COLORADO COURT OF APPEALS

DATE FILED: December 29, 2022
CASE NUMBER: 2022CA985

Court of Appeals No. 22CA0985
City and County of Denver District Court No. 20CV33915
Honorable Alex C. Myers, Judge

Catherine Pacheco,

Plaintiff-Appellee,

v.

SOMIP, Inc., a Colorado corporation,

Defendant-Appellant.

ORDER AFFIRMED IN PART, REVERSED IN PART,
AND CASE REMANDED WITH DIRECTIONS

Division III
Opinion by JUDGE FOX
Tow and Yun, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced December 29, 2022

The Law Offices of Brian D. Gonzales, PLLC, Brian D. Gonzales, Fort Collins, Colorado; Hood Law Office, PLLC, Alexander Hood, Denver, Colorado, for Plaintiff-Appellee

The Hustead Law Firm, Patrick Q. Hustead, Aaron M. Bell, Jason J. Patel, Denver, Colorado, for Defendant-Appellant

¶ 1 Plaintiff, Catherine Pacheco, brings this interlocutory appeal of class certification pursuant to section 13-20-901, C.R.S. 2022; C.A.R. 3.3; and C.R.C.P. 23(f). Pacheco alleged that her employer, SOMIP, Inc., deprived her and other putative class members of legally mandated rest and meal breaks. The district court granted class certification on both theories.

¶ 2 Although we agree that Pacheco satisfies class certification requirements on the rest break claim, we conclude that she fails to satisfy class certification requirements on the meal break claim. Accordingly, we affirm in part, reverse in part, and remand with directions to enter an order decertifying the class premised on meal break denial. While the guidance offered by *Hicks v. Colorado Hamburger Co.*, 2022 COA 149, was not available when the district court issued its certification order, we trust that the *Hicks* analysis will be useful to the court on remand.

I. Background

¶ 3 SOMIP owns and operates five McDonald's franchises in Colorado. Pacheco was a nonexempt hourly employee at one of the franchises from 2014 through early 2021.

¶ 4 In her November 17, 2020, class action complaint, Pacheco alleged that the company routinely denied its employees paid, ten-minute rest breaks and unpaid, thirty-minute meal breaks in violation of the Colorado Wage Claim Act (CWCA), §§ 8-4-101 to -125, C.R.S. 2022, the Colorado Minimum Wage Act (CMWA), §§ 8-6-101 to -120, C.R.S. 2022, and Colorado Department of Labor and Employment (CDLE) regulations, 7 Code Colo. Regs. 1103-1. Pacheco further alleged that SOMIP did not compensate its employees for the missed breaks.

¶ 5 The district court bifurcated discovery, initially limiting the parties to the issue of class certification before reaching the merits of the dispute. During the first phase, the parties submitted copies of SOMIP's time punch policy. The policy states, in relevant part, that employees must clock in and out at the start and end of every shift and break. It also states that employees must request that their manager make a correction if their timesheet appears inaccurate.

¶ 6 With respect to rest and meal breaks, SOMIP's policy provides,

> The Company will provide breaks to employees in accordance with Colorado law.

> Employees are entitled to an uninterrupted and duty-free 30-minute unpaid meal period when their work shift exceeds five consecutive hours in a day. *If practicable*, employees may take a paid ten minute rest period in the middle of each four-hour work period.

(Second emphasis added.)

¶ 7 SOMIP provided 116 affidavits of current and former employees. In pertinent part, these affidavits uniformly state,

> I record my time through our electronic system. For each day that I work, I record my hours and my total time worked. For each day that I work, I clock in and out at the start and end of my shift, *and I also clock in and out for lunch or for rest breaks*. This creates a record of my hours and my total time worked.

(Emphasis added.)

¶ 8 The parties also provided a random sample of employee timesheets showing that employees logged fewer rest and meal breaks than they earned.

¶ 9 At the end of the first phase of discovery, Pacheco moved the district court to certify as a class "[a]ll current and former hourly employees who worked for [SOMIP] from November 17, 2014 to present." Pacheco argued that the absence of a recorded rest or meal break in SOMIP's timesheets indicated that SOMIP failed to

authorize or permit the break. SOMIP countered that the timesheets did not support such an inference because the employees could have chosen not to take a break, failed to record a break, or asked their manager to manually adjust their pay after the missed break.

