Court case could drastically change the way growers pay piece-rate workers during rest breaks

By Ross Courtney
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GRANGER — Felipe Lopez wipes a bead of perspiration from his temple as he prunes gnarled Bing cherry trees in the foggy morning chill.

“I’m not cold,” he says with a grin as mariachi music plays from a radio a few rows away. “I’m sweating.”

The 30-year-old father of two could take a mid-morning break soon, but says he probably will just work until lunch, grabbing a quick drink of water here and there as he continues.

“I’m motivated,” said the Sunnyside man through a translator. Lopez is paid $2 for every tree he prunes by Jones Farms in Granger. The more he works, the more money he takes home.

The state Supreme Court will soon have something to say about break time for Lopez, his co-workers and the thousands of other farm laborers paid not by their time but by how many bins they fill, blossoms they thin and trees they prune.

The justices will hear a case, scheduled for oral arguments in March at Heritage University in Toppenish, that could drastically change the way growers pay piece-rate workers during rest breaks throughout Washington and perhaps wide swaths of America’s farm country. The hearing is in Toppenish because the court periodically takes cases on the road in an effort to bring the Temple of Justice in Olympia to the people.

State law allows piece-rate pay as long as every worker’s end-of-the-week wages work out to at least the minimum wage.

Farm-worker justice advocates argue the case could help right years of wrongs created by what they claim are unpaid rest breaks in violation of state law, and would encourage workers to take the rest they often skip in the name of money.

Agricultural industry representatives counter the case could cost growers millions of dollars in back wages, significantly increase the cost of labor and undermine a core ethos of farming culture: The harder you work, the more you make.

“A farm is not a factory,” said Frank Lyall, an orchardist who grows tree fruit in Grandview and Mattawa.

Lyall says his 200 or so seasonal employees “have a certain amount of control over how much money they make.”

Lawyers from all over the country on both sides and in between have rushed to intervene, filing seven friend-of-the-court, or amicus, briefs on behalf of groups that may be affected by the outcome.

“It’s gotten a lot of traction, and it’s a very important case,” said Jason Resnick, vice president and general counsel of the Western Growers Association, an Irvine, Calif.-based nonprofit that represents farmers in 20 states who together produce half the nation’s fresh fruit, vegetables and tree nuts.

In Washington, the rest-break case started in 2013 when seasonal workers at Sakuma Brothers Farms, a Skagit County berry producer, sued in U.S. District Court for underpayment, keeping poor wage records and not granting paid rest breaks under state wage laws and the federal Migrant and Seasonal Agricultural Worker Protection Act.

While admitting no wrongdoing, Sakuma Brothers settled the class-action case in June 2014 with the workers for $850,000 — $500,000 for the workers and $350,000 in attorney fees. A total of 923 workers are eligible for claims to a share of the settlement, said Sarah Leyrer, an attorney with the Seattle office of Columbia Legal Services, a legal-aid group representing the workers.

The settlement, however, covered only past practices. The two sides failed to reach an agreement on whether Sakuma should pay piece-rate workers separately for rest breaks in the future.

The U.S. District Court certified that issue to the state Supreme Court because state courts have never tackled the topic and the outcome could have widespread ramifications on Washington employers and workers. In the handoff to the state’s highest court, which will have the final say, the federal court posed two questions: Do farmers have to pay piece-rate workers separately for their breaks? And if so, how much?

The key word in the debate is “separate.”

Nobody on either side disputes whether breaks should be paid. State law requires that. The question in this case is whether piece-rate workers deserve break pay in addition to — “separately” in the language of the lawsuit — their normal wages. The plaintiffs say yes; the defendants say no, arguing that rest-break pay is already built into their piece-rate wages.

The difference would work out to roughly $20 per week for a worker picking three bins a day at $32 per bin, the equivalent of $12 an hour.

Lawyers in both camps point to what they call a “plain” reading of a relatively few sentences of state law that are proving to be anything but.

