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CERTIFICATION FROM
THE UNITED STATES
DISTRICT COURT FOR
THE WESTERN DISTRICT
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 CURIAE BRIEF OF THE
DEPARTMENT OF LABOR & INDUSTRIES

Filed *E*
Washington State Supreme Court

FEB 12 2015 *h/h*

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WSR 05-18-0913

I. INTRODUCTION

Rest breaks provide a crucial respite from work for our State's workers. This is why the Department of Labor & Industries is committed to all workers, non-agricultural and agricultural, receiving paid breaks. Before the certified questions at issue in this case, no one had formally asked the Department about how those breaks should be paid for agricultural workers who work on a piece-rate basis. Because the Department has not previously considered this question, and has not developed a policy or interpretation of its rule addressing this question, it will not address it in this amicus curiae brief. However, it will discuss: 1) that the Department does not have an administrative policy one way or the other regarding the separate payment of rest breaks for piece-work agricultural workers; 2) how the Department currently enforces rest break violations through a civil infraction process; and 3) why paid rest breaks must be provided to agricultural workers under WAC 296-131-020(2).

II. IDENTITY AND INTEREST OF AMICUS

The Department is responsible for administering and enforcing "all laws respecting the employment and relating to the health, sanitary conditions, surroundings, hours of labor, and wages of employees employed in business and industry." RCW 43.22.270(4). The Department enforces the rest break regulation, WAC 296-131-020, and therefore has

an interest in the Court's interpretation of it.

III. SPECIFIC ISSUE ADDRESSED BY AMICUS CURIAE

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?

IV. ARGUMENT

A. **The Department's Guidance Cited by Sakuma Brothers Is Limited and Does Not State Whether Workers Should Be Separately Compensated for Rest Breaks**

The Department does not have an administrative policy or interpretation addressing the specific questions presented here. Although the Department does not have an express policy addressing these issues, it has issued other policies regarding the calculation of overtime when workers are paid on a piece rate basis, how to calculate wages to ensure workers are paid at least minimum wage, and has provided a publication for agricultural employers and employees to assist them in complying with the state agricultural employment standards and the Minimum Wage Act. When the Department introduces an interpretative policy it typically seeks stakeholder input and then communicates its understanding through an administrative policy. *See e.g.*, Administrative Policy ES.C.6 ("This policy is intended as a guide in the interpretation of . . . relevant statutes, regulations, and policies[.]"), available at

<http://lni.wa.gov/WorkplaceRights/Rules/Policies/default.asp> (last visited January 20, 2015) (attached as Appendix A). These policies are filed with Code Reviser's Office. WSR 05-18-091 (September 7, 2005), available at <http://app.leg.wa.gov/documents/laws/wsr/2005/18/05-18-091.htm> (last visited January 20, 2015). While this Court should provide guidance to the Department, employers, and employees on this issue of first impression, the Department's policies addressing minimum wage compensation and its informal forms should not be read to suggest that the Department has articulated a specific interpretation to be accorded deference by this Court regarding the certified issues. *See Silverstreak, Inc. v. Dep't of Labor & Indus.*, 159 Wn.2d, 868, 884-85, 154 P.3d 891 (2007); *see also Public Utility Dist. No. 2 of Pacific County v. Comcast of Washington IV, Inc.*, ___ Wn. App. ___, 336 P.3d 65, 83 (2014).

The Department's interpretative policy for WAC 296-126-092(4) addressing the non-agricultural rest break rule shows how the Department distributes policy statements. *See* ES.C.6; WAC 296-126-092(4); *see also* WSR 05-18-091.¹ The Department has not "provided extensive literature and instruction establishing that there is no requirement to provide any separate and additional pay for rest breaks taken by workers employed on

¹ 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).

a piece-rate basis.” *Contra* Resp. Br. 9. Rather, the Department has not addressed this issue one way or the other.

