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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Court of Appeals No. 80861-3-I

CATHLEEN ROBERTSON, *et al*,
Plaintiffs-Petitioners,

v.

VALLEY COMMUNICATIONS CENTER,
Defendant-Respondent.

PETITION FOR REVIEW

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PETITIONER, DECISION & INTRODUCTION

Petitioners Cathleen Robertson, Scott Castonguay, and Andrea Raker, for themselves and all members of the certified class, ask this Court to accept review of the Court of Appeals' published decision, *Robertson v. Valley Communications Center*, Wash. Court of Appeals No. 80861-3-I (June 29, 2021); *recon. denied* (August 10, 2021) (copies attached).

This is a class action certified pursuant to the Washington wage payment and collection law (WPCL), RCW 49.48 *et seq*., and Washington Minimum Wage Act (MWA), RCW 49.46 *et seq*. While the appellate court held that the trial court committed numerous legal errors, it nonetheless affirmed based upon several misapprehensions of the facts and the law. This Court should grant review and reverse.

Specifically, the *undisputed* evidence here was that the public agency employer Valley Communications Center ("VCC") trained its 911 operator employees to perform nine preparatory tasks, *expressly requiring these tasks to be*

performed pre-shift at the employer's work site. Yet the trial court dismissed six of the nine tasks based on the federal *de minimis* doctrine, which the appellate court properly held has not been adopted in Washington because it is contrary to Washington law. And while the appellate court also reversed the trial court's ruling that one task (signing up for breaks) was not "work," where the class presented evidence that employees were trained to perform that task on the employer's premises, the appellate court nonetheless affirmed the trial court's ruling that a second task (gathering ergonomic equipment) was not "work," even though the employees presented *undisputed* evidence that they were trained to do that task on the employer's premises. The appellate decision thus contradicts its own correct reasoning.

Most concerning, however, is that even though the appellate court reinstated *eight* of the nine tasks, it "found" that the employees "conceded" they could not prove their damages for those *eight* tasks. That is simply incorrect. This Court

should grant review, reverse, and grant these employees a fair trial.

ISSUES PRESENTED FOR REVIEW

1. Did the appellate court create numerous conflicts with existing precedent by affirming a partial summary judgment dismissing an MWA claim based on a first pre-shift task (obtaining ergonomic equipment) where it also reversed partial summary judgment on a second pre-shift task (signing-up for breaks) due to genuine issues of material fact, and where the employees supported the first pre-shift task with precisely the same types of evidence (i.e., they were trained to perform this work on the employer's premises) that precluded summary judgment?

2. Did the appellate court create numerous conflicts with existing precedent in affirming the exclusion of a survey of class members regarding the time required to complete certain pre-shift tasks, an exclusion that relied upon a factual determination that the survey's phrasing was confusing, where

1) no evidence showed actual confusion; 2) class members could have been questioned on this at trial; and 3) many cases hold this was a question of fact going to weight, not admissibility?

3. Did the trial court err in granting partial summary judgment dismissing claims for double damages under RCW 49.52.070(2) based upon an implied presumption that a bona fide dispute existed, but where the record contained no evidence of a bona fide dispute at the time wages were withheld and VCC's asserted legal arguments were clearly legally erroneous?[1]

STATEMENT OF THE CASE

The basic facts are accurately stated in the appellate decision. They are also set forth, with citations, in the Brief of Appellant. We provide a brief summary here.

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[1] The appellate court did not reach this issue, which the class briefed. This issue may not independently justify review under this Court's criteria, but if the Court grants review, it should either address this issue, or remand it to the appellate court.

A. The employer trains its employees that to be considered "ready" for work, they must make certain pre-shift preparations, nine tasks that are performed on VCC's premises, but are uncompensated in violation of the MWA.

The appellants are a class of employees of VCC in two jobs: call receivers and dispatchers. All the employees work in the same 70- x 79-foot open space called the "Com Room." VCC expects its employees to be seated at their console and ready to begin work by one second past the top of the hour. CP 1127 – 1128.

To be ready at this time, employees may have to perform up to nine preparatory tasks prior to the start of their shifts:

1. Gathering/assembling guidebooks/resource materials;
2. Signing up for breaks;
3. 'Hand-punching' into computerized attendance/payroll system;
4. (For Dispatchers): obtaining console assignment;
5. Locating ergonomic chair and ergonomic carpel board, and/or any ergonomic equipment;
6. Logging into phone and computer systems;
7. Plugging headset and headset jack into console;

8. Reviewing clearing messages from the CAD system; and

9. (For Dispatchers): receive briefing from the outgoing Dispatcher. CP 4774 – 4779; CP 4780 – 4785.

All these tasks must be performed at VCC's work site according to its training, yet VCC does not compensate its employees for the time they spend preforming these daily preparatory tasks.

The employees sued VCC, alleging that its uncompensated pre-shift requirements violated the WPCL and the Washington MWA. The parties brought cross-motions for summary judgment as to whether the nine tasks were compensable work. The trial court eventually dismissed the employees' claims. CP 3807 – 3814; CP 4315 – 4316.

As discussed *infra*, the appellate court reversed many of the grounds on which the trial court relied, such as the federal *de minimis* doctrine that is contrary to Washington law. But the trial court's erroneous dismissal of six of the nine tasks as "*de minimis*" (CP 3807 – 3814) also undercut the employees'

preparation of their damages' calculations. The employees requested a continuance to reformulate their damage model, as all case work up to that point had been done based upon *all nine preparatory tasks* (not three of the nine tasks). The trial court denied a continuance. CP 4315 - 16.

