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DIVISION III
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No. 293661

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

WASHINGTON STATE NURSES ASSOCIATION, on behalf of certain
employees it represents, and VIVIAN MAE HILL, individually and on
behalf of others similarly situated,

Plaintiffs-Respondents,

v.

SACRED HEART MEDICAL CENTER,

Defendant-Appellant.

**BRIEF OF WASHINGTON STATE HOSPITAL ASSOCIATION,
MULTICARE HEALTH SYSTEM
AND FRANCISCAN HEALTH SYSTEM
*AMICI CURIAE***

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I. INTRODUCTION

The Superior Court's Order of August 20, 2010 erroneously imposes an additional burden upon Washington's employers that is incompatible with our state's Minimum Wage Act ("MWA"). Specifically, the Superior Court erred in holding that employees' missed rest breaks constitute "hours worked" pursuant to the MWA, obligating Defendant-Appellant Sacred Heart Medical Center ("SHMC") to compensate employees for missed breaks at the overtime rate of time and one-half. In addition, the court's award of double damages under RCW 49.52.070, due to SHMC's compensation of employees for missed rest breaks at straight time, rather than time and one-half, was manifestly unwarranted. Given the lack of any Washington case law, statutes, or regulations previously providing that missed rest breaks count as "hours worked" under the MWA, and an arbitrator's decision expressly concluding that missed breaks should be paid at straight time, an employer's alleged failure to compensate employees for missed breaks at the overtime rate involves a bona fide dispute precluding double damages.

II. IDENTITY AND INTEREST OF AMICI CURIAE

The Washington State Hospital Association ("WSHA") is a nonprofit membership organization representing Washington's 97

community hospitals and several health-related organizations. WSHA works to improve the health of the people of the state by becoming involved in all matters affecting the delivery, quality, accessibility, affordability, and continuity of health care. WSHA recognizes the critical role nurses play in providing quality patient care, as well as the need for a healthy work environment. WSHA is thus acutely aware of the impact of these issues on the ability of hospitals to offer, and hospital employees to take, rest and meal breaks. WSHA is also deeply concerned about public policies mandating the need to control the costs of delivering health care in Washington. As such, WSHA seeks to avoid the imposition of costs on hospitals when the costs are not required by the law.

MultiCare Health System (“MHS”) and Franciscan Health System (“FHS”) are non-profit health care organizations based out of Tacoma, Washington. Their networks of hospitals and clinics provide health care services throughout the state of Washington. Both employ thousands of registered nurses in their various facilities in Washington. Both MHS and FHS therefore have a significant interest in the courts’ interpretation of the MWA’s potential application to missed rest breaks and in the proper method of calculating compensation for employees’ missed breaks.

In addition, MHS has a particular interest in this proceeding. One of its hospitals is Tacoma General Hospital. MHS was involved with a similar dispute with Plaintiff-Respondent, the Washington State Nurses Association (“WSNA”), before the Department of Labor & Industries (“L&I”) in a formal proceeding under Ch. 49.48 RCW. WSNA chose not to further appeal the final administrative decision in that proceeding, a final decision adverse to the position it asserted there and asserts here. From Amici’s ability to review the record in this case, it does not appear that WSNA placed that final outcome in the formal record in this case.

III. ISSUES OF CONCERN TO *AMICI CURIAE*

Amici address the following issues:

- (1) Whether the Superior Court erred in holding that a missed rest break constitutes time worked pursuant to the MWA and is therefore subject to the statute’s overtime provisions. CP 1555-56.
- (2) Whether the Superior Court erred in awarding double damages pursuant to RCW 49.52.070. CP 1559-60.
- (3) Does WSNA’s failure to seek review of a final administrative determination adverse to its position here have any impact on this case?

IV. STATEMENT OF THE CASE

Amici accept the Statement of the Case in the Opening Brief of Defendant-Appellant SHMC at pages 5-8.

V. ARGUMENT

A. A Missed Rest Break Does Not Constitute “Hours Worked” Under the Washington Minimum Wage Act

In its Order of August 20, 2010, the Superior Court concluded that consistent with *Wingert v. Yellow Freight Systems, Inc.*, 146 Wn.2d 841, 50 P.3d 256 (2002), registered nurses who worked through their rest periods provided SHMC with additional time worked. The court went on to hold that a missed rest break is time worked under the MWA and thus could result in overtime hours if the nurse worked more than 40 hours in the week the missed rest break occurred, or if the missed rest break caused the nurse to work more than 40 hours in one week. CP 1555-56.

