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SUPREME COURT OF CALIFORNIA

JENNIFER AUGUSTUS, et al.,

Plaintiffs and Respondents,

v.

ABM SECURITY SERVICES, INC.,

Defendant and Appellant.

2d Civil Nos. B243788 & B247392

(Los Angeles County
Super. Ct. Nos. BC336416, BC345918,
CG5444421)

PETITION FOR REVIEW

After a Decision by the Court of Appeal
Second Appellate District, Division One

Service on Attorney General and District Attorney
[Bus. & Prof. Code § 17209; *See* CRC, Rule 29(b)]

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Treatises

Regulations

ISSUES FOR REVIEW

1. **Relieved of all Duty:** Labor Code section 226.7 forbids employers from requiring employees to "work" during meal breaks and rest breaks. In *Brinker*,[1] this Court held that for employers to satisfy this requirement for meal breaks, they must relieve their employees of all duties during the break. Does the same relieved-of-all-duties standard apply for rest breaks, as well?

2. **Work:** In *Mendiola*,[2] this Court held that security guards were performing compensable "work" while they were on call. Given the prohibition in Labor Code section 226.7 on employees being required to "work" during breaks, may employers require employees to remain on call during rest breaks?

[1] *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1040.
[2] *Mendiola v. CPS Sec. Solutions, Inc.* (2015) 60 Cal.4th 833, 838.

INTRODUCTION

This is an appeal from a $94-million summary judgment in favor of a class of more than 14,000 security guards who were forced to remain on duty during their nominal rest breaks. Summary judgment was possible because the entire case hinges on a discrete legal question:

> What standard must employers follow to provide rest breaks that comply with California law?

This is a fundamental issue of California labor law, which directly affects millions of employers and employees in this State. This Court has yet to directly address the issue. In *Brinker*, it held that employees must be relieved of all duty during meal breaks, but it never expressly applied the same standard to rest breaks.

Nevertheless, because Labor Code section 226.7 forbids employers from requiring employees to work during *either* rest or meal breaks, appellate courts have consistently found that the two types of breaks were governed by the same legal standard — both before *Brinker* and after.

The Court of Appeal's decision in this case, however, rejects those findings. It declares that *Brinker*'s "relieved of all duty" standard does *not* apply to rest breaks because that test is derived from language in Wage Order No. 4 that is exclusive to meal breaks. The court therefore infers that the IWC intended to allow "on-duty rest breaks."

Every prior appellate decision about rest breaks has taken the opposite position. But the opinion in this case examines the question in significantly more depth than prior courts have. Thus, for the time being, it is the authoritative precedent in California on this vital issue. There is just one problem: it reaches the wrong conclusion.

The court's entire theory is predicated on the false belief that California law recognizes the existence of "on-duty rest breaks." In reality,

there is no such thing, because a rest break is a 10-minute period during which an employee's job duties are temporarily suspended. When the employee is not relieved of duty, the result is *not* an "on duty" rest break. It is simply *no rest break* at all.

That is why the Wage Order describes the conditions when on-duty meal breaks are permitted, but says not a word about on-duty rest breaks. The IWC did not accept the concept of an "on-duty rest break," so it avoided incorporating them into California law. Instead of allowing employees to remain on duty during rest breaks, it authorized the DLSE to issue to employers carefully crafted exemptions from the rest-break requirements when compliance would inflict undue hardship on the employer's business.

In this case, ABM knew that it was obligated to relieve its employees of all duty during rest breaks, because in 2006 it successfully applied to the DLSE for an exemption from that requirement. But it later abandoned the exemption because it found it cumbersome to administer. Thus, in the trial court and on appeal, ABM never disputed that it was obligated to relieve its guards of all duty on their breaks. The Court of Appeal's conclusion that the meaning of "work" in Labor Code section 226.7 could have different meanings for meal breaks and rest breaks was a rule it derived on its own.

Eight days after the panel issued its opinion, this Court filed its opinion in *Mendiola*, which established that the time security guards spent on call at their jobsites constituted "hours worked" for which they were entitled to compensation. That holding should have been decisive in this case, because it means that ABM was forcing its guards to work during their rest breaks — in direct violation of section 226.7.