The employees' damages expert (Dr. Siskin) and Survey Expert (Dr. Shay) then prepared a survey used to calculate damages on the remaining three tasks. On the eve of trial, the court determined that it disagreed with the framing of a questionnaire to class members asking for their estimates of the amount of pre-shift time spent on the three remaining tasks and prohibited reliance on the questionnaire, disregarding the well-established legal principle that the *weight* given to survey evidence is issue of fact for the jury, not an *admissibility* issue. CP 4902-07.

After entry of an order striking Dr. Siskin's testimony, the employees filed an offer of proof that if Siskin was precluded from testifying as to damages, it would be impossible

to estimate class-wide damages on the available evidence for only the three tasks (CP 3008-09) and impossible to estimate class-wide damages from the testimony of the limited witnesses listed for trial because they would not represent a valid statistical sample for the class for *three* tasks. CP 3008. Thus, Dr. Siskin would be unable to testify as to the total damages for *three* tasks. *Id*.

The employer made an oral request to dismiss based upon the employees' inability to prove damages. The trial court granted the request and denied the employees' request for a continuance. CP 4315-16. Critically, *nowhere* did the class concede it could not prove damages for *eight* tasks.

B. The appellate court agreed with the employees' two key appellate arguments regarding the six dismissed tasks, yet it affirmed based on errors of law and fact.

The employees assigned three errors: 1) dismissing six of nine pre-shift tasks; 2) excluding their expert and dismissing the action; and 3) dismissing double damages. Although it affirmed, the appellate court agreed with the two key employee

arguments.

First, the appellate court agreed with the employees that the federal *de minimis* doctrine trial court used to dismiss six of their tasks[2] has not been adopted in Washington because it is contrary to Washington law. *Id*. at 12-15. The trial court thus erred in dismissing any of the tasks on this basis. *Id*.

Second, the appellate court agreed that as to one of the tasks (signing up for breaks) the employees established a genuine issue of material fact, contrary to the trial court's ruling. *Robertson* at 10-11. The employees showed that they were (a) trained to sign up for breaks at the job site prior to their shifts, and (b) received negative performance reviews if they failed to do so. *Id*. at 11. This was sufficient to establish a genuine issue of material fact on this issue, precluding

[2] (1) Signing up for breaks, (2) hand-punching into the computerized system, (3) (for dispatchers) obtaining a console assignment, (4) locating ergonomic equipment, (5) logging into phone and computer systems, and (6) plugging the headset and headset jack into consoles.

summary judgment. *Id*.

Yet the appellate court contradicted its own correct holding on signing-up for breaks in affirming dismissal of the claim for locating and assembling ergonomic chairs/keyboards/ equipment. *Robertson* at 9-10. Just as it did with signing-up for breaks, in addressing whether locating ergonomic equipment was in fact "work," the appellate court relied on the Wash. Dep't of Labor & Indus., Admin. Policy ES.C.2, specifically ¶15: "Compensable preparatory tasks are those which are 'integral or necessary to the performance of the job.'" *Robertson* at 9. And as with signing-up for breaks, the employees demonstrated that the employer trained its employees to locate and assemble their ergonomic equipment (carpel boards, ergonomic chairs) as one part of their pre-shift preparations,[3] and also trained them how to use that

[3] CP 1841; CP 1866; CP 1690; CP 1758; CP 1773; CP 1801; CP 1834; CP 1846; CP 1654; CP 1678; CP 1701-1702; CP 1719; CP 1733; and CP 1766.

equipment.[4] Further, like the break sign-ups, the employees established that the employer had "knowledge of the [employees'] presence on premises through said Class Members' use of Defendant's electronic payroll/identification system." CP 1052. Indeed, the fact of this preparatory task (along with all the others) being performed at the jobsite, under the supervision of Defendant's supervisors, was undisputed on summary judgment. CP 1580 – 2020.

Yet the appellate court found no factual dispute on this issue, directly contrary to its own reasoning regarding signing-up for breaks. *Compare Robertson* at 9-10 *with* Mot. for Recon. at 1-7. The evidence is to the contrary. *Id*.

On the survey/expert issue, the appellate court cited and relied upon the claims of the employer's undisclosed expert, Dr. Palmatier, which *were not admitted nor considered in the trial court*. *Compare Robertson* at 6-7. The appellate court

[4] CP 3574; CP 2121 ("Valley Communications Center - CE Training Leap Work Chair- How to use the Features").

essentially "re-weighed" the evidence, considering Dr. Palmatier's claims the trial court had not considered in the first instance. *Id.* at 15 -16. This is contrary to cases like *State v. Robinson*, 24 Wn.2d 909, 917, 167 P.2d 986 (1946) ("appellate courts [must not] make of themselves a second jury and then pass upon the facts").

The appellate decision then upheld the dismissal of the case due to the exclusion of Dr. Siskin's testimony, on the erroneous basis that the employees had "conceded below that they would be unable to prove damages on anything less than the full nine preshift tasks." *Roberston* at 17-18. No such "concession" appears in this record. *See, e.g.*, CP 3005-08. Despite this, the decision erroneously concluded that "[b]ecause the trial court did not err in dismissing one of the nine preshift tasks . . . the employees' concession applies to the remaining eight tasks." *Id*. No equitable or legal basis exists for this holding.