While a nurse who works through his or her rest break provides the employer with additional work within that shift, for which the nurse is fully paid, Amici respectfully submit that it simply does not follow that compensation for the missed rest break counts as “hours worked” under the MWA. The payment for the missed break is not a payment for hours worked, and therefore cannot result in overtime.

The *Wingert* case, relied upon by the Superior Court on this issue, is simply inapposite. *Wingert* merely held that an employee who misses a required 10-minute rest break is “entitled to be compensated” for an additional “10 minutes of work.” *Wingert v. Yellow Freight Sys., Inc.*, 146 Wn.2d 841, 849, 50 P.3d 256 (2002). This was because of the Court’s conclusion that employees who miss a rest break “are, **in effect**, providing [the employer] with an additional 10 minutes of labor.” 146 Wn.2d at 849 (emphasis added). *Wingert* did not hold that a missed rest break constitutes “hours worked” for purposes of calculating overtime under the MWA – the issue was just not addressed.¹ Neither did *Wingert* hold that missed rest breaks should be compensated at the overtime rate of time and one-half. Instead, *Wingert* simply held that the employee would be entitled to compensation for the equivalent of an additional 10 minutes for the missed 10-minute break. *Id.*

In order to properly analyze this issue, the necessary factual context must be kept in mind. The compensation for a missed break is paid for time *after* the employee has actually stopped working. This must be so, because if the employee continues his or her regular employment,

¹ Although *Wingert* discusses overtime wages, this was due to the fact that the missed rest breaks occurred during overtime shifts.

the employee is simply generating additional hours of work for which payment is due, and the missed rest break is not paid for. Rather, the compensation is not attached to *any* hours of work. Consider a routine hypothetical: a nurse working an eight-hour shift (with a one-half hour unpaid meal period) starts her shift at 7:00 a.m. and ordinarily finishes at 3:30 p.m. If that nurse is not allowed to take her afternoon rest break but has no other deviation from her regular day, the nurse still leaves the hospital at 3:30 p.m. The nurse is free to use the rest of her day entirely as she sees fit, without any restriction from the employer.

This 10-minute period for which the nurse is to be paid after her shift is not “hours worked” as that term is defined for purposes of the MWA. “‘Hours worked’ shall be considered to mean 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.” WAC 296-126-002(8). This definition has been repeatedly accepted by Washington courts. *Stevens v. Brinks Home Sec., Inc.*, 162 Wn.2d 42, 47, 169 P.3d 473 (2007); *Anderson v. Dep’t of Soc. & Health Servs.*, 115 Wn. App. 452, 456, 63 P.3d 134 (2003). Indeed, our Supreme Court has noted that this regulation is clear and unambiguous. *Stevens*, 162 Wn.2d at 47.

The analysis performed by the *Stevens* Court is instructive when examining the payment made for a missed break. The *Stevens* Court broke down WAC 296-126-002(8) into two components,² and the compensation for a missed break satisfies neither of them. First, to be “hours worked,” the employee must be “on duty.” The *Stevens* Court noted extensive facts indicating that the employees in that case were “on duty” while they drove their employer’s trucks. The employees could only use the trucks for company purposes; the employees were subject to the company’s rules as to how they operated and maintained the trucks; the employees were subject to being called while driving and redirected. 162 Wn.2d at 48-49. To the contrary in this case, the nurse receiving a payment for a missed break is not on duty at all. The nurse is entirely released from service and free to use the time in any way he or she sees fit.

The second component of WAC 296-126-002(8) analyzed by the *Stevens* Court is whether the employee is required to remain “on the employer’s premises or at a prescribed work place.” The *Stevens* Court

² WAC 296-126-002(8) also involves a third component, not addressed by the *Stevens* Court under the fact of that case: the time must be “authorized or required by the employer.” To the degree that this Court considers that component under the facts of this case, it reinforces the conclusion that the payment for the missed break does not generate “hours worked.” During the 10 minutes corresponding to the missed break, the nurse is not “authorized or required” by the employer to do *anything*, or be *anywhere*.

engaged in an extensive analysis as to whether the trucks driven by the employees in that case were a “prescribed workplace.” The Court noted that the truck contained necessary tools and equipment, and driving the truck was an integral part of the employee’s job. The truck was where the employee completed paperwork. The Court concluded that it was a “prescribed work place” for these employees. 162 Wn.2d at 49. Again, in contrast, the compensation for a missed break does not require the nurse to remain anywhere at all – the nurse is free to go wherever he or she wants.

