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Mar 05, 2015, 3:51 pm  
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No. 90932-6

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IN THE SUPREME COURT  
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CERTIFICATION FROM  
THE UNITED STATES  
DISTRICT COURT FOR  
THE WESTERN DISTRICT  
OF WASHINGTON

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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.

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**ANSWER TO AMICUS BRIEF OF ASSOCIATION OF  
WASHINGTON BUSINESS, WASHINGTON FARM BUREAU  
FEDERATION, AND WESTERN GROWERS ASSOCIATION**

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 ORIGINAL

## I. INTRODUCTION

In their amicus brief, the Association of Washington Business, Washington Farm Bureau Federation, and Western Growers Association (“AWB Amici”) make three central arguments: (1) economic theory excuses employers from separate payment for rest breaks because employers “price” the cost of rest break payment obligations into piece rates paid for picking; (2) requiring payment for piece-rate farm worker rest break time would “disrupt” other compensation systems; and (3) an employer may pay an employee for rest break time at the minimum wage rate even if that rate is lower than the employee’s usual pay rate.

Throughout their arguments, AWB Amici repeatedly assert that the workers here seek to create a “new obligation.” But the obligation to pay employees for rest break time is not new. Washington courts have consistently recognized that “on the employer’s time” in the generally applicable rest break regulation means that employers must pay for the time employees spend on rest breaks, and the Department of Labor and Industries (“DLI”) has endorsed this rule in a formal administrative policy. There is no reason to deny application of the rule on paid rest breaks to piece-rate farm workers who are protected under essentially identical regulatory language.

In accordance with RAP 10.3(f), the workers will not address every argument in AWB Amici’s brief. Instead, the workers will limit their discussion to AWB’s arguments regarding economic theory, the impact of this case on other

compensation systems, and the legal basis for paying piece-rate workers at a rate above the minimum wage for rest break time.

## II. ARGUMENT AND AUTHORITY

### A. Economic Theory Does Not Justify Violation of the Law.

AWB Amici fail to recognize the difference between economic theory and the law. They assert that employers may “price” employee benefits and taxes into wages to the extent necessary to account for the cost of those benefits and taxes. While this may or may not be true as a matter of economic theory, such a theory cannot excuse a violation of wage and hour law. For example, an employer may not “price” all taxes and benefits into an hourly wage rate if the result would be to lower the hourly rate below the minimum wage. *See* RCW 49.46.020. Similarly, an employer may not “price” the cost of rest breaks into a piece rate paid for picking time because the employer is required by law to pay the employee for the time spent on a rest break. *See* DLI Admin. Policy ES.C.6 § 10 (2005). Likewise, an employer may not deduct from piece-rate pay (which is specifically designated for piecework) in order to offset the employer’s “responsib[ility] for paying the employee for the time spent on a rest period.” *See id.*<sup>1</sup>

One purpose of Washington’s requirement that employers provide *paid* rest breaks is “to protect employees from ‘conditions of labor which have a

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<sup>1</sup> AWB Amici fail to explain why their economic theory should apply only to piece-rate workers. Under their theory, pay for rest breaks could be incorporated into an hourly wage for working time just as it could be incorporated into a piece rate.

pernicious effect on their health.”” *Wingert v. Yellow Freight Systems*, 146 Wn.2d 841, 850, 50 P.3d 256 (2002) (quoting RCW 49.12.010). This reason is consistent with Washington’s long and proud history of being a pioneer in the protection of employee rights. *See Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 298, 996 P.2d 582 (2000).

This history of worker protection developed against arguments that enforcing workers’ rights would disrupt economic conditions. Indeed, in 1937 the United States Supreme Court affirmed this Court’s holding that our state’s then-existing minimum wage law for women and minors was a valid exercise of constitutional power, despite a challenge that the law interfered with the freedom to contract. *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399-400, 57 S. Ct. 578, 585, 81 L. Ed. 703 (1937). In that case, the Court reflected on economic reality from the employee’s (and public’s) perspective:

The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenseless against the denial of a living wage is not only detrimental to their health and well being, but casts a direct burden for their support upon the community. What these workers lose in wages the taxpayers are called upon to pay. The bare cost of living must be met.

*Id.* at 399.

AWB Amici focus only on “economic reality” from the perspective of employers and ignore the economic realities of low-wage farm workers. *See* AWB Amici Brief at 10 (asserting that “the pricing of piece rates reflects” the

“economic reality”). The reality for farm workers who pick fruit on a piece-rate basis is that they are likely to forego rest breaks (and thus sacrifice health and safety) if they do not receive pay for rest break time. In recognition of this, DLI requires such breaks to be “on the employer’s time.” WAC 296-131-020(2); *see also* WAC 296-126-092(4); DLI Admin. Policy ES.C.6 § 10.<sup>2</sup> The Court should therefore reject AWB Amici’s economic theory arguments and should liberally construe the agricultural worker rest break regulation so that it furthers the policy in Washington of protecting workers. *See Pellino v. Brink’s, Inc.* 164 Wn. App. 668, 684-90, 267 P.3d 383 (2011) (liberally construing rest break requirements of WAC 296-126-092 for the benefit of workers).

