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**COURT OF APPEALS FOR DIVISION I  
STATE OF WASHINGTON**

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THE STATE OF WASHINGTON DEPARTMENT OF CORRECTIONS,  
in its own capacity, and as assignee of claims of University Mechanical  
Contractors, Inc., Bergelectric Corporation, and Pacific Construction  
Systems, Inc.,

Appellant,

v.

FLUOR DANIEL, INC., a foreign corporation, and FIREMAN'S FUND  
INSURANCE COMPANY, a foreign corporation,

Respondents.

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**APPELLANT'S REPLY BRIEF**

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## I. SUMMARY

The issue before the court – whether interest on an unliquidated damages arbitration award is appropriate for the period between the arbitration decision and entry of judgment – is one of first impression in Washington. Analogous Washington authority holds that a jury verdict is not “fully liquidated” before entry of judgment. Fluor’s suggestion that the arbitration award was liquidated because the parties waived their rights to superior court review under RCW 7.04,<sup>1</sup> is not supported by the language of the Partial Settlement And Alternative Dispute Resolution Agreement (“Arbitration Agreement”) and is irreconcilable with its position below.

Fluor’s continued reliance on *City of Moses Lake v. International Ass’n of Firefighters, Local 2052*, 68 Wn. App. 742, 847 P.2d 16 (1993), is misplaced. The *Moses Lake* court interpreted RCW 41.56.450, which addresses collective bargaining disputes for uniformed personnel. This statute is distinguishable from the general arbitration statute at issue in this case, RCW 7.04, because it provides that the arbitration panel’s decision shall be “final and binding.”

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<sup>1</sup> RCW 7.04 was amended by a bill that passed May 13, 2005. Laws of 2005, Ch. 433 (May 13, 2005) (“Uniform Arbitration Act” or “UAA”). However, the UAA does not govern agreements entered into prior to July 1, 2006.

It is unnecessary for the court to decide the issue discussed above if the court concludes that the superior court exceeded its authority to modify an arbitration award under RCW 7.04.170. *Moses Lake* does not provide alternative legal authority for a superior court to add interest to an arbitration award; the *Moses Lake* court was not bound by RCW 7.04.170.

## II. ARGUMENT

### A. Interest on Arbitration Awards Cannot Accrue Until Entry of Judgment.

Fluor conspicuously fails to provide any justification for awarding interest differently in the arbitration context than in the jury verdict context. Further, its argument that the parties waived their right to superior court review under RCW 7.04 lacks support in the Arbitration Agreement's language and would lead to obviously unintended results. It is a particularly bold argument given the fact that Fluor availed itself of superior court review below.

The *Moses Lake* court awarded prejudgment interest because the controlling statute, RCW 41.56.450, provides that the arbitration panel's decision is "final and binding." RCW 41.56.450 is not the controlling statute in this case; therefore, the court should not look to *Moses Lake* for guidance.

1. **RCW 4.56.110 and RCW 4.56.115 Adopt the Common Law Rule That Until Entry of Judgment, An Award Is Not Fully Liquidated.**

Neither party disputes the rule that prejudgment interest is only appropriate once damages are liquidated. Response Brief of Respondents Fluor Daniel, Inc., and Fireman Fund's [sic] Insurance Co. ("Respondent's Brief") at 5 (citing *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 15 P.3d 115 (2001)). The parties do dispute the point at which the damages became liquidated. DOC believes the damages became liquidated on February 8, 2005, the day the court entered its judgment. The policy underlying the jury verdict interest award statutes, RCW 4.56.110 and RCW 4.56.115, supports this conclusion.

When it drafted the relevant language in these statutes, the legislature merely recognized the common law rule that until entry of judgment a jury verdict is not fully liquidated. See *Keissling v. Northwest Greyhound Lines, Inc.*, 38 Wn.2d 289, 297, 229 P.2d 335 (1951). The *Keissling* court explained that until entry of judgment the award remains inconclusive due to the options available to the trial court to vacate or modify:

[t]he verdict of a jury or a pronouncement by the court determines and fixes a definite amount of recovery, but the demand is *not fully liquidated* until the entry of judgment for the reason that the court may grant a new trial because the award is excessive or insufficient; or may raise or lower

the amount and afford the party adversely affected the option to accept the same or submit to a new trial of the case, or, in the case of an award by the court, the trial judge may change his mind and make a different award than included in the original pronouncement.

