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SUPREME COURT OF THE STATE OF WASHINGTON

ANA LOPEZ DEMETRIO and FRANCISCO EUGENIO PAZ,
individually and on behalf of all others similarly situated,

Petitioners/Plaintiffs,

v.

SAKUMA BROTHERS FARMS, INC.,

Respondent/Defendant.

AMICUS BRIEF OF THE
ATTORNEY GENERAL OF WASHINGTON

Filed *E*
Washington State Supreme Court

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ORIGINAL

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I. INTRODUCTION

Washington's agricultural workers toil in often difficult conditions and for long hours. Many of these workers are paid on a piece-rate basis, rather than by the hour. For example, a worker might receive \$5.50 for each thirty-pound bag of red cherries picked.¹ To ensure that these workers receive at least some respite from their efforts, Washington law requires that agricultural workers receive ten minutes of rest time for every four hours worked and that employers pay workers for these rest breaks. The parties do not dispute these worker rights enshrined in law, but do dispute whether workers must receive a separate payment for their rest breaks or whether the payment is implicitly included in the piece rate.

The Attorney General urges the Court to hold that workers must receive a separate payment for their rest breaks. This result follows from the language of the applicable regulation, is consistent with construing wage and labor standards to protect workers, and is the best means of ensuring compliance with the undisputed requirements of state law.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

The Attorney General of Washington submits this brief pursuant to his long-recognized power to submit amicus curiae briefs on matters

¹ See U.S. Dep't of Labor, *Agricultural Online Wage Library* (updated Feb. 20, 2013) (available by selecting *Washington* in *Crop and Livestock Survey Reports* dropdown menu at <http://www.foreignlaborcert.doleta.gov/aowl.cfm>).

affecting the public interest. *See Young Americans for Freedom v. Gorton*, 91 Wn.2d 204, 212, 588 P.2d 195 (1978). This case presents issues of significant public interest because it affects thousands of Washington farmworkers and their families, as well as the farms that employ them. While the Department of Labor & Industries regulates the payment of wages and plans to file an amicus brief, with the Court's permission, it has not yet adopted policies or guidelines answering the certified questions in this appeal. The Attorney General has a distinct interest in the interpretation of state statutes and regulations to provide protection to workers and certainty for employers.

III. ISSUES ADDRESSED BY AMICUS

The Attorney General will address the first question certified to this Court: Does a Washington agricultural employer have an obligation under WAC 296-131-020(2) and/or the Washington Minimum Wage Act to separately pay piece rate workers for the rest breaks to which they are entitled? The Attorney General takes no position on the second question presented, regarding the calculation of the rate of pay for rest break time, except to note that, at the very least, the rate must meet the minimum wage standard. *See RCW 49.46.020*. Given the thorough briefing by the parties and an expected amicus brief from the Department of Labor & Industries, the Attorney General will not address every aspect of the arguments, and

will attempt to avoid repetition. *See* RAP 10.3(e) (amicus should avoid repetition of matters in other briefs).

IV. STATEMENT OF THE CASE

Because this case involves certified questions of law rather than adjudicating any factual disputes, the Attorney General does not rely on a statement of the case. Nevertheless, some facts are apparently undisputed or of such universal application that they cannot be questioned, and provide some context for the analysis. The following facts are drawn from the briefing by the parties.

Sakuma Brothers Farms, Inc., like many Washington farms, employs agricultural workers, some of whom work on a seasonal basis. Many of these workers, hired during harvest season to hand-pick fruit or other agricultural commodities, are paid on a piece rate basis (e.g., a set amount per box or pound). Other agricultural workers, by contrast, are paid by the hour.

Agricultural workers in Washington must be given a meal period of at least thirty minutes for every five-hour period worked. WAC 296-131-020(1). They must also be given a ten-minute rest period, “on the employer’s time,” for each four-hour period worked. WAC 296-131-020(2). Sakuma Brothers Farms is responsible for paying its piece rate workers the agreed-upon rate per piece, but disputes whether

it must make a separate payment for the ten-minute rest break or the thirty-minute meal period (neither party asserts that the workers must be paid for the meal period).

V. ARGUMENT

A. Standard of Review

This Court reviews certified questions of law, like the questions here, de novo. *Carlsen v. Global Client Solutions, LLC*, 171 Wn.2d 486, 493, 256 P.3d 321 (2011). Courts interpret regulations just as they would a statute, applying the plain meaning or rules of statutory construction as appropriate. *Overlake Hosp. Ass'n v. Dep't of Health*, 170 Wn.2d 43, 52, 239 P.3d 1095 (2010). One important rule of statutory construction particularly relevant here is that “[r]emedial statutes protecting employee rights must be liberally construed [in favor of the employee].” *Pellino v. Brink's, Inc.*, 164 Wn. App. 668, 684, 267 P.3d 383 (2011) (citing *Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 35, 42 P.3d 1265 (2002)). Because the regulation at issue here, WAC 296-131-020, is a remedial regulation promulgated in order to ensure the protection of agricultural workers by providing them at least ten minutes of rest every four hours, the Court should construe it liberally and in favor of the workers to ensure its effectiveness.