The plaintiffs accordingly filed a rehearing petition based on *Mendiola.* Without ordering briefing from ABM, the panel denied rehearing and modified its opinion to try to avoid the import of *Mendiola.* Its new rationale was that although on-call guards may be engaging in compensable "work," they are not actually "working" in violation of section 226.7.

This is a novel and troubling interpretation, which raises far more questions than it answers about how courts, businesses, and employees can ascertain which forms of "work" are acceptable during breaks and which are not. Are employees "working" if they perform only a "few" duties during a break? Do they need to perform some, most, or all duties before their labor legally counts as work?

Moreover, this new approach lends itself to the exploitation of workers, because it permits employers to require employees to perform some types of compensable work during rest breaks, effectively giving employers the right to extract an extra 20 minutes of labor that are supposed to belong to the worker in each 8-hour shift.

Depublishing the Court of Appeal's opinion would not go far enough to protect workers or reassure businesses. It would deprive more than 14,000 members of the plaintiff class appropriate restitution for having been denied legally compliant rest breaks, and it would deny companies the guidance they need about how to craft rest-break policies that comply with California law. While a depublished opinion would not bind future courts, it would still contain a ready-made rationale for on-duty rest breaks. Many employers will be emboldened to test those arguments if ABM remains victorious, especially given this case's high visibility in employment-law circles and the involvement of so many influential amici.

As long as the legality of on-duty rest breaks remains in doubt, even honest companies may feel pressured to adopt them in order to keep pace with competitors. In the short term, workers will be harmed; in the long term, the companies themselves could face crushing statutory liability. What all sides need is a clear, definitive explanation of what it takes for a rest break to comply with California law. This Court should grant review so that it can provide a permanent, definitive answer.

STATEMENT OF THE CASE

A. Factual Summary

ABM Security Services, Inc. ("ABM"), formerly d/b/a American Commercial Security Services, Inc. ("ACSS") employs thousands of security guards in California at residential, retail, office, and industrial sites. (Opn. at 3; 10JA 2965:16-2966:15.) Some sites have only one guard on duty; others have multiple guards working at the same time. (*Id.*)

Named plaintiffs Jennifer Augustus, Emmanuel Davis, and Delores Hall are all former ABM security guards. (Opn. at 3.)

Citing an ABM document titled "Post Orders," the Court of Appeal described the typical job duties for its security guards (which ABM refers to as security officers) in these terms:

> The primary responsibility of Security at a guarded facility is to provide an immediate and correct response to emergency/life safety situations (i.e. fire, medical emergency, bomb threat, elevator entrapments, earthquakes, etc.) In addition, the Security officers must provide physical security for the building, its tenants and their employees. . . [Guards] may be required to patrol guarded buildings, identify and report safety issues, hoist and lower flags, greet visitors, assist building tenants and

> visitors, respond to emergencies, provide escorts to parking lots, monitor and restrict access to guarded buildings, eject trespassers, monitor and sometimes either restrict or assist in moving property into and out of guarded buildings, direct vehicular traffic and parking, and make reports. (Opn. at 3.)

In 2006, ABM applied to the DLSE for an exemption from California's rest-break requirements for guards at its single-guard sites. (Opn. at 5, fn. 4; 10JA 2821, 2822.) The DLSE granted ABM a one-year exemption, which expired in 2007. (10JA 2822.) ABM later applied for and received a second annual exemption, but declined to use it. (12JA 3367; ABM's AOB at 9.)

B. Procedural Summary

1. The plaintiffs' lawsuit

In 2005, Augustus filed a putative class action, seeking to represent all security guards employed by ABM. (Opn. at 4.) In 2006, her complaint was related to and consolidated with similar complaints filed by Davis and Hall, and a master complaint was filed. The master complaint alleges, *inter alia*, that ABM "fail[ed] to consistently provide uninterrupted rest periods" under Wage Order No. 4, subd. (12), or premium wages in lieu of rest breaks, as required by Labor Code section 226.7.

2. Class certification

In 2009, the trial court granted the plaintiffs' motion for class certification of the rest-break class, which dated to July 2001. (Opn. at 3.) The class period was later revised to extend from July 12, 2001 to July 1, 2011, and to exclude employees who had been paid statutory penalties for rest-break violations, as well as guards who had worked at single-guard sites

during the 1-year period when ABM had received an administrative exemption for those sites. (Opn. at 5, n. 4.)