In sum, the appellate agreed that the trial court erred as a

matter of law in dismissing six of the nine tasks, but then affirmed based on reading a nonexistent concession into the record and reweighing the evidence. *See also* Mot. for Recon. at 12-16. The class was thus deprived of an opportunity to prove their damages arising from the *eight* improperly dismissed tasks.

WHY THIS COURT SHOULD ACCEPT REVIEW

A. The appellate decision conflicts with this Court's precedent, applying an unheard of and incorrect legal standard. RAP 13.4(b)(1).

The appellate decision conflicts with this Court's *Weeks v. Chief of State Patrol*, 96 Wn.2d 893, 639 P.2d 732 (1982). *Weeks* addressed whether time during the Trooper's lunch hours was compensable, where the Troopers were required to remain on call. *Id*. at 894. This Court upheld summary judgment for the Troopers, finding key that the employees were subject to the employer's *control and call back*: "Even though testimony in affidavits indicated permission is granted for troopers to engage in personal activities outside the work area during the lunch

hour, they must remain available by radio or telephone." *Id*. at 898.

Weeks cites federal decisions – including *Armour & Co. v. Wantock*, 323 U.S. 126, 89 L.Ed. 118, 65 S.Ct. 165 (1944) – as "representing the intent of our law." 96 Wn.2d at 897. *Armour* addressed whether "it [was] error to count time spent in playing cards and other amusements, or in idleness, as working time?" *Armour*, 323 US at 132. The Court held that such time was "work" – irrespective of the specific activities – where the employees were on call and under the employer's control, providing "a benefit to the employer." *Id*. at 128, 133.

Here, the employees demonstrated that all preparations were performed at the worksite and that employees could be called into their shifts early during their preparation time. CP 1571 – 74; 1918 – 68. This meets the definition of work in *Weeks*. This Court did not focus solely on "integral or necessary," but the appellate court did. This direct conflict with *Weeks* merits this Court's review. This is particularly the case

given that the appellate court's published opinion, and its reasoning, focusing *narrowly* on a single aspect of the much broader DLI "integral or necessary" test of work. Given the absence of other published cases other than *Weeks*, the test under *Robertson* will becomes a much narrower test of what constitutes work, impacting employees forced to undertake unpaid pre- and post-shift work.

B. The exclusion of the survey, and the resulting dismissal, conflict with many appellate decisions.

The reliability of a survey goes to its weight, not to its admissibility. *Cf., e.g., State v. Cauthron*, 120 Wn.2d 879, 899, 846 P. 2d 502 (1993) (questions regarding the application of scientific method go to "weight rather than the admissibility of the testimony," which is for a jury to assess). This rule is well-established – specifically with regards to surveys – in the Ninth Circuit. *See, e.g.*, *Keith v. Volpe*, 858 F.2 467, 480 (9th Cir. 1988) ("Technical inadequacies in the survey, including the format of the questions or the manner in which it was taken, bear on the weight of the evidence, not its admissibility.");

Fortune Dynamic, Inc. v. Victoria's Secret, 618 F.3d. 1025, 1037-38 (9th Cir. 2010) (reversing exclusion of survey: "these criticisms, valid as they may be, go to 'issues of methodology, survey design, reliability,... [and] critique of conclusions,' and therefore 'go to the weight of the survey rather than its admissibility").

Robertson – a published decision – neither addresses these well-established principles, nor proffers an alternate legal principle to follow in the future. Instead, it affirms the exclusion of evidence based on what *a court* may find unpersuasive, directly contrary to this Court's decisions (going back well over seventy years) on the proper roles of courts and juries. *See, e.g.*, *State v. Meyer*, 37 Wn.2d 759, 769, 226 P.3d 204 (1951); *Johnson v. Harvey*, 44 Wn.2d 455, 457, 268 P.2d 662 (1954) (citing *Birkel v. Chandler*, 26 Wash. 241, 246, 66 Pac. 406 (1901)).

The appellate decision also affirmed dismissal on the factually erroneous basis that the employees had "conceded"

inability to prove damages on less than the "full nine preshift tasks." *Robertson* at 17. No such concession was ever made, and nothing would prevent the employees from presenting evidence of damages based on the *eight* pre-shift tasks the appellate court reinstated – if it was fairly afforded an opportunity to do so. *See Chavez v. Our Lady of Lourdes Hosp. at Pasco*, 190 Wn.2d 507, 519, 415 P.3d 224 (2018).

Confronted with exclusion of their survey as to *three* of the nine tasks, and with a continuance denied, the class was unable to instantly switch gears and to put on the necessary proof with the witnesses previously listed to testify. Proof via representative testimony need only be made with sufficient certainty to show damages and to provide a reasonable basis for estimating damages. *See ESCA Corp. v. KPMG Peat Marwick*, 86 Wn. App. 628, 639, 939 P.2d 1228, 1233 (1997), *aff'd*, 135 Wn. 2d 820, 959 P.2d 651 (1998); and *Gaasland Co. v. Hyak Lumber & Millwork, Inc.*, 42 Wn.2d 705, 713, 257 P.2d 784 (1953). Given a fair opportunity to prepare their case to match

the new ruling on appeal, they certainly could do so here.[5] This Court should grant review and reverse.

