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65077-7

NO. 65077-7-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

MEGAN PELLINO, individually and on behalf
of others similarly situated,

Respondent,

v.

BRINK'S, INCORPORATED,

Appellant.

BRIEF OF RESPONDENT

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FILED
COURT OF APPEALS
STATE OF WASHINGTON
2010 OCT -1 PM 1:31

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I. INTRODUCTION

This appeal arises from a verdict in this certified class action issued by King County Superior Court Judge Michael J. Trickey after a bench trial conducted between November 9 and December 16, 2009. On March 3, 2010, the trial court issued a 55-page Findings of Fact, Conclusions of Law, and Order (“Decision”) (CP 4384-4443), and Judgment (CP 4380-83) in favor of Respondent Megan Pellino and members of the class (hereinafter, “class members” or “employees”).

In its Decision, the trial court found that Brink’s Incorporated (“Brink’s” or “employer”) failed to provide the rest breaks and meal periods required under Washington law to its armored truck crews, comprised of messengers and drivers, both because crew members were “always engaged in active work duties when on the armored vehicles, specifically guarding and being vigilant” (CP 4412), and because there was a “classwide pattern or practice of failure to provide class members with sufficient rest and meal break minutes during their workday, irrespective of the requirements of active guarding” (CP 4414). Judge Trickey made numerous factual findings related to these issues, and Brink’s does not assign error to any of them.

In the Judgment, the trial court awarded to the 182 class members an aggregate back pay amount of \$874,775.70, plus pre-judgment interest,

and attorneys fees and costs of \$817,018.71. Brink's appeals the back pay damages but does not challenge the award of interest, fees, and costs.

II. COUNTERSTATEMENT OF ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Brink's does not set forth all issues addressed in the Argument section of its brief. Plaintiff will limit her counterstatement of the issues to the questions set forth at pages 3-4 of Brink's' brief, and will address other issues in her Argument section, *infra*.

1. Whether an employer may require constant work activities during a paid meal period under Washington law, where the trial court found that Brink's armored truck crews have "constant work responsibilities" both "at and between stops" (CP 4391)?

2. Whether the duty of constant vigilance required by Brink's violates the requirements for lawful meal breaks and rest periods under Washington law, where the trial court found that the constant vigilance expected of all truck crew members "is not a passive state but requires active observation and mental exertion at all times" (CP 4390)?

3. Whether Brink's violated Washington's meal break and rest period requirements, irrespective of the duty of constant vigilance, where the trial court also found "there was insufficient time for armored truck crew members to take meal periods and rest breaks and that

management pushed crews to keep moving for security and business reasons” (CP 4395)?

4. Whether the trial court correctly found that “the concept of intermittent breaks is inapplicable here, because the requirements of active work and the restriction on personal relaxation, activities, and choice applied at all times during the armored vehicle runs, even during putative breaks” (CP 4413)?

5. Whether the trial court abused its discretion by certifying this case as a class action and refusing to decertify after trial, where it found that plaintiff proved classwide violations of Washington law at trial by means of documentary evidence, deposition testimony of managers, and representative in-court testimony of eight employees (CP 4415)?

6. Whether the trial court’s findings on damages were an abuse of discretion, where it found that the assumptions and methodology used by damages expert Dr. Jeffrey Munson were “sound and reasonable” (CP 4420), and that Brink’s failed to meet its burden to come forward with negating evidence under the burden-shifting framework set forth in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 90 L. Ed. 1515, 66 S. Ct. 1187 (1946) (CP 4418-19; 4421-24)?

III. STATEMENT OF THE CASE

A. Factual Background.

Because Brink's does not assign error to any of the detailed factual findings on liability made by the trial court, all of those findings are verities on appeal. Brink's' "Background" section, at pages 5 - 16, almost completely ignores these findings and makes numerous assertions that are directly contradicted by the trial court's findings and by the record.¹

1. Overview Of Crew Members' Duties.

Class members worked for Brink's in its Seattle and Tacoma branches during the class period of April 26, 2004 through October 31, 2007. Each armored truck crew is comprised of a driver and a messenger on routes that are organized by geographic area and serve a variety of customers. The crews' duties include delivering and picking up "liability" (Brink's' term for currency and other valuables) to and from stores, bank branches, and other customers, emptying and restocking ATMs, and delivering currency to central bank vaults at the end of the business day ("bank-outs"). Some routes may specialize in a single function, like servicing ATMs. Other routes have two components separated by a return to the branch, in which the crews handle pick-ups and deliveries to many

¹ Brink's' brief is also riddled with violations of the RAP's procedural requirements. It frequently fails to cite to the record at all, cites to the wrong page for factual assertions, or, elsewhere, plainly mischaracterizes the record. *See* RAP 10.3(a)(5). Further, its Appendix contains several documents that have not been designated. *See* RAP 10.3(a)(8). Finally, the text of the brief appears not to be double-spaced. *See* RAP 10.4(a)(2).

customers in the morning and early afternoon, followed by a bank-out and/or “deposit-pull” from ATMs later in the day. CP 4386-87.

Every route has a mandatory start time, and while there are no mandatory end times, most routes have to be completed and back in the branch by mid to late afternoon in time for the bank-outs to be organized. CP 4387-88. Each crew receives a daily guide sheet each day that lists all of its stops. Trial Exhibits (“Ex.”) 15, 216-217, 508 at D2673-74. During the course of each work day, the driver fills in the time of arrival and departure at each stop. Some of the guide sheets have a pre-marked space for drivers to indicate whether “lunch” is taken. *Id.*

Crew members had a number of tasks that had to be performed at the branch, both before and after each route, and between the two components of particular routes. These tasks “include ‘buying’ or checking out liability, keys, firearms, radios, and paperwork from the vault, pre-trip inspection of the truck, and loading liability and coins before the run, and ‘selling’ liability back to the vault, and completing and returning paperwork at the end of the run.” CP 4387. Crews working runs with a second component (*e.g.*, a bank-out or deposit pull) would return to the branch in between the two parts, but, as the trial court found and contrary to the assertions in Brink’s’ brief, there was little non-working time at the branch between the two components. *Id.*; *see* RP 1247-48

(Carl Boyd);² RP 781-82, 805-06 (Jason Desvignes); RP 873-74 (Michael Jaquish); RP 1002 (Neil McCracken); RP 348-49, 351-52, 639 (Megan Pellino); RP 17-18 (11/19/09 PM sess.) (Steven Remillard).³

The trial court found that “crews were told to keep the truck moving for business reasons and to maintain the profitability of the branch,” (CP 4395; *see* RP 682-83, 727-28 (Jaquish)), and that most customer stops were expected to be completed in five minutes or less (CP 4395; *see* RP 1059-60 (Darryl Bartlett); RP 1243 (Boyd); RP 991 (McCracken); RP 289 (Pellino). Contrary to Brink’s’ claim that “management doesn’t even know where the crew is at any given time,” (App. Br. at 9), the trial court found that “[s]upervisors would check the progress of the trucks throughout the day and urge crews to hurry up to remain on schedule and meet the bank-out deadline.” CP 4396; *see* RP 1074-75 (Bartlett); RP 698 (Jaquish); RP 1002-03 (McCracken); RP 948 (Preis); RP 2319-20 (Harry Graham). Brink’s’ claim that there were no consequences to crew members who came back to the branch late (App. Br. at 9-10) also is contradicted by the record and the trial court’s finding: “Although crews could perform their own bank-out if they returned to the branch too late to meet the bank-out crew, managers discouraged this and

² The trial court’s Decision cited to a draft form of the trial transcript whose pagination does not match the “RP” citations contained herein.

³ A different court reporter recorded the proceedings on the afternoon of November 19, so this portion of the Verbatim Report is not paginated consecutively with the remainder of the Report.

criticized or wrote up crews for returning late.” CP 4396; *see also* CP 4396-97 (“[c]rews that returned late too often could lose their routes or be assigned to less desirable positions as floaters”); RP 1246-47, 1293 (Boyd); RP 697-700 (Jaquish); RP 1031-32 (McCracken); RP 318 (Pellino); RP 941-42 (Ryan Preis).

2. The Trial Court Found (a) Any Break Time Received Was Legally Inadequate Because Of Brink’s’ Vigilance Requirement; And (b) Class Members Were Not Able To Take Sufficient Break Time In Any Event.

The trial court found that class members never received lawful breaks because (a) “they were always engaged in active work duties when on the armored vehicles, specifically, guarding and being vigilant (*e.g.*, scanning their routes and surrounding areas, being alert, and giving the appearance of alertness, looking out of windows, and maintaining communications with fellow crew members when apart)” (CP 4412); and, (b) even if time used for eating and going to the bathroom could be counted as break time, there was a “classwide pattern or practice of failure to provide class members with sufficient rest and meal break minutes during their workdays” (CP 4414).

a. Brink’s’ Vigilance Requirement Resulted In Legally Defective Break Time.

The trial court found that Brink’s’ requirement of active guarding and vigilance at all times made it impossible for crew members to receive legally effective break time. In its brief, Brink’s describes the vigilance

requirement in a manner that is inconsistent with the record and the trial court's unchallenged factual findings.

Under Brink's' rules, class members were required "to be vigilant and alert at all times and to guard the cash and other valuables entrusted to Brink's by its customers while on their runs." CP 4388. The "Handbook for Brink's Personnel" states:

The primary duty of every armed Brink's employee is to act as a guard. That is, to enforce against employees and other persons, rules to protect the property of Brink's or its customers or to protect the safety of persons through the use of force up to and including deadly force.

Ex. 1 at D987. Brink's training materials provide the same instruction. *See* Ex. 11 at D2623; Ex. 508 at D2706; Ex. 573 at D120, D261. Truck crews must not only be alert at all times, they must also "look alert" in order to deter the "criminal element." Ex. 1 at D986. Brink's managers conduct periodic "street inspections" of every crew "to evaluate the crew's alertness and other aspects of their performance." CP 4391; Ex. 230.

Further, the trial court specifically credited "class member testimony that messengers and drivers are expected to carry out this primary job function of guarding at all times when they are out on their routes, including whenever they are using the bathroom, purchasing food, or eating." CP 4388-89; *see* RP 1235, 1258 (Boyd); RP 1062 (Bartlett); RP 995, 1041 (McCracken); RP 256-57, 338-342, 395, 409-10 (Pellino);

RP 931, 936-37 (Preis). This evidence was corroborated by the testimony of supervisors. CP 4389; *see* RP 668 (Jaquish); RP 2294-95, 2301 (Henry Dotson); RP 2337-39, 2343-45 (Matthew Martinez); RP 2354-57, 2359 (Cammae Moreland).

The reason for this vigilance requirement is made very clear to the employees. Class members are trained that “a certain percentage of the population would be willing to kill them to get’ the liability they were carrying.” CP 4390, *citing* RP 667-68 (Jaquish). This message is reinforced by informing messengers and drivers about incidents of attacks against armored vehicles and crews. *See* RP 776 (Desvignes); RP 679 (Jaquish); RP 259-63 (Pellino); *see also* Exs. 12-14 (Training Videos). Indeed, messengers are even trained to distrust their drivers and monitor them because of the risk of an “inside job.” CP 4392, *citing* RP 670-71 (Jaquish); RP 261-63 (Pellino).

Brink’s misstates the facts, and greatly understates the nature of the required vigilance, when it states “depending on the situation...it could mean a casual eye in one case, but more active scanning in another.” App. Br. at 13. It is not merely a “common sense” level of care. *Id.* at 14. Rather, “[t]he vigilance required of class members is not a passive state but requires active observation and mental exertion at all times.” CP 4390. “Drivers and messengers are instructed to continuously observe their surroundings for potential threats, to anticipate and ‘take every

possible precaution' against possible attack, and to be constantly suspicious of other vehicles and pedestrians, even persons who appear to be police officers, store employees, or innocuous pedestrians." *Id.*, citing Ex. 1 at D1008-09; Ex. 505 at D2562-64; RP 1057 (Bartlett); RP 1236 (Boyd); RP 774 (Desvignes); RP 249-50 (Pellino); RP 932-33 (Preis). For example, class member Neil McCracken explained that he was "constantly scanning my mirrors and anything in front of me, maybe odd people looking at the vehicle," and was "constantly looking for threats" to himself or the messenger." RP 988, *quoted at* CP 4391. Jason Desvignes testified that "driving in an armor car relaxing, that is nonexistent.... Robbery is always a constant thought, anywhere in your time. Relax is not an option." RP 776-77, *quoted at* CP 4395.