¶ 10 The district court concluded that the timesheets were a common method of proof among the putative class and that common questions of law and fact predominated over the individual questions SOMIP raised. Accordingly, it certified the class on both the rest and meal break theories.

II. Legal Framework

A. Class Action Law and Standard of Review

¶ 11 Class actions serve important functions in our civil justice system, including the promotion of judicial efficiency, consistency, and access to justice. *See Jackson v. Unocal Corp.*, 262 P.3d 874, 880-81 (Colo. 2011). Thus, we liberally construe C.R.C.P. 23 to support its policy favoring maintenance of class actions. *Farmers Ins. Exch. v. Benzing*, 206 P.3d 812, 817-18 (Colo. 2009); *LaBerenz v. Am. Fam. Mut. Ins. Co.*, 181 P.3d 328, 333 (Colo. App. 2007).

¶ 12 A party can maintain a class action if:

> (1) The class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

C.R.C.P. 23(a).

¶ 13 In addition to satisfying these requirements, the party moving for class certification must prove, as relevant here, that (1) "questions of law or fact common to the members of the class predominate over any questions affecting only individual members," and (2) "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." C.R.C.P. 23(b)(3).

¶ 14 Because class actions are a case management tool, we generally review a district court's decision to certify a class for an abuse of discretion. *Jackson*, 262 P.3d at 879-80; *BP Am. Prod. Co. v. Patterson*, 263 P.3d 103, 108 (Colo. 2011). We will only reverse a district court's certification order if it is manifestly arbitrary, unreasonable, or unfair, or when the court applies the incorrect legal standard. *Jackson*, 262 P.3d at 880. Where a certification

decision rests purely on a question of law, we review de novo. *BP*, 263 P.3d at 108.

1. Predominance

¶ 15 To certify a class under C.R.C.P. 23(b)(3), a district court must find that questions of law or fact common to the class predominate over individual questions of law or fact. Whether common questions predominate over individual ones turns on "whether the proof at trial will be predominantly common to the class or primarily individualized." *Garcia v. Medved Chevrolet, Inc.*, 263 P.3d 92, 98 (Colo. 2011) (citation omitted). It is "a fact-driven, pragmatic inquiry guided by the objective of judicial efficiency and the need to provide a forum for the vindication of dispersed losses." *Medina v. Conseco Annuity Assurance Co.*, 121 P.3d 345, 348 (Colo. App. 2005); *see also State Farm Mut. Auto. Ins. Co. v. Reyher*, 266 P.3d 383, 387 (Colo. 2011).

¶ 16 Plaintiffs establish predominance when they "advance[] a theory by which to prove or disprove 'an element on a simultaneous, class-wide basis, since such proof obviates the need to examine each class member's individual position.'" *Benzing*, 206 P.3d at 820 (citation omitted).

¶ 17 While a court may need to consider the parties' substantive claims and defenses as part of its predominance analysis, it must not prejudge the merits of the case or certify only those claims likely to prevail on the merits. *Jackson*, 262 P.3d at 885. And the need for individual proof of damages does not preclude a finding of predominance. *Id.* at 889.

2. Class-wide Inferences

¶ 18 Parties may rely on class-wide inferences to prove a common element of their claim. *See Garcia*, 263 P.3d at 99-102; *Menocal v. GEO Grp., Inc.*, 882 F.3d 905, 918-22 (10th Cir. 2018). Class-wide inferences prevent redundant inquiries into the individual circumstances of each class member. *BP*, 263 P.3d at 111.

¶ 19 "[A] trial court must rigorously analyze the evidence presented to determine whether [it] supports a class-wide inference . . . ." *Garcia*, 263 P.3d at 100. This rigorous analysis requires a district court to consider not only whether the circumstantial evidence common to the class supports an inference, but also whether any individual evidence offered by the opposing party refutes that inference. *Id.* at 102; *BP*, 263 P.3d at 111.

B. Colorado Hourly Wage Law

¶ 20 Two Colorado statutes establish the foundational wage protections for hourly workers: the CMWA and the CWCA. *See* §§ 8-4-101 to -125; §§ 8-6-101 to -120. The CDLE is empowered to promulgate an annual regulation that implements these two statutes. Colorado Overtime and Minimum Pay Standards Order No. 36, 7 Code Colo. Regs. 1103-1 (effective Mar. 16, 2020-Dec. 31, 2020) (COMPS Order).