C. This appeal also presents the question of first impression whether tasks an employer trains its employees to do are "integral or necessary to the performance of the job," or otherwise compensable.

The appellate court's analysis of whether assembling ergonomic equipment was compensable focused on whether the task was "integral or necessary to the performance of the job." As noted *supra*, the employees demonstrated (as with signing up for breaks) that the employer trained them to perform this task pre-shift and that the employer controls where and when the task must occur. As with the breaks issue, that is sufficient to carry their claims to a jury.

No Washington case addresses whether an employer training its employees to perform a task, in and of itself, creates a reasonable inference that the task is "integral or necessary to

[5] VCC's own expert, Dr. Nickerson, confirmed that individual and class-wide damages could be calculated from available data. CP 1451 – 1453; 1463; 1495 - 1496.

the performance of the job." On signing up for breaks, the appellate court held that "the employees' evidence that they were trained to sign up for breaks prior to their shift creates a reasonable inference that they were authorized to do so." *Robertson* at 12. And "[e]mployers are required to compensate employees for any time 'authorized or required' not just the work it requires." *Id*. at 11; (citing RCW 49.46.020, .130; WAC 296-126-002(8)). *That* analysis should be the law of Washington.

But the appellate decision erroneously found *no evidence* that the employees were trained to assemble ergonomic equipment as part of their pre-shift preparations. On the contrary, taking the facts in the light most favorable to the employees, there is no dispute in this record that such training occurred. *See infra* and Mot. for Recon. at 1-7.

This is an excellent case for this Court to instruct that RCW 49.46.020, .130, WAC 296-126-002(8), and Admin. Policy ES.C.2 require employers to compensate employees for

performing tasks the employer *trains* its employees to perform on its premises. The trial and appellate courts erred in failing to do so. This Court should accept review on this issue of substantial public interest. RAP 13.4(b)(4).

CONCLUSION

In the context of an appellate court denying hundreds of Washington workers compensation for unpaid work under the MWA – where the appellate court otherwise held that the trial court had committed multiple manifest legal errors – granting review here is imperative.

RESPECTFULLY SUBMITTED September 9, 2021.

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that pursuant to RAP 18.17, the foregoing Petition for Review was produced using word processing software and the number of words contained in the document, exclusive of words contained in the appendices, the title sheet, the table of contents, the table of authorities, the certificate of compliance, the certificate of service, signature blocks, and pictorial images (*e.g.*, photographs, maps, diagrams, and exhibits) is 3,228.

DATED September 9, 2021.

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CERTIFICATE OF SERVICE

The undersigned certifies, under penalty of perjury under the laws of the State of Washington, that on the 9th day of September, 2021, I electronically filed the above and foregoing document with the Clerk of Court using the CM/ECF system, and in addition, I e-mailed a true and correct copy of this document to:

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CATHLEEN ROBERTSON, SCOTT CASTONGUAY and ANDREA RAKER, for themselves, and for all others similarly situated,

Appellants,

v.

VALLEY COMMUNICATIONS CENTER,

Respondent.

No. 80861-3-I

DIVISION ONE

PUBLISHED OPINION

APPELWICK, J. — Employees of the VCC brought suit under the Washington Minimum Wage Act[1] alleging the VCC regularly required them to perform nine tasks prior to the start of their shift without pay. The trial court granted summary judgment that six of these nine tasks were not compensable work tasks or were otherwise de minimis. The trial court excluded a survey of class members and corresponding expert testimony as fundamentally flawed. The employees conceded that without the survey, they would be unable to prove damages and could no longer sustain their suit. VCC brought a motion for summary judgment on that basis, which the trial court granted. We affirm.

FACTS

Valley Communications Center (VCC) is a regional 911 center that provides 24 hour emergency communication services to south King County. The appellants

[1] Chapter 49.46 RCW.

are a class of employees in two positions at VCC: call receivers and dispatchers. Call receivers and dispatchers both work in a 70 foot by 79 foot open floor plan room at VCC called the “Com Room.”

Call receivers receive incoming 911 calls, collect information from the caller, and determine which, if any, agencies should respond to the event. They input information into the computer aided dispatch (CAD) system, where it can be accessed by dispatchers and responding units. In order to perform these functions, call receivers log into the CAD system and a separate phone system. They then plug their issued headset into a workstation and press a button on the computer screen that allows them to begin taking calls. Call receivers’ workstations are not assigned, they can sit at any open workstation.

Dispatchers use the information entered into the CAD system by call receivers to dispatch emergency services as needed. They use two way radios to communicate directly with units in the field. Dispatchers are assigned to specific consoles in the Com Room that dispatch for specific agencies (e.g., Auburn Fire Dispatch or Renton Police Dispatch). Each console must be continually staffed. So, outgoing dispatchers must brief incoming dispatchers on the activities open on the console. Incoming dispatchers can plug their headsets into the console while the outgoing dispatcher is still plugged in. Dispatchers must log in to the console and phone system. Because of the fluid nature of handoffs from one dispatcher to another, an incoming dispatcher could begin their shift utilizing the previous dispatcher’s login and then switch to their own account after their shift starts.