Based on this evidence and testimony, the trial court made the unchallenged factual finding that "there is no time during a run when drivers and messengers can relax, engage in personal activities, or simply focus on eating." CP 4395. "The only personal activities in which crew members can engage at any time on their routes are eating, drinking, and smoking." CP 4393, *citing* RP 2329-32 (Graham); RP 16 (11/19/09 PM sess.) (Remillard). Even talking at any time to passers-by is prohibited. CP 4393.

Brink's prohibits the presence or use of reading materials, radios, tape players, or personal items of any kind at any time while crew members are on their routes. The Handbook states:

3.080 READING MATERIAL AND PERSONAL ITEMS

Employees, while on duty, are forbidden to carry books, magazines, newspapers, personal radios, tape players, tape recorders, personal cell phones, personal pagers, personal computers, etc.

3.090 PERSONAL BUSINESS

Making purchases, paying bills or engaging in any personal business is prohibited for any member of an armored vehicle crew while on duty.

Ex. 1 at D1004; *see also id.* at D1037 (“Neither the driver nor any other member of the crew should do anything such as reading a newspaper, listening to a personal radio, etc. that will distract from guard duties.”). “Use of distracting materials” is a cause for termination. CP 4393, *citing* Ex. 505 at D2552. The “Form 132s,” which were posted at the branches and set forth “Working Conditions and Benefits,” state in the section entitled “Break Periods,” that “[t]he security and operational rules and procedures applicable to Brink’s employees assigned to work on armored vehicle crews ... remain in effect at all times during such break periods.” CP 4389, *citing* Exs. 4 - 8. Thus, the duty to guard and remain vigilant at all times on a run is not merely “advised” by Brink’s, as set forth in appellant’s brief, it is a basic work requirement.

b. Lack Of Opportunity To Take Rest Breaks And Meal Periods.

Brink's further misstates the record and the trial court's unchallenged findings when it asserts that the taking of breaks is a matter of "personal choice" and that "some crews take long breaks; others do not." App. Br. at 10. In fact, the trial court found that crew members did not have time for eating and resting, and never stopped the truck for that purpose. CP 4397; *see* RP 1063 (Bartlett); RP 780-81 (Desvignes); RP 688-90 (Jaquish); RP 998-99 (McCracken); RP 949 (Preis); RP 2359 (Moreland). If they spent time eating, it was "while the truck was moving, or for drivers, during the brief periods while the messenger was making pick-ups or deliveries at a stop." CP 4397; *see* RP 1083-84 (Bartlett); RP 1242-45 (Boyd); RP 776, 781 (Desvignes); RP 689 (Jaquish); RP 997, 1001, 1035 (McCracken); RP 267, 342-43 (Pellino); RP 938 (Preis); RP 13-14, 57-58 (11/19/10 PM sess.) (Remillard).

Rest breaks amounted to nothing more than "running to the bathroom or grabbing food or drink to go at a stop along the route." CP 4397-98. Class members were "compelled" by their time constraints not to spend time waiting in line to purchase food, and "would use restrooms in easily accessible locations." CP 4398; *see* RP 1244, 1279 (Boyd); RP 780-81, 813 (Desvignes); RP 686-89, 865 (Jaquish); RP 998 (McCracken); RP 637-38 (Pellino); RP 41 (11/19/10 PM sess.) (Remillard). On occasion, class members would be compelled to urinate

in bottles on the truck, because a readily accessible bathroom could not be found. CP 4398; RP 686 (Jaquish); RP 340-41 (Pellino); RP 992-94 (McCracken).

Brink's' portrayal of the record on this issue (among others) is highly misleading and inaccurate. It cites testimony that class members ate food on the routes, but neglects to point out that they ate while at the same time performing work duties. *See* App. Br. at 11-13. For example, while Mr. McCracken would sometimes run in to buy food at a fast food store (RP 1043-44), he would eat the food only while performing his other duties as a driver or messenger (RP 997, 1033-34). Similarly, Brink's cites testimony from Darryl Bartlett that class members could go shopping, App. Br. at 12, when, in fact, Mr. Bartlett referenced a single shopping incident as an example of an employee who was not "performing ... duties in a way that [was] appropriate." RP 1085, 1101. Carl Boyd is quoted as having "admitted" that if rest breaks and meal periods were not taken, "it was because [he or they] chose not to take them." App. Br. at 12. In fact, Mr. Boyd explained that he did not have a real choice because of his fear of retaliation. Brink's omitted the sentence underlined below in its recitation of his testimony:

Q [by Brink's attorney]: Now, is it fair that on occasions when you or the crew that you worked, with did not take meal or rest periods, it was because you chose not to take them?

A [by Mr. Boyd]: It is fair. That you would choose not to take it because you don't want to get reprimanded, not taken off your runs.

RP 1298 (emphasis added).

The trial court also made unchallenged findings that operational factors controlled by Brink's contributed to the lack of break time. For example, the court found that "the length of the routes and the number of stops ... precluded crews from taking rest stops or meal breaks." CP 4396. There were so many stops on each route, that "crews had to keep the trucks moving to complete all stops and return to branch in time for the afternoon bank-out." *Id.* Also, "management pushed crews to keep moving for security and business reasons," and crews were trained not to stop anywhere for any longer than necessary "in order minimize its exposure as a target." CP 4395. The expectation was that trucks would be stopped at a particular location for five minutes or less. *Id.* As one class member explained, crews "need to be constantly moving because if you are not, you are costing the company money." CP 4396, *citing* RP 946 (Preis).

While Brink's claims that it built an extra 50 minutes for breaks into the design of routes, App. Br. at 8, the trial court found that this testimony, even if true, supported the employees' claim that there was insufficient amount of break time provided. Because "drivers and messengers could not [for security reasons] take their lunch break and rest breaks at the same time..., [i]t would have required an hour in each work

day for both the driver and messenger to take a meal period, and additional time to take the rest breaks....” CP 4397. Thus, the 50 minutes per day allegedly added to the schedules was, on its face, insufficient.

In addition, the work load was heavy and continuous every day. “Drivers have constant work responsibilities when the truck is stopped and the messenger is outside the vehicle.” CP 4391. Besides scanning the area for potential threats, “[d]rivers also may complete paperwork, like the daily guide sheet....” *Id.* Drivers also have “constant work responsibilities between stops, including driving the vehicle safely, making sure the truck is not being followed, and maintaining a lookout for possible threats.” *Id.*; *see* RP 774, 801 (Desvignes); RP 988-89 (McCracken); RP 10 (11/19/10 PM sess.) (Remillard); RP 2295 (Dotson); Ex. 573 at D207.

Likewise, messengers “also have constant work responsibilities at and between stops.” CP 4391. “At stops, messengers have the responsibility of transporting liability to and from customer locations as quickly and securely as possible. Between stops, messengers complete paperwork and prepare the ‘liability’ for delivery at the next stop.” CP 4391-92; *see* RP 1058 (Bartlett); RP 1238, 1285-1290 (Boyd); RP 684-85 (Jaquish); RP 990 (McCracken); RP 307-315, 550, 552, 587 (Pellino).

The trial court found that the evidence on eating and rest break practices could be applied on a classwide basis in part because the testifying class members observed the same practices among the “dozens

of other class members [with whom they worked] and on multiple different routes throughout the Class Period.” CP 4398. There was “consistent and credible” class member testimony that “the total amount of time they generally spent on such bathroom breaks or food stops” was between three and ten minutes per day, well below the time required by law. *Id.*

Further, the trial court found that the “absence of adequate rest and meal break time is corroborated by the daily guide sheets introduced into evidence in the case and the testimony of Dr. Robert Abbott, plaintiff’s expert statistician, regarding sampling and analysis of those guide sheets.” CP 4399. Dr. Abbott directed the sampling of 952 guide sheets that were analyzed “for whether meal or rest breaks were recorded, the number and duration of any meal periods or rest breaks that were recorded, and whether the guide sheet contained a pre-printed slot for recording a lunch break.” *Id.* Numerous managers testified that crew members were instructed to record rest and meal breaks on these sheets. CP 4400-01; RP 2264 (Christopher Chamberlain); RP 2299 (Dotson); RP 2329 (Graham); RP 2341 (Martinez). Nonetheless, Dr. Abbott’s analysis shows that only 2.5% of the sampled guide sheets contain a recorded meal period, while one or more rest breaks (typically, bathroom breaks) were recorded on only 9.3% of the sheets. CP 4400; Ex. 219. The 24 recorded meal periods lasted an average of only 10.6 minutes and often involved

just a single crew member, and none lasted the requisite 30 minutes. *Id.*; Ex. 220. Similarly, among sheets with recorded rest breaks, the total duration of all recorded breaks averaged only 8.3 minutes, and no sheet contained 20 minutes of recorded break time for each crew member. CP 4400; Ex. 221. And, of the 247 guide sheets that had pre-printed spaces for recording lunch, only 24 had meals recorded; the vast majority were left blank, crossed out, or contained an affirmative statement that no lunch was taken. *Id.*

Finally, Brink's managers knew or should have known that class members were not receiving adequate break time, and the trial court so found. CP 4402. There was un rebutted evidence that: (a) Brink's supervisors pressured crews throughout the day to keep the trucks moving and/or criticized crews for returning late; (b) Brink's supervisors, who conducted street inspections, never saw crew members take breaks; and (c) crew members complained to management about the lack of breaks. *Id.* Former Tacoma branch manager Christopher Chamberlain testified that the "culture" of the business was not to have breaks. RP 2270, *cited in* CP 4403. This "culture" was evident from the start of class members' employment. During orientation, new employees were told they were entitled to breaks, but at the same time were instructed that company policy prohibits stopping for breaks and that they have to eat while the truck is in motion. CP 4403, *citing* RP 681-82, 730-31 (Jaquish).

B. Procedural Background.

This case was filed on April 25, 2007 and certified as a class action by Judge Paris Kallas on June 5, 2008. CP 602-14. The certification covered claims for missed meal and rest breaks, as well as off-the-clock pre-shift work. Plaintiff dropped the pre-shift claim before trial and presented evidence only on the missed rest and meal break claims.

On July 24, 2009, Judge Erlick denied the parties' cross-motions for summary judgment. CP 1564-69. With respect to plaintiff's motion for partial summary judgment, Judge Erlick found that while "employers cannot require employees to perform 'unremitting work' without adding additional compensation" (CP 1567), "the 'vigilance requirement' presents issues of fact" precluding judgment (CP 1569). Likewise, Judge Erlick denied Brink's motion for summary judgment due to the presence of "material issues of fact" regarding missed breaks. CP 1567.

On September 15, 2009, Brink's moved to decertify the class. CP 1887. On September 29, 2009, the trial court denied the motion. CP 1977.

The trial, which began on November 9, 2009, lasted 14 court days. Plaintiff offered the testimony of eight class member witnesses, four each from the two Brink's branches in Seattle and Tacoma. CP 4386. One witness, Michael Jaquish, was also a part-time supervisor and trainer of new employees. Plaintiff also put on a liability expert, Dr. Abbott, and a damages expert, Dr. Munson. Brink's did not put on a single lay or expert

witness, and its case consisted solely of the introduction of documents and deposition excerpts.

On December 14, 2009, after plaintiff rested, Brink's moved for judgment as a matter of law and to decertify the class. RP 2207-2243. The trial court reserved ruling on those motions until the close of the evidence. RP 2242. On January 7, 2010, the court issued its oral decision, RP 2591-2610, and on March 3, 2010, issued its Findings of Fact, Conclusions of Law, and Judgment. CP 4380-4443. The court awarded the 182 class members back pay of \$874,775.70 pursuant to the Washington Industrial Welfare Act, RCW 49.12, and the Minimum Wage Act, RCW 49.46, as well as prejudgment interest of \$422,536.75. CP 4380. The court also awarded class counsel \$817,018.71 in attorneys fees and costs. *Id.* On March 19, 2010, Brink's filed its Notice of Appeal. CP 4524-4614.