¶ 21 With respect to rest breaks, the COMPS Order provides that "[e]very employer shall authorize and permit a compensated 10-minute rest period for each 4 hours of work, or major fractions, thereof, for all employees." *Id.* at Rule 5.2. It then elaborates on the rationale behind and implication of this rule, noting that

> [w]hen an employee is not authorized and permitted a required 10-minute rest period, his or her shift is effectively extended by 10 minutes without compensation. Because a rest period requires 10 minutes of pay without work being performed, work during a rest period is additional work for which additional pay is not provided. Therefore, a failure by an employer to authorize and permit a 10-minute compensated rest period is a failure to pay 10 minutes of wages at the employee's agreed-upon or legally required (whichever is higher) rate of pay.

Id. at Rule 5.2.4.

¶ 22 If an employee works during required rest periods and is not paid, she receives "less than the legal minimum wage" and effectively provides the equivalent number of minutes worked to her employer without compensation. *See Pilmenstein v. Devereux Cleo Wallace*, 2021 COA 59, ¶ 37. As such, the employee can pursue monetary damages in a civil action. COMPS Order, Rule 8.1(A), 7 Code Colo. Regs. 1103-1; *see also Sobolewski v. Boselli & Sons, LLC*, 342 F. Supp. 3d 1178, 1184 (D. Colo. 2018).

¶ 23 As for meal breaks, the COMPS Order states that an employee is entitled to an uncompensated, uninterrupted, and "duty-free meal period of at least a 30-minute duration when the shift exceeds 5 consecutive hours." COMPS Order, Rule 5.1, 7 Code Colo. Regs. 1103-1. But the Order also includes a caveat:

> When the nature of the business activity or other circumstances make an uninterrupted meal period impractical, the employee shall be permitted to consume an on-duty meal while performing duties. Employees shall be permitted to fully consume a meal of choice on the job and be fully compensated for the on-duty meal period without any loss of time or compensation.

Id. Thus, an employer must provide their employee with either (A) an uncompensated, uninterrupted, and duty-free thirty-minute meal break, or (B) the opportunity to eat a meal of choice while on the clock. *Id.*

¶ 24 In addition to equipping employees with rights to rest and meal breaks, the COMPS Order imposes record-keeping duties on employers. As pertinent here, employers must maintain "a true and accurate record for each employee which contains [a] daily record of all hours worked." *Id.* at Rule 7.1(C).

III. Analysis

A. Rest Breaks

¶ 25 While the parties appear to group the relative merits of their rest and meal break theories as a single argument, we address each break type separately, as the pertinent regulations vary by break type. Regarding rest breaks, SOMIP contends that the district court erred when it concluded that issues common to the class predominated over individual issues. SOMIP also challenges the district court's conclusion that a class action is the superior case management tool and claims the district court abused its discretion

by failing to consider nonbinding authority from other Colorado judicial districts. We are unpersuaded.

1. Predominance

¶ 26 Because the common issues raised by the rest break theory predominate over individual ones, we conclude that Pacheco has satisfied the requirements of C.R.C.P. 23(b)(3) and that class certification is warranted.

¶ 27 We first reject SOMIP's claim that the district court failed to follow C.R.C.P. 23(b)(3)'s predominance requirement. SOMIP appears to argue that the district court conducted no substantive weighing as required by C.R.C.P. 23(b)(3), and that if it had, it would have denied class certification. We disagree. We are satisfied that the district court identified SOMIP's arguments, assigned weight to SOMIP's supporting evidence, and compared SOMIP's proffered individual issues with the common questions of law and fact Pacheco raised.

¶ 28 And we are not persuaded by SOMIP's contention that even if the district court weighed the common and individual questions the parties raised, it abused its discretion in reaching its conclusion.

¶ 29 Here, the timesheets provide a viable class-wide means of proving liability and damages. Each member of the putative class was subject to the same break policy requiring employees to clock in and out for their rest breaks.[1] Thus, the district court can infer from the absence of a ten-minute break in SOMIP's timesheets that the employer neither authorized and permitted the break nor compensated the employee for the missed break. *See Benzing*, 206 P.3d at 820; *Garcia*, 263 P.3d at 98. To determine SOMIP's liability and calculate the employee's damages for missed rest breaks, the district court need only refer to SOMIP's timesheets — a piece of evidence common to the class.