VCC employees are paid hourly. But, their hours worked are tracked per shift, rather than per hour. Employees record their shift attendance by "hand punching" into the Com Room by placing their hand on a biometric reader and entering their employee code. At all times relevant to this litigation, the employees were allowed to hand punch in up to 30 minutes before the start of their shift and could hand punch out up to 15 minutes before the end of their shift. These periods are known as "gracing" periods.[2] Regardless of the precise time that an employee hand punches in or out during a gracing period, they are paid from their scheduled start time to their scheduled end time. If an employee is required to stay past their scheduled end time, they are paid based on a rounding rule to the nearest fifteen minute increment.

Employees are expected to be seated at their console and ready to begin work by one second past the top of the hour. In order to be ready at this time, employees may have to perform a variety of preparatory tasks. The employees allege that they are required to complete nine tasks prior to the start of the shift:

1. Gathering/assembling guidebooks/resource materials;
2. Signing up for breaks;
3. 'Hand-punching' into computerized attendance/payroll system;
4. (For Dispatchers): obtaining console assignment;
5. Locating ergonomic chair and ergonomic carpel board, and/or any ergonomic equipment;
6. Logging into phone and computer systems;

[2] The preshift gracing period was changed from 30 minutes to 5 minutes during the course of litigation.

7. Plugging headset and headset jack into console;

8. Reviewing clearing messages from the CAD system; and

9. (For Dispatchers): receive briefing from the outgoing Dispatcher.

The employees brought suit alleging the requirement violated the Washington wage payment and collection law (WPCL), chapter 49.48 RCW, and Washington Minimum Wage Act (MWA), chapter 49.46 RCW.

Both sides moved for summary judgment. The employees sought a ruling that VCC had actual or constructive knowledge of their uncompensated work, and that VCC was liable for double damages because it willfully withheld their wages. VCC sought a ruling that the nine tasks were not compensable work, or, in the alternative, were not recoverable under the de minimis doctrine. It also sought a ruling that it was not liable for double damages.

The trial court denied the employees' motion for double damages. But, it found that VCC had knowledge of employees' presence on campus prior to their shifts though the use of the hand punching system. It granted partial summary judgment for VCC, finding it was not liable for double damages, but otherwise denied VCC's motion for summary judgment.

VCC then moved to depose 33 employees regarding their preshift routines. The trial court granted the motion over the employees' objection. During depositions, employees were questioned about their preshift routine as a whole, rather than the time it took to perform each individual task. At least one employee indicated it would not be possible to estimate the amount of time each task took as opposed to the whole preshift routine.

The employees moved for summary judgment that the nine preshift tasks were compensable work. VCC cross moved for summary judgment that the tasks were not compensable work. The trial court granted partial summary judgment for VCC and denied for the employees. It found that two of the tasks—signing up for breaks and locating ergonomic chairs and equipment—were not "work" because they were not in the control of or for the benefit of the employer. It ruled that six[3] of the nine tasks were not compensable under the de minimis doctrine. The trial court denied summary judgment on the remaining three tasks: (1) gather/assemble guidebooks/resource materials, (2) review/clear messages from the CAD system, and (3) (for dispatchers) receive briefing from outgoing dispatcher.

The employees enlisted an expert, Dr. Bernard Siskin. Siskin and his colleague Dr. Susanne Shay, developed a survey to be sent to class members to determine how much time they spent on the remaining preshift tasks. The survey begins by informing class members of its purpose:

> This form is being sent to you to collect certain information needed for the lawsuit Robertson v. VCC, regarding tasks that you may perform prior to the start of your shift at VCC from March 17, 2013 to the present. You are receiving this form because you are a member of the Class.

[3] (1) Signing up for breaks, (2) hand punching into the computerized attendance/payroll system, (3) (for dispatchers) obtaining a console assignment, (4) locating an ergonomic chair and an ergonomic carpel board, and/or any ergonomic equipment, (5) logging into the phone and computer systems, and (6) plugging the headset and headset jack into console.

The survey then asks two questions, one about the three remaining preshift tasks, and one about the dismissed six tasks:

> Question 1: While your arrival times may have changed over your time employed at VCC, during the period from March 17, 2013 until the present, or if no longer employed at VCC - March 17, 2013 until the end of your employment date - looking back on your typical routine, what would you estimate has been the average total time you spent per shift doing the following tasks:
>
> 1. Gathering/assembling guidebooks/resource materials;
> 2. Reviewing/clearing messages from [the] CAD system; and
> 3. (For Dispatchers): receive briefing from the out-going Dispatcher.
>
> . . . .
>
> Question 2: And what would you estimate the average total time per shift you have spent doing the following tasks.
>
> 1. Signing up for breaks;
> 2. “Hand-Punching” into computerized attendance/payroll system;
> 3. (For Dispatchers): obtaining console assignment;
> 4. Locating ergonomic chair and ergonomic carpel board, and/or any ergonomic equipment;
> 5. Logging into phone and computer systems;
> 6. Plugging headset and headset jack into console.

(Emphasis in original.)

VCC enlisted its own expert, Dr. Robert Palmatier, who prepared a critique of the survey. He argued that the questions were significantly unclear because the questions ask for time spent “per shift” rather than “preshift.” He argued that some respondents would believe they were being asked to provide the amount of time spent on these tasks during their entire shift, rather than prior to the start of the shift only. In support of this theory, he pointed out that 18 percent of survey respondents had given time estimates for the amount of time they spent on preshift

tasks that exceeded the amount of time that they were in the building prior to their shift.