IV. ARGUMENT

A. Standard Of Review.

Many of the issues here involve mixed questions of law and fact. However, Brink's has not assigned error to the trial court's factual findings related to liability, which are therefore "verities on appeal." *Moreman v. Butcher*, 126 Wn.2d 36, 39, 891 P.2d 725 (1995); *see also* RAP 10.3(g) (appellate court will not consider claimed errors not included in assignments of error or clearly disclosed in associated issues).

Conclusions of law to which errors have been assigned are reviewed *de novo*. *Sunnyside Valley Irrigation District v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003).

A trial court's denial of summary judgment cannot be appealed following a trial "if the denial was based upon a determination that material facts are disputed and must be resolved by the factfinder." *Brothers v. Public School Employees of Washington*, 88 Wn. App. 398, 399, 945 P.2d 208 (1997). Therefore, Brink's' first assignment of error, on denial of its summary judgment motion, should be disregarded.

A class certification under CR 23 will be reviewed for abuse of discretion and will not be disturbed on appeal "if the record indicates the court properly considered all CR 23 criteria." *Nelson v. Appleway Chevrolet, Inc.*, 160 Wn.2d 173, 188, 157 P.3d 847 (2007). *See also Ericks v. Denver*, 118 Wn. 2d 451, 467, 824 P.2d 1207 (1992)("A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds").

Likewise, a trial court's calculation of damages is reviewed for abuse of discretion. *Harmony v. Madison Harmony Dev. Corp.*, 143 Wn. App. 345, 357-58 (2008).

B. The Legal Requirements Regarding Meal And Rest Periods.

1. The Requirements Must Be Interpreted Liberally.

The claims in this case were brought under the Industrial Welfare Act, RCW 49.12 (“IWA”), the Minimum Wage Act (“MWA”), RCW 49.46, and the Wage Rebate Act, RCW 49.52. These are remedial statutes and as such must be liberally interpreted to protect workers’ rights. *See International Ass’n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 35, 42 P.3d 1265 (2002); *Wingert v. Yellow Freight Systems, Inc.*, 146 Wn.2d 841, 850, 50 P.3d 256 (2002) (recognizing purpose of IWA is to protect employees). This liberal rule of construction is consistent with Washington’s history “as a ‘pioneer’ in assuring payment of wages due an employee.” *Champagne v. Thurston Cty.*, 163 Wash.2d 69, 76, 178 P.3d 936 (2008)(citations omitted). *See also* CP 4408-09.

2. The Meal Period And Rest Break Requirements.

The IWA is dedicated to the protection of the health and safety of Washington employees. *See* Declaration of Purpose, at RCW 49.12. The legal requirements for meal periods and rest breaks are set forth in WAC 296-126-092, which was promulgated by the Department of Labor & Industries (“DL&I”) pursuant to the IWA, RCW 49.12.091, and RCW 43.22.270(4). *See* Respondent’s Appendix 1 (“Resp. App. 1”). DL&I also has issued Administrative Policy ES.C.6 interpreting the meal and rest break regulation, as well as Policy ES.C.2 on the meaning of “hours

worked.” Resp. App. 2 (ES.C.6) & 3 (ES.C.2). As the trial court noted, “DL&I’s interpretation of its own regulation in this instance is entitled to great deference by the Court...” CP 4408, *citing Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 593-94, 90 P.3d 659 (2004); *White v. Salvation Army*, 118 Wn. App. 272, 75 P.3d 990 (2003).

With respect to rest breaks, the regulation requires that employees shall be allowed a paid rest break of not less than ten minutes for each four hours of working time. WAC 296-126-092(4). Rest breaks are periods in which a worker is able “to stop work duties or activities for personal rest and relaxation.” DL&I Policy ES.C.6, § 10. Rest breaks cannot be waived. *Id.* at § 9. Rest breaks may be intermittent as long as the underlying purpose of the rest break is not compromised. *Id.* at § 12; WAC 296-126-092(5). Thus, a series of ten one-minute breaks does not satisfy the requirement. DL&I Policy ES.C.6, § 12. Similarly, employees may be required to remain “on call” during rest breaks as long as the underlying purpose of the rest break is not compromised and employees are free to rest, attend to personal business, and make personal choices as to how they spend their time. *Id.* at § 13. Any time spent performing work during the “on call” rest break is not counted toward the requisite ten minute break. *Id.*

With respect to meal periods, the regulation requires that employees shall be allowed a meal period of not less than thirty minutes

for each five hours of work and that no employee “shall be required to work more than five consecutive hours without a meal period.” WAC 296-126-092(1)-(2); DL&I Policy ES.C.6, § 5. Meal periods must be paid when employees are “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). Under the DL&I Policy, if the paid, “on duty” meal period “is interrupted due to the employee’s performing a task, upon completion of the task, the meal period will be continued until the employee has received 30 minutes total of mealtime. Time spent performing the task is not considered part of the meal period.” DL&I Policy ES.C.6, § 7. If the employer complies with its obligations, “payment of an extra 30-minute meal break is not required.” *Id.*

3. Definition Of “Work” Under Washington Law.

The term “hours worked” is defined at WAC 296-126-002(8) as “all hours during which the employee is authorized or required by the employer to be on duty on the employer’s premises or at a prescribed work place.” DL&I Policy ES.C.2 provides a very broad requirement of when an employer has to pay for work performed:

If the employer knows or has reason to believe that the employee is continuing to work, such time is working time.

An employer may not avoid or negate payment of wages by issuing a rule or policy that such time will not be paid or must be approved in advance.... It is the employer’s

responsibility to ensure that employees do not perform work that the employer does not want performed.

Resp. App. 3; *see also IBP, Inc. v. Alvarez*, 546 U.S. 21, 25, 126 S. Ct. 514, 519, 163 L. Ed. 2d 288 (2005)(holding that, under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, the term “work” is defined “broadly” and includes “physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business”).

C. The Trial Court Acted Within Its Discretion When It Certified And Tried The Case As A Class Action.

Brink’s assigns error as to whether the case should have been certified as a class action before trial, or whether it should have been decertified after the plaintiff rested. App. Br. at 22-23. Specifically, it claims the evidence shows an absence of commonality and that Ms. Pellino did not have a “typical” claim. *Id.* Brink’s’ arguments fail.

First, Brink’s never challenges the trial court’s conclusion that liability in the case could be tried “by using representative evidence to prove a pattern or practice of violations by the defendant with respect to the class.” CP 4414 (citations omitted). Nor does it assign error to the trial court’s finding that “Plaintiff has met her burden of presenting sufficient representative evidence to prove a pattern or practice of rest and meal break violations.” CP 4415. Moreover, the testimony and documentary evidence firmly established universal policies with respect to

constant vigilance and operational procedures and pressures that were common to the entire class. Thus, Brink's argument that there was a "lack of uniformity" in the evidence, App. Br. at 23, is in conflict with the trial court's unchallenged reliance on, and the content of, the representative evidence presented. *See Chavez v. IBP, Inc.*, 2005 WL 6304840, *3 (E.D. Wash. 2005)(rejecting motion for decertification after a bench trial where "the foundation of Defendants' argument for decertification is based upon proposed findings regarding pre-shift activities and meal break activities that are in direct contradiction of this Court's findings....").

Finally, none of the cases cited by Brink's involved a class certification in a remotely similar context, namely, where a class action had already been tried and the verdict was based on representative evidence that the trier of fact found sufficient to prove a "classwide pattern or practice." CP 4414. Here, the trial court did not abuse its discretion in trying the case as a class action and refusing to decertify the class.

D. The Trial Correctly Interpreted And Applied Washington Law On Meal Periods And Rest Breaks.

1. Brink's Misstates The Law And The Trial Court's Holding.

Brink's argues the trial court erred when it held that under Washington law employees "shall receive" meal periods and rest breaks. App. Br. at 24; CP 4409. According to Brink's, an employer's only obligation is not "to stand in the way of employees who choose to take

breaks.” App. Br. at 24-25. Thus, Brink’s argues that as long as an employer does not prohibit break time, or discipline employees who take breaks, an employer’s obligation is fulfilled. Brink’s is wrong.

Brink’s’ contention ignores the meaning of the regulation, the case law, and the administrative policy promulgated by the DL&I. First, the use of the term “shall be allowed” does not mean, as Brink’s argues, that the employer has very limited responsibility. For example, the regulation specifically places on the employer the burden of making certain that break time occurs, even if the term “employer” does not appear. WAC 296-126-092(4) provides that a rest period “shall be scheduled [obviously, by the employer] as near as possible to the midpoint of the work period.” In addition, the word “shall” is used throughout the regulation, and Washington case law interprets that term as a mandatory requirement. *E.g., Wilson v. Horsley*, 137 Wn.2d 500, 513, 974 P.2d 316 (1999)(“Shall means shall. It imposes a mandatory duty.”).

Further, the Washington Supreme Court has interpreted the phrase “employees shall be allowed” in WAC 296-126-092(4) as meaning that employers have a duty “to provide” the required breaks. In *Wingert*, 146 Wn.2d at 848, the Court held that insufficient rest breaks were provided by the employer: “Yellow Freight did not comply with WAC 296-126-092(4) when *it failed to provide* paid rest breaks to employees who worked two hours or less of overtime following their regular shifts.” (Emphasis

added.) While *Wingert* only discusses rest breaks, its reasoning applies with equal force to meal periods because the regulation uses the same syntax, namely, “employees shall be allowed,” for both rest breaks and meal periods.

In addition, DL&I’s policy on rest breaks and meal periods makes it clear that employers have the obligation to ensure that breaks occur. For example, in connection with *paid* meal periods (at issue here), the policy states “the employer must make every effort to provide the employees with an uninterrupted meal period.” Resp. App. 2, § 7. This policy, like the other provisions discussed above, demonstrates that employers cannot take a purely passive role in providing rest and meal breaks and escape liability simply by not expressly prohibiting such breaks.

In addition, Brink’s’ argument that Washington’s break law is permissive in nature is inconsistent with the broad manner in which a remedial statute such as the Industrial Welfare Act, RCW 49.12, must be interpreted, and “Washington's long and proud history of being a pioneer in the protection of employee rights.” *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 300, 996 P.3d 582 (2000).

Brink’s further quotes *White v. Salvation Army* out of context to argue that an employer has no affirmative duties at all with respect to break time. In fact, *White*, which involved residential counselors who had the time and ability to relax and even sleep, only held that the employer

did not have an obligation to *schedule* meal periods or rest breaks, which is not in dispute here. *White* recognized, however, that the “underlying purpose for meal periods and rest periods -- to provide relief to employees from ‘work or exertion’ -- is the same for both.” 118 Wn. App. at 283.

As the trial court found, an “employer violates the law if it creates or disregards conditions of employment that it knows or should know are preventing employees from getting lawfully adequate breaks.” CP 4411, *citing United Food & Commercial Workers Union Local 1001 v. Mutual Benefit Life Ins. Co.*, 84 Wn. App. 47, 54, 925 P.2d 212 (1996), and DL&I Policy ES.C.2. In other words, an employer cannot create the conditions that make breaks impossible and then evade responsibility by contending that it tells employees that they are entitled to break time. As the trial court found, that is precisely what happened here, where the employees had continuous work responsibilities throughout the day, causing class members to be unable to take meal periods and rest breaks.

2. “Unremitting Work Duties” Are Inconsistent With A Paid On Duty Meal Period.

Brink’s misstates the trial court’s holding as being limited to its finding that class members were required to remain vigilant during breaks. *E.g.*, App. Br. at 26. In fact, the court found both that all break time was defective due to the vigilance requirement, and, even if that were not so, class members were not able to take sufficient amount of break time

minutes, regardless of the active guarding requirement. CP 4414. Because Brink's does not address or assign error to the latter finding, its challenge to the court's judgment fails for that reason alone.

In any event, the trial court was correct to conclude that "no active work" can be required of employees during an on duty meal period just because the employee is paid for the time. The trial court's full statement is found at CP 4410:

In summary, neither paid rest breaks nor paid meal periods have to be scheduled..., the breaks can be interrupted (within reasonable limits), and employees may be required to remain "on duty" on the employer's premises during the breaks. However, this "on duty" responsibility is limited to being "on call;" no active work can be performed, and the employee must be able to engage in personal activities and rest during these breaks. And, the full amount of required time (*i.e.*, 10 minutes' rest break for each 4 hours, and 30 minutes' meal period for each 5 hours) must be provided.

To hold otherwise would mean that employers would be free to compromise the health and safety purpose of the meal period by simply paying employees to work non-stop through their break time. No Washington court has countenanced such a result.