In 1976, the Legislature mandated that employers give their workers 10-minute paid rest breaks for every four hours worked. A special agricultural provision reiterated the policy in 1990.

What’s not clear is how that applies to piece-rate workers.

The plaintiffs argue that nothing in state law makes piece-rate different from hourly wages when it comes to rest breaks. In California, courts have agreed there is no difference. Also, the plaintiffs argue, paying for rest breaks is a sure-fire way to encourage workers to rest when conditions are hot and strenuous.

The plaintiffs also seek to have the wages for rest breaks calculated from the average of the previous week’s wages. Thus, the more a worker earns through work, the more that worker should earn on break, they argue.

For their part, the defendants counter that agricultural workers fall under different regulations that specifically mention piece-rate work. Washington Administrative Code for agricultural wages includes the following clause: “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.”

In other words, piece-rate pay is fine as long as every employee receives minimum wage at the end of the week for their time, including rest breaks. If they fall short, the growers must make up the difference.

Besides, the grower groups argue, changing the interpretation would expose growers to millions of dollars in claims for back wages and penalties.

Sakuma Brothers employees are not eligible for any back wages even if they win the case because they’ve already been paid in the form of a settlement. However, workers by the thousands throughout the rest of state may be able to claim separate rest-break pay for the past three years, the statute of limitations on compensation complaints, if the justices rule in the Sakuma laborers’ favor.

Pear and apple farmers alone could be on the hook for more than $25 million in wages, interest and penalties just for their seasonal harvest employees for the past three years, said Brendan Monahan, a Yakima attorney hired by several grower associations to file one of the amicus briefs.

“It could have a fundamental, and in some cases catastrophic, financial impact on Washington farmers,” Monahan said.

The debate started in California.

Just like in Washington and throughout the nation, growers there often pay seasonal workers per bin, pound, lug or some other unit.

In 2013, a California state Court of Appeals ruled in favor of a Safeway driver who sued for additional hourly payment during his breaks. The California state Supreme Court declined to hear an appeal.

Since then, California growers have been paying separately for piece-rate breaks, while facing class action claims seeking millions of dollars worth of back wages for four years and penalties, said Resnick of the Western Growers Association.

The association teamed with Washington business organizations to file one of the amicus briefs on the side of the employers.

Resnick likened the shock to growers as if they suddenly received four years’ worth of speeding tickets after driving what they thought was the speed limit.

“Just tell me what the rules are and we’ll obey them,” Resnick said. “But don’t move the goal posts on me.”

If the Washington Supreme Court follows California and rules in the workers’ favor, other states may follow, Resnick said.

Beneath the legal argument in the Sakuma Brothers case is whether rest breaks are mandatory for piece-rate workers.

The lawsuit doesn’t directly ask the Supreme Court. But all parties raise the question, seeking to have it become a matter of settled law. The court’s decision can’t help but indirectly address the question because plaintiffs want piece-rate breaks paid for separately. That way, workers would have incentive to take them and have the same recourse as hourly workers if they are denied.

Both sides agree that breaks keep employees safer and more productive.

However, “I haven’t talked to any farm workers who have the option” of not taking breaks, said Sarah Leyrer, the lawyer for the employees in the lawsuit. Instead, current practice may lead growers to pressure the laborers to hurry their harvest of a perishable product.

Adam Belzberg, the Sakuma Brothers’ Seattle attorney, advises all his grower clients to enforce breaks to avoid liability. “In this day and age, absolutely.”

He also warns growers to expect resistance from workers, some of whom would rather keep working to either make more money or leave earlier in the afternoon.

“There’s some push back at first,” he said.

Growers in the Yakima Valley say piece-rate pay is the only way to attract workers, especially seasonal employees during peak harvest. Each year, farmers complain about a shortage of workers. Handmade signs up and down the Yakima Valley back roads proclaim “Necessita Ayuda” or some other equivalent of “Help Wanted.”

They let workers take breaks whenever they want.

G&G Orchards in Yakima has shifted work like pruning and thinning to hourly wages in recent years as a way to encourage workers to slow down and pay closer attention to quality, said Rene Garcia, vice president of the company.