VCC moved exclude the survey and Siskin's conclusion drawn therefrom, or, in the alternative, to conduct a Frye[4] hearing. It also moved to allow Palmatier to testify at the Frye hearing and, if necessary, at trial. The trial court granted the motion to exclude the survey and Siskin's opinions. It found that the survey was so fundamentally flawed that any testimony derived from it would be misleading and confusing to the jury. It based its decision on the use of "per shift" rather than "preshift" language in the questions, and the fact that some respondents had provided answers in excess of the total amount of time they were in the building prior to their shift. The court also denied VCC's motion to allow Palmatier to testify as moot in light of the exclusion of Siskin's testimony.

The employees conceded to the trial court that, without the survey, they would be unable to prove class wide damages on the remaining three preshift tasks. They conceded this was so because the witnesses on their witness list were not representative of the class, and those who were deposed were asked only to provide an estimate of all nine tasks, rather than just three of the nine. Based on these concessions, VCC moved for summary judgment to dismiss claims based on the remaining three tasks. The trial court granted the motion.

The employees appeal. VCC cross appealed, but later withdrew that appeal.

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[4] Frye v. United States, 293 F. 1031 (D.C. Cir. 1923).

DISCUSSION

The employees assign three errors. First, they argue the trial court erred in granting partial summary judgment that six of the nine preshift tasks are not compensable work or are de minimis. Second, they argue that the trial court abused its discretion in excluding Siskin's survey and his opinions drawn therefrom. Last, they assert that the trial court erred in granting summary judgment that VCC was not liable for double damages under RCW 49.52.070(2).

I. Dismissal of Six Preshift Tasks

The employees argue that the trial court erred in granting partial summary judgment dismissing six of the nine preshift tasks. The trial court determined that two of those six—signing up for breaks and locating ergonomic chairs and equipment—were not "work" because they were not within the control of or for the benefit of the employer. It further found that all six tasks were not compensable under the de minimis doctrine.

Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). All facts and reasonable inferences must be viewed in the light most favorable to the nonmoving party. Stevens v. Brink's Home Sec., Inc., 162 Wn.2d 42, 46-47, 169 P.3d 473 (2007). The moving party bears the initial burden of showing an absence of an issue of material fact. Young v. Key Pharm., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989). The nonmoving party must then set forth specific facts showing that there is a genuine issue of fact for trial. Id. at 225-26.

We review summary judgment decisions de novo, engaging in the same inquiry as the trial court. Volk v. DeMeerleer, 187 Wn.2d 241, 254, 386 P.3d 254 (2016).

A. Tasks That do not Meet the Definition of "Work"

The trial court found that two of the nine preshift tasks were not "work" within the meaning of the MWA: signing up for breaks and locating ergonomic chairs/equipment.

The MWA requires employees to be compensated for all hours worked. RCW 49.46.020, .130. Hours worked includes any time an employee is "authorized or required by the employer to be on duty on the employers premises or at a prescribed work place." WAC 296-126-002(8). Time spent conducting preparatory tasks is considered hours worked. WASH. DEP'T OF LABOR & INDUS., ADMIN. POLICY ES.C.2, at 8 (rev. Sept. 2, 2008).[5] Compensable preparatory tasks are those which are "integral or necessary to the performance of the job."[6] Id. When an employee does not have control over when and where preparatory activities can be made, the activities are considered hours worked. Id.

VCC provides ergonomic equipment to employees. Employees and supervisors describe the selection of chairs and use of ergonomic equipment as a matter of preference. Employees point to no specific facts that establish the use of ergonomic equipment was "integral or necessary" to the completion of the job.

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[5] http://www.lni.wa.gov/workers-rights/_docs/esc2.pdf

[6] Both parties rely on this policy to determine whether preparatory tasks are compensable. An agency policy can be useful in determining the meaning of statutory terms. See generally Stahl v. Delicor of Puget Sound, Inc., 148 Wn.2d 876, 886-87, 64 P.3d 10 (2003); Richardson v. Dep't of Labor and Indus., 6 Wn. App. 2d 896, 909, 432 P.3d 841 (2018), review denied, 193 Wn.2d 1009, 439 P.3d 1069 (2019).

The employees point to no evidence that VCC required employees to use this ergonomic equipment or that an employees were ever disciplined for not using ergonomic equipment.

The employees instead point to the VCC standard operating procedures, policy no. 300, which requires employees to be fully prepared to start their shift at one second past the start of their shift. But, that policy does not set out specific requirements for what preparations must occur. It does not require the use of ergonomic equipment. The employees also point to negative employee evaluations they received if they did not arrive at the facility with enough time to complete preshift tasks and be ready to begin work at their scheduled time. But, the negative comments the employees point to do not reference the inability to secure ergonomic equipment, rather they reference the inability to promptly begin work at the scheduled time. None of these comments indicates that utilizing ergonomic equipment is a job requirement.

But, at least one of those negative reviews specifically references the inability to sign up for breaks prior to the start of a shift. And, positive evaluations specifically praise employees for arriving with enough time prior to their shift to sign up for breaks. Additionally, a 2007 memorandum from VCC supervisors to employees confirms that employees are expected to sign up for breaks “before [the employee] sit[s] down or at the next earliest convenience.” At least one employee indicated that if he did not sign up for a break slot prior to his shift, he would ask a supervisor to assign him a break slot. Some supervisors and

employees indicated that employees are able to sign up for breaks after the start of their shift. But, at least one trainer indicated that employees are not permitted to sign up for breaks after the start of their shift. The record supports that training officers trained employees to sign up for breaks as a part of a preshift routine.