As discussed above, the DL&I policy guidance explicitly rejects Brink's' argument. Section 7 of Policy ES.C.6 states that when a paid meal period is interrupted with a work task, "[t]ime spent performing the task is not considered part of the meal period." Thus, where the regulation states an employee must be paid for his time if he is required to "remain

on duty on the premises or at a prescribed work site in the interest of the employer” (WAC 296-126-092(1)), it means that the employee must be paid if he is required to be available to engage in active work, not that he can be expected to actively work throughout the meal period. In the event such work is performed, the entire purpose of the break time is compromised and additional pay is required. In fact, Policy ES.C.6 § 7 specifically provides that if the employer complies with its obligations [to allow for true break time for paid meal periods], “payment of an extra 30-minute meal break is not required.” By the same token, if an employer does *not* comply with its obligations regarding paid meal periods, an extra 30 minutes of pay is owed to the employee.

Brink’s also is wrong when it contends that the trial court “confused” the term “on call” with “on duty,” and that if an employee has an “on duty” meal period, he can be expected to engage in “active work.” App. Br. at 32-33. In fact, Brink’s incorrectly assumes that there is only one type of “on call” time, and that it is unpaid time. In fact there is both paid and unpaid “on call” time, and Brink’s fails to distinguish between the two. The on duty meal period at issue here is akin to paid “on call” time, which occurs when the employee’s time is sufficiently restricted that “it is not spent primarily for the benefit of the employee.” *Chelan County Deputy Sheriffs’ Ass’n v. Chelan Cty*, 109 Wn.2d 282, 299, 745 P.2d 1 (1987)(instruction applying test developed under the FLSA). In *Chelan*

County, for example, the court affirmed a jury finding that a police officer should be paid for his “on call” time because his movements were severely restricted, and also remanded for trial the question of compensability of “on call” time spent eating and sleeping. *Id.* Thus, paid “on call” time does not involve active work. Rather, the pay obligation is triggered by restrictions placed on the employee’s freedom to act during the period. Likewise, class members were paid by Brink’s for time during their meal periods, not to actively work while eating, but to remain with the truck for the benefit the employer. These constraints alone are sufficient to trigger the obligation for a paid meal period under WAC 296-126-092(1). When the employer additionally requires active and continuous work responsibilities throughout the meal period, as Brink’s did here, it eviscerates the purpose of the meal period and renders the employer liable for damages for failure to provide a true meal period.

This point also is clear from the federal regulations on “Waiting Time,” 29 C.F.R. §§ 785.14-.17, cited by Brink’s. 29 C.F.R. § 785.15 discusses the concept of “On Duty,” and states:

A stenographer who reads a book while waiting for dictation, a messenger who works a crossword puzzle while awaiting assignments, fireman who plays checkers while waiting for alarms and a factor worker who talks to his fellow employees while waiting for machinery to be repaired are all working during their periods of inactivity.... [T]he employee is unable to use the time

effectively for his own purposes.... The employee is engaged to wait.

Resp. App. 4. This is virtually identical to the description of paid “on call” time in 29 C.F.R. § 785.17. However, as the trial court found here, the armored truck crews were more than “engaged to wait.” They were actively guarding at all times during the run. They could not read books, do crossword puzzles, play checkers or chat with passers-by, and were not merely “on duty” as that term is used in WAC 296-126-092(1) and 29 C.F.R. § 785.15.

This same point is made by implication in DL&I’s discussion of *unpaid* meal periods. Section 6 of Policy ES.C.6 states that whether a meal period has to be paid must be analyzed “on a case-by-case basis,” and the key factor is whether the employees are “free to spend their meal period on the premises as they please” (in which case the meal period may be unpaid), or whether they are “on the premises in the interest of the employer” (in which case it must be paid). Accordingly, an “on duty” meal period does not mean the employee can be actively engaged in work, but rather that he or she can be called to work by the employer at a moment’s notice in order to perform required tasks.

The case law rejects Brink’s’ argument as well. As the court explained in *Frese v. Snohomish County*, 129 Wn. App. 659, 666, 120 P.3d 89 (2005), an employer cannot “demand unremitting work through

the [paid] lunch period.” Brink’s is wrong to characterize this holding as only requiring that employees “still have the ability to eat.” App. Br. at 29. Clearly, the court there found that a paid “on duty” meal period under Washington law cannot involve continuous work responsibilities.

To hold otherwise would subvert the purpose and benefit of meal periods. The logic of Brink’s’ argument would permit, as an example, a factory owner to require employees on a manufacturing assembly line to stay on the line as long as they have the ability to chew on a sandwich. This is no different than what was required of class members here, who were required to actively guard the highly valuable contents of their trucks, without reprieve, for their full work shifts on the routes.

Finally, the cases cited by Brink’s do not support its argument. Brink’s misstates the holding in *White v. Salvation Army*, 118 Wn. App. at 279. As explained previously, *White* held only that an employer does not have a duty to *schedule* meal periods. *White* does not stand for the proposition that an employer can create work conditions that it knows or should know will preclude adequate time for lawful breaks from active work duties and escape liability simply because it does not “actively prevent” employees from taking breaks.

Brink’s’ reliance on *Iverson v. Snohomish County*, 117 Wn. App. 618, 72 P.3d 772 (2003), is likewise misplaced. As Division I explained subsequently in *Frese*, the *Iverson* decision does not hold that a paid “on

duty” meal period “contemplates activity, duty, not just being on call.” App. Br. at 32. In *Frese*, the court explained that the dispute before it was not confronted in *Iverson*, which was “whether the duties the employees were called upon to perform went beyond what the [labor] agreement contemplates for ‘on call’ status.” 129 Wn. App. at 663; *see also id.* at 671 (Appelwick, J. concurring)(“The evidence in *Iverson* was that Iverson was on call”). This is very similar to the issue here as well. Moreover, Iverson’s claim failed in part because he offered no evidence that he had to perform active work duties during his meal period. *Iverson*, 117 Wn. App. at 622. Brink’s’ assertion that the *Iverson* court denied additional compensation to the plaintiff even though he “perform[ed] numerous duties beyond an appreciation of the dangerous surroundings...,” App. Br. at 28, simply misstates the factual findings in the case.

Brink’s also mischaracterizes *Eisenhauer v. Rite Aid Corp.*, 2006 WL 1375064 (W.D. Wash. 2006). That case is distinguishable in at least two respects. First, the pharmacist there was himself a manager, who determined how and when staff would get breaks. Second, the pharmacist in fact received a half hour meal period, although he chose to take it more than five hours into his shift. *Id.* at *8-9 (finding that the pharmacist received sufficient time for breaks, took a “formal meal break at 3:00 pm,” and “consciously chose when and how to eat his meals”). Given these

facts, the court reasonably held that he could not seek extra compensation because he did not have a meal period scheduled earlier in his shift.

Likewise, in *Bell v. Addus Healthcare, Inc.*, 2007 U.S. Dist. LEXIS 59464, *12 (W.D. Wash. 2007), the court dismissed plaintiff's claim regarding meal periods because she sought a "duty free" meal period, stating "Ms. Bell may have a claim under Washington law for unpaid wages, but she does not have a claim for either failure to provide meal periods or failure to provide duty free meal periods." Here, class members seek unpaid wages, and acknowledge that they could be "on call" during their meal periods. The issue here, but not discussed or confronted in *Eisenhauer* or *Bell*, is whether an employer is entitled to require employees to actively work throughout their meal periods.

In sum, DL&I's interpretation (Resp. App. 2) of its own regulation (Resp. App. 1) prohibits a paid meal period that consists of continuous, active work. Brink's is wrong to argue that payment for the meal period permits an employer to require constant work.

3. Vigilance In This Case Required Active Work.

Brink's contends that its vigilance requirement amounts to nothing more than "keep[ing] an eye out for her own safety during a break...." App. Br. at 32. As explained in the Statement of Facts, *supra*, the trial court found that vigilance in this context required much more: class members were "always engaged in active work duties when on the

armored vehicles, specifically, guarding and being vigilant (e.g., scanning their routes and surrounding areas, being alert, and giving the appearance of alertness, looking out of windows, and maintaining communications with fellow crew members when apart).” CP 4412. “The vigilance required of class members is not a passive state but requires active observation and mental exertion at all times.” CP 4390. As noted above, these findings are verities on appeal.⁴

Brink’s also argues that its vigilance requirement cannot constitute compensable “work” because it is not primarily for the benefit of Brink’s, but rather was “advised” for the safety of the class members themselves. App. Br. at 32, 34. This contention is refuted, *inter alia*, in the first page of its own Handbook, which directs all employees that their “primary duty is...to act as a guard ...[t]hat is, to enforce against employees and other persons, rules to protect the property of Brink’s or its customers....” Ex. 1 at D987. It is immaterial that vigilance serves to protect the employees as well. As the trial court pointed out, “[t]he fact that constant vigilance may have benefited the class members by protecting their personal safety, as

⁴ Brink’s cites *Jonites v. Exelon Corp.*, 522 F.3d 721 (7th Cir. 2008), and *Summers v. Howard University*, 127 F. Supp.2d 27 (D.D.C. 2000), for the proposition that the duty to remain vigilant cannot constitute work. However, *Jonites* held only that plaintiffs’ claims were subject to mandatory arbitration and declined to reach the question of whether plaintiffs were engaged in compensable work when they had to remain alert for trespassers during their lunch periods. 522 F.3d at 724. In *Summers*, the court merely denied plaintiffs’ motion for summary judgment where there was evidence that the college security officers could leave campus to eat lunch and could engage in personal activities like shooting pool during that time. 127 F. Supp.2d at 34-35.

well as serving the business interests of the company, does not change this conclusion.” CP 4413, *citing Stevens v. Brink’s Home Security, Inc.*, 162 Wn.2d 42, 55, 169 P.3d 473 (2007)(Madsen, J., concurring)(“The fact that a technician personally benefits [from use of a company van during travel time between home and work sites] does not preclude the conclusion that travel from and to the home is compensable time”).

Finally, Brink’s makes the unsupported policy argument that, if affirmed, this verdict will mean that crew members will have to be “unconcerned about their personal safety” during breaks. App. Br. at 35. Brink’s ignores the many options it has to make lawful breaks possible, such as permitting returns to the branch during the day, arranging for secured stops along the routes, or placing an additional guard on the trucks. Further, as the trial court noted, Brink’s never applied for a variance pursuant to RCW 49.12.105, a process by which employers in special circumstances may seek from DL&I adjustments of the legal requirements. CP 4411-12.

E. There Was No Waiver Of The Meal Periods.

There are several flaws in Brink’s waiver argument. First, it is defective on its face because Brink’s failed to assign error to the trial court’s factual finding that “there was no evidence in this case to support the conclusion that class members willingly and voluntarily waived their meal breaks, and there is evidence to the contrary from former branch

managers.” CP 4417 (citations omitted). Since it neglected to assign error to this finding, it cannot be heard to argue “[t]he court erred in finding” no waiver. App. Br. at 36. See RAP 10.3(g).

Second, Brink’s argues that while there is no evidence of express waivers by class members, such waivers may be implied by conduct, citing *Rhodes v. Gould*, 19 Wn. App. 437, 441, 576 P.2d 914 (1978). However, the holding in *Rhodes* undercuts Brink’s’ argument. There, the court held that an appellate court cannot find waiver in the absence of a finding of fact from the trial court of the conditions giving rise to waiver. *Id.* Here, of course, the trial court made the contrary finding of fact, namely, that there was no evidence of any waiver, implicit or otherwise.

Finally, waiver is an affirmative defense on which Brink’s had the burden of proof. *Id.* at 440. However, Brink’s fails to cite to a single fact in the record in support of its argument that class members intentionally and voluntarily relinquished their statutory right. See App. Br. at 36-37.

F. Class Members Received No Lawful Rest Breaks.

While most of Brink’s’ arguments concern the trial court’s findings and conclusions regarding the meal break claim, it makes two arguments regarding rest breaks: (1) that the holding of *White v. Salvation Army, supra*, permitted Brink’s to require class members to be vigilant during rest breaks; and (2) that class members received intermittent rest breaks. Brink’s is wrong on both counts.

