimes the messenger would say “let’s wait until the next stop.”

Q. That was field discretion?

A. Yes, we communicated, we decided what was best for us and we balanced everything. RP 11/16/09 at 97-98. *See also* RP 11/16/09 at 166.

3. Vigilance as Common Sense

Brink’s only makes one request of crew members during breaks: that they be “vigilant,” or careful (using common sense), to promote safety and to minimize the dangers of working with a firearm. RP 11/19/09 at 8. Within the Start System, Messengers and Drivers decide for themselves what vigilance, or care and common sense, requires in light of the prevailing situation. Depending on the situation (e.g., purchasing food in a good neighborhood versus a bad neighborhood), it could mean a casual eye in one case, but a more active scanning in another. *Compare* RP 11/19/09 at 11 *with* RP 11/16/09 at 17. But the baseline, as emphasized in training and publications, is best described as “relaxed but alert,” particularly when “on duty.”

To further promote employee safety, Brink’s urges crew members to be alert and use sound judgment. RP 11/10/09 at 77, 90. The

Handbook explains that “[b]ecause of the nature of our work and the fact that employees are handling firearms [as licensed by the State of Washington], it is absolutely necessary that all employees be alert and use good judgment at all times.” Ex. 2, at 4. Brink’s echoes this message in its Basic Blue Training. Ex. 11, at 7.

But Ms. Pellino said it best: remaining vigilant is just exercising “common sense.” RP 11/12/09 at 98. She recognized the importance of vigilance: “By letting your guard down and not remaining vigilant,” you are more likely “to be taken advantage of.” *Id.* at 76-78; *see also id.* at 97-98. Because the name “Brink’s” is associated with access to money, crew members are encouraged to be relaxed but alert at all times away from the Branch. RP 11/19/09 at 52-53; RP 11/10/09 at 151; RP 11/16/09 at 172.

The views of Michael Jaquish, the trainer, are especially informative. He instructed Drivers and Messengers that they should normally operate under Condition Yellow, “a condition of what they call relaxed but alert.” RP 11/16/09 at 17.² Not only did Jaquish admit that one could be simultaneously “alert” and “relaxed,” he published a book promoting the idea. *Id.* at 87-88. Entitled “The Personal Survival,” Jaquish’s book recommends that every person, no matter her occupation, *always* be at Condition Yellow when outside the home. *Id.* at 88. According to Jaquish, “being alert but relaxed is a method of appropriately surviving in the United States.” *Id.*

² Employees were not advised to move to Orange until a threat was perceived. RP 11/16/09 at 18. Rather, they were simply asked to be “aware of [their] surroundings.” *Id.* at 84.

Jaquish's views on Condition Yellow are reflected in the Brink's Firearms Manual ("Manual"). Ex. 12. Consistent with Jacquish's advice, the Manual describes Condition Yellow as being "relaxed but alert." *Id.* at 80-81. The Manual indicates that vigilance is not paranoia, but simply a reasonable state of awareness:

It is not suggesting paranoia but simply being aware of the environment and being alert to detect potential hazards. It is dangerous to be unaware and unconcerned about the surrounding environment. An individual not properly conditioned may not be able to go from an unaware state of mind to a state of alertness quickly enough and this may endanger not only the individual but his or her partners. *Id.*

Brink's emphasized to Messengers and Drivers that their safety was priority number one. Crew members "were always told that . . . [the] main thing is making sure that everyone is safe." RP 11/12/09 at 24.

Crew members had no trouble looking out for their own safety—practicing vigilance—while eating a meal or otherwise taking a break. Boyd "could eat and look out the window" of the armored-vehicle workplace and he felt safe while doing so. RP 11/19/09 at 50. "Scanning and remaining vigilant" did not impede Pellino from "eat[ing] after [her] messenger had secured himself inside of the customer location." RP 11/10/09 at 149. Nor did vigilance prevent her from purchasing coffee at the local QFC. *Id.* at 152.

Jaquish summed it up best, however, when he explained what "vigilance" looks like in practice:

[A] lot of their job involves *sitting in the back of their truck and not doing anything for long periods of time*. So there is no reason why you can't relax your eyes. You are

not supposed to sleep but *a lot of them did relax and eat their lunch*. They . . . *could, for sure, eat their lunch*. RP 11/16/09 at 80.

No evidence was presented that any Driver or Messenger was not allowed a break, or ever called upon to take action based upon remaining vigilant and careful during a meal or rest period or otherwise. Nor was any evidence presented by Plaintiff as to exactly what “vigilance” meant, was, or is in the context of “work” or as a matter of law. No evidence was presented that employees were called upon to enforce rules against other employees or persons during breaks, nor was any evidence presented that a third party attacked a vehicle or any Brink’s employee during the class period.

B. Complaint and Class Certification

Plaintiff filed her complaint on April 25, 2007, on behalf of all Messengers and Drivers in the Seattle and Tacoma Branches. She asserted four counts corresponding to two theories of liability: (1) failure to “allow” meal and rest periods; and (2) failure to pay for alleged “pre-shift” work. *See* Ex. 13, at ¶¶ 4.1-4.9.

Plaintiff moved for class certification on October 29, 2007, arguing that common questions of law and fact predominated because all Messengers and Drivers were (1) forced to perform duties before their scheduled start times, and (2) “subjecte[d] to the same requirement of constant vigilance” that supposedly precluded breaks. *See generally* Ex. 14. In response, Brink’s offered the testimony of ten Messengers and Drivers demonstrating that crews were paid for all time worked, that crews

were “on duty,” and that breaks were allowed and taken according to crew members’ discretion. The court granted Plaintiff’s motion on June 3, 2008.

Brink’s moved for decertification on September 14, 2009. Further discovery confirmed that break practices varied dramatically, undermining the legitimacy of the class. *See* Ex. 15 at 1. In contrast to the conclusory affidavits relied upon by the court in its initial decision, detailed deposition testimony showed that crew members were instructed they *should* take breaks but *decide for themselves* when, where, and how. *See id.* at 13-16. This individual discretion—and the variations it produced—was the natural consequence of the Start System, where stops were sequenced by employees and runs varied greatly in terms of numbers of stops and total distance and crews were far away from managers back at the Branch. *See id.* at 13-18. Despite this testimony, the court stood by its earlier decision. Ex. 16.

Because a plaintiff bears the burden of showing that a class should remain certified through judgment, Brink’s made a final attempt to decertify the class at trial. In addition to the trial testimony showing highly individualized discretionary break practices, the supposed class claim of unpaid “pre-shift” work was abandoned—mere days before trial was scheduled to start. Again, the court refused to decertify.

C. Summary Judgment

The parties filed cross-motions for partial summary judgment on June 12, 2009, contending they were entitled to judgment as a matter of

law on the break claim. Ex. 17, at 1; Ex. 18, at 1. While the court denied both motions in its July 20, 2010 ruling, it made a number of factual findings that supported Brink's position:

Extra time is included in the schedule to account for traffic congestion and Brink's makes an allowance for a 30-minute meal period and two 10-minute rest periods. Drivers are not required to return the vehicle at any particular time and are paid until the truck is returned and the crew clocks out. If a crew member informs management that he or she did not have sufficient time for a meal or rest period on a particular route, the route is adjusted accordingly. Ex. 19, at 2.