Sakuma Brothers first invokes Administrative Policy ES.A.8.1 to argue that the Department has made a clear policy determination supporting its position. Because the Department does not have a policy addressing the certified issues, the policy guidance it has provided should be read in its proper context. The Department issued ES.A.8.1 to provide guidance on how to calculate overtime, including when *covered* workers are paid on a piece rate basis. This policy clearly delineates that it addresses *overtime* standards under “RCW 49.46.0130, WAC 296-126, and WAC 296-128.” Resp. Br. Appendix A-4, p. 1. It does not address agricultural workers covered by WAC 296-131-020, because agricultural workers are not eligible for overtime pay under the Minimum Wage Act. RCW 49.46.130(2)(g).

Next Sakuma Brothers cites Administrative Policy ES.A.8.2 and asserts that “[i]f separate and additional pay for rest breaks taken by piece-rate workers really was a regulated policy, it would have to be included in Department’s Administrative Policies and regular rate of pay computation, but it is not.” Resp. Br. 11. Likewise, this policy addresses computations for overtime rates, which is not applicable to these agricultural workers, who are not eligible for overtime under the Minimum Wage Act.

Administrative Policy ES.A.8.2 (Resp. Br. Appendix A-5, p. 1);
RCW 49.46.130(2)(g).²

Sakuma Brothers also cites several forms the Department provides to employers and employees engaged in agricultural work. Resp. Br. 11 (citing Appendix A-7, p. 1-2 and Appendix A-8, p. 1-2). While the Department's publications, F700-171-000 and F700-125-000, do address the workers here, they do not address the questions raised by the certified questions. The Department created the Agricultural Employer Worksheet, F700-125-000, as a worksheet for agricultural employers to assist them in determining if they are following the state agricultural employment standards and the Minimum Wage Act for their employees. The Department created the document entitled "When paid by piece rate, are you earning minimum wage?," F700-171-000, to show piece rate workers working in the field how to calculate their wages to check if they are being paid at least minimum wage. Neither was intended to provide additional interpretative guidance regarding rest period pay requirements. The documents focus on telling employers and employees how to comply with the minimum wage requirements. The agricultural worksheet merely

² Even to the extent that ES.A.8.1 and ES.A.8.2 are useful for addressing piece-rate overtime calculations, neither says one way or the other how rest breaks should be accounted for in the overtime calculation because they do not explain how to calculate the total compensation, which must be divided by hours worked to establish the "regular rate of pay."

paraphrases the *entire* WAC 296-131-020(2) and asks for the employer to describe the practice on rest periods. *See* Resp. Br. Appendix A-7, p. 2. The document entitled “When paid by piece rate, are you earning minimum wage?” F700-171-000, only addresses compensation during unpaid meal breaks under the Minimum Wage Act, it does not address whether rest breaks must otherwise be paid under the agricultural rest break regulation. *Contra* Resp. Br. Appendix A-7, p. 2 (“If you are not able to take a full, 30-minute meal period, you do not need to deduct 30 minutes from your hour worked for the day.”). The Department’s only express policy statement that touches on WAC 296-131-020(2) is the reiteration that “when computing minimum wage for workers paid on a piece rate basis, the employees['] rest periods must be included in the number of hours worked.” *See* Administrative Policy ES.D.2. (administrative policy addressing recordkeeping and access to payroll records for agricultural employment). This recitation of the regulation does not provide any new guidance, but serves the purpose of providing the information from the regulation in policy so it is readily available to the reader.

Finally, the materials from the Department’s rule-making process cited by Sakuma Brothers do not provide useful guidance to the Court. The Small Business Economic Impact Statement is a general statement

about all agricultural workers, not just piece rate workers. It states that the “[c]ompliance costs for this proposed rule are limited to the additional labor costs to an employer of this requirement, if any.” Resp. Br. Appendix A-1, p. 1. It assumes that there will be additional costs for the employer if employees are not already being given breaks, because the employer would have to pay additional labor costs to get the same work done, it does not say whether the current underlying practice includes compensation for rest breaks one way or the other. Resp. Br. Appendix A-1, p. 1 (“If it were assumed that an employee did not currently take breaks and that an additional twenty minutes *must be worked each day by an employee to accomplish the same amount of work*, the additional labor cost to the employer (based on minimum wage of \$4.25 an hour) would be \$1.42 per employee for every eight hours worked.”) (emphasis added).