*Id.* (emphasis added).

In 1969, the legislature amended RCW 4.56.110, the statute relating to interest on judgments, to include language that specified the date from which interest would begin to be calculated:

2) Except as provided under subsection (1) of this section, judgments shall bear interest at the rate of ten percent per annum *from the date of entry* thereof . . . .

Laws of 1969, c. 46, s 1 at 112 (emphasis added). In 1975, the legislature added similar language into RCW 4.56.115, the statute relating to interest on judgments against the state. Laws of 1975, c. 26 at 39. In light of the absence of language regarding the timing of interest accrual prior to these amendments, it can be inferred that the legislature was merely recognizing the common law rule expressed in *Keissling*. See *Weyerhaeuser Company v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 687, 15 P.3d 115 (2001) (“Weyerhaeuser does not ask us to overrule *Kiessling* and effectively ignore RCW 4.56.110(3); thus, we follow precedent. Interest for the nonliquidated damages for the Longview site runs only from date of judgment.”).

The reasoning behind the common law and statutory rules for the accrual of interest on judgments arising from jury verdicts is equally applicable to arbitration awards. As is the case for jury verdicts, the superior court has the power to vacate or modify arbitration awards. RCW 7.04.160-.170. While the authority of the superior court to vacate or modify is arguably more limited in the arbitration context, the very fact that circumstances exist under which vacation or modification may be appropriate is sufficient to make the arbitration decision “not fully liquidated.” See *Kiessling*, 38 Wn.2d at 297. See also *Aguirre v. AT & T Wireless Services*, 118 Wn. App. 236, 241, 75 P.3d 603 (2003) (“interest generally accrues on judgments from the date the judgment is entered”).

**2. The Parties Did Not Waive Their Rights to Superior Court Review Under RCW 7.04.**

The parties’ mutual waiver of “any and all rights to appeal to appeal the Arbitration Award” in the Arbitration Agreement did not convert the arbitrator’s decision into a fully liquidated amount. Fluor argues for the first time in this appeal that the parties intended to not only waive their appeal rights but also intended to waive their rights to superior court review under RCW 7.04.150-.170. Respondent’s Brief at 6. Such an assertion is neither supported by the language of the Arbitration

Agreement or the absurd results that would follow. The relevant language of the arbitration agreement provides as follows:

[o]nce the Arbitrator issues a decision, either party may submit the decision to the King County Superior Court in the action now pending. The parties agree the judgment to be entered will be in full and complete compliance with the decision of the Arbitrator. Once said judgment is entered the judgment will be final and binding on Fluor and DOC. Fluor and DOC each waive any and all rights to appeal the Arbitration Award.

CP 4, ¶8. The final sentence of this paragraph from the Arbitration Agreement is standard language that makes the arbitrator's decision regarding the merits of the controversy final. Under this provision, the parties waive the right to challenge the substance of the arbitrator's decision. They wanted resolution and made the arbitrator, Jerry Hainline, the ultimate decision maker with regard to all findings of fact and conclusions of law. However, the parties never intended to foreclose superior court review under RCW 7.04, which is not an evaluation of the merits of the controversy.

Indeed, Fluor asserted its right to superior court review under RCW 7.04 in the prior proceedings. A superior court reviewing an arbitration decision has three options available. It may either: 1) confirm the decision under RCW 7.04.150; 2) vacate the decision under RCW 7.04.160 or; 3) modify the decision under RCW 7.04.170. Before

the superior court, Fluor requested review of the arbitration decision and purportedly asked the court to confirm it under RCW 7.04.150.<sup>2</sup> CP 15.

Fluor's exact words were:

[u]nder the statute, Fluor is entitled to have the Award confirmed because none of the exceptions set forth in the statute apply. The award is not beyond the jurisdiction of the Court, and the Award is not subject to vacation, modification, or correction under either RCW 7.04.160 or RCW 7.04.170.

*Id.* Fluor said nothing about the court not having authority to vacate or modify due to a waiver provision in the Arbitration Agreement. It only stated its position that there were no grounds for the court to vacate or modify the amount. By asking for "confirmation" of the arbitration award and citing RCW 7.04.150-.170, Fluor explicitly recognized the parties' right to superior court review under RCW 7.04.