WSNA has sought to confuse this issue by focusing on the requirement of the rest break regulation – that the rest break is “on the employer’s time.” WAC 296-126-092(4). However, the text of the regulation makes clear that this requirement attaches when the employee has been “allowed a rest period,” *id.*, i.e., a rest break has been actually taken. L&I’s Administrative Policy reinforces this conclusion, referring to the rest break as being scheduled no more than three hours into a four-hour work period. Administrative Policy ES.C.6, “Meal and Rest Periods for Nonagricultural Workers Age 18 and Over,” § 11 (revised June 24, 2005) (hereinafter, “AP ES.C.6”). Treating a rest period actually taken by the employee as a part of the hours worked is appropriate, in light of the restrictions employers are permitted to put on an employee’s activities

during a rest break. The employer can require the employee to remain on the employer's premises, require the employee to remain on call, or otherwise restrict the employee's activities during the rest break. *Id.* § 10 (“Nothing in this regulation prohibits an employer from requiring employees to remain on the premises during their rest periods.”); *id.* § 13 (employers may require employees to remain on call during their paid rest periods); *White v. Salvation Army*, 118 Wn. App. 272, 283, 75 P.3d 990 (2003) (holding that requiring an employee to remain on call during rest periods does not violate WAC 296-126-092(4)).³ In short, rest breaks are considered “hours worked” because the employer maintains the ability to exercise a certain level of control over how and where the employee spends that time. *See* AP ES.C.6, §§ 10, 13.

Focusing on the degree of control exercised by the employer is entirely consistent with prior decisions from our Supreme Court. In *Weeks v. Chief of Washington State Patrol*, 96 Wn.2d 893, 639 P.2d 732 (1982),

³ L&I's response to the query: “When are meal periods considered ‘hours worked’?” is telling. The L&I clarified: “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.” Administrative Policy ES.C.2, “Hours Worked,” § 10 (revised Sept. 2, 2008) (emphasis added); *see also* AP ES.C.6, § 7; *White*, 118 Wn. App. at 283 (holding that the employer's measure of control over rest breaks is not distinguishable from meal breaks).

the Court dealt with state patrol officers who were required to remain on call during their lunch hours. They were required to remain in their area of patrol and to be available by radio or telephone. Applying WAC 296-126-002(8), the Court concluded that such a level of control rendered the lunch hour “work.” 96 Wn.2d at 898.

The critical difference between a rest break actually taken during a shift and payment for a missed rest break is thus apparent: the employer lacks any control over the employee’s time with respect to the missed break. Amici are unaware of any Washington employer that requires an employee to remain on the premises at the end of the employee’s shift in order to “make up” his or her missed rest breaks. Mandating that an employee sit in a break room watching 10 minutes tick by on the clock, for no productive purpose, would be absurd. Instead, an employee who works through his or her rest break is able to leave work at the close of the shift and thereafter spend his or her time as the employee sees fit.

B. Payment for a Missed Rest Break Is Payment for Time Not Worked.

Washington’s wage and hour laws recognize that employers may be obligated, under certain circumstances, to provide compensation to employees for time periods during which no work is performed.

Employers may compensate employees for paid holidays, vacation time, and sick leave. *See* Administrative Policy ES.A.8.1, “Overtime,” § 5 (revised Nov. 6, 2006). Such payments are referred to as “[p]ayment for non-working hours.” *Id.* Under Washington law, overtime is only due when an employer employs an employee for more than 40 hours, RCW 49.46.130(1), and this only applies to “hours worked.” Administrative Policy ES.A.8.2, “How to Compute Overtime” (no revision date), at 1. The number of hours worked for purposes of determining overtime does not include hours paid by the employer, but during which no work was actually performed. The wage and hour laws do “not require that an employer pay overtime for vacation, holiday and sick leave time off, and such time need not be counted as ‘hours worked’ for overtime compensation.” *York v. Wichita Falls*, 763 F. Supp. 876, 885 (N.D. Tex. 1990); *see also Am. Fed. of Gov’t Employees, Local 3721 v. Dist. of Columbia*, 715 F. Supp. 391, 392 (D.D.C. 1989) (applying FLSA⁴; noting that an employee who takes eight hours of vacation leave and works an

⁴ The Washington courts have frequently looked to analogous FLSA authority for support in interpreting the MWA’s provisions. *See, e.g., Chelan Cnty. Deputy Sheriff’s Ass’n v. Cnty. of Chelan*, 109 Wn.2d 282, 292-93, 745 P.2d 1 (1987). Indeed, Washington courts have referred to FLSA case law in construing what are, or are not, “hours worked.” *Anderson*, 115 Wn. App. At 457-59.

extra nine-hour shift in the same workweek is only entitled to one hour, rather than nine hours, of overtime); *Lanehart v. Horner*, 818 F.2d 1574, 1578 (Fed. Cir. 1987) (“paid leave shall not be included as hours worked in computing FLSA overtime” (internal quotation marks and citation omitted)); *O’Hara v. Menino*, 253 F. Supp. 2d 147, 154-57 (D. Mass. 2003) (paid lunch breaks were not “hours worked” under the FLSA where they were not predominantly for the employer’s benefit).