3. The trial court finds that ABM fails to give its guards off-duty rest breaks and grants summary adjudication to Augustus on that issue

In 2009, the plaintiffs moved for summary adjudication of ABM's liability on their rest-break claim. Their motion was based principally on the admission of ABM's designated person-most-knowledgeable about ABM's rest-break policy, Fred Setayesh, ABM's Senior Branch Manager. (Opn. at 6; 2JA 476: 24-27.) Mr. Setayesh testified that ABM guards were not relieved of all duties during their rest breaks. (Opn. at 6.)

ABM cross-moved for summary judgment. In the statement of facts in its motion, ABM explained that "All guards are expected to ensure the security of their properties as well as the tenants at their worksite. This includes being available should an emergency arise, such as a medical crisis or fire, or an unexpected escort be needed." (7JA 2053:9-11.)

ABM argued that the guards were not really working during their rest breaks because it allowed them to enjoy privileges they were denied while on duty. It asserted: "Such leisure activities, like reading a book and smoking, are clearly prohibited during work hours. . . . Therefore, there is no question that when an officer engages in these non-work activities, he or she is taking a break, even if his or her cell phone or pager may (in some instances) still be on." (10JA 2914:20-24; Opn. at 6.)

In opposing the plaintiffs' motion, ABM's response to the plaintiffs' separate statement of undisputed facts acknowledged that ABM guards "must keep their radios or pagers on in case an emergency - fire, flood, criminal activity, medical crisis or bomb threat - should arise to ensure the safety of the facility and its tenants. (10JA 2901:27-2902:5.)

During oral argument of the cross-motions, ABM's counsel admitted that California's rest-break rules required employees to be relieved of all duty. (3RT 4526:24-26.) He argued that ABM complied with that requirement because "[b]eing relieved of duty doesn't mean that you are relieved of the mere possibility that you can be called back." (3RT 4526:26-28.)

On December 23, 2010, Judge Carolyn Kuhl issued a written order granting the plaintiffs' motion for summary adjudication and denying ABM's motion. (Opn. at 6; 13JA 3754-3755.) That order described the parties' respective positions this way:

> Defendant's policies make all rest breaks subject to interruption in case of an emergency or in case a guard is needed (for example, when a tenant needs an escort to the parking lot, which could not be called a life threatening emergency but nonetheless is an important job duty for a security guard.) Because a guard must be available for these situations, guards must keep their cell phones or pagers on. Defendant's position is that interruptions are so rare that the guards are effectively getting their breaks; that plaintiffs have presented no evidence that a guard who was interrupted could not restart their break; and that, because a guard is free to engage in non-work related activities during the rest period (provided the rest break is not interrupted) such as smoking cigarettes, surfing the internet, reading a newspaper or book, having a cup of coffee, etc., that the breaks are in compliance with the wage

order and should not be considered on-duty time.

(13JA 3757-3758.)

Judge Kuhl ruled that ABM security guards remained under ABM's control while they took their breaks, even though they were allowed to engage in some personal activities, and ABM therefore violated the requirement that employers provide duty-free rest breaks. (13JA 3758-3760; Opn. at 6.)

4. The trial court grants summary judgment in favor of the plaintiffs

In 2012, plaintiffs moved for summary judgment on their damages claim, contending the only remaining task was to apply the court's earlier finding to undisputed facts. (Opn. at 6.) Plaintiffs contended that, because ABM forced its security guards to remain on duty during their rest breaks, it owed each employee an additional hour of payment under Labor Code section 226.7, subdivision (b), plus a waiting- time penalty, and interest. (*Id.*)[3]

Using ABM's payroll records, plaintiffs' expert determined there were 14,788 class members who worked a total of 5,166,618 days of at least 3.5 hours in length. Multiplying that number by an average pay rate of $10.87 resulted in $56,102,198 in unpaid wages and restitution. Plaintiffs added a claim for $41,288,882 in accrued interest and $5,689,860 in waiting time penalties, and requested that judgment be entered in favor of the class in the amount of $103,808,940, plus costs and attorney fees. (Opn. at 7.)

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[3] Section 226.7 was amended in 2013. (Stats. 2013, ch. 719 (S.B. 435), § 1.) Among other things, the amendment redesignated former subdivisions (a) and (b) as subdivisions (b) and (c), respectively. All subsequent references to the statute are to the current redesignated subdivisions (b) and (c).