These findings notwithstanding, the court held that Brink's policy encouraging "vigilance" could potentially give rise to a violation of the Code. *See id.* at 4-5. The court held that requesting "vigilance" could be asking too much if it "undermines the purpose of the break, precluding the employees from eating during their lunch break or getting relief from work or exertion during their breaks." *Id.* at 4. This, the court held, was a question to be resolved at trial. *See id.* at 6.

D. Trial

Trial began on November 9 and ended on December 16, 2009. Plaintiff put on eight class-member witnesses. Content that their testimony—even if credited in every detail surviving after cross examination—did not establish a violation of the Code, Brink's declined to offer any testimony in rebuttal. Plaintiff also put on two purported expert witnesses, Drs. Robert Abbott and Jeffrey Munson. Brink's moved to strike their testimony on various grounds, but the court denied these

motions.

The court issued its oral decision in favor of Plaintiff on January 7, 2010. As would be the case in its formal Findings of Fact and Conclusions of Law, the court relied on the evidence that Messengers and Drivers were “always vigilant.” RP 1/7/10 at 14.

E. Findings and Conclusions

The court issued its Findings and Conclusions on March 9, 2010, which were nearly identical to those suggested by Plaintiff. *Compare* Ex. 20 *with* Ex. 21.

Though the Code states that employees “shall be *allowed*” a meal period, WAC 296-126-092(1), the court held that employees “*shall receive* a meal period,” Ex. 20, ¶ 7, p. 26. The court further held that, even if an employee is paid during a meal period, “she cannot be *required* to carry out active work activities.” *Id.* at ¶ 9, p. 27. Additionally, the court decided that the Code’s reference to an “on duty” paid meal period was inexplicably “limited to being on call.” *Id.* at ¶ 10, p. 27. Next, the court held that if an employer violates the paid meal period provision, it must pay the employee *additional* wages on top of those already paid for the on-duty meal period, extending the rule from *Wingert v. Yellow Freight Sys., Inc.*, 146 Wn. 2d 841, 848 (2002). Ex. 20, ¶ 12, p. 28. The court held that class members “received only legally defective break time,” in terms of both rest and meal periods. *Id.* at ¶ 14, p. 29. It based this conclusion almost exclusively on Brink’s advice to remain vigilant. *See id.* at ¶ 16, p. 29.

Similarly, because Brink's encouraged its employees to always maintain a personal level of vigilance and because vigilance is immeasurable, the court held that "the concept of intermittent breaks is inapplicable here." *Id.* at ¶ 19, p. 30. Because crews were advised to use common sense during break periods, the court concluded that "any time class members spent going to the restroom or eating . . . does not constitute lawful break time under Washington law." *Id.* at ¶ 18. p. 30.

F. Judgment and Appeal

The court issued judgment in favor of the class on March 9, 2010 in the amount of \$1,297,312.45. CP 249 at 1. Brink's filed its notice of appeal on March 19, 2010. CP 252.

V. Summary of Argument

The lower court committed three fundamental errors, among many. First, it completely misconstrued the language of section 296-126-092, virtually rewriting the Code. Although the Code is designed to grant employers the option of allowing paid meal breaks, the court plucked this concept out of the Code. If employers are prohibited from merely advising employees to be safe while on paid breaks in or out of the workplace, the on-duty meal period concept in the Code will be effectively eliminated. Similarly, the court ignored the Code's authorization of intermittent rest periods. DLI authorized intermittent rest periods for precisely the situation presented here, where fully scheduled and uninterrupted rest periods are not feasible, practicable, or chosen by employees within their discretion.

The second fundamental error committed by the court was its decision to certify and maintain this case as a class action. The ebb and flow of an employee’s workday is *not* defined by Brink’s. It is defined by the employee herself, exercising the broad field discretion inherent within the Start System. Brink’s employees have discretion over when, where, and how to make customer stops and take breaks, including whether to take breaks at all. As one would expect, this discretion yielded break practices that varied dramatically across the class and over time. Commonality was nowhere to be found.

The final key fundamental error committed by the court was its assessment of damages. Even though Plaintiff’s damages “expert” relied on incomplete data that had been collected, managed, and manipulated by Plaintiff’s counsel—and the expert based his alleged calculations on faulty assumptions that *conflicted* with the assumptions employed by Plaintiff’s liability “expert”—the court nonetheless concluded that the calculations were reasonable. The record proves otherwise.

VI. Argument

A. Standards of Review

This Court reviews a lower court’s interpretation of a regulation *de novo*. *ShareBuilder Sec., Corp. v. Hoang*, 137 Wn.App. 330, 334 (2007). A regulation must be given its plain meaning. *Lake v. Woodcreek Homeowners*, 168 Wn. 2d 694, 704 (2010).

A decision on class certification is reviewed for abuse of discretion. *Nelson v. Appleway Chevrolet*, 160 Wn. 2d 173, 188 (2007).

So too with an award of damages following a bench trial. *Harmony v. Madison Harmony Dev.*, 143 Wn. App. 345, 357-58 (2008). “A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds.” *Id.* at 358. *See also Eriks v. Denver*, 118 Wn. 2d 451, 466-467 (1992).

B. The Court Abused its Discretion in Certifying and Maintaining this Case as a Class Action

A case should be decertified whenever it appears to no longer meet the requirements for class actions. *See Weston v. Emerald City Pizza LLC*, 137 Wn. App. 164, 168 (2007); *Miller v. Farmer Bros.*, 115 Wn. App. 815, 820-821 (2003). Until a final judgment, the plaintiff bears the burden of proving that each requirement for certification is satisfied. *Weston*, 137 Wn. App. at 168. Plaintiff failed to sustain her burden.

As explained in *Weston*, common issues predominate only when “the defendant has engaged in a ‘common course of conduct’ in relation to all potential class members.” *Id.* at 170. Thus, there must be an employer-imposed “rule” or “uniform policy.” *Id.*; *Garcia v. Johanns*, 444 F.3d 625, 632 (D.C. Cir. 2006); *Bolin v. Sears*, 231 F.3d 970, 975 (5th Cir. 2000).

Brink’s had no uniform rule or policy on breaks—let alone one that was proven at trial—other than that breaks were allowed to all crew members within their discretion within the Start System of field operations. Indeed, the Start System of field operations was based on the *absence* of requirements; the only “rule” was that crew members start

work at certain times and thereafter use sound judgment in exercising their field discretion as to stops and allowed breaks while on duty. Because of this approach to allowed break practices, such practices varied from employee to employee. Apart from timing, the choice of work environment as to breaks—inside or outside the armored vehicle—was characterized by a *lack of uniformity*. Plaintiff showed nothing more than “diverse acts in various circumstances.” *Bolin*, 231 F.3d at 975. Simply put, Brink’s allowed breaks and requested that they be taken safely, but left everything else up to the employee.