Missed rest breaks similarly involve compensation for time that is not actually worked and that cannot be included in a calculation of overtime. “[I]t is undoubtedly true that the MWA does not require workers to be paid for time not spent working” *Berrocal v. Fernandez*, 155 Wn.2d 585, 594, 121 P.3d 82 (2005). Neither does the MWA require employers to pay an employee at the overtime rate of time and one-half where the employee has not actually worked more than 40 hours in the workweek at issue. RCW 49.46.130. Missed rest breaks do not involve actual hours worked beyond the employee’s regular shift. Holding otherwise creates nothing but a legal fiction.

The Superior Court’s holding that employees’ missed rest breaks create overtime obligations under the MWA was in error. Allowing this holding to stand would create an unjustified burden on employers

throughout the state, requiring the compensation of employees at overtime rates for time not actually worked. The Superior Court's holding on this issue should be reversed by this Court, in accordance with the longstanding and logical understanding that only hours actually worked can trigger entitlement to overtime pay under the MWA.

C. Double Damages Under RCW 49.52.070 Are Not Warranted Under These Circumstances

In addition to its erroneous conclusion that missed rest breaks constitute "hours worked" pursuant to the MWA, the Superior Court erred in awarding double damages to Plaintiffs-Respondents under RCW 49.52.070. Liability under RCW 49.52.050 is only warranted where the employer "willfully and with intent to deprive the employee of any part of his or her wages, shall pay any employee a lower wage than the wage such employer is obligated to pay." RCW 49.52.050(2) (emphasis added); *see also Pope v. Univ. of Wash.*, 121 Wn.2d 479, 491 n.4, 852 P.2d 1055 (1993) (holding that the "argument that RCW 49.52.050 establishes liability without fault is not persuasive. Lack of intent may be established either by a finding of carelessness or by the existence of a bona fide dispute."). "RCW 49.52.070 . . . provides double damages only for the willful withholding of wages." *Lillig v. Becton-Dickinson*, 105 Wn.2d 653,

659, 717 P.2d 1371 (1986) (emphasis added). “Where an employer fails to pay wages owed, [Washington] cases have thus far established two instances that negate a finding of willfulness: ‘the employer was careless or erred in failing to pay, or a “bona fide” dispute existed between the employer and employee regarding the payment of wages.’” *Morgan v. Kingen*, 166 Wn.2d 526, 534, 210 P.3d 995 (2009) (quoting *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 160, 961 P.2d 371 (1998)), amended by No. 81202-1, 2009 Wash. LEXIS 1070 (Wash. Nov. 9, 2009); see also RCW 49.48.082(13) (defining the term “willful” for purposes of a wage claim as “a knowing and intentional action that is neither accidental nor the result of a bona fide dispute”).

The Superior Court acknowledged in this case that SHMC paid straight time pursuant to a ruling from a labor arbitrator, but it nonetheless concluded that it had no bona fide dispute to a claim for overtime pay for those claims. CP 1559. Contrary to the court’s holding, an award of double damages was wholly unwarranted under the circumstances. As discussed in Section V.A, above, the *Wingert* case did not provide that missed rest breaks are “hours worked” pursuant to the overtime provisions of the MWA. Neither has any other Washington case or statute previously provided that missed rest breaks must be treated as hours leading to

overtime. In fact, the cases, statutes, and regulations reasonably support the opposite conclusion: that time not actually worked and over which an employer exercises no control cannot be treated as time “worked” in excess of 40 hours. *See* RCW 49.46.130.

SHMC’s approach in this case did not involve a “willful” failure to pay wages. Given the lack of prior legal authority to support the position that missed rest breaks must be paid at time and one-half, the employer was justified in following the express ruling from the labor arbitrator and treating missed breaks just as it would other forms of compensated, non-work hours, such as vacation and sick leave.

The courts’ definition of a “bona fide dispute” for purposes of RCW 49.52.070 is not as narrow as the Superior Court suggests. In fact, as even the *Wingert* Court noted, the courts are hesitant to impose double damages absent “substantial evidence that [the employer] acted willfully and with the intent to deprive its employees of their wages.” *Wingert*, 146 Wn.2d at 849 (emphasis added). There must simply be “a ‘fairly debatable’ dispute over whether . . . all or a portion of the wages must be paid.” *Schilling*, 136 Wn.2d at 161.