First, the reasoning set forth above regarding meal periods applies, if anything, with even greater force to rest breaks. DL&I Policy ES.C.6, § 10 could not be more clear that active work is incompatible with a lawful rest break: “The term ‘rest period’ means to stop work duties, exertions, or activities for personal rest and relaxation.” Resp. App. 2. Section 13 further explains that during a rest break, “employees must be allowed to rest, eat a snack or drink a beverage, make personal telephone calls, attend to personal business, close their door to indicate they are taking a break.” There is no dispute that class members here were never permitted to engage in any of these activities while on their routes.

Brink’s argues again in this section that it only asks class members to remain “relaxed but alert” during their rest periods, and that employees are free “to engage in personal action, like using the restroom, smoking or shopping for clothes.” App. Br. at 38. In fact, the only personal activities allowed are to use the restroom and to grab food or a smoke on the go. There is no evidence that class members shop for clothes, and Brink’s does not support this contention with any citation to the record. In any event, employees are entitled by law to a much wider range of personal activities, including reading, listening to music, resting, and telephoning,

all of which are expressly prohibited under Brink's rules. *See* Ex. 1 at D1004.⁵

Finally, with respect to intermittent breaks, the trial court found "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." CP 4413. It also found that the bathroom stops or time spent hurriedly buying food or drink "are too short and hurried to rise to the level of 'intermittent breaks.'" CP 4416. Indeed, there was unrebutted evidence that class members could not relax even when they went to the bathroom. *See* CP 4389, *citing* RP 824 (Desvignes); RP 28-29 (11/19/10 PM sess.) (Remillard). Under the DL&I Policy, where "continuous activities" are required, as with a production line, it is not possible to take "intermittent breaks." Just so here, where class members could never stop working, and therefore did not receive any lawful break time, intermittent or otherwise.

G. The Trial Court Did Not Err In Relying Upon Dr. Abbott's Expert Testimony.

There are several flaws in Brink's' arguments concerning Dr. Abbott's testimony. App. Br. at 40-42. First, as in other areas, Brink's

⁵ Although some class members did carry cell phones for emergency use, the trial court specifically found "they only occasionally used the phones for personal reasons, and the vehicles were too noisy to allow much use in any event." CP 4393 (citations omitted).

did not assign error to the admission of his testimony. Thus, its arguments on this point should be disregarded in their entirety. RAP 10.3(g).

Second, Brink's mischaracterizes the testimony and misrepresents how the trial court used it. For example, it states that Dr. Abbott "assumed employees always wrote down their breaks...." App. Br. at 40. In fact, Dr. Abbott made no such assumption, *see* RP 1187-88; his expert testimony was limited to the selection of a representative sample of daily guide sheets and summarizing the occurrences of recorded break times indicated on those sheets, RP 1117. Any inference from the absence of recorded breaks was up to the court, including inferences in light of managerial testimony that crew members were instructed to record breaks.

Nor did the trial court rely on Dr. Abbott's testimony to prove that no breaks were taken or that the guide sheets showed every instance when a class member used the bathroom or grabbed food to go. App. Br. at 42. With respect to rest breaks, the court explicitly stated that "the absence of recorded restroom stops or stops to grab food or drink on most of the guide sheets does not necessarily mean that such stops were not made." CP 4401. Dr. Abbott's findings were relevant, however, to "corroborate class member testimony regarding the duration of such stops." *Id.*

With respect to meal periods, the trial court found only that the small incidence of recorded meal breaks and their short duration when recorded "corroborates class member testimony that [they] did not receive

meal breaks, that class members would record stops or delays of more than a few minutes, and that few meal breaks were recorded even when a pre-printed space was included in the guide sheet for doing so.” CP 4401.

Finally, contrary to Brink’s’ argument, the fact that some class members would return to the branch after their main route was completed, and before a bank-out or deposit-pull run, does not undercut the value of Dr. Abbott’s testimony. *See App. Br. at 42.* Whether or not class members had time to use the bathroom at the branch has no bearing on Dr. Abbott’s testimony or the way in which the trial court relied upon it.

H. The Back Pay Damage Award Was Not Flawed.

1. The Trial Court Correctly Applied *Wingert* To Missed Meal Periods.

Brink’s challenges the trial court’s holding that the principle established by the Supreme Court in *Wingert v. Yellow Freight Systems, supra* -- that if an employer fails to provide required paid rest breaks, it must pay for the missed time -- also applies to missed paid meal periods. CP 4418. This was clearly correct. *Wingert* was based on the principle that an employer who makes an employee work through paid rest break time must pay for the work time (even though the break time is already compensated) because the workers have “in effect, provid[ed their employer] with an additional 10 minutes of labor....” 146 Wn.2d at 849. This same reasoning applies to paid meal periods. If employees are

compelled to work through a paid meal period without the ability to rest, relax, and focus on eating and drinking, they have likewise given their employer additional labor without appropriate compensation.

Thus, back pay is due on a missed meal period (even though paid) just as it is with a missed rest break (even though paid). *See Alvarez v. IBP, Inc.*, 339 F.3d 894, 913-14 (9th Cir. 2003), *aff'd*, 546 U.S. 21, 126 S. Ct. 514, 163 L. Ed. 2d 288 (2005)(employees in meatpacking plant were entitled to an additional 30 minutes of payment under Washington law when they received less than their full 30 minute meal break).

2. The Trial Court Used The Proper Framework For Calculating Damages.

Brink's does not take issue with the trial court's general approach to proof of damages in this case. Specifically, the trial court held, and Brink's does not disagree, that "[w]here, as here, the fact of injury has been established, Plaintiff does not need to establish the amount of damages owed with absolute certainty," CP 4418, *citing Gaasland Co. v. Hyak Lumber & Millwork, Inc.*, 42 Wn.2d 705, 713, 257 P.2d 784 (1953). Brink's also does not dispute that the trial court correctly recognized that in wage cases, "once a plaintiff has established that he has performed work for which he did not receive proper compensation, he need only prove the amount and extent of that work as a matter of just and reasonable inference." CP 4418, *citing Mt. Clemens*, 328 U.S. at 680.

After plaintiff provides a reasonable approximation of unpaid work time, it falls upon defendant to produce evidence negating plaintiff's estimate or showing the precise amount of work performed. *Mt. Clemens*, 328 U.S. at 687-88.

3. Brink's Failed To Carry Its Burden Of Proof Regarding Damages.

Brink's attack on the damages award in this court mirrors its approach in the trial court. Specifically, Brink's confines itself to taking rhetorical "pot shots" at plaintiff's expert, who based his calculations almost entirely on data that Brink's itself provided, but does not produce evidence of any kind to rebut either Dr. Munson's methodology or the actual damages awarded. In the absence of such evidence, the trial court was plainly correct, and certainly did not abuse its discretion, in finding that Brink's did not come forward with sufficient evidence supporting its criticisms and that Dr. Munson's calculations represent a reasonable approximation of the damages owed. CP 4418-24.

a. There Is No "Disconnect" Between The Testimony of Dr. Abbott And Dr. Munson.

Contrary to Brink's assertion, there is no disconnect between the testimony of Drs. Abbott and Munson. Brink's argument in this regard is based on an incorrect assertion of fact that has no basis in the record and was never presented to the trial court.

Neither Dr. Abbott nor any other witness testified that the daily guide sheets sampled by Dr. Abbott showed a typical run duration of only six to eight hours. *See* App. Br. at 44. In fact, neither Dr. Abbott nor any other witness analyzed the guide sheets to determine average run length. To the extent that Brink's relies on the few guide sheets it handpicked for Exhibits 22 and 23 to its Appendix, these represent only 10 of the 952 guide sheets sampled by Dr. Abbott and admitted into evidence. Thus, Brink's' claim that there is a two to four hour discrepancy between the guide sheets and the punch data used by Dr. Munson has no basis in the trial record.

In addition, to the extent that the guide sheets show run durations shorter than the workday hours reflected in the punch data, that is to be expected and was fully considered by the trial court. Class members have work responsibilities both before and after their runs in terms of handling the liability and preparing the truck. CP 4387. And while some crews sometimes returned to the branch between runs, the trial court found, based on substantial witness testimony, that in such instances "there was typically little non-working time at the branch between the two components." *Id.* The existence of some testimony attesting to the infrequent availability of some down time at the branch (after a run that already lasted eight or more hours (CP 4388)) does not change the

evidence supporting the trial court's factual finding, or the propriety of assessing damages based on the duration of the entire workday.

b. There Was No Attorney Manipulation.

Brink's' assertion that plaintiff's counsel manipulated the data provided to Dr. Munson by adding a "totaled amount" column to the punch data is pure fantasy and has no basis in the record.⁶ *See* App. Br. at 46. This column was part of all the customized time detail records produced by Brink's for each class member. *E.g.*, Ex. 212 ; E x. 565 (proffered by defendant). The Seattle branch payroll administrator, Jhan-Moneeh Chau, testified that this column appeared in Brink's' reports and represents an employee's "[t]otal time for the day" measured from their scheduled start time to their clock-out time. RP 2274-77. It was used by Dr. Munson because employees might punch in before their scheduled start times. In such instances, the "totaled amount" figure could be slightly less than the time lapse between the punch in and punch out times, although the cumulative difference was less than one percent. RP 71-72 (11/17/09 PM session). As the trial court found, therefore, Dr. Munson's use of the "totaled amount" is conservative because it excludes pre-shift time that may or may not have been spent working. CP 4405. Thus, there

⁶ At page 46 of its brief, Brink's cites to "RP 11/19/09 at 11-14" to support this assertion. This citation does not correspond with the Verbatim Report of Proceedings for that day, or the testimony of Dr. Munson.

is no factual basis to Brink's' claim of attorney manipulation and no evidence of any error in the damages calculation.

c. Dr. Munson's Methodology Was Not Flawed.

The trial court also extensively addressed Brink's' contention that Dr. Munson's methodology was flawed because his calculations included days in which class members worked in non-Washington branches, in non-driver/messenger job classifications, or at the branch rather than on an armored truck. The court concluded that these alleged problems arose largely because Brink's' own production of data was "at times overinclusive, underinclusive and incomplete, or inconsistent." CP 4421-22. The court further concluded that Dr. Munson either adequately adjusted his calculations for these alleged errors during trial or that Brink's' failed to produce sufficient evidence that the errors in fact existed. CP 4422-24.

Specifically, Dr. Munson reduced his damage calculations at trial for nine class members for whom there was evidence of out-of-state work. CP 4424-32. Neither at trial nor here has Brink's' pointed to any additional class members for whom such adjustments are necessary.

With respect to out-of-classification (non-driver/messenger) work, the trial court found that Brink's' did not present sufficient evidence that Dr. Munson included such work in his calculations. CP 4422. The

propriety of that conclusion is bolstered here by Brink's' complete failure to provide any record citations for this argument in its brief.

The trial court similarly found that Dr. Munson had reasonably reduced his damage calculations to account for days working in the branch and that Brink's' identification of isolated mistakes in this analysis failed to demonstrate any "systematic errors or significant understatement" in the amount of the reductions. CP 4422-23. Brink's again repeats its evidentiary deficiencies before the trial court by failing to substantiate its allegations with any record citations in its brief here.

In any event, these alleged errors occur only at the margins of Dr. Munson's analysis, if at all, and do not affect his core methodology, described at length at CP 4403-07, of utilizing daily time data and weekly payroll data to determine the number of break minutes owed and the back pay due for such time. Given the soundness of this basic methodology, Brink's' arguments go at most to the weight of his testimony, not its admissibility. *See Lewis River Golf, Inc. v. O.M. Scott & Sons*, 120 Wn.2d 712, 717-720, 845 P.2d 987 (1993); *Alpine Industries, Inc. v. Gohl*, 30 Wn. App. 750, 754-56, 637 P.2d 998 (1981). The trial court's thoughtful consideration of these arguments demonstrates that it did not abuse its discretion in either admitting the testimony or the weight it was given.