Typicality, too, was nowhere in sight. The trial testimony showed that Plaintiff’s work and on-duty break practices varied significantly from those of her colleagues. Her claim did not “arise[] from the same event or practice or course of conduct that g[a]v[e] rise to the claims of other class members,” *Smith v. Behr*, 113 Wn. App. 306, 320 (2002), because Plaintiff exercised her field discretion according to her own personal inclinations. She smoked, either inside or outside the armored vehicle; others didn’t. She received free food at McDonald’s stops; others packed a lunch. Plaintiff was not representative or “typical” of the eight class members who testified, let alone of the entire class waiting in the wings.

C. The Court Misinterpreted the Code

The lower court’s order on summary judgment and its Conclusions of Law reflect a thorough misunderstanding of the Code’s purpose and intended consequences. In cases alleging a violation of a regulation, the analysis must begin with the language itself. *Valley Envtl. Lab. LLC v.*

Yakima Cnty., 139 Wn. App. 239, 244 (2007). Here, the trial court (1) ignored the meaning of the word “allowed”; (2) disregarded the fact that Brink’s does not “require” employees to work more than five consecutive hours without a meal period (or more than three consecutive hours without a rest period), thereby effectively eliminating the “allowed” “on-duty” meal period provided in the Code; and (3) gutted the concept of intermittent rest periods advanced by the Code.

1. Employers Must “Allow” Meal and Rest Breaks; They Need Not Provide, Enforce, or Police Them

The Code states that “[e]mployees shall be allowed” meal and rest periods. WAC § 296-126-092(1), (4). This does not mean, as the trial court concluded, that employees “*shall receive*” these breaks no matter what, as taking breaks is the choice of the employee, not the employer. Ex. 20, ¶ 7, p. 26. Much less does the Code’s use of the term “allowed” mean “the employer [has] an *affirmative obligation to make sure they are provided and taken.*” *Id.* ¶ 11, pp. 27-28.

Instead, “shall be allowed” means that employers cannot stand in the way of employees who choose to take breaks. As explained in *White*:

WAC 296-126-092 does not require an employer to schedule meal periods for its employees. Rather, it states that “[e]mployees shall be allowed a meal period” ***The employer cannot prevent an employee from taking their meal period, but there is no affirmative duty on the employer to schedule meal periods for a specific time.***

White v. Salvation Army, 118 Wn. App. 272, 279 (2003) (emphasis added). In other words, an employer may not prevent an employee from

taking a break. On the other hand, that the break actually occurs lies within employee free choice under the Code.

Employers need not “schedule meal periods for a specific time.” *Id.* If an employer does not even know when an employee will take a break because it has left the break unscheduled and at the employee’s discretion, how can it “make sure” that the break actually occurs? The answer is that it cannot, which is consistent with the idea that breaks are “allowed” by employers, not that employees “shall receive” breaks or that employers have “an *affirmative obligation to make sure they are provided and taken.*” Ex. 20 at ¶ 7, p. 26; ¶ 11, pp. 27-28.

The federal court recognized this straightforward concept in *Eisenhauer v. Rite Aid*, 2006 WL 1375064 (W.D. Wash. 2006). Eisenhauer was a pharmacist who could not leave the pharmacy because it was open at all times and “did not schedule ‘overlapping’ pharmacist shifts.” *Id.* at *1. Although Rite Aid “allowed” Eisenhauer to take breaks, it was his obligation “to make suitable provisions for his lunch and other breaks while he was on duty.” *Id.* He exercised his discretion to skip meal breaks and simply “grab a bite here [and] grab a bite there.” *Id.* at *3 The court rejected Eisenhauer’s claim that he was not allowed breaks because he (1) “chose when and how to eat his meals”; and (2) “was paid for all of his time.” *Id.* Like the *White* Court, the court in *Eisenhauer* held that the Code “does not require an employee to take a meal break. Instead, the language of the statute is *permissive . . .*” *Id.* at *2

In sum, the “shall be allowed” language of the Code does not impose upon employers “an affirmative obligation to make sure [breaks] are provided and taken.” Ex. 20, ¶ 11, pp. 27-28, 30-31. The lower court was mistaken.³

2. Brink’s Did Not “Require” Employees to Work Without Breaks

A plaintiff suing under the Code has the burden of proving a violation. *Iverson v. Snohomish Cnty.*, 117 Wn. App. 618, 622 (2003). But a plaintiff does not carry that burden simply by proving she was not “allowed” a meal period; she must also prove she was “*required* to work more than five consecutive hours without a meal period.” WAC 296-126-092(2); *see also* WAC 296-126-092(4) (“No employee shall be *required* to work more than three hours without a rest period.”). If the employer does not “require” the employee to work more than five consecutive hours without a meal period, or more than three consecutive hours without a rest period, it has not violated the Code. *Id.*

There is no evidence that Brink’s “required” the class to work more than five consecutive hours without a meal period or more than three consecutive hours without a rest period. Even if the trial court properly concluded that “vigilance” constitutes “work”—Brink’s disagrees—the class still needed to show that the “vigilance” requested was an instruction

³ The trial court’s reading of the word “allow” is also contradicted by the use and definition of the word “allow” in other contexts. *Washington v. Tracy*, 128 Wn. App. 388, 396 (2005) (equating “allow” with “to accord permission or consent to”); *Washington Water v. Yarbrough*, 148 Wn. 2d 403, 410-11 (2003) (contrasting “allowing” work with “forcing” work); *City of Lakewood v. Pierce Cnty.*, 106 Wn. App. 63, 73 (2001) (equating to “allow” with to “grant” and “to permit as a right [or] privilege”).

that breaks were not “allowed.” “[T]o ‘require’ means to ‘claim by right and authority: insist upon,’ to ‘demand,’ or ‘to impose a compulsion or command upon [someone] to do something.’” *City of Lakewood*, 106 Wn. App. at 73.

The lower court never determined whether Brink’s “impose[d] a compulsion or command” to remain vigilant in order to eliminate allowed breaks. If it had endeavored to actually determine this issue, the court would have found that Brink’s only *encouraged* vigilance during the allowed breaks—nothing more, nothing less—and breaks were allowed as reflected in training and postings. Indeed, because Messengers and Drivers were unsupervised during runs, Brink’s had no ability to “compel” vigilance, assuming the concept of vigilance could even be measured directly, much less do so by telephone. All Brink’s could do—all it *did* do—was train and inform employees that breaks were allowed and mention that safety was required while on duty, including during breaks. Thus, even if maintaining vigilance during a break constitutes “work” (and it does not), Brink’s did not “require” that “work,” nor did it interfere with the allowed breaks.