The dispute need not be merely factual but can involve a dispute of law regarding the issue of whether particular wages are actually owed to

an employee. *See, e.g. Monahan v. Emerald Performance Materials, LLC*, 705 F. Supp. 2d 1206, 1218 (W.D. Wash. 2010) (holding that double damages under RCW 49.52.070 are not warranted where “the employer shows that it acted in subjective good faith and had objectively reasonable grounds for believing its conduct did not violate the FLSA”). The mere fact that an employee's interpretation of its legal obligation to pay may be erroneous is immaterial; “The question is whether [the employee’s] entitlement to the payments [is] ‘fairly debatable.’” *Moore v. Blue Frog Mobile, Inc.*, 153 Wn. App. 1, 8, 221 P.3d 913 (2009). Similarly, the simple fact that an employer’s failure to pay wages may ultimately be deemed to have violated the law does not preclude a bona fide dispute regarding the underlying legal obligation. *See, e.g., Bates v. City of Richland*, 112 Wn. App. 919, 51 P.3d 816 (2002) (holding that double damages under RCW 49.52.070 were not warranted, even where the employer violated RCW 41.20.050 and .060 in its calculation of employee pension payments); *Cannon v. City of Moses Lake*, 35 Wn. App. 120, 125, 663 P.2d 865, 868 (1983) (denying a request for double damages under RCW 49.52.070, even where the employer’s failure to pay employees’ accrued vacation time violated RCW 41.26.120).

The case at hand does not involve a situation where the employer refused to pay any compensation whatsoever for missed rest breaks. In fact, SHMC paid its employees not only for the time actually worked, but also provided compensation equivalent to an additional fifteen minutes of pay for each missed rest break, which SHMC reasonably believed to be the full amount owed under the circumstances.⁵ “This situation evidences no intentional deprivation of wages as required to sustain a claim under RCW 49.52.050.” *Simon v. Riblet Tramway Co.*, 8 Wn. App. 289, 293, 505 P.2d 1291 (1973) (emphasis added). “An employer’s genuine belief that he is not obligated to pay certain wages precludes the withholding of wages from falling within the operation of RCW 49.52.050(2) and 49.52.070.” *Ebling v. Gove’s Cove, Inc.*, 34 Wn. App. 495, 500, 663 P.2d 132 (1983).

The court’s award of double damages was untenable in light of the employer’s reasonable belief that it was not obligated to compensate its employees at the overtime rate for hours that no court had previously held to constitute “hours worked” under the MWA. Allowing an award of double damages to stand under these circumstances could expose multiple

⁵ SHMC’s collective bargaining agreement with WSNA provides for 15-minute breaks, rather than the 10-minute breaks required by WAC 296-126-092(4).

employers across the state to similar unjustified liability stemming from a good faith interpretation of the existing law.

D. In a Claim Under WAC 296-126-092, WSNA Is Barred from Claiming Additional Compensation for Missed Breaks

Both parties in this proceeding have repeatedly referenced an administrative proceeding involving Tacoma General Hospital, a hospital operated by one of the Amici. CP 749-50. It is not clear to Amici whether WSNA, as a party to that proceeding with Tacoma General, ever advised the Superior Court that the proceeding arose from a formal wage complaint it had filed with L&I. Please see Attachment One.⁶ In resolving that complaint, L&I determined that when Tacoma General “compensates the nurse by paying 15 minutes of straight time,” it “effectively pays the nurse at overtime rates for the missed mandatory 10-

⁶ As an administrative proceeding, this is the type of information of which the appellate court may take judicial notice. ER 201 (providing that “[j]udicial notice may be taken at any stage of the proceeding” with respect to a fact that is “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned”). To the extent the information involves evidence not considered by the Superior Court, Amici respectfully assert that the information should be considered by this Court pursuant to RAP 9.11(a). Particularly given the parties’ repeated references to the L&I proceedings, it would be inequitable to decide the case solely on the incomplete evidence in the record; this additional information is needed to fairly resolve the issues on review. This additional information is likely to change the Court’s decision given the collateral estoppel effect of the L&I decision. See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327-28, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979). Amici, as non-parties, were unable to present this particular evidence to the trial court and are unable to seek an equivalent remedy through a post-judgment motion or a request for a new trial. See RAP 9.11(a).

minute break as provided by WAC 296-126-092.” CP 749-50. While it is clear from the record that WSNA advised the Superior Court that it had sought reconsideration of that ruling, CP 745, it is not clear that WSNA ever put into the written record that its request for reconsideration had been denied. Please see Attachment Two.⁷ For purposes of the Administrative Procedures Act, L&I’s final determination is either an order in an “adjudicative proceeding” under RCW 34.05.570(3) or an “other agency action” under RCW 34.05.570(4). In either event, WSNA⁸ was allowed 30 days to seek review of L&I’s determination. RCW 34.05.542(2), (3). WSNA never did so. It may no longer contest the principle decided by L&I. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 328, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979) (“Permitting repeated litigation of the same issue as long as the supply of unrelated defendants holds out reflects . . . the aura of the gaming table . . .”).