Judge Wiley heard the motion for summary judgment. In a tentative ruling issued before the hearing, he incorporated the court's prior summary adjudication ruling and stated that "[p]ut simply, if you are on call, you are not on break." (Opn. at 7.) He found that the pattern of evidence submitted showed that ABM did not relieve its workers of all duty during their breaks, and that these on-duty breaks were legally invalid. (*Id.*)

After the hearing, the court adopted its tentative ruling, denied ABM's concurrent motion to decertify the class, and awarded judgment to the plaintiff class for $55,887,565 in statutory damages pursuant to section 226.7, $31,204,465 in pre-judgment interest, and $2,650,096 in waiting time penalties. (Opn. at 7.)

Six months later, the court entered an amended judgment that awarded plaintiffs approximately $27 million in attorney fees, representing 30 percent of the common fund, plus $4,455,336.88 in fees under Code of Civil Procedure section 1021.5. (Opn. at 8.)

ABM appealed the original judgment and the amended judgment. (Opn. at 8.) The Court of Appeal consolidated both appeals. (*Id.*)

The appeal garnered considerable attention from both employer-side and employee-side organizations. Amicus briefs were filed in support of ABM by the California Employment Law Council and Employer's Group; by the California Chamber of Commerce; by the U.S. Chamber of Commerce, the National Association of Security Companies, and the California Association of Licensed Security Agencies; and by TrueBlue, Inc. Amicus briefs supporting the plaintiffs' position were filed by the California Employment Lawyers' Association (CELA) and by the Consumer Attorney's Association of California.

5. The Court of Appeal's original unpublished opinion

On December 31, 2014, the Court of Appeal issued an unpublished opinion that affirmed the class-certification order, but reversed the summary judgment against ABM. The court did not find that there were triable issues of fact that precluded summary judgment. Instead, it determined that on-call rest breaks did not violate the law. Its opinion acknowledged that California forbids employers from requiring their employees to "work" during rest breaks. But it held that employers are not required to relieve their workers of all duties during rest breaks. The court encapsulated its reasoning in this paragraph from page 10 of its opinion:

> Here, although ABM's security guards were required to remain on call during their rest breaks, they were otherwise permitted to engage and did engage in various nonwork activities, including smoking, reading, making personal telephone calls, attending to personal business, and surfing the Internet. The issue is whether simply being on-call constitutes performing "work." We conclude it does not. (Opn. at 10.)

6. The plaintiffs' rehearing petition

Eight days after the court filed its opinion reversing the summary judgment, this Court filed its opinion in *Mendiola v. CPS Security Solutions, Inc.*, No. S212704, Jan. 8, 2015, 60 Cal.4th 833. *Mendiola* holds that security guards who are kept on call by their employer are, in fact, "working" and are therefore entitled to compensation even if they are permitted to engage in other personal activities, "including sleeping, showering, eating, reading, watching television, and browsing the Internet." (*Mendiola* at p. 9.)

The plaintiffs argued that the holding in *Mendiola* — that security guards are working while they are kept on call — and the logic that the

Court employed to reach that holding, were irreconcilable with the Court of Appeal's opinion in this case. The plaintiffs asked the court below to grant rehearing and to decide this case in light of *Mendiola.*

7. The Court of Appeal denies rehearing, modifies its opinion, and grants the requests for publication

The Court of Appeal did not solicit a response to the rehearing petition from ABM. While the rehearing request was pending, the court received several requests for publication, including from ABM, United Site Services, the California Retailers Association, Sedgwick, LLP, and CPS Security Solutions.

On January 29, 2015, the panel issued an order denying the petition, modifying its opinion, and granting publication. The court determined that instead of requiring it to reconsider its conclusion that being on call did not constitute "work," this Court's opinion in *Mendiola* actually buttressed its decision, because it read *Mendiola* to implicitly distinguish between actually working and simply being available to work.

As the court put it: "In sum, although on-call hours constitute 'hours worked,' remaining available to work is not the same as performing work. (See *Mendiola, supra,* 2015 Cal. LEXIS at p. 9 [distinguishing readiness to serve from service itself]; see also Cal. Code Regs., tit. 8, § 11040, subd. 2(K) [distinguishing "hours worked" from work actually performed].) Section 226.7 proscribes only work on a rest break." (Order at 4.)