D. Employees May Be Required to Remain “On Duty” During Meal Periods

The Code states that “[m]eal periods shall be on the employer’s time when the employee is required by the employer to remain *on duty* on the premises or at a prescribed work site in the interest of the employer.” WAC § 296-126-092(1). In other words, an employer may require an

employee to remain on duty during a meal period, but the employer must pay wages in return. This is a simple concept; unfortunately, the trial court failed to appreciate and apply it correctly.

a. **The Court Erred in Concluding that
“No Active Work Can Be Performed”**

The court concluded that “no active work can be performed” during a paid meal period. Ex. 20, ¶ 10, p. 27. That was plain error. In *Iverson*, a corrections officer was required to remain at his post and perform numerous duties during his meal period. *Iverson*, 117 Wn. App. at 620. Though he was paid for the time, he contended he was due additional compensation because he was required to perform numerous duties beyond an appreciation of the dangerous surroundings inherent in the prison system, or “vigilance” for his own safety, while on break or otherwise. *Id.* at 621. This Court disagreed. *Id.* at 623.

In *White*, employees similarly requested additional compensation because they performed certain duties during on-duty meal periods. *White*, 118 Wn. App. at 278. Agreeing with the *Iverson* panel, the Court held that the employer “*could* require its employees to interrupt their meal periods with work . . . as long as it paid them.” *Id.* at 280. Because the defendant paid the employees for their entire shifts, no additional compensation was due. *Id.* at 274-75, 280-81. The Court was not convinced that the defendant failed to allow meal periods because there was no decrease in work duties. Instead, the Court held that a decrease in work duties has “*no bearing*” on compliance with the Code. *Id.* at 278.

Nevertheless, the court below was troubled by the statement in *Frese v. Snohomish County*, 129 Wn. App. 659, 666 (2005), that an employer cannot “demand unremitting work through the [paid] lunch period.” See Ex. 20, ¶ 9, p. 27. But the notion that there may be a *limit* to the level of permissible work during an on-duty meal period does not mean that work is forbidden *altogether* during the meal period. That is like concluding that all physical contact is forbidden in hockey because *certain* contact is out of bounds.⁴ At most, *Frese* only establishes that employees must still have the physical ability to eat. See *Frese*, 129 Wn. App. at 670. Because the Brink’s employees testified without exception that they *had* time and the ability to eat, RP 11/12/09 at 1-2; RP 11/16/09 at 97, 154, this aspect of *Frese* is not controlling. What’s more, *Frese* expressly confirmed that “employees who are paid to be on the premises and on call during meal breaks are *not* entitled to additional pay simply because the breaks are unscheduled, intermittent, or *interrupted by work duties.*” *Frese*, 129 Wn. App. at 670.

The bottom line is this: because the class members still had the physical ability to eat and took the break time, “[d]ecreased duties had no bearing” on the meal break analysis. *White*, 118 Wn. App. at 278.⁴

⁴ This view has also been taken up by the federal courts. Citing to *White*, the district court explained in *Bell v. Addus Healthcare*, 2007 U.S. Dist. LEXIS 13065 (W.D. Wash. 2007), that “*the employer need not reduce employees’ duties during the meal period.*” *Id.* at *22-23. The federal court came to the same conclusion in *Eisenhauer*. In addition to concluding that “Washington law does not require that breaks be taken,” the *Eisenhauer* court rejected the plaintiff’s “claim that the break periods were not met because he was never completely relieved of his duties.” *Eisenhauer*, 2006 WL 1375064 at *3. As the court explained, “[t]his was much the same argument as was made [and rejected] in *White* . . . and *Frese*” *Id.*

Accordingly, the court below erred in its conclusion that “no active work can be performed” during a paid meal period, assuming the concept of “vigilance” for one’s own safety is even “work.” Ex. 20, ¶ 10, p. 27. After all, why would employers bother to pay their employees for on-duty meal periods if they could not even request that they be careful or use common sense? Or, for that matter, why would the Code allow for “on-duty” meal periods if it was in reality effectuating the concept of “off-duty” meal periods?

b. Conflation of “On Duty” with “On Call”

The court below confused the distinct concepts of “on duty” and “on call.” The Code states that “[m]eal periods shall be on the employer’s time when the employee is required by the employer to remain *on duty*” WAC 296-126-092(1). Nowhere does it mention the phrase “on call,” let alone equate it with “on duty.” Nevertheless, the lower court concluded that “this ‘on duty’ responsibility is limited to being ‘on call.’” Ex. 20, ¶ 10, p. 27. As a result, it held that “no active work can be performed” during paid meal breaks. *Id.*; *see also*, ¶ 9, p. 27. That is not what DLI intended in promulgating the Code.

Being “on duty” is not the same as being “on call.” Being “on call” is generally defined as waiting to be *called* upon by the employer to perform work. Time “on call” *may* be compensable “work” if an employee is waiting to be called upon to work. But, unlike time “on duty,” time “on call” is not by definition compensable, as here, where there is no evidence that any crew member was waiting for Brink’s to

make an assignment, as crew members decided run structure on their own. *See Armour v. Wantock*, 323 U.S. 126 (1944); *Skidmore v. Swift*, 323 U.S. 134 (1944).

This distinction is well recognized under Washington law. *See, e.g., Chelan Deputy Sheriffs' Ass'n v. Chelan Cnty.*, 109 Wn. 2d 282, 298-97 (1987); *Guard v. Friday Harbor*, 22 Wn. App. 758, 760 (1979). Indeed, employees “on call” are frequently *uncompensated* for time spent in that status, during which no obligation to “engage in active duty” or “work” is present. *See* 29 C.F.R. § 785.17; *DePriest v. River*, 187 Fed. Appx. 403, 404 (5th Cir. 2006).

In contrast, employees are required to be paid when they are “on duty.” An employee who is “on duty” *cannot* be “on call”—if simply because she already has her assignment. *See Buchanan v. Dep't of Energy*, 247 F.3d 1333, 1339 (Fed. Cir. 2001); *Reich v. Southern New England Telecom. Corp.*, 121 F.3d 58, 66 (2d Cir. 1997). Whether taking a break or not, an “on duty” employee has already been “called” upon to engage in work—herein, the essence of the Start System. *See, e.g., Owner-Operator v. FMCSA*, 494 F.3d 188, 208 (D.C Cir. 2007).

DLI was aware of this distinction when it drafted the Code, recognizing that the duty to pay wages during a meal period is only triggered when the employer “requires the employee to act in the interest of the employer.” DLI Policy § 7. In other words, DLI realized that being “on duty” requires acts in the interest of the employer. *Id.* Being “on

call”—subject to the *possibility* of a request for action on behalf of the employer at some uncertain future time—is not being “on duty.”

The cases discussing paid meal periods reinforce this point. Indeed, *Iverson* alone should put the matter to rest, as the Court clearly held that an “on-duty” meal period contemplates active duty, not just being on call. *See Iverson*, 117 Wn. App. at 620 (affirming summary judgment for employer even though Iverson had to “remain at his post and perform numerous duties”).

c. At The Very Least, the Code Allows An Employer to Advise Vigilance During Breaks

But even if the Code does not allow all “active work” during on-duty paid meal periods—and there is little question that it does allow work, “active” or otherwise, as it allows employees to “act in the interest of the employer”—it most certainly permits the simple advice to remain vigilant, to stay “relaxed but alert” during the break.