The same result applies here. SHMC pays its nurses 15 minutes of straight-time pay for any missed breaks and thus satisfies its obligations

⁷ Again, the Court may judicially notice this administrative determination. ER 201(b).

⁸ Conversely, because Tacoma General prevailed in the L&I proceeding, it would not have had standing to seek review of the agency’s action. RCW 34.05.530. Thus, Tacoma General never had occasion to seek review of L&I’s cursory error in stating that a missed rest break could generate overtime obligations, which L&I announced with no analysis whatsoever. CP 749.

under WAC 296-126-092. Amici will not repeat but instead adopt the arguments made by Appellant:⁹ WSNA defeated removal of this case to federal court by disavowing any claim under the collective bargaining agreement that gives rise to the entitlement to a 15-minute rest break. Either WSNA's claim rests upon or requires the interpretation of the collective bargaining agreement and is preempted, or it arises solely from WAC 296-126-092 and is barred for the reasons identified above.

VI. CONCLUSION

For the reasons stated above, Amici urge this Court to reverse the Superior Court's Order of August 20, 2010 with respect to the issues addressed above.

DATED this 8th day of April, 2011.

By 
Timothy J. O'Connell, WSBA No. 15372
Karin D. Jones, WSBA No. 42406
STOEL RIVES LLP
Attorneys for Amici Curiae

⁹ Appellant's Opening Brief at 21-24.

CERTIFICATE OF SERVICE

I, Debbie Dern, the undersigned, hereby certify and declare that the following statements are true and correct:

1. I am over the age of 18 years, not a party to the within cause and am employed by the law firm Stoel Rives LLP. My business address is 600 University Street, Suite 3600, Seattle, Washington 98101.

2. On the 8th day of April, 2001, I caused to be sent for filing an original and one copy of *Brief of Washington State Hospital Association, MultiCare Health System, and Franciscan Health System Amici Curiae* via Federal Express overnight mail to:

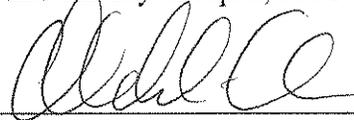
Clerk of the Court
Court of Appeals, Division III
500 N. Cedar Street
Spokane, WA 99201

3. On the 8th day of April, 2001, I caused to be served a copy of *Brief of Washington State Hospital Association, MultiCare Health System, and Franciscan Health System Amici Curiae* via U.S. Regular Mail to:

David Campbell, Esq.
Dmitri Iglitzin, Esq.
Carson Glickman-Flora, Esq.
Schwerin Campbell Barnard & Iglitzin, LLP
18 W. Mercer Street, Suite 400
Seattle, WA 98101-3971

Paula L. Lehmann
Michael J. Killeen
Davis Wright Tremaine LLP
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045

Executed at Seattle, Washington this 8th day of April, 2011.



Debbie Dern

ATTACHMENT 1

Department of Labor & Industries
 Employment Standards Program
 PO Box 44510
 Olympia WA 98504-4510
 (360) 902-5316 or 1-866-219-7321



999990

WORKER RIGHTS COMPLAINT

Case # 601 033 839
 51359

Company (Employer) Information

1. Name of business Tacoma General Hospital			6. Name of business owner, manager or supervisor William Greenbeck, Director of Human Resources		
2. Mailing address of business 315 Martin Luther King Jr. Way			7. Business phone # 253-406-1000	8. Cell phone #	
3. City Tacoma	State WA	ZIP 98406-0299	9. FAX # 253-403-1307	10. When is your scheduled payday?	
4. Address where work performed if not at main address			11. Type of business		
5. City	State	ZIP	12. Has company filed for bankruptcy? <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Don't know	13. Is company still in business? <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Don't know	