To reach this conclusion, the court explained that the term "work" is used as both a noun and a verb in Wage Order 4. When used as a noun it means "employment," that is, the time when an employee is subject to the employer's control. (Order at 1.) By contrast, when work is used as a verb it means "exertion." (*Id.*) In the court's view, Labor Code section 226.7,

which prohibits employers from requiring their employees to "work" while on rest breaks, "uses 'work' as an infinitive verb contraposed with 'rest.' It is evident, therefore, that 'work' in that section means exertion on an employer's behalf." (Order at 2.)

Citing *Mendiola*, the court declared that:

> Not all employees at work actually perform work. '[A]n employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen .... [I]dleness plays a part in all employments in a stand-by capacity.'"(*Mendiola v. CPS Security Solutions, Inc.* (2015) 2015 Cal. LEXIS 3, 9-10 (*Mendiola*), quoting *Armour & Co. v. Wantock* (1944) 323 U.S. 126, 133.) Remaining on call is an example. On-call status is a state of being, not an action. But section 226.7 prohibits only the action, not the status. In other words, it prohibits only working during a rest break, not remaining available to work." (Order at 2, duplicate internal quotation marks omitted.)

The panel bolstered its conclusion by noting that ABM guards who are on rest break do not perform all of the activities that they perform while on duty. (Order at 3.) It also observed that the Wage Order expressly requires that employees be relieved of all duties during meal breaks, but contains no similar requirement for rest breaks. (Order at 2.) In the court's view, "If the IWC had wanted to relieve an employee of all duty during a rest period, including the duty to remain on call, it knew how to do so. That it did not indicates that no such requirement was intended." (*Id.* at 3.)

The court acknowledged that on-call guards "must return to duty if requested, but as discussed above and as implicitly acknowledged in

Mendiola, *supra*, remaining available to work is not the same as performing work." (*Id.*)

WHY REVIEW IS WARRANTED

A. The Court of Appeal adopted two novel legal rules that nullify California's rest-break requirements

1. The opinion says the "relieved of all duty" standard only applies to meal breaks — not rest breaks

The opinion in this case announces that employers are *not* obligated to relieve their employees of all duty during rest breaks. This is a radical change in California employment law because courts previously acknowledged that both rest breaks and meal breaks had to be "duty free."

The Courts of Appeal have applied the "relieved of all duty" standard to rest breaks in numerous opinions in the recent past — not merely in dicta, but also within the *ratio decidendi* of several cases.[4] By adopting the opposite position, the court in this case has created a serious split in authority.

The rule that the panel announced in this case would have changed the outcome in *Godfrey v. Oakland Port Services Corp.* (2014) 230 Cal.App.4th 1267, which affirmed a $1.5-million judgment against a trucking company for failing to provide its drivers off-duty meal and rest breaks. (*Id.* at pp. 1272, 1286-1287.) The defendant challenged the damages calculation by pointing to testimony from a driver who said he took rest breaks while in his truck, waiting in line at the port. (*Id.* at p. 1287, fn. 21.)

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[4] "It is an elementary concept that *ratio decidendi* is the principle or rule which constitutes the basis of the decision and creates binding precedent, while dictum is a general argument or observation unnecessary to the decision which has no force as precedent." (*United Steelworkers of America v. Board of Education* (1984) 162 Cal.App.3d 823, 834, citing 6 Witkin, Cal.Procedure (2d ed. 1971) Ratio Decidendi and Dicta, § 676, p. 4589.)

The Court of Appeal held that those rest breaks were invalid because they occurred during "time that was not off duty." (*Id.*) "Waiting, even in a comfortable location, is 'on-duty' by definition," the court observed. (*Id.* at p. 1286.)

The "relieved of all duty" standard was also applied to rest breaks in *Dailey v. Sears, Roebuck and Co.* (2013) 214 Cal.App.4th 974. That case held that the fact that department-store managers were accessible by cell phone during rest breaks was not substantial evidence that they had been forced to remain "on duty," absent proof that their employer had required them to remain available. (*Id.* at pp. 1000-1002.)