To begin with, if an employee does nothing more than keep an eye out for her own safety during a break (or in life), she is not performing “work.” The evidence demonstrates that advising “vigilance” is nothing more than a reminder to exercise common sense while on duty. RP 11/12/09 pp. 97-98. “Because of the nature of our work and the fact that employers are handling firearms, it is absolutely necessary that all employees be alert and use good judgment at all times.” Ex. 2, § 1.020, p. 4. Indeed, handling a firearm under Washington law allows no break

from safety.⁵ As Jaquish observed, vigilance does not mean being on edge or jumping at every flash of motion. Instead, it means being “relaxed but alert,” operating under “Condition Yellow.” RP 11/16/09 p. 17.⁶ The evidence at trial plainly showed that the advice to be relaxed but alert is just a reminder to exercise common sense under the circumstances of the armored vehicle industry. That is not “work.” It is just good advice, particularly when licensed and armed under Washington law.

That “vigilance,” or the exercise of common sense, is not “work” is established through reference to the definition of “hours worked” under WAC 296-126-002 and DLI’s interpretation of that regulation. The MWA requires an employer to compensate an employee for all hours worked. RCW § 49.46.020. DLI has clarified that “‘hours worked’ means all work requested, suffered, permitted, or allowed.” DLI Admin. Policy on “Hours Worked,” § 1.

But there is no authority for the proposition that exercising common sense constitutes “work requested, suffered, permitted, or allowed.” Indeed, there are several cases suggesting just the opposite. Washington authority on the point is admittedly lacking, but cases under

⁵ See RCW § 77.15.675 (unlawful to hunt while under influence of intoxicating liquors or drugs); *Second Amend. Found. v. Renton*, 35 Wn. App. 583, 586-87 (1983) (upholding ordinance banning carrying of firearms in taverns in light of “public safety” concerns); *Bernethy v. Walt Failor's Inc.*, 97 Wn.2d 929, 934 (1982) (finding negligent entrustment where gun-shop owner sold rifle to visibly intoxicated customer).

⁶ This message is reinforced through the Firearms Manual, wherein Brink’s advises that “[e]veryone while on duty should work relaxed but alert.” Ex. 12, at 80-81. As the Manual reminds them, their “contact [with firearms] requires [their] constant attention and responsibility.” *Id.* at 1.

the FLSA are instructive. An activity constitutes “work” under the FLSA if it involves “physical or mental exertion” that is “*controlled or required* by the employer and *pursued . . . primarily for the benefit of the employer* and his business.” *Reich v. New York City Transit Auth.*, 45 F.3d 646, 651 (2d Cir. 1995); *Alvarez v. IBP, Inc.*, 339 F.3d 894, 902 (9th Cir. 2003). Here, the evidence shows that vigilance is *not* controlled or required by Brink’s and *not* primarily for the benefit of Brink’s, but rather for the benefit of the employees themselves.

Therefore, while Brink’s pays its employees the entire workday, remaining vigilant, or using care or common sense, does not convert time spent on breaks into excessive “work” because, as *Iverson* and *Frese* suggest, that “task” is so minimal that it is not even cognizable in the analysis, much less measurable. Courts analyzing similar issues have been skeptical to claims that a duty to remain “vigilant” or “alert” constitutes “work.” *See Jonites v. Exelon Corp.*, 522 F.3d 721, 724 (7th Cir. 2008); *Summers v. Howard Univ.*, 127 F. Supp. 2d 27, 34-35 (D.D.C. 2000).

Even if this Court disagrees with Brink’s that vigilance is not “work,” that would still not justify the decision below. The cases addressing on-duty paid meal period violations all *presume* that the need to remain alert or vigilant is permissible. Plaintiff Iverson alleged that his obligation to supervise inmates during lunch and to “respond to emergency situations” was more akin to regular work and, therefore, impermissible. *Iverson*, 117 Wn. App. at 620-21. Although the Court rejected the claim, its analysis did *not in any way* focus on Iverson’s

general duty to remain vigilant for his own safety while in this potentially dangerous workplace (he was surrounded by inmates). Instead, the Court observed that, while Iverson was always alert and poised to respond to emergency situations, the “work” he had to perform in responding to those situations did “not take up more than 10 percent of the lunch period.” *Id.* at 622. In other words, the Court took it for granted that the mere duty to keep a casual eye on inmates, for Iverson’s own safety as much as anything else, could *not* trigger a missed meal period. *Id.* at 622-23. Otherwise, it would have been much easier for the Court to end the inquiry right there—on the vigilance theory offered below.⁷

Consider the practical consequences of concluding otherwise. If the ruling below stands, Brink’s will necessarily instruct its crew members to “be unconcerned about their personal safety” every time they choose to take a break and refuse to pay them for the allowed break. Even though they may be in dangerous circumstances while on the break, Brink’s will have to tell crew members, “It’s okay to be careless while carrying a firearm. During breaks you *must* ignore what’s going on around you

⁷ The Court employed the same presumption in *Frese* where, again, corrections officers sued for wages beyond those already received for paid meal periods. *Frese*, 129 Wn. App. at 661-62. Though the Court suggested the employees *might* have a claim if they “conclusively proved that they never ha[d] time to eat,” *id.* at 670, the Court again took it for granted that the mere duty to remain alert was insufficient, *see id.* at 664. Indeed, the discussion of the pertinent facts proves that the Court was concerned only with *actual*, physical work, not a duty to stay alert in between such tasks. *See id.* Again, it would have been much easier for the Court to simply end the analysis with the observation that the employees undisputedly had a duty to remain vigilant while in the prison workplace. But the Court did not so analyze the case because it realized that a continuing duty to look out for one’s own safety, particularly when possessing a firearm, does not interfere with the ability to take a break. *See id.* at 664-65.

within the armored-vehicle workplace or otherwise.” If the trial court’s decision is affirmed, here is no “on-duty” meal period under the Code,

E. The Court Ignored Evidence of Waiver

The court erred in finding that there was “no evidence in this case to support the conclusion that class members willingly and voluntarily waived their meal breaks.” Ex. 20, ¶ 29, p. 34. The “shall be allowed” language permits waiver of a meal period. DLI Policy § 8. Waiver need not be in writing, but can be inferred from the employee’s decision to keep working when she knows that a break is permitted. *Id.*; *Rhodes v. Gould*, 19 Wn. App. 437, 441 (2006). Because employees are in the best position to decide whether to take an allowed break, courts readily find waiver under the Code. In *Eisenhauer*, the plaintiff waived his right to claim a violation when he “consciously chose when and how to eat his meals.” *Eisenhauer*, 2006 WL 1375064 at *3. By deciding to “grab a bite here [and] grab a bite there,” the plaintiff “waived his right to go back and seek additional compensation for the breaks he chose not to take.” *Id.*

Just as in *Eisenhauer*, Messengers and Drivers “consciously chose when and how to eat [their] meals.” *Id.*; RP 11/10/09 at 176, 178; RP 11/12/09 at 4. If they failed to take certain breaks, they “waived [their] right to go back and seek additional compensation” for any alleged violations. *Eisenhauer*, 2006 WL 1375064 at *3. The Start System provided employees virtually complete discretion to choose when, where, and how to take breaks. The Guide Sheets were simply to-do lists, with employees determining, based on field conditions and personal

inclinations, the order in which to make stops. There was no set time to finish the runs and employees were paid until they swiped out.