The Outline of Agricultural Rule Proposal does not show whether or not the Department chose to include separate pay for rest breaks. *Contra* Resp. Br. 8. The author of this document is unknown and it is unclear what proposal was before the author.

The Department has not addressed the issues presented by the certified questions here. Accordingly, the Court should not draw the conclusion from the Department’s materials that it has determined whether or not piece-rate workers should be compensated separately for their rest

breaks under WAC 296-131-020(2). Nevertheless, the Department believes that the Court should be aware of its rest break enforcement mechanisms for agricultural workers and the other regulatory protections afforded agricultural workers.

B. The Department Issues Penalties to Employers for Rest Break Violations Under RCW 49.30.040

The Department issues penalties when an employer fails to provide a rest break to agricultural workers. RCW 49.30.040 provides that violations for all agricultural employment laws are a class 1 civil infraction at a maximum of \$250 for each violation. *See* RCW 7.80. The Department can issue infractions for failing to provide the required pay statements to employees, failing to maintain the required employment records, failing to maintain the required poster outlining agricultural workers' rights, or failing to provide meal or rest breaks. WAC 296-131-015, WAC 296-131-017, WAC 296-131-110, WAC 296-131-020. The Department issues these infractions for violations of the agricultural rules by filing the infraction in the district court of the county where the violation occurred. RCW 7.80. This infraction process does not include a mechanism for the Department to recover unpaid wages or provide for wage relief for agricultural workers, but it also does not preclude the recovery of unpaid wages in another type of action, such as the private

action here in district court. See RCW 49.52.070; see also RCW 49.48.030, .040.

C. Because Rest Breaks Promote a Safe and Healthy Workplace, Rest Breaks Must Be Provided by Employers to Agricultural Workers—Including Piece-Rate Workers

Both agricultural and non-agricultural employees in Washington have a right to rest breaks during the work day. WAC 296-126-092; WAC 296-131-020. These rest breaks are particularly important for agricultural workers because agricultural workers work long hours outdoors, often in rural locations, with limited access to facilities and amenities. At least one study suggests that rest breaks reduce the risk of accidents during sustained activities. Philip Tucker, et al, *Rest Breaks and Accident Risk*, 361 *The Lancet* 680 (2003) (study showing that regular rest breaks reduced the risk of industrial accidents at a large industrial plant). This is why rest break and meal period *requirements* for agricultural workers include “one 10-minute *paid* rest break for each 4 hours worked.” *Breaks & Meal Periods*, “Agricultural workers get rest breaks and meal periods too,” <http://lni.wa.gov/WorkplaceRights/Agriculture/Breaks/default.asp> (last visited January 16, 2015) (emphasis added); see also *What Are Your Rights as a Worker?* <http://lni.wa.gov/FormPub/Detail.asp?DocID=1486>

(last visited January 17, 2015) (“You have the right to a paid 10-minute rest break for each four hours you work.”).

Other state regulatory schemes work in concert with the Department’s authority under RCW 49.30.040 and WAC 296-131 to ensure that agricultural workers receive the protections necessary given their unique work conditions and employment arrangements. *See, e.g.*, RCW 49.17, WAC 296-62, WAC 296-307-095, WAC 296-155-140 (safety and health regulations that apply to agricultural workers); *see also* RCW 19.30, WAC 296-310 (regulatory regime requiring licensing and wage protections for workers hired by farm labor contractors).

In particular, the Department has promulgated rules under RCW 49.17 (the Washington Industrial Safety & Health Act) that apply to agricultural workers and ensure safe work environments. *See e.g.*, WAC 296-62; WAC 296-307-095. Heat stress rules require employers to provide an outdoor heat exposure safety program in their written accident prevention program and encourage employees to frequently consume water to ensure hydration. WAC 296-62-09530. Employers must provide adequate drinking water during the shifts, relieve employees from duty and monitor them if they are showing signs or symptoms of heat-related illness, as well as determine whether medical attention is necessary. WAC 296-62-09540; WAC 296-62-09550; *see also* WAC 296-62-09560.