The employees adduced specific facts that showed that employees were trained to sign up for breaks prior to their shift and received negative performance reviews if they failed to do so. This created a reasonable inference that VCC exercised control over when signing up for breaks occurred. As the nonmoving party to VCC's motion for summary judgment, the employees are entitled to that inference. See Stevens, 162 Wn.2d at 46-47. VCC controls where this task must take place: employees sign up for breaks on a "break board" on VCC's campus. It cannot be reasonably contested that signing up for breaks is necessary or integral to completion of the job. Breaks are required by WAC 296-126-092.

Viewing the facts in the light most favorable to the employees, there remains a genuine issue of material fact that signing up for breaks is integral or necessary for the completion of the employees' jobs, and that VCC controls where and when the task must occur.

While there is some evidence in the record that VCC did not require employees to sign up for breaks prior to the start of their shift, this fact is not dispositive. Employers are required to compensate employees for any time "authorized or required" not just the work it requires. RCW 49.46.020, .130; WAC 296-126-002(8). This includes "all work requested, suffered, permitted, or

allowed." ADMIN. POLICY ES.C.2, at 1. The employees' evidence that they were trained to sign up for breaks prior to their shift creates a reasonable inference that they were authorized to do so.

Viewing the facts and reasonable inferences in the light most favorable to the employees, a genuine issue of fact exists as to whether time employees spent signing up for breaks was "hours worked." The trial court erred in granting VCC's motion for summary judgment on that issue. But, the employees did not succeed in creating an issue of material fact regarding whether time spent gathering ergonomic equipment was "hours worked." Employees adduced no specific facts that the use of such equipment was integral or necessary to the performance of their jobs. The trial court correctly granted summary judgment on that issue.

B. The De Minimis Doctrine

The employees argue that the trial court erred in dismissing six tasks under the federal de minimis doctrine. They argue this is so both because Washington courts have not adopted the de minimis doctrine and because the court incorrectly applied the doctrine to the facts of this case. We need not reach the way in which the trial court applied the de minimis doctrine because we are not persuaded the Washington courts have adopted the de minimis standard for MWA claims.

The MWA requires employees to be compensated for all hours worked. RCW 49.46.020; .130. Its federal counterpart, the Fair Labor Standards Act (FLSA) contains a similar requirement. 29 U.S.C. § 206. But, federal courts have adopted the de minimis rule, which makes otherwise compensable work time

outside of a scheduled shift noncompensable. Lindow v. United States, 738 F.2d 1057, 1062 (9th Cir. 1984). To determine when the doctrine applies, courts consider (1) the practical administrative difficulty of recording the additional time; (2) the aggregate amount of compensable time; and (3) the regularity of additional work. Id. at 1063.

VCC has cited to no substantive state authority that adopts the de minimis doctrine to the MWA.[7] We are aware of one instance where this court has been asked to so apply the de minimis doctrine. We declined the invitation: "[W]e are aware of no state authority that applies the de minimis rule, and the State has shown no compelling reason to apply such a rule." Davis v. Dept. of Transp., 138 Wn. App. 811, 820, 159 P.3d 427 (2007).

VCC argues that Administrative Policy ES.C.2, at 4 "applie[s] or endorse[s]" the de minimis doctrine for Washington wage claims. It does not. The policy uses the words de minimis once, as an adjective in a description of a hypothetical situation where an employee would be entitled to compensation for drive time between their home and a first drive site. Id. That alone does not substantively or

[7] VCC cites to three Washington cases that it purports to apply an "equitable de minimis doctrine as part of common law." None of these cases concern either the MWA, FLSA, or unpaid wages. See In re Bartel v. Em't Sec. Dep't, 60 Wn.2d 709, 712, 714, 375 P.2d 154 (1962) (referring to de minimis rule to assist in defining "self-employed" for purposes of RCW 50.20.080, Employment Security Act); Lang v. Dep't. of Labor & Indus., 35 Wn. App. 259, 262-63, 665 P.2d 1386 (1983) (using "de minimis" adjective to describe the benefit an employer receives from an employee leaving work early while interpreting the Industrial Insurance Act, Title 51 RCW); Reynolds v. Hancock, 53 Wn.2d 682, 684, 335 P.2d 817 (1959) (describing damages in a contract case as "de minimus non curat lex").

impliedly adopt, endorse, or apply the federal de minimis doctrine to Washington wage claims.

Nor has VCC cited state authority for the standard that they purport governs applicability of FLSA case law to interpretation of the MWA: that FLSA case law should be applied unless the MWA "expressly differs." VCC's citation to Drinkwitz v. Alliant Techsystems, Inc. reveals the correct standard: "Because the MWA is based upon the FLSA, federal authority under the FLSA often provides helpful guidance. However, the MWA and FLSA are not identical and we are not bound by such authority." 140 Wn.2d 291, 298, 996 P.2d 582 (2000). The MWA is to be liberally construed in favor of employees to effectuate the legislative intent to protect wages and assure payment. Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett, 146 Wn.2d 29, 35, 42 P.3d 1265 (2002). If federal case law does not advance this intent, there is no requirement to apply that case law simply because the MWA does not "expressly" differ. See Drinkwitz, 140 Wn.2d at 298 (Washington courts are not bound by FLSA case law when interpreting the MWA). Adoption of the de minimis doctrine, which allows otherwise compensable work to be uncompensated, would not advance the legislature's intent to protect employee wages and assure payment. We decline to do so.