Crew members often skipped or took shorter breaks because they wanted to shorten their workday. This is understandable; it was the same motivation that drove Eisenhower to “grab a bite here [and] grab a bite there.” *Eisenhauer*, 2006 WL 1375064 at *3. But just as it was for Eisenhower, it was a voluntary choice amounting to waiver. Finally, to the extent Plaintiff contended it was physically impossible to make all of the required stops on a run and still have time for breaks, she failed to back that up with any evidence whatsoever. If the situation were as Plaintiff described it, she could have conducted a time-and-motion study to substantiate the claim. She did not.

F. Misinterpretation of the Rest-Break Provision

The court’s misunderstanding of “vigilance” also skewed its analysis of the Code’s rest-break provision. Because crew members were asked to remain “relaxed but alert” during rest periods, the court reasoned that (1) the rest periods were legally deficient; and (2) the concept of intermittent rest periods was inapplicable. Ex. 20, ¶¶ 15-19, pp. 29-30.

1. Requesting Vigilance During a Rest Period Is Permissible

Brink’s has already explained why it is permissible to advise “vigilance” during an on-duty paid meal period. This same reasoning applies to rest periods. In *White*, the employees argued that they were denied both rest and meal periods “because there was no decrease in their

work duties.” *White*, 118 Wn. App. at 278. Yet this Court rejected their argument, disagreeing that requiring “a worker to act in the interest of the employer” necessarily defeated the purpose of the break period: “*We see no persuasive basis for distinguishing between permitting a worker to act in the interest of an employer during meal periods and doing so during rest periods . . .*” *Id.* at 283.

Indeed, if an employer can only ask an employee to remain “on call” during a rest period as the court concluded, to advise continued vigilance, or care or the use of common sense, during breaks is to ask no more than that. *See* DLI Policy §§ 10, 13. Brink’s asks Messengers and Drivers to stay “relaxed but alert” during rest periods. It does *not* ask them to take any physical action—like delivering liability—and it allows them to engage in personal activities, like using the restroom, smoking or shopping for clothes. If asking an employee to stay “relaxed but alert” is asking too much, *White*’s holding—that an employer “may require a worker to act in [its] interest” during a rest period—becomes meaningless. *White*, 118 Wn. App. at 283.

2. Messengers and Drivers Took Intermittent Rest Periods

The Code provides that, “[w]here the nature of the work allows employees to take intermittent rest periods equivalent to ten minutes for each 4 hours worked, scheduled rest periods are not required.” WAC § 296-126-092(5). The trial court all but ignored this provision, concluding “that the concept of intermittent breaks is inapplicable here,

because the requirements of active work and the restrictions on personal relaxation, activities, and choice applied at all times during the armored vehicle runs, even during putative breaks.” Ex. 20, ¶ 19, p. 30. Apparently, the court believed that the request to remain vigilant during rest periods somehow made the option of intermittent rest periods inapplicable. But the only conditions placed on the availability of intermittent rest periods are (1) that the “nature of the work” allows such breaks; and (2) that the intermittent breaks not be so brief as to render them illusory. *See* DLI Policy § 2.

The nature of Brink’s operations allows for intermittent breaks for the simple reason that Brink’s allowed these breaks and *employees admittedly took them*. Messengers and Drivers routinely took restroom and smoke breaks. The only so-called “work” they performed was being vigilant, a simple request to use common sense. This is not the sort of break-precluding activity that DLI had in mind when it promulgated the Code. DLI has stated that “[t]he nature of the work on a production line when employees are engaged in continuous activities . . . does not allow for intermittent rest periods.” DLI Policy § 12. DLI was trying to prevent the situation where momentary lulls in work could qualify as intermittent breaks. But that was not the situation here. Unlike employees “engaged in continuous activities” on an assembly line, crew members exercised their discretion and personal inclination to use the restroom, smoke a cigarette, do personal shopping, make personal calls, and send text

messages (or chose not to). The “nature of the work” is perfectly suited to intermittent rest periods for Brink’s crew members.

Likewise, intermittent breaks on the armored-vehicle run were not so brief as to render them illusory. Rest times under an intermittent approach cannot be so short as to be nothing more than the momentary lulls that occur in every work setting. *See* DLI Policy § 5 (“A series of ten one-minute breaks is not sufficient to meet the intermittent rest break requirement.”) Here, however, the breaks taken by crews were *well over* one minute in duration. With restroom breaks, for instance, the witnesses consistently testified to taking as many as four minutes per break. RP 11/16/09 at 128; RP 11/19/09 at 18; RP 1/17/09 at 113-14, 116-17, 123, 154, 162-64, 167; RP 11/10/09 at 147.

Rest breaks were also taken at the Branch when crews completed the first portion of their runs and awaited departure on a late afternoon bank-out or other such run. These crews were free to use the restroom or to spend time in the break room. RP 11/19/09 at 153-154, 194. The court ignored this evidence.

G. Dr. Abbott’s Flawed Liability Analysis

Most of the expert testimony in this case related to the purported calculation of damages. There was, however, a subset of expert testimony that related to liability—that given by Dr. Robert Abbott. This testimony was flawed. Abbott erroneously assumed that employees never took breaks unless they noted them on the Guide Sheet. He assumed employees always wrote down their breaks, which was not proven at trial.

Abbott also ignored the fact that employees spent significant work time at the Branch, during “vault days” (when no armored-vehicle work was performed by employees) and otherwise, where no vigilance was necessary. *See, e.g.*, RP 11/19/09 at 28-29; RP 11/10/09 at 132-33.

Abbott relied solely on the Guide Sheets for his opinions. RP 11/18/09 at 54. His entire testimony revolved around whether Guide Sheets had any *marked* breaks. However, he admitted he did not know whether any breaks were actually taken. *Id.* at 82. While counsel asked the court to infer that the lack of marked breaks meant no breaks were taken, RP 11/18/09 at 116, that was pure speculation.

Pellino testified that the Driver—the only person recording breaks on the Guide Sheet—would not know whether she, as a Messenger, was eating in the rear of the armored vehicle or workplace. RP 11/12/09 at 140. Pellino and other witnesses admitted that Drivers would not know if a Messenger took a break while at a customer location outside the armored-vehicle workplace, and that they often declined or forgot to record breaks. *See* RP 11/10/09 at 135; RP 11/16/09 at 31, 149, 155-156, 189-90. Devignes admitted that whether he logged a rest stop “depend[ed] upon how long the stop took.” RP 11/16/09 at 160. If he could “get [his] food and run out,” he saw “no need to annotate that.” *Id.* And this is on top of the fact that Guide Sheets only listed stop times, not what occurred on those stops. RP 11/16/09 at 108. Crew members sometimes “went and got hamburgers,” with no one the wiser. *Id.* at 108-09.