Although an administrative agency's interpretation of its administrative rules is entitled to deference, that canon of statutory construction does not apply here where the Department of Labor & Industries has not issued a policy statement or provided an interpretation regarding the certified questions. The Attorney General understands that the Department of Labor & Industries plans to file, pending the Court's permission, an amicus brief addressing this issue.

B. Workers Must Be Paid For Rest Breaks

The regulation at issue here, WAC 296-131-020, applies specifically to agricultural workers and provides:

(1) Every employee employed more than five hours shall receive a meal period of at least thirty minutes. Employees working eleven or more hours in a day shall be allowed at least one additional thirty-minute meal period.

(2) Every employee shall be allowed a rest period of at least ten minutes, *on the employer's time*, in each four-hour period of employment. For purposes of computing the minimum wage on a piecework basis, the time allotted an employee for rest periods shall be included in the number of hours for which the minimum wage must be paid.

(Emphasis added.) As noted by Plaintiffs Demetrio and Paz, and not disputed by Defendant Sakuma Brothers Farms, this regulation requires that employees receive rest breaks for every four hours of work and that they be paid for those rest breaks. *See* Demetrio & Paz Opening Br. at 12; Sakuma Bros. Farm Resp. Br. at 7 (acknowledging that agricultural

workers must be paid for their rest breaks but arguing that payment for rest breaks is included in the piece rate). This conclusion is apparent from the inclusion of “on the employer’s time” in the provision addressing rest breaks, but not in the provision addressing meal breaks. WAC 296-131-020. Interpreting the identical language “on the employer’s time” in a regulation applicable to non-agricultural workers, this Court has already concluded that this language requires the employer to pay the employee for rest breaks. *See Washington State Nurses Ass’n v. Sacred Heart Med. Ctr.*, 175 Wn.2d 822, 831, 287 P.3d 516 (2012) (applying WAC 296-126-092(4) to hold nurses entitled to payment for missed rest breaks); *Wingert v. Yellow Freight Sys., Inc.*, 146 Wn.2d 841, 848, 50 P.3d 256 (2002) (interpreting WAC 296-126-092(4) to require paid rest breaks); *see also Pellino*, 164 Wn. App. at 689-90.

Similarly, this Court and the Court of Appeals have made clear in applying the nearly identical regulation for non-agricultural workers that employers have an affirmative obligation to provide rest breaks, and that workers may not waive the rest period by “volunteering” to work through it. *See Pellino*, 164 Wn. App. at 688, 697 (interpreting WAC 296-126-092(4) applicable to non-agricultural workers). *Cf. Wingert*, 146 Wn.2d at 852 (workers may not abrogate rest break

requirements in collective bargaining agreement).² Thus, Sakuma Brothers Farms is incorrect when it suggests that it has no affirmative obligation to provide rest breaks or that workers may voluntarily forgo them. *See* Sakuma Bros. Farms Resp. Br. at 18.

C. Requiring Separate Payments for Rest Breaks Follows From the Plain Language of WAC 296-131-020

The plain language of the rest break regulation requires that employees be paid for those breaks. But Sakuma Brothers Farms' reading of the regulation would eviscerate that requirement for piece rate workers.

WAC 296-131-020(2) explicitly provides that the ten-minute rest break must be "on the employer's time." By contrast, the regulation does not require that thirty-minute meal breaks be "on the employer's time." WAC 296-131-020(1). If a separate payment for rest breaks is not required for piece rate workers, as Sakuma Brothers Farms argues, there would essentially be no difference between these two types of breaks, contrary to the regulation's plain language. A worker who is paid a set amount per pound of cherries picked, for example, would receive the same "payment" when taking a rest break as when taking a meal break, i.e., no payment at

² The legislature has enacted some limited exceptions, not applicable here, to the prohibition against reducing rest breaks in collective bargaining agreements. *See* RCW 49.12.187.

all. The employer's argument thus reads "on the employer's time" out of the regulation.

Moreover, the employer's claim that the next sentence of the regulation supports its position is exactly backwards. Sakuma Brothers Farms claims support for its position from the provision stating: "For purposes of computing the minimum wage on a piecework basis, the time allotted an employee for rest periods shall be included in the number of hours for which the minimum wage must be paid." WAC 296-131-020(2). But application of this regulation actually shows that additional and separate payment *is* required for rest breaks.