Not only is Fluor's current position irreconcilable with its position below, but concluding that the parties intended to waive their rights under RCW 7.04 would lead to absurd results. For example, the superior court may vacate an arbitration decision if it can be shown that "the award was procured by corruption, fraud or other undue means." RCW 7.04.160(1). According to Fluor, even if DOC had discovered that Fluor had paid the arbitrator to decide in its favor, DOC would have no recourse because it

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<sup>2</sup> DOC contends that this request for confirmation was a disguised request for modification. *See supra* at §II.B.

waived its right to appeal. The parties did not intend to allow for such a ridiculous scenario when they agreed to the limited waiver of their rights to “appeal the Arbitration Award.”

This interpretation of the parties’ intent is further bolstered by the sentence immediately preceding the waiver provision which provides that “[o]nce judgment is entered, the judgment will be final and binding” upon both parties. CP 6, ¶8. Contractual language should be read so as to give meaning to every term. *Diamond “B” Constructors, Inc. v. Granite Falls Sch. Dist.*, 117 Wn. App. 157, 165, 70 P.3d 966 (2003). If the parties had waived their right to superior court review under RCW 7.04, the arbitration decision itself would be final and binding and this language would be unnecessary.<sup>3</sup>

Because the parties did not waive their right to superior court review under RCW 7.04 , the arbitrator’s decision was equivalent to a jury verdict – it only fixed a definite amount of recovery but was not “fully liquidated” until entry by the superior court. Therefore, the assessment of interest before entry of judgment was unlawful.

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<sup>3</sup> Or the parties could have specified that the arbitration award would be “final and binding” when issued, as opposed to once judgment was entered.

**3. If the Parties Waived Superior Court Review Under RCW 7.04, the Superior Court's Interest Award Was a Breach of the Arbitration Agreement.**

Should the Court agree with Fluor that the parties intended to waive their rights to superior court review of the appellate award under RCW 7.04 in addition to appellate review of the merits of the controversy the trial court's interest award would still be erroneous. If the parties agreed in the Arbitration Agreement that the superior court had no authority to review Mr. Hainline's decision, then Fluor breached the Arbitration Agreement when it requested that the court modify the award amount by adding \$43,380.22 in interest. Therefore, under either interpretation of the appellate waiver provision the court should delete the interest award from the judgment amount.

**4. *Moses Lake* Involved a Distinguishable Arbitration Statute, RCW 41.56.450.**

The Washington appellate decision *Moses Lake* is factually distinguishable and yet its holding is consistent with DOC's position that the court should look to the to the jury verdict statutes for guidance. Under the jury verdict statutes, only if directed to enter a verdict after appellate review can superior courts award interest from the date the jury rendered the verdict. RCW 4.56.110(3)(4); RCW 4.56.115. Consistent with this statutory rule, the *Moses Lake* court held that the trial court,

which was acting in an appellate capacity, should have awarded prejudgment interest from the date of the arbitration panel's decision. *Moses Lake*, 68 Wn. App. at 749.

The trial court review in *Moses Lake* was appellate in nature because the arbitration panel's decision was final and binding upon both parties. The controlling statute in *Moses Lake*, RCW 41.56.450, provides that the arbitration panel's decision:

shall be *final and binding* upon both parties, subject to review by the superior court upon the application of either party solely upon the question of whether the decision of the panel was arbitrary or capricious . . . .

RCW 41.56.450 (emphasis added). This "final and binding" language, which is absent from RCW 7.04, supports the conclusion that the arbitration panel's decision in a collective bargaining dispute is fully liquidated. Further action by the superior court is not required to give final effect to the arbitration award under RCW 41.56.450. Review by the superior court (acting in its appellate capacity) is simply an option for the adversely affected party.

The appellate review performed by the trial court in *Moses Lake* is distinguishable from the much more limited review permitted by the superior court in this case under RCW 7.04. Under RCW 7.04, the merits of the controversy cannot be considered. *Westmark Properties, Inc. v.*

*McGuire*, 53 Wn. App. 400, 402, 766 P.2d 1146 (1989). Any justification for vacation and modification must be present on the face of the award. *Id.* at 402-404. In contrast, the collective bargaining arbitration statute, RCW 41.56.450, allows the trial court to review the merits of the arbitration panel's decision under the arbitrary and capricious standard -- a standard of appellate review. Because the *Moses Lake* trial court reviewed the merits of the dispute under the arbitrary and capricious standard, it acted in an appellate capacity.