Moreover, the assumption in Abbott's analysis is that the Guide Sheets cover a crew member's entire day. But part of the day was spent back at the Brink's Branch. For example, Pellino testified about breaks she took at the Branch, including breaks for lunch, RP 11/10/09 at 133-34, 164, and driving the company car to Taco Bell while still on the clock. *Id.* at 158-63. Similarly, Boyd and Desvignes sometimes finished runs early and would go to the break room and rest while still on the clock. RP 11/19/09 at 86-87; RP 11/16/09 at 144.

In order for Abbott's testimony to have shown that breaks were not taken based on the Guide Sheets, the following needed to be proved at trial: (1) that the Guide Sheets encompassed an entire work day; (2) that the Drivers were aware of all breaks that were taken; and (3) that all Drivers consistently wrote down all breaks taken. Plaintiff did not meet her burden to prove any of these facts whatsoever.

H. The Court Erred in Its Approach to Damages

1. Error in Extending *Wingert* to Meal Periods

The first error committed by the trial court in terms of damages was perhaps the most fundamental: The purpose and design of the Code notwithstanding, the trial court concluded that the remedy for a rest-period violation also applies in the context of a meal-period violation. Ex. 20, ¶ 12, p. 28. In reaching this conclusion, the court confounded the two types of breaks. Meal and rest periods are not the same, and different rules govern them. *Compare Iverson*, 117 Wn. App. at 620 *with Wingert*, 146

Wn. 2d at 849. Quite appropriately, the remedies available for the two types of breaks stand in sharp contrast.

Unlike the language governing meal periods—which mentions paid *and* unpaid meal periods—the Code only authorizes *paid* rest periods. WAC 296-126-092(4). An employer that requires its employees to work through rest periods—recognizing again that “intermittent” rest breaks are permissible—is not off the hook just because it pays wages the whole time through. “Employees who must work through their [paid] break are, in effect, providing [their employer] with an additional 10 minutes of labor.” *Wingert*, 146 Wn. 2d at 849. Accordingly, the *Wingert* Court awarded extra compensation for a rest-period violation. *Id.*

In contrast, there *is* such a thing as an *unpaid* meal period under the Code. The law does not require employers to pay compensation for a meal period because a meal period is normally *unpaid*. See WAC 296-126-092(1); *McGinnis v. State*, 152 Wn. 2d 639, 641 n.2 (2004); *Alvaraz*, 339 F.3d at 913. In other words, the default is a meal period *without* pay. An employer can deviate from this model, but only if it pays wages for an on-duty meal period. To put it differently, the “remedy” for an on-duty meal period is already *built into the regulation*. The DLI has said so itself. As the DLI put it (appearing as *amicus curiae*), “[t]he Code “evinces a clear, bright-line standard: it requires employers to provide meal-breaks of at least 30 minutes, and it demands that employers interrupting meal-breaks pay for the entire meal-break, *regardless of the length and the number of the work-interruptions or curtailments.*” *Id.*

In all the published cases, *not once* has a court recognized the possibility of wages on top of those already provided for during an on-duty paid meal period. *See White*, 118 Wn. App. at 278; *Iverson*, 117 Wn. App. at 620; *Alvarez*, 339 F.3d at 913-14. By extending the rule from *Wingert* to meal periods, the court manufactured a remedy that was never intended.

2. **Dr. Munson's Flawed Damages Calculations**

The trial court concluded “that Dr. Munson’s overall methodology for calculating damages was sound and reasonable” Ex. 20, ¶ 36, pp. 37-38. The record does not support this conclusion.

a. **Disconnect Between Analyses**

First, there was a major disconnect between Abbott’s “liability” opinions and Munson’s “damages” opinions. Abbott *only* considered Guide Sheets, while Munson did *not* consider the Guide Sheets at all.

Those Guide Sheets, the only materials reviewed by Abbott, showed a typical run of between six and eight hours. RP 11/18/09 at 54; Exs. 22, 23. Munson, on the other hand, did not review Guide Sheets or schedules. RP 12/07/09 at 98. He considered “punch data,” the electronic information captured when employees swiped in and out at the Branch. Accordingly, Munson’s analysis showed a work day of ten hours on average. *See* Exs. 24, 25. The testimony reveals this extra time (two to four hours) was spent at the Branch, either before or after the run. RP 11/16/09 at 153-54, 194; RP 11/19/04 at 86-87.

This additional two to four hours each day created insurmountable problems. Employees did not have to remain “vigilant” at the Branch. RP 11/17/09 at 106. They could and did take breaks at the Branch. RP 11/16/09 at 153-54, 194; RP 11/10/09 at 133-34, 160-64, 170. Thus, even if vigilance precluded breaks on the armored vehicle runs, the breaks that employees took at the Branch still needed to be accounted for, lessening the overall time calculated from the punch data.

But Munson didn’t account for this difference, and neither did the court. Despite this two-to-four-hour disconnect, the court reasoned that Munson’s use of the punch data was reasonable because, “even though they include work at the branch, . . . such work is inherently connected to work on the armored vehicle runs and there is no evidence that employees received break time during these work activities or between these work activities and the actual run.” Ex. 20, ¶ 36, pp. 37-38. To the contrary, the evidence was undisputed that employees *did* take breaks at the Branch, and there was no evidence submitted by Plaintiff that crew members needed to be vigilant at the Branch.

b. Attorney Manipulation

In addition to this disconnect, Munson’s analysis suffered from severe attorney manipulation. “Expert testimony is admissible if the witness’s expertise is supported by the evidence, his opinion is based on material reasonably relied on in his professional community, and his testimony is helpful to the trier of fact.” *Deep Water Brewing v. Fairway Resources*, 152 Wn. App. 229, 271 (2009); Wash. R. Evid. 703.

Although Rule 703 permits the admission of hearsay and inadmissible facts for the limited purpose of showing the basis of the expert's opinion, it is "not designed to allow a witness to summarize and reiterate all manner of inadmissible evidence." *Deep Water Brewing*, 152 Wn. App. at 275. Just as the court is a "gatekeeper" to ensure that "junk science" is not admitted into evidence, so too is it a gatekeeper to ensure that expert testimony is not based on "junk science" or faulty data. See *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147-49 (1999).