Summary judgment that time spent locating ergonomic equipment was not "hours worked" was proper, because the employees have not adduced specific facts showing that this was integral or necessary to the completion of their jobs. Summary judgment that time spent signing up for breaks is not "hours worked"

was improper, because genuine issues of material fact remain as to the extent to which VCC controlled when and where this task took place. Summary judgment that all other tasks were not compensable was improper, because Washington has not adopted the federal de minimis standard for claims under the MWA.

II. Damages Survey

Employees argue that the trial court abused its discretion in excluding Siskin's survey and opinions drawn therefrom. The trial court concluded that the surveys were inadmissible under ER 403 and ER 702. ER 403 allows the trial court to exclude evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury. ER 702 governs expert opinion testimony. It allows admission of expert testimony if it will assist the trier of fact to understand the evidence or to determine a fact in issue. Id.

We review the trial court's exclusion of expert testimony for an abuse of discretion. Philippides v. Bernard, 151 Wn.2d 376, 393, 88 P.3d 939 (2004). An abuse of discretion exists if the decision is manifestly unreasonable or based on untenable grounds or reasons. Mayer v. Sto Indus., Inc., 156 Wn.2d 677, 684, 132 P.3d 115 (2006).

The trial court's decision rested on its view that the survey and Siskin's opinions from it were not helpful to the jury and would confuse them because "he asked the wrong question." This is not manifestly unreasonable. The distinction between "preshift" and "per shift" is a central issue in this case: employees cannot

recover for tasks performed during their shift because they have already been compensated for that time.

The employees argue that VCC presented no evidence that the survey was confusing to respondents. But, VCC submitted expert analysis showing that 18 percent of survey respondents gave impossible answers to the survey (i.e., that they spent more time on the nine tasks than they spent in the building prior to their shift). This is strong evidence that a sizable number of respondents believed that they were being asked about time they spent on the tasks during the entirety of their shift, rather than before their shift. This called into question the reliability of the survey instrument.

The employees argue that the wording of the questions goes to weight rather than admissibility. They argue that because surveys are a well-established scientific technique, the trial court should have allowed the jury to weigh questions about the quality of the survey. They concede that Washington courts have not developed a specific jurisprudence on how admissibility of surveys are to be addressed. They argue that the trial court should have adopted federal jurisprudence on the issue. They cite to cases from the Ninth Circuit standing for the proposition that "[t]echnical inadequacies in [a] survey, including the format of the questions or the manner in which it was taken, bear on the weight of the evidence, not its admissibility." Keith v. Volpe, 858 F.2d 467, 480 (9th Cir. 1988); Fortune Dynamic, Inc. v. Victoria's Secret Stores Brand Mgm't, Inc., 618 F.3d 1025, 1037-38 (9th Cir. 2010)).

Where, as here, Washington evidence rules mirror their federal counterparts, courts may look to federal case law interpreting federal rules as persuasive authority in interpreting our own rules. In re Det. of Pouncy, 168 Wn.2d 382, 392 n.9, 229 P.3d 678 (2010). The trial court was therefore free to rely on these cases as persuasive authority, but was not required to.

Even so, the trial court's determination was not that there was a minor technical issue with the survey. Instead, the trial court found that the wording of the question was so flawed that the survey would be of no help to the jury. That decision is not manifestly unreasonable given the significant distinction between preshift and per shift time to the facts of this case.

Expert testimony is admissible only if it is helpful to the jury. ER 702. And, any evidence may be excluded if its probative value is outweighed by the substantial risk of confusing the jury. ER 403. Having determined the survey to be flawed to this level, the trial court's decision to exclude it and Siskin's corresponding testimony was not an abuse of discretion.

III. Dismissal was Proper

The trial court did not abuse its discretion in ruling to exclude Dr. Siskin's survey of class members or his conclusions drawn therefrom. The employee's conceded below that they would be unable to prove damages on anything less than the full nine preshift tasks. Because the trial court did not err in dismissing one of the nine preshift tasks—locating ergonomic equipment—the employees'

concession applies to the remaining eight tasks. The trial court did not err in dismissing the case.[8]

We affirm.

Appelwick, J.

WE CONCUR:

Brennan, J. Mann, C.J.

[8] Because we find dismissal of the case is appropriate, we need not address whether the trial court erred in finding VCC was not liable for double damages.

FILED
8/10/2021
Court of Appeals
Division I
State of Washington

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

CATHLEEN ROBERTSON, SCOTT CASTONGUAY and ANDREA RAKER, for themselves, and for all others similarly situated, Appellants, v. VALLEY COMMUNICATIONS CENTER, Respondent.	No. 80861-3-I ORDER DENYING MOTION FOR RECONSIDERATION

The appellants, Cathleen Robertson, Scott Castonguay, and Andrea Raker, have filed a motion for reconsideration. The court has considered the motion pursuant to RAP 12.4 and a majority of the panel has determined that the motion should be denied. Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

Judge

LAW OFFICES OF STEPHEN M. HANSEN

September 09, 2021 - 1:06 PM

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