Worker's Information

14. Your name (last, first, middle initial) Mr. <input type="checkbox"/> Mrs. <input type="checkbox"/> Ms. <input type="checkbox"/> David Campbell for Wash. State Nurses Association		20. Social Security Number	21. Home phone	22. Work phone 206-285-2828
15. Home address 18 W. Mercer, Ste 400		23. Date alleged violation occurred From 7/18/2002 to Present		24. Rate of pay \$
16. City Seattle	State WA	ZIP 98119	25. Were you under 18 when employed? <input type="checkbox"/> Yes <input type="checkbox"/> No	26. Date of birth, if under 18 when started work
17. Email address campbell@workerlaw.com & flora@workerlaw.com		27. If under 18, was parent authorization form signed? <input type="checkbox"/> Yes <input type="checkbox"/> No	28. Was work performed in Washington? <input type="checkbox"/> Yes <input type="checkbox"/> No	
18. Job title Attorney for WSNA	19. Type of work you performed		29. List family relationship if related to employer	

30. Type(s) of Complaint: Check appropriate box(s). Please note, if the complaint is wage related, provide any documents you have to support it. (see #38 below)

- | | | |
|---|---|--|
| <input type="checkbox"/> Final wages not paid | <input type="checkbox"/> Unpaid prevailing wage (complete reverse side) | <input type="checkbox"/> Uniform charges |
| <input type="checkbox"/> Unpaid minimum wage | <input type="checkbox"/> Child labor laws | <input type="checkbox"/> Family care |
| <input checked="" type="checkbox"/> Unpaid overtime | <input type="checkbox"/> Meal periods | <input type="checkbox"/> Nurse overtime |
| <input type="checkbox"/> Unpaid hours worked | <input type="checkbox"/> Rest periods | <input type="checkbox"/> Other |
| <input type="checkbox"/> Unauthorized deductions | | |
| <input type="checkbox"/> Unpaid agreed wage | | |
| <input type="checkbox"/> NSF/bad check or credit card | | |

31. Please explain the complaint items checked above.

Tacoma General Hospital pays its hourly employees, including WSNA-represented nurses, straight time pay for missed rest breaks mandated by WAC 296-126-092 even when those nurses have worked 40 hours in a work week or, if employed on a 8/80 schedule, 8 hours in a day or 80 hours in a 14-day work cycle. The Hospital has refused to pay the required time and one-half rate for the missed rest breaks despite knowledge of the Department of Labor & Industries' policy requiring the overtime rate.

32. Estimate # of workers affected	33. If this is a wage complaint, did you ask the employer for your wages? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	If yes, state dates you requested your wages Most recently, October 29, 2007
34. Are you still working for this employer? <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Fired <input type="checkbox"/> Quit <input type="checkbox"/> Laid off <input type="checkbox"/> Don't know	35. Date you started working for this employer	36. If no longer working for this employer, list last date worked

37. If no longer working for this employer, give the reason(s) for leaving

38. To better assist the investigation, please provide as many of the following records as possible:

- | | |
|---|--|
| <input type="checkbox"/> Written wage agreement | <input type="checkbox"/> Attendance rosters |
| <input type="checkbox"/> Shift schedules | <input type="checkbox"/> Log books |
| <input type="checkbox"/> Personal time records | <input type="checkbox"/> Payroll check stubs |
| <input type="checkbox"/> Time card or copy | <input type="checkbox"/> Copies of bad checks |
| | <input type="checkbox"/> Employee hand book if available |

List other records you can provide

Wage Information

Worker Rights Complaint continued

39. How often are you paid? <input type="checkbox"/> Monthly <input checked="" type="checkbox"/> Twice monthly <input type="checkbox"/> Every other week <input type="checkbox"/> Weekly <input type="checkbox"/> Daily			40. Do you have a written employment agreement? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No If yes, provide copy		
41. Are you represented by a union? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No		42. Excluding taxes, have you authorized any other deductions? <input type="checkbox"/> Yes <input type="checkbox"/> No If yes, what? If available, provide copy of written authorization			
43. Were you paid straight time for overtime hours? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No		44. Are overtime hours on time cards? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No		45. Were overtime hours recorded by your employer by another method? <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Don't know	
46. Did you receive pay stubs? <input type="checkbox"/> Yes <input type="checkbox"/> No		47. Do you have your pay stubs? <input type="checkbox"/> Yes <input type="checkbox"/> No If yes, please provide copies		48. Do you have a record of payment other than pay stubs? <input type="checkbox"/> Yes <input type="checkbox"/> No	
49. When is/was the scheduled payday for these wages?			50. Do you have any outstanding loans/advances owing to the business? <input type="checkbox"/> Yes <input type="checkbox"/> No If yes, indicate amount owed. \$		
51. Do you have any property belonging to the business? <input type="checkbox"/> Yes <input type="checkbox"/> No If yes, list:			52. Do you have an attorney who is working to collect the wages for you? <input type="checkbox"/> Yes <input type="checkbox"/> No		