Fluor's only response to this distinction is that the *Moses Lake* court did not expressly make this connection. Respondent's Brief at 12. As quoted by Fluor, the court recognized that:

the City was under a duty to raise the firefighters' salaries in the amount specified, subject only to review as provided in RCW 41.56.450.

*Id.* However, because the court did not explicitly state the City's duty to increase the salaries arose from the fact that the arbitration panel's decision was final and binding, Fluor concludes that such an interpretation is contrary to the court's intent. The parallel structure of the court's language and the language of RCW 41.56.450 (*infra* at 8) suggests just the opposite conclusion; the court found that the City had a "duty to raise the firefighter salaries" specifically because the arbitration panel's decision was "final and binding." *Moses Lake*, 68 Wn. App. At 749. Therefore,

contrary to Fluor's position, the fact that the *Moses Lake* decision involved RCW 41.56.450 is a point of significant distinction.

**B. The Superior Court's Addition of Prejudgment Interest to the Arbitration Award Was an Unlawful Modification.**

This court need not reach the prejudgment interest issue discussed in §II.A. because the superior court exceeded its limited powers of review under RCW 7.04.170 by adding \$43,380.22 in interest to the amount awarded by the arbitrator when it entered judgment. *See Westmark Properties, Inc. v. McGuire*, 53 Wn. App. 400, 766 P.2d 1146 (1989) (superior court overreached its authority under RCW 7.04.170 by adding prejudgment interest to arbitration award). No grounds exist for distinguishing *Westmark*. As in *Westmark*, the arbitration award did not mention interest. *Westmark*, at 401; CP 12. As in *Westmark*, the court's judgment included prejudgment interest in addition to the principal amount. *Id.* As in *Westmark*, the face of the award lacks any grounds for modifying the principal amount. *Westmark*, at 404; CP 12. As in *Westmark*, the prejudgment interest must be deleted from the judgment.

Fluor attempts to avoid the statutory restrictions on superior court modifications of arbitration decisions by disguising the modification as a mere confirmation of the principal amount. This characterization of the superior court's action lacks any legal support. Nowhere in the arbitration

confirmation provision, RCW 7.04.150, does language exist that would permit the court to tack prejudgment interest onto an arbitration award. The only provision under RCW 7.04 that authorizes the court to modify an award and enter a different judgment amount is RCW 7.04.170. None of the exclusive reasons for modifying an arbitration amount under this provision allow for an interest award that the arbitrator failed to provide.<sup>4</sup>

Fluor continues to force a square peg into a round hole by again citing *Moses Lake*. Fluor suggests that *Moses Lake* stands for the proposition that a court may award prejudgment interest despite the “absence of a statute authorizing an award of prejudgment interest.” Respondent’s Brief at 12. However, RCW 7.04.170 did not bind the *Moses Lake* court as it did the superior court below. The collective bargaining statute, RCW 41.56.450, controlled the court’s authority in *Moses Lake*. This statute does not put any restrictions on the superior court’s review other than setting out the standard of review – arbitrary and

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<sup>4</sup> “In any of the following cases, the court shall, after notice and hearing, make an order modifying or correcting the award, upon the application of any party to the arbitration:

- (1) Where there was an evident miscalculation of figures, or an evident mistake in the description of any person, thing or property, referred to in the award.
- (2) Where the arbitrators have awarded upon a matter not submitted to them.
- (3) Where the award is imperfect in a matter of form, not affecting the merits of the controversy. The order must modify and correct the award, as to effect the intent thereof.” RCW 7.04.170 (amended by Laws of 2005, ch. 433, § 24 (eff. 1/1/06)).

capricious. RCW 41.56.450. As the *Moses Lake* court did not interpret the power of the superior court to modify an arbitration decision under RCW 7.04.170, its holding does not apply.

Despite Fluor's attempts to paint it as a confirmation of the arbitration award, the superior court's addition of prejudgment interest to the judgment amount was a modification. The list of circumstances that justify a modification by a superior court under RCW 7.04.170 is exclusive. None of them provide for adding prejudgment interest. The superior court's modification of the arbitration award was unlawful and the prejudgment interest must be deleted from the judgment.

### III. CONCLUSION

For the foregoing reasons, appellant respectfully requests that the court reverse the trial court's award of prejudgment interest on the underlying arbitration award and delete the prejudgment interest from the judgment.

RESPECTFULLY SUBMITTED this 22<sup>nd</sup> day of July, 2005.



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