**B. Separately Paid Rest Breaks Do Not Disrupt Compensation Systems.**

Without providing any evidence of current compensation practices, AWB Amici assert that if this Court finds WAC 296-131-020(2) requires separately paid rest breaks, various compensation systems (such as salaries and commissions) will be disrupted. This argument not only departs from the certified questions but also has no basis in past experience or the law.

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<sup>2</sup> AWB Amici suggest that DLI concluded that employers need not separately pay piece-rate farm workers for the time spent on rest breaks. That is incorrect. DLI’s amicus brief states that the “Department has not addressed this issue one way or the other,” but “to the extent that the two rest break standards are similar, ES.C.6 may aid the Court in interpreting WAC 296-131-020(2).” DLI Amicus Brief at 1-2 & n.1. Furthermore, DLI states that “there is no reason to interpret the identical operative language [in WAC 296-126-092(4) and WAC 296-131-020(2)] differently.” DLI Amicus Brief at 12.

In suggesting the workers seek to create a “new obligation” that will “disrupt” other compensation systems, AWB Amici ignore *Wingert* and its progeny. In *Wingert*, this Court held that because rest breaks must be “on the employers’ time,” those employees who are required to work through rest breaks must be compensated for each ten minutes of break time to which they were entitled. 146 Wn.2d at 849. The Court noted no evidence or concern regarding economic disruption from this ruling and did not limit its holding to hourly workers.

Some ten years following *Wingert*, Washington courts further addressed the requirements for rest break pay without mentioning any past or anticipated economic disruption. See *Wash. State Nurses Ass’n v. Sacred Heart Med. Ctr.*, 175 Wn.2d 822, 287 P.3d 516 (2012); *Pellino*, 164 Wn. App. 668. AWB Amici offer no evidence that a ruling requiring pay for farm worker rest break time would be more disruptive than this Court’s previous holdings under WAC 296-126-092(4). AWB Amici further fail to appreciate that separate pay for rest break time *is the law under WAC 296-126-092(4)* and will not be disruptive to employers that are already complying with the law.

AWB Amici assert that non-hourly forms of compensation will be undermined by the requirement that employers pay for the time employees spend on rest breaks. This argument, however, is not supported by law. Like piece-rate farm workers, non-agricultural workers (including those who are compensated on

a non-hourly basis) are entitled to paid rest breaks. *See* WAC 296-126-092(4) (providing that “[e]mployees,” without qualification, “shall be allowed a rest period of not less than ten minutes, on the employer’s time, for each four hours of working time”); WAC 296-131-020(2) (providing “[e]very employee,” without qualification, “shall be allowed a rest period of at least ten minutes, on the employer’s time, in each four-hour period of employment”). AWB Amici would have the Court limit the application of these regulations by inserting the term “hourly” in front of “employees.” *See* WAC 296-126-092(4). But no such limitation exists.

Just as workers paid under various compensation systems are entitled to overtime unless exempt, such workers are also entitled to be paid “for the time spent on a rest period.” DLI Admin. Policy ES.C.6 § 10. Nothing in WAC 296-126-092(4) or the DLI administrative policy exempts covered employers who pay employees on a piecework basis (or any other basis) from this requirement. Moreover, AWB Amici’s arguments about other compensation systems are outside the scope of the certified questions, and in any event, are not supported by the DLI documents on which they rely, which concern “How to Compute Overtime” for non-agricultural workers.<sup>3</sup>

Nevertheless, the workers will briefly address salary and commission systems to clarify that any ruling under the agricultural rest break regulation will

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<sup>3</sup> In DLI’s amicus brief, the Department points out that the administrative policy on which AWB Amici relies is inapposite. *See* DLI Amici’s Brief at 4-5 & n.2.

cause no “disruption” for employers covered by the generally applicable regulation. First, a “[s]alary is where an employee regularly receives for each pay period . . . a predetermined monetary amount (salary)” regardless of variations in the “quantity or quality of work performed.” DLI Admin. Policy ES.A.9.1 at 2 (2014). In contrast, piece-rate pay is based on the *quantity* of the work performed. *See* DLI Admin. Policy ES.A.8.2 at 2 (2014) (stating that piece-rate employees are “paid a fixed amount per unit of work”). Thus, while a salary may cover all work time (including rest break “hours worked”), a piece rate covers only the time in which pieces or units are being produced (*e.g.*, picking time).