¶ 30 SOMIP argues that we cannot infer a rest break was missed solely by looking at the timesheet for the following reasons: (1) the employee could have voluntarily given up the break; (2) the

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[1] SOMIP claims that this case is akin to *Ruiz v. U.S. Bank National Ass'n*, No. 18-cv-03200, 2020 WL 5517113, at *3 (D. Colo. July 24, 2020) (unpublished order). In *Ruiz*, the court held that the employer's lack of a uniform break policy undermined class certification. But here, SOMIP created a uniform, written break policy granting managers discretion to deny legally mandated rest breaks. It then required each employee to sign the policy and mandated that employees log their breaks in accordance with its policy — unlike the employer in *Ruiz*. For this reason, we find the comparison inapposite.

employee could have taken the break without clocking in and out; and (3) the employee could have requested that their manager manually adjust their pay after a missed break. Each reason is unavailing. Our review of the record shows that SOMIP offered little evidence to support these speculative assertions, and to the extent countervailing evidence calls the timesheets into question, such doubts can be resolved through circumstantial evidence and class-wide inferences.

¶ 31 First, SOMIP contends employees could have voluntarily "waived" their rest break and instead chosen to keep working. It supports this assertion with its signed employee affidavits, which state that an employee's decision to not take a rest break was the employee's own choice. Given this possibility, SOMIP contends that we cannot infer that a missing rest break on the timesheet means that the manager did not authorize and permit a rest break. But the district court afforded these "happy camper" declarations limited weight, and we perceive no abuse of discretion in that finding. *See Scardina v. Wiegand II*, No. 2014CV31681, 2017 WL 3449238, at *17 (City & Cnty. of Denver Dist. Ct. June 15, 2017) (unpublished order) (expressing skepticism of current employees'

testimony that was favorable to employer); *see also Jackson*, 262 P.3d at 880.

¶ 32 C.R.C.P. 23(b)(3) only requires that Pacheco "advance[] a *theory* by which to prove or disprove 'an element on a simultaneous, class-wide basis.'" *Benzing*, 206 P.3d at 820 (emphasis added) (citation omitted). Her theory is that liability and damages can be inferred from the timesheets, and that SOMIP's counterargument that the workers voluntarily waived their break can be debunked by circumstantial evidence. *See State Farm*, 266 P.3d at 387-89 (discussing evidence sufficient to undermine a class-wide inference). Such circumstantial evidence could include, for example, whether the workplace culture made breaks impractical, whether the restaurant was understaffed, whether the frequency of "waived" breaks decreased after Pacheco filed suit, or whether a rational minimum wage-earning fast-food worker would choose to forgo ten minutes of compensated rest for every four hours worked.

¶ 33 To be sure, SOMIP may supplement its "happy camper" affidavits with individual testimony that employees voluntarily gave up paid breaks. *BP*, 263 P.3d at 111; *see also Garcia*, 263 P.3d at

101-02. If it manages to do so, the district court may, at that time, assess the competing arguments.

¶ 34 Second, SOMIP contends that the timesheets do not support a missed break inference because employees could have taken their rest break without clocking out for it. Thus, it argues, the district court would have to poll each putative class member and supervisor to assess whether a missed break was actually missed, or simply unrecorded.[2] This argument is directly controverted by SOMIP's own admission, through 116 signed employee affidavits, that "[f]or each day that [employees] work, [they] clock in and out at the start and end of [their] shift, *and [they] also clock in and out for lunch or for rest breaks*." (Emphasis added.) We decline to allow this speculative argument to defeat class certification in light of SOMIP's own admission that employees follow the time punch policy.

¶ 35 Third, SOMIP argues that the timesheets are unreliable because employees could have asked their manager to retroactively

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[2] SOMIP supports its counterargument by presenting phone records suggesting that Pacheco made a phone call without clocking out for a break. While we disagree that such proof undermines class certification as a whole, SOMIP may develop and rely on such evidence as the case proceeds on the merits.

adjust their timesheet to account for the missed break. Again, SOMIP does not cite any record evidence supporting this assertion. Such a bald claim is insufficient to rebut Pacheco's substantial evidence supporting the class-wide inference. *See Garcia*, 263 P.3d at 100-01; *see, e.g.*, *Garcia v. Tyson Foods, Inc.*, 770 F.3d 1300, 1307 (10th Cir. 2014) (holding that an employer may not benefit from the court's denial of circumstantial or representative evidence when the employer's inability to maintain accurate records created the need for such evidence); *Hodgson v. Humphries*, 454 F.2d 1279, 1283 (10th Cir. 1972) (same).