Wages Owed (Documentation requested)

53. Rate of pay \$ per <input type="checkbox"/> Hour <input type="checkbox"/> Day <input type="checkbox"/> Week <input type="checkbox"/> Month		54. Other rate of pay. Piece rate <input type="checkbox"/> Commission <input type="checkbox"/> Sq ft <input type="checkbox"/> Flat rate <input type="checkbox"/> Other (specify) <input type="checkbox"/>			
55. From To		56. How many hours due?		57. Partial payment received \$	58. What pay is due you before taxes? \$
59. Reason employer gave for refusing to resolve your complaint or payment of wages					

Prevailing Wage & Project Information If you are filing a complaint against an employer on more than one project, complete blocks 60-74 for each project. Extra copies of this section may be provided upon request. Prevailing wage investigations generally take 180 days. Complex complaint investigations may take longer.

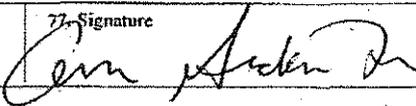
60. Project name			61. Awarding agency (public entity for whom work is being performed)		
62. Name of general contractor (prime contractor)			63. Location where you worked		
64. Prime Contractor's phone number		65. Job classification (type of work performed)			66. Hourly rate paid
67. Prevailing wage rate required (if known) \$		68. First date you worked on project	69. Last date you worked on project		70. Was an 'Intent to Pay Prevailing Wage' form posted on the job site? <input type="checkbox"/> Yes <input type="checkbox"/> No
71. Is project completed? <input type="checkbox"/> Yes <input type="checkbox"/> No	72. Project completion date	73. Place a checkmark in the boxes below for any benefits provided by the employer <input type="checkbox"/> Medical <input type="checkbox"/> Dental <input type="checkbox"/> Vacation <input type="checkbox"/> Pension <input type="checkbox"/> Holidays <input type="checkbox"/> Other			
74. If "other" is checked in the previous question, please explain other benefit(s)					

Your Contact Person Information and Signature

75. Please provide information of a contact person NOT living with you who will always know how to reach you. This is necessary in the event we cannot locate you.

David Campbell or Carson Glickman-Flora		206-285-2828	
Name		Phone number	
Schwerin Campbell Barnard & Iglitzin, 18 W. Mercer St. Ste 400			
Address		City State ZIP	
Seattle		WA 98119	
City		State ZIP	

To the best of my knowledge, the information I have entered on this form is true and accurate.

76. Date 12/21/2007	77. Signature 
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ATTACHMENT 2



STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES
PO Box 44000 • Olympia, Washington 98504-4000

RECEIVED
FEB 17 2009
STOEL RIVES LLP

February 13, 2009

Carson Glickman-Flora
Counsel for Washington State Nurses Association
18 West Mercer Street, Suite 400
Seattle, WA 98119

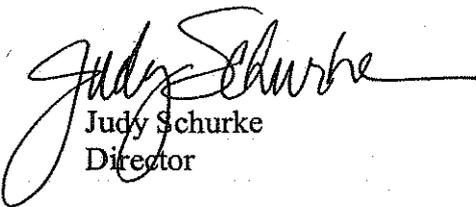
Dear Ms. Glickman-Flora:

This letter is in response to your January 22, 2009 letter requesting reconsideration of the department's determination on the Washington State Nurses Association's December 24, 2007 complaint. I understand you have spoken with Suchi Sharma, Policy and Regulatory Development Counsel, and Rich Ervin, Employment Standards Manager, to discuss your concerns with the department's January 13, 2009 decision.

The December 24, 2007 complaint submitted by David Campbell on behalf of WSNA cannot be considered by the department as a complaint filed under the Wage Payment Act as the Wage Payment Act is limited to complaints filed by individuals and does not allow complaints filed by interested parties. Rather, we accepted the complaint under our well-established *de jure* authority under the law.

After a complete legal review of WSNA's December 24, 2007 complaint and your January 22, 2009 letter, the department maintains its position outlined in its January 13, 2009 letter. As mentioned in the letter, the department will be initiating an inquiry into rest break practices in the hospital industry given the serious concerns raised about the prevalence of missed breaks and the alleged lack of an effective reporting mechanism for missed breaks in health care facilities.

Sincerely,



Judy Schurke
Director

cc: Timothy O'Connell, Attorney
Jeff Johnson, Washington State Labor Council
Evelyn Lopez, Assistant Attorney General
Ernie LaPalm, Deputy Director
for Field Services