Second, many different commission-based compensation systems exist. The proper way to pay commission employees for rest breaks under WAC 296-126-092(4) depends on the factual circumstances of the particular arrangement. If an employee is paid solely on the basis of a commission, then under the applicable DLI interpretation, the employer is responsible for also paying the employee “for the time spent on a rest period” at the average hourly rate because the employee is not engaging in sales activity while on a rest period. *See* DLI Admin. Policy ES.C.6 § 10.<sup>4</sup> If a commission employee also has an hourly rate for non-sales work, then that rate applies for rest breaks, just like it does for other hourly employees. *See infra* Section II.C.

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<sup>4</sup> Outside salespersons, however, are exempt from rest break requirements. *See* WAC 296-126-002(2)(b). In addition, any employer covered by WAC 296-126-092(4) can seek a variance from rest break pay requirements by submitting a written application to the director of DLI. WAC 296-126-130.

In sum, a holding that requires employers to separately pay piece-rate farm workers for their rest breaks under WAC 296-131-020(2) will not disrupt any other pay system. All employers covered by WAC 296-126-092(4) are already subject to the requirement to pay “for the time spent on a rest period,” regardless of the pay system they use. *See* DLI Admin. Policy ES.C.6 § 10. Nothing in the regulation or the DLI’s administrative policy interpreting the regulation exempts employers with non-hourly pay systems from this requirement.

**C. Washington Law Establishes That Rest Breaks Shall Be Paid at the Worker’s Usual Rate.**

AWB Amici assert there is “no legal basis” for paying for rest breaks at anything other than the minimum wage. AWB Amici Brief at 15. This proposition is contradicted both by the text of WAC 296-131-020(2) and case law. The regulation provides that rest breaks shall be paid “on the employer’s time.” The first sentence of subsection (2), which addresses the obligation to pay for rest breaks, says nothing about the minimum wage.<sup>5</sup> AWB Amici are effectively asking the Court to substitute “at no less than the minimum wage” for “on the employer’s time,” but this is contrary to the plain language of the rule. Workers will not be fully compensated “on the employer’s time” if they receive rest break pay at a rate less than they otherwise receive while working on the

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<sup>5</sup> AWB does not argue that the second sentence of WAC 296-131-020(2), on including rest break time in calculating minimum wage compliance, is the basis for its argument that there is no obligation to pay workers more than the minimum wage for rest breaks. AWB Amici Brief at 15-17.

employer's time.

In *Wingert*, workers sought compensation for denied rest breaks that should have occurred during the first two hours of their overtime assignments. 146 Wn.2d at 849. Adopting the rationale of the Court of Appeals, this Court held that the generally applicable rest break rule “clearly and unambiguously prohibits” denying paid rest breaks “regardless of whether the hours worked are regular hours, overtime hours, or a combination of both.” *Id.* at 848. The Court did not limit the plaintiffs’ remedy for missed rest breaks to minimum wage.

Similarly, in *Sacred Heart*, this Court held that nurses who did not receive required rest breaks were entitled to overtime compensation for missed rest breaks. 175 Wn.2d at 826. Even the employer understood that compensation was based on the usual pay rate when it argued for payment at “straight time” rather than minimum wage. *Id.* at 825-26, 830. The Court found that because the employer denied breaks that took the workweek beyond 40 hours, the rest break hours were compensable at the overtime rate. *Id.* at 832. Again, the Court based rest break pay on the usual pay rate, plus the overtime premium.

The language of WAC 296-131-020(2) and the cases interpreting “on the employer’s time” demonstrate that piece-rate farm workers should receive rest break compensation at their usual rate, just as hourly workers do. For piece-rate farm workers, this rate may be determined by averaging piece-rate earnings for the workweek.

### III. CONCLUSION

AWB Amici seek a ruling that would allow employer-oriented economic theory to trump the law and that would depart from Washington's long and proud history of protecting worker rights. Contrary to AWB Amici's suggestion, a holding that piece-rate farm workers are entitled to separate pay for rest break time under WAC 296-131-020(2) would not have an adverse effect on other compensation systems because employers are already required to pay employees for the time spent on rest breaks. Finally, AWB's Amici's argument that payment obligations for piece-rate farm worker rest break time should be limited to minimum wage is contradicted by the text of the rule at issue as well as Washington case law. Just like hourly workers in Washington, piece-rate farm workers should receive compensation for rest break time at their usual hourly rate.

RESPECTFULLY SUBMITTED AND DATED this 5th day of March,  
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I certify under penalty of perjury under the laws of the State of  
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Attached please find Plaintiffs-Petitioners' Answer to Amicus Brief of Association of Washington Business, Washington Farm Bureau Federation, and Western Growers Association, to be filed in *Demetrio, et al v. Sakuma Brothers Farms, Inc.*, Supreme Court Case No. 90932-6.

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