¶ 36 Not only do SOMIP's claimed individual inquiries fail to undermine Pacheco's class-wide method of proof, they raise several common questions of law, further supporting the district court's predominance conclusion. *See Jackson*, 262 P.3d at 880. Namely, SOMIP's waiver argument raises the question of whether the CWCA and CMWA allow an employer to short employees ten minutes of pay to which they were legally entitled simply because they voluntarily skipped their break. *See Sobolewski*, 342 F. Supp. 3d at 1184; *Pilmenstein*, ¶ 37. SOMIP's manual adjustment argument raises the question of whether the CWCA and CMWA allow an

employer to put the onus on employees to ask for compensation for missed rest breaks. The common questions of law raised by these defenses tip the predominance balance in favor of class certification.

¶ 37 Four other considerations inform our conclusion that the district court correctly concluded that Pacheco's rest break claim satisfies the requirements of C.R.C.P. 23(b)(3).

¶ 38 First, Pacheco bolsters her common method of proof with a common question of law: whether SOMIP's policy of giving managers discretion to grant rest breaks "if practicable" violates the COMPS Order requiring that "[e]very employer *shall* authorize and permit a compensated 10-minute rest period for each 4 hours of work." COMPS Order, Rule 5.2, 7 Code Colo. Regs. 1103-1 (emphasis added); *see also id.* at Rule 7.1. The bar plaintiffs must meet to advance a common legal claim is not high; to proceed as a class, plaintiffs need only provide "'some evidence . . . to support the allegations that other similarly situated employees were subjected to a common policy' that violated the law." *Pieksma v. Bridgeview Bank Mortg. Co.*, No. 15 C 7312, 2016 WL 7409909, at *1 (N.D. Ill. Dec. 22, 2016) (unpublished opinion) (citation omitted);

see also Jackson, 262 P.3d at 885. Here, the uncontroverted record reveals that SOMIP's employees were subject to the uniform break policy.

¶ 39 Second, Pacheco plans to use a paradigmatic type of evidence to prove liability and damages: employee timesheets. *See* 2 William B. Rubenstein, *Newberg and Rubenstein on Class Actions* § 4:50, Westlaw (6th ed. database updated Dec. 2022) (observing that common issues will predominate if "individual factual determinations can be accomplished using computer records, clerical assistance, and objective criteria — thus rendering unnecessary an evidentiary hearing on each claim") (citation omitted). In fact, the United States District Court for the District of Colorado certified a substantially similar class for the same reason. *See Sobolewski v. Boselli & Sons, LLC*, No. 16-cv-01573, 2018 WL 3838140, at *3 (D. Colo. June 13, 2018) (unpublished opinion)

("Electronic payroll records that are available for every member of

the proposed class is the precise type of generalized proof that makes a class action more efficient than an individual action.").[3]

¶ 40 Third, our jurisprudence favors class certification. Injuries like those Pacheco alleged would not be economically viable on an individual basis. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (explaining that class actions allow parties to aggregate "relatively paltry potential recoveries into something worth [an attorney's] labor" (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997))); *see also* Scott A. Moss & Nantiya Ruan, *The Second-Class Class Action: How Courts Thwart Wage Rights by Misapplying Class Action Rules*, 61 Am. U. L. Rev. 523, 561 (2012) (discussing the types of injuries that class actions are uniquely able to address). Providing the putative class the opportunity to prove that they were deprived of rest breaks is fundamentally consistent

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[3] To be sure, the court in *Sobolewski v. Boselli & Sons, LLC*, No. 16-cv-01573, 2018 WL 3838140, at *4 (D. Colo. June 13, 2018) (unpublished opinion), certified a class for the alleged deprivation of meal breaks. But the plaintiff's claim there — namely, that the employer's policy effectively compelled employees to clock in early from their lunch break — is materially different than Pacheco's meal break claim, as explained below.

with the purpose of C.R.C.P. 23. *See Jackson*, 262 P.3d at 880-81; *Benzing*, 206 P.3d at 817-18.

¶ 41 Fourth, class certification is conditional. If SOMIP admits evidence that undermines the viability of the timesheets as a class-wide means of proof, the district court retains the discretion to decertify the class. *See Jackson*, 262 P.3d at 881-84.

¶ 42 Because Pacheco presents a common method of proof and common questions of law, and because SOMIP's counterarguments are unavailing, we conclude that the district court did not abuse its discretion in finding that questions of law and fact common to the class predominate over individual issues on the rest break theory. *Id.* at 880.