Here, the court failed to act as a gatekeeper. Plaintiff's counsel not only cherry-picked the data upon which Munson relied, he *manipulated* it beforehand by coding it and crunching the numbers for Munson to utilize to come to his conclusions. As Munson testified, the payroll spreadsheets Plaintiff's counsel gave to him were *different* than those produced and maintained by Brink's. See RP 11/19/09 at 11-14. Counsel added a "totaled amount" column, *id.* at 12, and although that purported to be a simple calculation based on the punch data, Munson admitted that "[t]hose [amounts] coincided very closely [with that data] most of the time but *at times they did differ*" *Id.* at 14. This was not harmless error; Munson "used . . . [t]he totaled amount" to "determine how long an individual's work period was." *Id.* at 24.

Moreover, Munson had no idea how the materials were generated or if anything was excluded. See *Id.* at 17. The problems touched every aspect of the data analysis, particularly the vault data. Munson used the vault data to adjust the total damages figure to the tune of 3 percent. *Id.* at

33. But again, he had no idea how that underlying vault data was generated. *Id.* at 17.

Courts examining these issues have recognized the obvious: It is one thing if “the expert arrived at his opinions after an independent review of all relevant facts,” but quite another if “he relied on ‘facts’ chosen and presented by an attorney advocating for a particular position.” *Mack v. Amerisource*, 671 F. Supp. 2d. 706, 712 (D. Md. 2009); *see also Karn v. Ingersoll-Rand*, 168 F.R.D. 633, 639 (N.D. Ind. 1996); *Elm Grove Coal Co. v. Director*, 480 F.3d 278, 302-03 (4th Cir. 2007).

As if that were not troubling enough, counsel’s manipulation of the data *before* submitting it to Munson is even more problematic. Counsel tried to be a co-expert in this case. *See* RP 11/19/09 at 11-14, 24 (describing counsel’s flawed “totaled amount” calculations). Once the underlying unidentified data was produced by Brink’s to Plaintiff’s counsel, the data was reviewed, coded, and summarized by Plaintiff’s counsel—*not* Munson—and thereafter counsel’s analysis was incorporated into Munson’s calculations. Counsel’s manipulation of the underlying data tainted the expert opinion beyond rehabilitation and precluded cross-examination and other inquiry concerning the legitimacy and accuracy of the data. It was not reliable as expert testimony. *See State v. Nation*, 110 Wn. App. 651, 662-64 (2002) (excluding expert’s testimony where analysis performed by office technician of the expert). The testimony should have been excluded under Rule 703.

c. **Dr. Munson Used A Flawed Methodology**

Under Rule 702, a witness qualified as an expert may testify on the basis of “scientific, technical, or other specialized knowledge” if it “will assist the trier of fact” Wash. R. Evid. 702. But helpfulness to the trier of fact is not the only consideration. Rather, where the expert’s testimony is based on or includes novel scientific, technical, or other specialized knowledge, such testimony “may be admitted or relied upon *only* if generally accepted as reliable by the relevant scientific, technical, or specialized community.” *State v. Phillips*, 123 Wn. App. 761, 842 (2004) (citing *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)).

“The *Frye* rule is concerned only with whether the expert’s underlying theories and methods are generally accepted.” *Ruff v. Dep’t of Lab. & Indus.*, 107 Wn. App. 289, 300 (2001). When a court determines “whether the evidence being offered is based on established scientific [or other technical] methodology,” the analysis requires “*both* an accepted theory and a valid technique to implement that theory.” *State v. Cauthron*, 120 Wn. 2d 879, 889 (1993). *Frye* applies to expert testimony involving mathematics, valuation, and damages calculations. See *Reading Radio v. Fink*, 833 A.2d 199, 208 (Pa. Super. 2003); *Progressive v. All Care*, 914 So.2d 214, 225 (Miss. Ct. App. 2005).

Measured against these requirements, Munson’s testimony did not pass muster. For example, Munson misinterpreted the payroll data by including, as work time, time spent by crew members when assigned to work at branches other than Seattle and Tacoma and outside the class.

Again, this was not harmless error because he “used the payroll data to determine which weeks people worked and to determine pay rate and to estimate the damages” *See* RP 11/19/09 at 122.

Yet another flaw was Munson’s use of payroll data without verifying that each employee was in the proper position classification contained in the class, i.e., Driver or Messenger. For example, Ruby Buenavista was included in the calculation even though she worked almost exclusively in the Branch and was only classified as a Messenger for pay-rate purposes. This issue not only goes to damages but to liability (i.e., whether someone like Buenavista was actually a member of the class).

Another deficiency in Munson’s calculations was his use of vault data. Simply put, there was no evidentiary basis for this data, where it came from, or any ability to verify its accuracy. While Plaintiff’s counsel offered argument as to its source, Munson himself was unable to offer any testimony regarding this data. When asked on cross-examination whether he could be questioned about the source and validity of the vault data, Munson candidly admitted that he could not.

During cross-examination, numerous errors were shown that reduced the damages. Plaintiff argued, and the court agreed, that these errors only reflected problems with a few class members. This ignores the nature of a class action. Plaintiff offered eight class members and argued they were representative of 174 others. Representative evidence cuts both ways. If the testimony of individual class members was credited to establish class-wide liability, then the problems identified in Munson’s

cross-examination for a sample of class members should have been credited to exponentially show class-wide problems in those calculations.

Plaintiff's counsel had information that would have demonstrated that the data used included time worked and wages paid for class members outside the Tacoma and Seattle Branches, in classifications other than Driver and Messenger. Exs. 26, 27, 28. By ignoring this, counsel effectively instructed Munson to produce inflated damages estimates.

VII. Conclusion

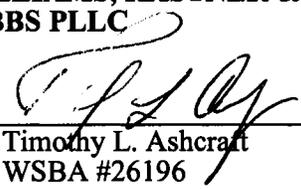
For the foregoing reasons, this Court should reverse and remand with instructions to enter judgment in favor of Brink's. The plain meaning of the Code, and the settled rules governing class actions, hang in the balance.

Dated: August __, 2010

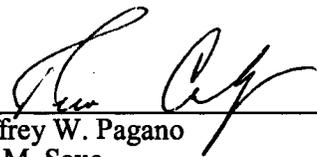
Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Karen Becker, certify and declare as follows:

1. I am now and at all times herein mentioned am a citizen of the United States and resident of the state of Washington, over the age of eighteen years, not a party to the above-entitled action, and am competent to testify as a witness.

2. I am employed with the firm of Williams, Kastner & Gibbs PLLC, 1301 A Street, Suite 900, Tacoma, WA 98402.

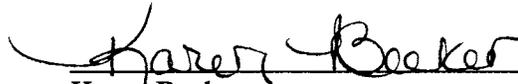
3. On the date below, I caused to be served as indicated below, a true and correct copy of the document to which this certificate is attached to counsel indicated below:

Martin S. Garfinkel
Adam J. Berger
Schroeter, Goldmark & Bender
500 Central Building
810 Third Avenue
Seattle, WA 98104

- Via ABC Legal Messengers
- Via Facsimile
- Via U.S. Mail
- Via Electronic Mail

The foregoing is a true and correct statement, is made under penalty of perjury and under the laws of the United States of America and the State of Washington.

DATED this 5th day of August, 2010.



Karen Becker

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