However, Garcia still must hire up to 150 or so seasonal pickers by the bin during harvest.

“They (piece-rate workers) can take a break whenever they want to take a break,” he said. “That’s their own time.”

Dennis Jones, owner of Jones Farms north of Granger, likes the work he gets from piece-rate workers, but occasionally he switches to hourly pay, such as when apples are picked by color, because he wants them to slow down and select carefully.

Even then, he throws a piece-rate “bonus” pay on top of the hourly wage. If he didn’t, he wouldn’t find employees.

“If you told harvesters that you wanted to pay them by the hour to pick cherries, they would not work here,” Jones said.

On that foggy day pruning cherry trees in Granger, Lopez teamed up with Efrain Jimenez, 43, to team prune, planning to split the wage evenly. Together they have 25 years of experience in their nimble hands and keen eyes.

They work quickly and efficiently, with hardly a wasted movement as they lop away dead wood, tall suckers and branches too close to one another under the watchful eyes of crew boss Tranquilino Torres, himself a 15-year veteran of Jones Farms.

Occasionally, the workers move too fast and prune where they shouldn’t, Torres said through a translator. “Sometimes I tell them to be careful.”

But they all shrug when asked about plans for a break. Sometimes they take them, sometime they don’t.

• Editor’s note: Jones Farms orchard manager Hector Dominguez assisted briefly with Spanish translation for this story.

• Ross Courtney can be reached at 509-930-8798 or rcourtney@yakimaherald.com.

Related Information

The case

The state Supreme Court will hear oral arguments in the case of Ana Lopez Demetrio and Francisco Eugenio Paz vs. Sakuma Brothers Farms at 1:30 p.m. March 23 at Heritage University in Toppenish. The question before the court is whether piece-rate workers should be paid separately for rest breaks; that is, in addition to their regular pay. The decision could affect thousands of farm workers in the state.

The code

The arguments deal with the following sections of the Washington Administrative Code:

• 296-126-092-4: Employees shall be allowed a rest period of not less than ten minutes, on the employer’s time, for each four hours of working time. Rest periods shall be scheduled as near as possible to the midpoint of the work period. No employee shall be required to work more than three hours without a rest period.

• 296-131-020-2: 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.

The math

State fruit industry representatives estimate a ruling in the farm workers’ favor could open the door to claims of more than $25 million in back wages, damages and interest from pear and apple growers alone.

Here’s how the math would roughly work out for one Yakima Valley farmer who employs about 150 seasonal employees to complete a peak apple harvest that lasts about 60 days: Assuming the state’s 2012 adverse effect wage of $12 per hour, the two 10-minute breaks would cost an extra $4 per day per employee. For 150 employees for 60 days times three years, the grower would owe $108,000 in back wages alone, not including interest and penalties.

Click on the links below to view the amicus briefs related to the piece-rate case:

https://www.documentcloud.org/documents/1657402-piece-rate-lawsuit-attorney-general-amicus.html

https://www.documentcloud.org/documents/1657403-piece-rate-lawsuit-business-association-amicus.html

https://www.documentcloud.org/documents/1657404-piece-rate-lawsuit-farmworkers-reply.html

https://www.documentcloud.org/documents/1657405-piece-rate-lawsuit-growers-associations-amicus.html

https://www.documentcloud.org/documents/1657406-piece-rate-lawsuit-l-amp-i-amicus.html

https://www.documentcloud.org/documents/1657407-piece-rate-lawsuit-labor-advocates-amicus-2.html

https://www.documentcloud.org/documents/1657408-piece-rate-lawsuit-labor-advocates-amicus.html

https://www.documentcloud.org/documents/1657409-piece-rate-lawsuit-sakuma-response.html

https://www.documentcloud.org/documents/1657410-piece-rate-lawsuit-ufw-amicus.html

https://www.documentcloud.org/documents/1657414-piece-rate-lawsuit-opening-brief.html