Moreover, as the trial court noted, in the absence of reliable and comprehensive information on the days during which class members

allegedly worked in the branch rather than on the trucks, it would have been appropriate to disregard this issue entirely (which Dr. Munson did not do) to avoid the risk of undercompensating class members and rewarding 'Brink's for its misfeasance. CP 4424, *citing Reich v. Southern New England Telecoms. Corp.*, 121 F.3d 58, 69-70 (2d Cir. 1997) (affirming damage award despite defendant's proffer that calculations included time spent by class members in non-compensable positions); *Amaral v. Cintas Corp. No. 2*, 78 Cal Rptr.3d 572, 596-99 (Cal. App. 2008) (same). This is consistent with the general rule in Washington that once the fact of damages has been established an award of damages is appropriate even if the amount is only approximate. *Mothers Work, Inc. v. McConnell*, 131 Wn. App. 525, 536, 128 P.3d 128 (2006)(awarding overtime damages based on conflicting and inexact calculations of competing experts); *Lewis River Golf*, 120 Wn.2d at 717-720; *Alpine Industries*, 30 Wn. App. at 754-56.

Finally, Brink's does not assign error to the trial court's adoption of the burden-shifting approach developed by the United States Supreme Court in *Mt. Clemens*, 328 U.S. at 687 -88. Under that approach, as discussed above, once plaintiff provides a reasonable approximation of the uncompensated time owed, defendant must come forward with evidence negating plaintiff's estimate or showing the precise amount of work performed. *Id.* Here, Dr. Munson presented a detailed calculation of the

time owed, including reductions for out-of-state work and estimated branch days. However, despite the opportunity to come forward with its own damage calculations or amount of reductions for out-of-state work, out-of-classification work, or branch days, Brink's failed to do so. Therefore, it cannot now claim that the trial court abused its discretion in calculating damages.

I. Plaintiff Should Be Awarded Fees And Expenses On Appeal.

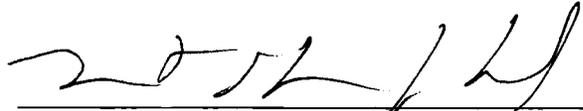
Pursuant to RAP 18.1, and based upon RCW 49.46.090 and 49.48.030, Respondent should be awarded attorneys fees and expenses incurred in connection with this appeal.

V. CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the trial court's Decision be affirmed in its entirety.

Respectfully submitted this 30th day of September, 2010.

SCHROETER GOLDMARK & BENDER



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Adam J. Berger, WSBA #20714

Attorneys for Respondent

NO. 65077-7-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

MEGAN PELLINO, individually and on behalf
of others similarly situated,

Respondent,

v.

BRINK'S, INCORPORATED,

Appellant.

**APPENDIX TO
BRIEF OF RESPONDENT**

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FILED
COURT OF APPEALS DIVISION I
STATE OF WASHINGTON
2010 OCT -1 PM 1:32

ORIGINAL

Respondent hereby submits the following Appendix in support of
Brief of Respondent.

Appendix 1: WAC 296-126-092

Appendix 2: Washington State Department of Labor & Industries'
Employment Standards Policy ES.C.6;

Appendix 3: Washington State Department of Labor & Industries'
Employment Standards Policy ES.C.2; and

Appendix 4: 29 U.S.C. §§785.14 - .17

DATED this 30th day of September, 2010.

SCHROETER GOLDMARK & BENDER



Martin S. Garfinkel, WSBA #20787

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Attorneys for Respondent

APPENDIX 1

WAC 296-126-092

Meal periods — Rest periods.

(1) Employees shall be allowed a meal period of at least 30 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.

(3) Employees working three or more hours longer than a normal work day shall be allowed at least one 30-minute meal period prior to or during the overtime period.

(4) Employees shall be allowed a rest period of not less than 10 minutes, on the employer's time, for each 4 hours of working time. Rest periods shall be scheduled as near as possible to the midpoint of the work period. 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 10 minutes for each 4 hours worked, scheduled rest periods are not required.



ADMINISTRATIVE POLICY

STATE OF WASHINGTON DEPARTMENT OF LABOR AND INDUSTRIES EMPLOYMENT STANDARDS

TITLE: MEAL AND REST PERIODS
FOR NONAGRICULTURAL WORKERS
AGE 18 AND OVER

NUMBER: ES.C.6

REPLACES: ES-026

CHAPTER: RCW 49.12
WAC 296-126-092

ISSUED: 1/2/2002
REVISED: 6/24/2005

ADMINISTRATIVE POLICY DISCLAIMER

This policy is designed to provide general information in regard to the current opinions of the Department of Labor & Industries on the subject matter covered. This policy is intended as a guide in the interpretation and application of the relevant statutes, regulations, and policies, and may not be applicable to all situations. This policy does not replace applicable RCW or WAC standards. If additional clarification is required, the Program Manager for Employment Standards should be consulted.

This document is effective as of the date of print and supersedes all previous interpretations and guidelines. Changes may occur after the date of print due to subsequent legislation, administrative rule, or judicial proceedings. The user is encouraged to notify the Program Manager to provide or receive updated information. This document will remain in effect until rescinded, modified, or withdrawn by the Director or his or her designee.

1. Are meal and rest periods conditions of labor that may be regulated by the department under RCW 49.12, the Industrial Welfare Act?

Yes, the department has the specific authority to make rules governing conditions of labor, and all employees subject to the Industrial Welfare Act (IWA) are entitled to the protections of the rules on meal and rest breaks. The actual meal and rest break requirements are not in the statute but appear in WAC 296-126-092, Standards of Labor.

Note: Minor employees (under 18) and **agricultural workers** are not covered by these rules. The regulations for minors are found in WAC 296-125-0285 and WAC 296-125-0287. The regulations for agricultural employees are found in WAC 296-131-020.

2. Are both private and public employees covered by these meal and rest period regulations?

Yes. The IWA and related rules establish a minimum standard for working conditions for all covered employees working for both public sector and private sector businesses in the state, including non-profit organizations that employ workers.

3. Does a collective bargaining agreement (CBA) or a labor/management agreement allow public employers to give meal and rest periods different from those under WAC 296-126-092?

Yes. Effective May 20, 2003, the legislature amended RCW 49.12.005 to include “the state, any state institution, state agency, political subdivisions of the state, and any municipal corporation or quasi-municipal corporation”. Thus it brought public employees under the protections of the IWA, including the meal and rest period regulations, WAC 296-126-092. See *Administrative Policy ES.C.1 Industrial Welfare Act and ES.A.6 Collective Bargaining Agreements*.

Exceptions--The meal and rest periods under WAC 296-126-092 do not apply to:

- Public employers with a local resolution, ordinance, or rule in effect prior to April 1, 2003 that has provisions for meal and rest periods different from those under WAC 296-126-092, or
- Employees of public employers who have entered into collective bargaining contracts, labor/management agreements, or other mutually agreed to employment agreements that specifically vary from or supersede, in part or in total, the rules regarding meal and rest periods, or
- Public employers with collective bargaining agreements (CBA) in effect prior to April 1, 2003 that provide for meal and rest periods different from the requirements of WAC 296-126-092. The public employer may continue to follow the CBA until its expiration. Subsequent collective bargaining agreements may provide for meal and rest periods that are specifically different, in whole or in part, from the requirements under WAC 296-126-092.

If public employers do not meet one of the above exceptions, then public employees are included in the requirements for meal and rest periods under WAC 296-126-092.

4. May a collective bargaining agreement have different provisions for meal and rest periods for employees in construction trades?

Yes. Effective May 20, 2003, RCW 49.12.187 was amended to include a provision that the rules regarding appropriate meal and rest periods (WAC 296-126-092) for employees in the construction trades, i.e., laborers, carpenters, sheet metal, ironworkers, etc., may be superseded by a CBA negotiated under the National Labor Relations Act. The terms of the CBA covering such employees must specifically require rest and meal periods and set forth the conditions for the rest and meal periods. However, the conditions for meal and rest periods can vary from the requirements of WAC 296-126-092.

Construction trades may include, but are not necessarily limited to, employees working in construction, alteration, or repair of any type of privately, commercially, or publicly-owned building, road, or parking lot, or erecting playground or school yard equipment, or other related industries where the employees are in a recognized construction trade covered by a CBA.

This exception does not apply to employees of construction companies without a CBA.

5. When is a meal period required?

Meal period requirements are triggered by more than five hours of work:

- Employees working five consecutive hours or less need not be allowed a meal period. Employees working over five hours shall be allowed a meal period. See WAC 296-126-092(1).

- The 30-minute meal period must be provided between the second and fifth working hour.
- The provision in WAC 296-126-092(4) that no employee shall be required to work more than five consecutive hours without a meal period applies to the employee's normal workday. For example, an employee who normally works a 12-hour shift shall be allowed to take a 30-minute meal period no later than at the end of each five hours worked.
- Employees working at least three hours longer than a normal workday shall be allowed a meal period before or during the overtime portion of the shift. A "normal work day" is the shift the employee is regularly scheduled to work. If the employee's scheduled shift is changed by working a double shift, or working extra hours, the additional meal period may be required. Employees working a regular 12-hour shift who work 3 hours or more after the regular shift will be entitled to a meal period and possibly to additional meal periods depending upon the number of hours to be worked. See WAC 296-126-092(3).
- The second 30-minute meal period must given within five hours from the end of the first meal period and for each five hours worked thereafter.

6. When may meal periods be unpaid?

Meal periods are not considered hours of work and may always be unpaid as long as employees are completely relieved from duty and receive 30 minutes of uninterrupted mealtime.

It is not necessary that an employee be permitted to leave the premises if he/she is otherwise *completely* free from duties during the meal period. In such a case, payment of the meal period is not required; however, employees must be completely relieved from duty and free to spend their meal period on the premises as they please. These situations must be evaluated on a case-by-case basis to determine if the employee is on the premises in the in the interest of the employer. If so, the employee is "on duty" during the meal period and must be paid.

Employees who remain on the premises during their meal period on their own initiative and are completely free from duty are not required to be paid when they keep their pager, cell phone, or radio on *if* they are under no obligation to respond to the pager or cell phone or to return to work. The circumstances in determining when employees carrying cell phones, pagers, radios, etc., are subject to payment of wages must be evaluated on a case-by-case basis.

7. When must the meal period be paid?

Meal periods are considered hours of work when the employer requires employees to remain on duty on the premises or at a prescribed work site *and* requires the employee to act in the interest of the employer.

When employees are required to remain on duty on the premises or at a prescribed work site and act in the interest of the employer, the employer must make every effort to provide employees with an uninterrupted meal period. If the meal period should be interrupted due to the employee's performing a task, upon completion of the task, the meal period will be continued until the employee has received 30 minutes total of mealtime. Time spent performing

the task is not considered part of the meal period. The entire meal period must be paid without regard to the number of interruptions.

As long as the employer pays the employees during a meal period in this circumstance and otherwise complies with the provisions of WAC 296-126-092, there is no violation of this law, and payment of an extra 30-minute meal break is not required.

8. May an employee waive the meal period?

Employees may choose to waive the meal period requirements. The regulation states employees "shall be allowed," and "no employee shall be required to work more than five hours without a meal period." The department interprets this to mean that an employer may not require more than five consecutive hours of work and must allow a 30-minute meal period when employees work five hours or longer.

If an employee wishes to waive that meal period, the employer may agree to it. The employee may at any time request the meal period. While it is not required, the department recommends obtaining a written request from the employee(s) who chooses to waive the meal period.

If, at some later date, the employee(s) wishes to receive a meal period, any agreement would no longer be in effect. Employees must still receive a rest period of at least ten minutes for each four hours of work.

An employer can refuse to allow the employee to waive the meal period and require that an employee take a meal period.

9. What is the rest period requirement?

Employees shall be allowed a rest period of not less than ten minutes on the employer's time in each four hours of working time. The rest break must be allowed no later than the end of the third working hour. Employees may not waive their right to a rest period.

10. What is a rest period?

The term "rest period" means to stop work duties, exertions, or activities for personal rest and relaxation. Rest periods are considered hours worked. Nothing in this regulation prohibits an employer from requiring employees to remain on the premises during their rest periods. The term "on the employer's time" is considered to mean that the employer is responsible for paying the employee for the time spent on a rest period.

11. When must rest periods be scheduled?

The rest period of time must be scheduled as near as possible to the midpoint of the four hours of working time. No employee may be required to work more than three consecutive hours without a rest period.

12. What are intermittent rest periods?

Employees need not be given a full 10-minute rest period when the nature of the work allows intermittent rest periods equal to ten minutes during each four hours of work. Employees must be permitted to start intermittent rest breaks not later than the end of the third hour of their shift.