An example illustrates the point. Imagine a worker who picks cherries for exactly 8 hours, takes no rest breaks, and earns on a piece rate basis exactly \$75.76 for the day, which would be the minimum wage for 8 hours of work (8 hours times the current Washington minimum wage of \$9.47 per hour). If the rest breaks did not need to be separately accounted for and paid, the employer would not need to make any additional payment to this worker. But under the regulation, as Sakuma Brothers Farms concedes, "the ten-minute rest breaks must be included as hours worked for purposes of calculating and ensuring the payment of minimum wage." Sakuma Bros. Farms Resp. Br. at 8. Thus, the 20 minutes that the worker should have taken as breaks must be added to the 8 hours he

actually worked to determine whether he earned the minimum wage. And for an 8 hour and 20 minute day, he did not earn the minimum wage. Accordingly, under this regulation, he is clearly entitled to a “separate and additional” payment for his rest breaks (20 minutes, or 1/3 of an hour, times the minimum wage).

For workers making more than minimum wage, there is no indication in the regulation as a whole or when viewing this second sentence in isolation that they need not be paid for their rest breaks. Nor does this sentence of the regulation indicate in any way that payment for the rest period is “included in the piece rate.” *See Sakuma Bros. Farms Resp. Br.* at 7. Instead, this sentence reinforces that the rest period must be accounted for and paid for.

Sakuma Brothers Farms also errs in claiming support in the rule’s history. The history of the rule simply does not answer the question of whether rest breaks must be separately paid or are (sub silentio) implicitly included in the piece rate. First, Sakuma Brothers Farms cites to a document titled *Outline of Agricultural Labor Rule Proposal*. Sakuma Bros. Farms Resp. Br., App. A-2. This document does not address the certified questions here. Rather, the document states that “Labor” wanted rest periods to be paid at a specific rate: the average rate for that category of piecework. Sakuma Bros. Farms Resp. Br., App. A-2. Even if this

document had persuasive authority, and even if one accepted that Labor did not get what it wanted, which the document does not specifically answer, the fact that rest periods are not paid at the *rate* that was desired does not suggest in any way that the rest periods should not be paid separately. Other than reinforcing that the rest periods must be paid, the document simply does not address the certified questions here.

The Small Business Economic Impact Statement related to promulgation of the rest-break regulation also does not have any bearing on the certified questions here. *See Sakuma Bros. Farms Resp. Br. at 15 & App. A-1.* The statement does not address whether rest breaks are separately paid for (either before or after promulgation of the rule); instead, it simply states that if workers are not currently taking rest breaks, there will be an additional cost to employers because they will need to pay for additional labor to accomplish the same amount of work. *Sakuma Bros. Farms Resp. Br. at 15 & App. A-1 at 1.*

In short, the plain language of the regulation supports requiring a separate and additional payment for rest breaks, and the regulation's history does not demonstrate a contrary intent.

D. The Best Way to Ensure Payment for Rest Breaks is to Require Separate Payment

Requiring a separate payment for rest breaks is the best way to ensure compliance with the rest-break regulation. In this case, both parties agree that rest breaks must be allowed and that employers must pay workers for their rest breaks. Sakuma Brothers Farms argues that the payment for the rest break is already included in the piece rate. Sakuma Bros. Farms Resp. Br. at 7. But as a practical matter, their position means that piece rate workers earn nothing during their rest breaks because they are not picking, creating a strong disincentive to take the breaks.

By contrast, requiring separate payment for a worker's ten-minute rest break fully effectuates the rest break regulation as to all piece rate workers. Separate payment provides an incentive for workers to take their full ten-minute rest break. Workers who otherwise might view the rest break as time away from picking fruit and thus earning money will instead have a vivid reminder that the rest break is a valuable part of their workday—a valuable part of their workday that deserves to be compensated. Also, workers receiving more than minimum wage can be confident that they are being paid for their rest break, as required by law.

The agricultural worker rest break regulation is remedial and should be interpreted liberally in the worker's favor. *Pellino*, 164

Wn. App. at 684-85. In order to fully effectuate the regulations, separate payment for rest breaks should be required.

VI. CONCLUSION

Providing rest breaks for agricultural workers is an issue of great public concern to Washington State. The legislature directed the Department of Labor & Industries to adopt rules specifically to address this important aspect of worker safety and welfare. *See* Laws of 1989, ch. 380, § 85. The resulting rules require agricultural workers to receive a ten-minute break for every four-hour period worked, and that they be paid during those rest breaks. Requiring separate payment for rest breaks ensures that this remedial statute is fully effectuated. The Attorney General respectfully requests that the Court answer the first certified question in the affirmative.

RESPECTFULLY SUBMITTED this 30th day of January 2015.

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the state of Washington, that on this date I have caused a true and correct copy of the foregoing Amicus Brief Of The Attorney General Of Washington to be served via electronic mail on the following:

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