The same standard had been applied in an earlier case — *Bufil v. Dollar Financial Group, Inc.* (2008) 162 Cal.App.4th 1193 — where the Court of Appeal certified a class action based on evidence that the defendant failed to "relieve the employee[s] of all duty for 10 consecutive minutes every four hours in order to accommodate lawful rest breaks."(*Id.* at p. 1199.) It held that the class was ascertainable because the employer's policy meant its workers "were never off duty and could never put up a sign saying 'I'm off on break.'" (*Id.* at p. 1208.)

The legal rationale for requiring employees to be relieved of duty during rest breaks was elucidated by *Faulkinbury v. Boyd & Associates, Inc.* (2013) 216 Cal.App.4th 220, which invoked the DLSE's opinion that a "rest period must be, as the language of Wage Order No. 4–2001 implies, duty-free." (*Id.*, quoting DLSE Opn. Letter 2002.02.22, internal brackets omitted.) That conclusion is directly at odds with the present case's holding that an "on-duty rest period . . . is permissible." (Order at 3.)

The conflict is exacerbated by the opinion's conclusion that previous statements by the DLSE that rest periods must be duty free somehow

meant something other than what they said. First, the court flatly denies that "the DLSE [letter] in 2002 . . . requires that all rest breaks be duty free." (Opn. at 12.) Later, it admits that it was "the DLSE's opinion that rest periods must be duty free" — but implies that the "scope" of that standard is up for debate. (Opn. at 13.) In reality, the DLSE made the breadth of that prohibition clear by indicating that employees could not be required to walk from one work station to another while on break. (DLSE Opn. Let. 2002.02.22.)

The DLSE's opinion was vindicated by this Court's decision in *Brinker*, which held that Labor Code section 226.7, subd. (b), obligates an employer to "relieve the employee of all duty and relinquish any employer control over the employee and how he or she spends the time." (*Id.*, 53 Cal.4th at p. 1059.) It is true the Court addressed that issue in the context of meal breaks. But the statute applies to rest breaks as well; it prohibits "work during a meal or rest or recovery period." (Labor Code § 226.7, subd. (b).) Logically, this Court's interpretation of that prohibition should also apply with equal force to each category of break.

If rest breaks were governed by a different standard, the Court would likely have mentioned that in the portion of its opinion in *Brinker* devoted to the plaintiffs' rest-break claims. Instead, the Court approvingly cited *Bufil* — a case that certified a rest-break class action based on the "relieved of all duty" standard. (*Brinker*, 53 Cal.4th at pp. 1033-1034, citing *Bufil*, 162 Cal.App.4th at p. 1208.) *Brinker* held that the trial court had correctly certified a rest-break class consisting of employees who had not been relieved of all duties during their rest breaks. (*Id.* at pp. 1032-1033.) Thus, although *Brinker* never expressly held that rest breaks must be duty free, that was clearly an unstated premise underlying the decision.

The opinion in this case rejects that logic, advancing two legal arguments in favor of "on duty" rest breaks. Neither of the two arguments can support the radical conclusion that the Court of Appeal reached.

Its opinion first points out that Wage Order No. 4 expressly states that employees must be relieved of all duty during meal breaks — but does not repeat that requirement in the subdivision mandating rest breaks. (Order at 2, comparing Wage Order. No 4, subd. 11(A) & 12(A).) The court infers that the IWC must have omitted the language for a reason, so it concludes that on-duty rest breaks must be legal.

The real answer is much simpler: The IWC did not need to specify that rest breaks should be "off duty," because rest breaks must already be "off duty" by definition. That's what a rest break is — a period in which an employee is freed from performing his or her work duties. (See Merriam-Webster.com [**rest:** "freedom from activity or labor"; **break:** "a respite from work, school, or duty"].)

If employees are required to remain on duty during their rest breaks, then there is nothing to distinguish their breaks from the remainder of the workday. The panel in this case was apparently comfortable with that outcome. (See Order at 3 ["section 226.7 does not require that a rest period be distinguishable from the remainder of the workday"].) But the IWC did not have such an incongruity in mind when it drafted Wage Order No 4.

It is clear that the IWC did not recognize the concept of an "on-duty rest break" because no such term appears in the Wage Order. There are detailed standards that describe when "on-duty meal breaks" are permissible — which makes sense, because employees may voluntarily choose to work while they eat in exchange for extra compensation. (*Id.* at