An "intermittent rest period" is defined as intervals of short duration in which employees are allowed to relax and rest, or for brief personal inactivities from work or exertion. A series of ten one-minute breaks is not sufficient to meet the intermittent rest break requirement. The nature of the work on a production line when employees are engaged in continuous activities, for example, does not allow for intermittent rest periods. In this circumstance, employees must be given a full ten-minute rest period.

13. How do rest periods apply when employees are required to remain on call during their rest breaks?

In certain circumstances, employers may have a business need to require employees to remain on call during their paid rest periods. This is allowable provided the underlying purpose of the rest period is not compromised. This means that employees must be allowed to rest, eat a snack or drink a beverage, make personal telephone calls, attend to personal business, close their door to indicate they are taking a break, or make other personal choices as to how they spend their time during their rest break. In this circumstance, no additional compensation for the 10-minute break is required. If they are called to duty, then it transforms the on-call time to an intermittent rest period and they must receive the remainder of the 10-minute break during that four-hour work period.

14. May an employer obtain a variance from required meal and rest periods?

Employers who need to change the meal and rest period times from those provided in WAC 296-126-092 due to the nature of the work may, for good cause, apply for a variance from the department. The variance request must be submitted on a form provided by the department, and employers must give notice to the employees or their representatives so they may also submit their written views to the department. See ES.C.9, Variances.

15. May a Collective Bargaining Agreement negotiate meal and rest periods that are different from those required by WAC 296-126-092?

No. The requirements of RCW 49.12 and WAC 296-126-092, establish a minimum standard for working conditions for covered employees. Provisions of a collective bargaining agreement (CBA) covering specific requirements for meal and rest periods must be least equal to or more favorable than the provisions of these standards, with the exception of public employees and construction employees covered by a CBA. See *Administrative Policy* ES.A.6 and/or ES.C.1.

APPENDIX 2

APPENDIX 3



ADMINISTRATIVE POLICY

STATE OF WASHINGTON DEPARTMENT OF LABOR AND INDUSTRIES EMPLOYMENT STANDARDS

TITLE: HOURS WORKED

NUMBER: ES.C.2

**CHAPTER: RCW 49.12
WAC 296-126**

REPLACES: ES-016

ISSUED: 1/2/2002

REVISED: 6/24/2005

REVISED: 11/28/2007

REVISED: 9/2/2008

ADMINISTRATIVE POLICY DISCLAIMER

This policy is designed to provide general information in regard to the current opinions of the Department of Labor & Industries on the subject matter covered. This policy is intended as a guide in the interpretation and application of the relevant statutes, regulations, and policies, and may not be applicable to all situations. This policy does not replace applicable RCW or WAC standards. If additional clarification is required, the Program Manager for Employment Standards should be consulted.

This document is effective as of the date of print and supersedes all previous interpretations and guidelines. Changes may occur after the date of print due to subsequent legislation, administrative rule, or judicial proceedings. The user is encouraged to notify the Program Manager to provide or receive updated information. This document will remain in effect until rescinded, modified, or withdrawn by the Director or his or her designee.

1. The department has the authority to investigate and regulate “hours worked” under the Industrial Welfare Act.

“Hours worked,” means all hours during which the employee is authorized or required, known or reasonably believed by the employer to be on duty on the employer's premises or at a prescribed work place. An analysis of “hours worked” must be determined on a case-by-case basis, depending on the facts. See WAC 296-126-002(8). See Administrative Policy ES.C.1.

The department's interpretation of “hours worked” means all work requested, suffered, permitted or allowed and includes travel time, training and meeting time, wait time, on-call time, preparatory and concluding time, and may include meal periods. “Hours worked” includes all time worked regardless of whether it is a full hour or less. “Hours worked” includes, for example, a situation where an employee may voluntarily continue to work at the end of the shift. The employee may desire to finish an assigned task or may wish to correct errors, prepare time reports or other records. The reason or pay basis is immaterial. If the employer knows or has reason to believe that the employee is continuing to work, such time is working time.

An employer may not avoid or negate payment of regular or overtime wages by issuing a rule or policy that such time will not be paid or must be approved in advance. If the work is performed, it must be paid. It is the employer's responsibility to ensure that employees do not perform work that the employer does not want performed.

The following definitions and interpretations of “hours worked” apply to all employers bound by the Industrial Welfare Act, even those not subject to the Minimum Wage Act. There is no similar

definition of "hours worked" in RCW 49.46, the Minimum Wage Act, or in WAC 296-128, Minimum Wage rules. Therefore, these definitions and interpretations apply to all employers subject to RCW 49.12, regardless of whether they may be exempt from or excluded from the Minimum Wage Act.

2. What is travel time and when it is considered hours worked?

Introductory statement to the policy:

This policy is designed to provide general information in regard to the current opinions of the Department of Labor & Industries on the subject matter covered. This policy is intended as a guide in the interpretation and application of the relevant statutes, regulations, and policies, and may not be applicable to all situations. This policy does not replace applicable RCW or WAC standards. If additional clarification is required, the Program Manager for Employment Standards should be consulted.

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The purpose of this policy statement is to update section two of Labor and Industries' administrative policy ES.C.2 (section 2) pertaining to hours worked. Following the *Stevens v. Brink's Home Security* decision, Labor and Industries committed to updating this section of the policy to reflect the Supreme Court decision in the *Brink's* case and address ambiguity created by that case. [*Stevens v. Brink's Home Security*, 162 Wn.2d 42, 169 P.3d 473 (2007)]. This policy is not intended to address or cover all employee travel time issues. Instead, it is limited to the particular issues raised in the *Brink's* case regarding whether time spent driving a company-provided vehicle between home and the first or last job site of the day constitutes compensable "hours worked."

Whether time spent driving in a company-provided vehicle constitutes paid work time depends on whether the drive time is considered "hours worked."

Whether travel or commute time is compensable depends on the specific facts and circumstances of each individual employee, employer, and work week. If the travel or commute time is considered "hours worked" under RCW 49.46.020 and WAC 296-126-002(8), then it is compensable and the employee must be paid for this time. These statutory and regulatory requirements cannot be waived through a collective bargaining agreement or other agreement.

"Hours worked" means all hours when an employee is authorized or required by the employer to be on duty on the employer's premises or at a prescribed workplace. WAC 296-126-002(8).

There are three elements to the definition of hours worked:

- 1- An employee is authorized or required by the employer,
- 2- to be on duty,
- 3- On the employer's premises or at a prescribed workplace.

If any of the three elements is not satisfied, then the time spent driving in a company-provided vehicle is not considered "hours worked." The specific factors used to establish the "authorized

or required” element are not listed in this policy. However, the element must be met for “hours worked” under the law.

Time spent driving a company-provided vehicle during an employee’s ordinary travel, when the employee is not on duty and performs no work while driving between home and the first or last job site of the day, is not considered hours worked.

Time spent driving a company-provided vehicle from the employer's place of business to the job site is considered hours worked. Time spent riding in a company-provided vehicle from the employer's place of business to the job site is not considered hours worked when an employee voluntarily reports to the employer’s location merely to obtain a ride as a passenger for the employee’s convenience, is not on duty, and performs no work. Time spent driving or riding as a passenger from job site to job site is considered hours worked.

Factors to consider in determining IF AN EMPLOYEE IS “on duty” when driving a company-provided vehicle between home and work.

To determine if the employee is on duty, you must evaluate the extent to which the employer restricts the employee’s personal activities and controls the employee’s time. This includes an analysis of the frequency and extent of such restrictions and control. Following is a non-exclusive list of factors to consider when making a determination if an employee is “on duty.” There may be additional relevant factors that the Supreme Court or L&I have not considered. All factors must be considered and weighed in combination with each other. The mere presence or absence of any single factor is not determinative.

1. The extent to which the employee is free to make personal stops and engage in personal activities during the drive time between home and the first or last job site of the day, or whether the vehicle may only be used for company business.
2. The extent to which the employee is required to respond to work related calls or to be redirected while en route.
3. Whether the employee is required to maintain contact with the employer.
4. The extent to which the employee receives assignments at home and must spend time writing down the assignments and mapping the route to reach the first job site before beginning the drive.

Factors to consider in determining if an employee is “on the employer’s premises or at a prescribed work place” when driving a company-provided vehicle between home and work.

To determine if a company-provided vehicle constitutes a “prescribed work place,” you must evaluate whether driving the particular vehicle is an integral part of the work performed by the employee. Following is a non-exclusive list of factors to consider when making a determination if an employee is “on the employer’s premises or at a prescribed work place.” There may be additional relevant factors that the Supreme Court or L&I have not considered. All factors must

be considered and weighed in combination with each other. The mere presence or absence of any single factor is not determinative.

1. Whether the nature of the business requires the employee to drive a particular vehicle provided by the employer to carry necessary nonpersonal tools and equipment to the work site.
2. The extent to which the company-provided vehicle serves as a location where the employer authorizes or requires the employee to complete business required paperwork or load materials or equipment.
3. The extent to which the employer requires the employee to ensure that the vehicle is kept clean, organized, safe, and serviced.

The following are two examples of how this policy may be used to determine whether or not drive time between home and the first or last job site of the day in a company-provided vehicle is compensable. These examples are illustrative and are not intended to create additional factors or address other scenarios where the facts differ from those below.

COMPENSABLE EXAMPLE:

1. In this example, the facts establish that the drive time between home and the first or last job site of the day in a company-provided vehicle is compensable. For purposes of this example, all of the following facts are present. The employee drives between home and the first or last job site of the day in a company-provided vehicle:

- As a matter of accepted company practice, the employee is prohibited from any personal use of the vehicle, which must be used exclusively for business purposes; and
- The employer regularly requires the employee to perform services for the employer during the drive time including being redirected to a different location; and
- The employee regularly transports necessary nonpersonal tools and equipment in the vehicle between home and the first or last job site of the day; and
- The employee receives his/her daily job site assignments at home in a manner that requires the employee to spend more than a de minimis amount of time writing down the assignments and mapping travel routes for driving to the locations.

NON COMPENSABLE EXAMPLE:

2. In this example, the facts establish that the drive time between home and the first or last job site of the day in a company-provided vehicle is not compensable. For purposes of this example, all of the following facts are present. The employee drives between home and the first or last job site of the day in a company-provided vehicle:

- The employer does not strictly control the employee's ability to use the vehicle for personal purposes. E.g., the employee, as a matter of accepted company practice, is

able to use the vehicle for personal stops or errands while driving between home and the job site; and

- The employee is not required to perform any services for the employer during the drive including responding to work related calls or redirection; and
- The employee does not perform any services for the employer during the drive including work related calls or redirection.

3. What constitutes training and meeting time and when is it considered “hours worked”?

Training and meeting time is generally interpreted to mean all time spent by employees attending lectures, meetings, employee trial periods and similar activities required by the employer, or required by state regulations, and shall be considered hours worked.

Time spent by employees in these activities need *not* be counted as hours worked if all of the following tests are met:

3.1 Attendance is voluntary; and

3.2 The employee performs no productive work during the meeting or lecture; and

3.3 The meeting takes place outside of regular working hours; and

3.4 The meeting or lecture is not directly related to the employee's current work, as distinguished from teaching the employee another job or a new, or additional, skill outside of skills necessary to perform job.

If the employee is given to understand, or led to believe, that the present working conditions or the continuance of the employee's employment, would be adversely affected by non-attendance, time spent shall be considered hours worked.

Time spent in training programs mandated by state or federal regulation, but *not* by the employer, need not be paid if the first three provisions are met; that is, if attendance is voluntary, the employee performs no productive work during the training time, and the training takes place outside of normal working hours.

A state regulation may require that certain positions successfully complete a course in Cardio-Pulmonary Resuscitation (CPR). The rules may require that in order to be employed in such a position the person must be registered with the state or have successfully completed a written examination, approved by the state, and further fulfilled certain continuous education requirements. However, should the employer require all employees to attend training, all employees attending the training must be paid for the hours spent in the training course.

Although the training course may be directly related to the employee's job, the training is of a type that would be offered by independent institutions in the sense that the courses provide generally applicable instruction which enables an individual to gain or continue employment with any employer which would require the employee to have such training, then this training would be regarded as primarily for the benefit of the employee and not the employer. In training of this type, where the employee is the primary beneficiary, the employee need not be paid for attending.

Where an employer (or someone acting on the employer's behalf), either directly or indirectly, requires an employee to undergo training, the time spent is clearly compensable. The employer in such circumstances has controlled the employee's time and must pay for it. However, where

the state has required the training, as in the example stated above, a different situation arises. When such state-required training is of a general applicability, and not tailored to meet the particular needs of individual employers, the time spent in such training would not be compensable.