2. Other Issues

¶ 43 SOMIP next argues that the district court abused its discretion in concluding that a class action was the superior method to adjudicate the dispute. It appears to argue that the superiority threshold cannot be met where the district court would have to calculate individualized damages, and any authority stating the contrary is inapposite if it was housed within a predominance analysis rather than a superiority analysis. We are unpersuaded.

¶ 44 First, the need for some individual proof of damages generally does not preclude class certification. *Jackson*, 262 P.3d at 889-90; *Buckley Powder Co. v. State*, 70 P.3d 547, 554 (Colo. App. 2002) (holding that the need for proof of individualized damages does not defeat superiority). Given that a common method of proof (the timesheets) demonstrates when and how many rest breaks were taken, the district court did not abuse its discretion in concluding it could manage the individualized calculations.

¶ 45 Second, a class action is the superior vehicle to resolve this dispute because the claims for recovery are small sums such that it would not be cost effective for employees to retain counsel on an individual basis and the dispute is localized to the state, limiting complicated coordination with other jurisdictions. *See Jackson*, 262 P.3d at 880. Additionally, the district court found that a class action is more economical and efficient than piecemeal litigation, which finds support in the record. *See id.*; *see also* C.R.C.P. 23(b)(3).

¶ 46 We also reject SOMIP's argument that the district court abused its discretion by failing to consider nonbinding authority favorable to SOMIP's position — namely, two opinions from other

state district courts that denied class certification on similar facts. SOMIP has cited no authority, and we are aware of none, stating that a district court abuses its discretion by reaching a different conclusion than other state courts addressing similar issues.

B. Meal Breaks

¶ 47 SOMIP also challenges the court's predominance conclusion as to meal breaks. Because individual issues predominate over common issues on the meal break theory, we conclude that the district court misapplied the law, and thus abused its discretion, in grouping the meal break claim with the rest break claim and certifying both together. *See Jackson*, 262 P.3d at 880.

¶ 48 Our conclusion centers on the absence of a viable class-wide theory of liability or damages for missed meal breaks. *See Benzing*, 206 P.3d at 820. Because SOMIP can comply with the COMPS Order by providing the employee *either* a thirty-minute unpaid meal break *or* the opportunity to eat a meal of choice on the clock, COMPS Order, Rule 5.1, 7 Code Colo. Regs. 1103-1, the timesheet evidence fails to provide a uniform method of proof. Instead, a missing meal break on the timesheet could mean one of two things: (1) the manager did not provide an opportunity for an on-the-clock

meal (and thus violated the regulation) or (2) the manager allowed an on-the-clock meal and thus comported with the regulation. *See id.*

¶ 49 Accordingly, to prove liability on the missed meal break theory, Pacheco would have to prove that for each missed meal break on the timesheet, the manager did not allow that employee an on-the-clock meal — a fact requiring individualized evidence to be proven.

¶ 50 Such individualized inquiries would predominate over the common issues. *See Garcia*, 263 P.3d at 99-102 (reversing class certification due to need for individualized inquiries); *see also* Rubenstein, § 4:50 (noting that common questions do not predominate if, "as a practical matter, the resolution of . . . [an] overarching common issue breaks down into an unmanageable variety of individual legal and factual issues," and collecting cases on this point) (citation omitted).

¶ 51 Thus, unlike the rest break theory, Pacheco failed to propose a uniform method of proof that would prove SOMIP's failure to comply with the relevant meal break regulations. *See Livingston v. U.S. Bank, N.A.*, 58 P.3d 1088, 1091 (Colo. App. 2002).

predominate over the common issues, this theory fails to satisfy C.R.C.P. 23(b)(3).

IV. Conclusion

¶ 52 For the foregoing reasons, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion and *Hicks*.

JUDGE TOW and JUDGE YUN concur.

Court of Appeals

STATE OF COLORADO
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PAULINE BROCK
CLERK OF THE COURT

NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(m), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b), will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Gilbert M. Román,
Chief Judge

DATED: January 6, 2022

Notice to self-represented parties**: You may be able to obtain help for your civil appeal from a volunteer lawyer through The Colorado Bar Association's (CBA) pro bono programs. If you are interested in learning more about the CBA's pro bono programs, please visit the CBA's website at **www.cobar.org/appellate-pro-bono** or contact the Court's self-represented litigant coordinator at 720-625-5107 or **appeals.selfhelp@judicial.state.co.us.