When state or federal regulations require a certificate or license of the employee for the position held, time spent in training to obtain the certificate or license, or certain continuous education requirements, will not be considered hours worked. The cost of maintaining the certificate or license may be borne by the employee.

4. What determines an employment relationship with trainees or interns?

As the state and federal definition of "employ" are identical, the department looks to the federal Fair Labor Standards Act for certain training conditions exempted from that act. Under certain conditions, persons who without any expressed or implied compensation agreement may work for their own advantage on the premises of another and are not necessarily employees. Whether trainees are employees depends upon all of the circumstances surrounding their activities on the premises of the employer. If all six of the following criteria are met, the trainees are not considered employees:

- 4.1** The training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school; and
- 4.2** The training is for the benefit of the trainee; and
- 4.3** The trainees do not displace regular employees, but work under their close observation; and
- 4.4** The business that provides the training derives no immediate advantage from the activities of the trainees, and may in fact be impeded; and
- 4.5** The trainees are not necessarily entitled to a job at the conclusion of the training period; and
- 4.6** The trainees understand they are not entitled to wages for the time spent in the training.

5. What constitutes paid or unpaid work for students in a school-to-work program?

Students may be placed in a school-to-work program on a paid or unpaid basis. The department will not require payment of minimum wage provided all of the following criteria are met. If all five requirements are not met, the business will not be relieved of its obligation to pay minimum wage, as required by the Minimum Wage Act.

- 5.1** The training program is a bona fide program certified and monitored by the school district or the Office of the Superintendent of Public Instruction; and
- 5.2** A training plan exists that establishes a link to the academic work, e.g., a detailed outline of the competencies to be demonstrated to achieve specific outcomes and gain specific skills. The worksite effectively becomes an extension of the classroom activity and credit is given to the student as part of the course; and
- 5.3** The school has a designated district person as an agent/instructor for the worksite activity and monitors the program; and
- 5.4** The worksite activity is observational, work shadowing, or demonstrational, with no substantive production or benefit to the business. The business has an

investment in the program and actually incurs a burden for the training and supervision of the student that offsets any productive work performed by the student. Students may not displace regular workers or cause regular workers to work fewer hours as a result of any functions performed by the student, and

5.5 The student is not entitled to a job at the completion of the learning experience. The parent, student, and business all understand the student is not entitled to wages for the time spent in the learning experience.

If a minor student is placed in a paid position, all requirements of the Minimum Wage Act, the Industrial Welfare Act, and minor work regulations must be met. Minor students placed in a paid position with public agencies are subject to the Industrial Welfare Act.

Public agencies are not subject to the state minor work regulations, but they are subject to payment of the applicable state minimum wage. Note: Public agencies employing persons under age 18 are subject to the federal Child Labor Regulations and should contact the United States Department of Labor for specific information on hours and prohibited occupations.

6. What constitutes “waiting time” and when is it considered “hours worked”?

In certain circumstances employees report for work but due to lack of customers or production, the employer may require them to wait on the premises until there is sufficient work to be performed. “Waiting time” is all time that employees are required or authorized to report at a designated time and to remain on the premises or at a designated work site until they may begin their shift. During this time, the employees are considered to be engaged to wait, and all hours will be considered hours worked.

When a shutdown or other work stoppage occurs due to technical problems, such time spent waiting to return to work will be considered hours worked *unless* the employees are completely relieved from duty and can use the time effectively for their own purposes. For example, if employees are told in advance they may leave the job and do not have to commence work until a certain specified time, such time will not be considered hours worked. If the employees are told they must “stand by” until work commences, such time must be paid.

7. Is there a requirement for “show up” pay?

An employer is not required by law to give advance notice to change an employee’s shift or to shorten it or lengthen it, thus there is no legal requirement for show-up pay. That is, when employees report to work for their regularly scheduled shift but the employer has no work to be performed, and the employees are released to leave the employer’s premises or designated work site, the employer is not required to pay wages if no work has been performed.

8. What constitutes “on-call” time and when is it considered “hours worked”?

Whether or not employees are "working" during on-call depends upon whether they are required to remain on or so close to the employer's premises that they cannot use the time effectively for their own purposes.

Employees who are not required to remain on the employer's premises but are merely required to leave word with company officials or at their homes as to where they may be reached are not working while on-call. If the employer places restrictions on where and when the employee may travel while “on call” this may change the character of that “on call” status to being engaged in the performance of active duty. The particular facts must be evaluated on a case-by-case basis.

9. What constitutes preparatory and concluding activities and when is this time considered “hours worked”?

Preparatory and concluding activities are those activities that are considered integral or necessary to the performance of the job. Those duties performed in readiness and/or completion of the job shall be considered hours worked. When an employee does not have control over when and where such activities can be made, such activities shall be considered as hours worked.

Examples may include the following:

9.1 Employees in a chemical plant who cannot perform their principle activities without putting on certain clothes, or changing clothes, on the employer's premises at the beginning and end of the workday. Changing clothes would be an integral part of the employee's principle activity.

9.2 Counting money in the till (cash register) before and after the shift, and other related paperwork.

9.3 Preparation of equipment for the day's operation, i.e., greasing, fueling, warming up vehicles; cleaning vehicles or equipment; loading, and similar activities.

10. When are meal periods considered “hours worked”?

Meal periods are considered hours worked if the employee is required to remain on the employer's premises at the employer's direction subject to call to perform work in the interest of the employer. In such cases, the meal period time counts toward total number of hours worked and is compensable. See Administrative Policy ES.C.6.

APPENDIX 4

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Code of Federal Regulations Currentness

Title 29. Labor

Subtitle B. Regulations Relating to Labor

Chapter V. Wage and Hour Division, Department of Labor

Subchapter B. Statements of General Policy or Interpretation Not Directly Related to Regulations

Part 785. Hours Worked (Refs & Annos)

▣ Subpart C. Application of Principles

▣ Waiting Time

→ § 785. 14 General.

Whether waiting time is time worked under the Act depends upon particular circumstances. The determination involves “scrutiny and construction of the agreements between particular parties, appraisal of their practical construction of the working agreement by conduct, consideration of the nature of the service, and its relation to the waiting time, and all of the circumstances. Facts may show that the employee was engaged to wait or they may show that he waited to be engaged.” (Skidmore v. Swift, 323 U.S. 134 (1944)) Such questions “must be determined in accordance with common sense and the general concept of work or employment.” (Central Mo. Tel. Co. v. Conwell, 170 F. 2d 641 (C.A. 8, 1948))

SOURCE: 26 FR 190, Jan. 11, 1961, unless otherwise noted.

AUTHORITY: 52 Stat. 1060; 29 U.S.C. 201-219.

29 C. F. R. § 785. 14, 29 CFR § 785. 14

Current through September 23, 2010; 75 FR 58275

C**Effective:[See Text Amendments]**

Code of Federal Regulations Currentness

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Subtitle B. Regulations Relating to Labor

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Part 785. Hours Worked (Refs & Annos)

☞ Subpart C. Application of Principles

☞ Waiting Time

→ § 785.15 On duty.

A stenographer who reads a book while waiting for dictation, a messenger who works a crossword puzzle while awaiting assignments, fireman who plays checkers while waiting for alarms and a factory worker who talks to his fellow employees while waiting for machinery to be repaired are all working during their periods of inactivity. The rule also applies to employees who work away from the plant. For example, a repair man is working while he waits for his employer's customer to get the premises in readiness. The time is worktime even though the employee is allowed to leave the premises or the job site during such periods of inactivity. The periods during which these occur are unpredictable. They are usually of short duration. In either event the employee is unable to use the time effectively for his own purposes. It belongs to and is controlled by the employer. In all of these cases waiting is an integral part of the job. The employee is engaged to wait. (See: *Skidmore v. Swift*, 323 U.S. 134, 137 (1944); *Wright v. Carrigg*, 275 F. 2d 448, 14 W.H. Cases (C.A. 4, 1960); *Mitchell v. Wigger*, 39 Labor Cases, para. 66,278, 14 W.H. Cases 534 (D.N.M. 1960); *Mitchell v. Nicholson*,

179 F. Supp, 292,14 W.H. Cases 487 (W.D.N.C. 1959))

SOURCE: 26 FR 190, Jan. 11, 1961, unless otherwise noted.

AUTHORITY: 52 Stat. 1060; 29 U.S.C. 201-219.

29 C. F. R. § 785.15, 29 CFR § 785.15

Current through September 23, 2010; 75 FR 58275

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Part 785. Hours Worked (Refs & Annos)

[↗] Subpart C. Application of Principles [↗] Waiting Time**→ § 785.16 Off duty.**

(a) General. Periods during which an employee is completely relieved from duty and which are long enough to enable him to use the time effectively for his own purposes are not hours worked. He is not completely relieved from duty and cannot use the time effectively for his own purposes unless he is definitely told in advance that he may leave the job and that he will not have to commence work until a definitely specified hour has arrived. Whether the time is long enough to enable him to use the time effectively for his own purposes depends upon all of the facts and circumstances of the case.

(b) Truck drivers; specific examples. A truck driver who has to wait at or near the job site for goods to be loaded is working during the loading period. If the driver reaches his destination and while awaiting the return trip is required to take care of his employer's property, he is also working while waiting. In both cases the employee is engaged to wait. Waiting is an integral part of the job. On the other hand, for example, if the truck driver is sent from Washington, DC to New York City, leaving at 6 a.m. and arriving at 12 noon, and is completely and

specifically relieved from all duty until 6 p.m. when he again goes on duty for the return trip the idle time is not working time. He is waiting to be engaged. (*Skidmore v. Swift*, 323 U.S. 134, 137 (1944); *Walling v. Dunbar Transfer & Storage*, 3 W.H. Cases 284; 7 Labor Cases para. 61,565 (W.D. Tenn. 1943); *Gifford v. Chapman*, 6 W.H. Cases 806; 12 Labor Cases para. 63,661 (W.D. Okla., 1947); *Thompson v. Daugherty*, 40 Supp. 279 (D. Md. 1941))

SOURCE: 26 FR 190, Jan. 11, 1961, unless otherwise noted.

AUTHORITY: 52 Stat. 1060; 29 U.S.C. 201-219.

29 C. F. R. § 785.16, 29 CFR § 785.16

Current through September 23, 2010; 75 FR 58275

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Subchapter B. Statements of General Policy or Interpretation Not Directly Related to Regulations

Part 785. Hours Worked (Refs & Annos)

[↗] Subpart C. Application of Principles [↗] Waiting Time**→ § 785.17 On-call time.**

An employee who is required to remain on call on the employer's premises or so close thereto that he cannot use the time effectively for his own purposes is working while "on call". An employee who is not required to remain on the employer's premises but is merely required to leave word at his home or with company officials where he may be reached is not working while on call. (Armour & Co. v. Wantock, 323 U.S. 126 (1944); Handler v. Thrasher, 191 F. 2d 120 (C.A. 10, 1951); Walling v. Bank of Waynesboro, Georgia, 61 F. Supp. 384 (S.D. Ga. 1945))

SOURCE: 26 FR 190, Jan. 11, 1961, unless otherwise noted.

AUTHORITY: 52 Stat. 1060; 29 U.S.C. 201-219.

29 C. F. R. § 785.17, 29 CFR § 785.17

Current through September 23, 2010; 75 FR 58275

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COURT OF APPEALS DIV. #1
STATE OF WASHINGTON

2010 OCT -1 PM 1:32

NO. 65077-7-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

MEGAN PELLINO, individually and on behalf
of others similarly situated,

Respondent,

v.

BRINK'S, INCORPORATED,

Appellant.

**DECLARATION OF SERVICE OF BRIEF OF RESPONDENT;
AND APPENDIX TO BRIEF OF RESPONDENT**

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ORIGINAL

DECLARATION OF SERVICE

I, Sheila Cronan, a resident of the County of Kitsap, declare under penalty of perjury under the laws of the State of Washington that on September 30, 2010, I caused to be delivered in the manner set forth below a true and correct copy of the Brief of Respondent, Appendix to Brief of Respondent, and this Declaration of Service on the following counsel of record:

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DATED at Seattle, Washington this 30th day of September, 2010.



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