Likewise, the Department has promulgated regulations that set forth standards for field sanitation for workers engaged in a hand labor operation. WAC 296-307-095; WAC 296-307-09503. The employer must provide potable water, handwashing facilities, and toilet facilities. WAC 296-307-09512; WAC 296-307-09515; WAC 296-137-09518. The toilet and handwashing facilities must be near the work site. WAC 296-307-09515; WAC 296-137-09518. Although workers may take toilet breaks at will (subject to reasonable restrictions), ensuring that workers take adequate rest breaks reinforces the regulatory protections for agricultural workers such as heat stress rules and field sanitation. Paid rest breaks encourage workers to take breaks in hot weather to cool down and drink liquids; paid rest breaks encourage workers to take the time to seek out the proper restroom facilities. And paid rest breaks encourage workers to take the time to properly clean their hands after taking restroom breaks. In hand-picking operations, proper field sanitation addresses safety and health concerns for both the workers and the consumers of the products they pick. Finally, rest breaks allow workers to have a respite from work and relax and recover from work.

Sakuma Brothers states that it strictly enforces breaks to ensure that they are always taken and never missed. Resp. Br. 18. If true, this approach is consistent with the Department's understanding of

WAC 296-131-130(2) and its enforcement through RCW 49.30.040. However, Sakuma also states that it believes that “the actual taking of rest breaks is a voluntary decision for the worker.” Resp. Br. 18.³ The Department does not agree that taking rest breaks is voluntary because “rest breaks cannot be waived under Washington law.” *Pellino v. Brink’s Inc.*, 164 Wn. App. 668, 697, 267 P.3d 383 (2011) (citing Department’s Administrative Policy ES.C.6, §§ 8, 9 at 4); *see also Washington State Nurses Association v. Sacred Heart*, 175 Wn.2d 822, 831, 2877 P.3d 516 (2012). While it is true that the Administrative Policy ES.C.6 relates to the non-agricultural rest break rule, WAC 296-126-092(4), and the Department has not provided an administrative policy addressing WAC 296-131-020(2), there is no reason to interpret the identical operative language in the two regulations differently. *Compare* WAC 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.”) (emphasis added) *with* WAC 296-131-020(2) (“Every employee *shall be allowed a rest period of* at least ten minutes, *on the employer’s*

³ According to the deposition testimony, Sakuma’s rest break policy stated: “if an employee normally works an eight hour day with two allowed ten minute breaks, can they skip their breaks and be paid an extra 20 minutes for the day? No, since the employee is already being paid for eight hours of work including the break times, they do not receive additional pay. An Employee can choose to skip a break.” Pet’r’s Br. Ex. A, pp. 49-50. Although the Sakuma’s representative could not say whether this was the most recent policy, it does appear that it was Sakuma’s policy at one time.

time, in each four-hour period of employment.”) (emphasis added). It is also significant that the agricultural rest break regulation does not contain an exception for “intermittent rest periods” like that contained in the non-agricultural rest break rule promulgated before it. *Cf.* WAC 296-126-092(5) (“Where the nature of the work allows employees to take intermittent rest periods equivalent to ten minutes for each four hours worked, scheduled rest periods are not required”).⁴ The agricultural rest break rule does not contain a provision allowing intermittent rest breaks because the nature of agricultural labor requires employers to provide an uninterrupted ten-minute break for each four hours worked. Agricultural workers are no less entitled to the “personal rest and relaxation” afforded to non-agricultural workers by rest breaks. *See* E.S.C.6 at 4.

In any case, as the Department indicates on its website and publications, the rest break rule requires “one ten-minute *paid* rest break for each four hours worked.” Sakuma Brothers is correct that “[t]he health and safety of workers is properly protected through the enforcement of breaks.” Resp. Br. 26. Ensuring that workers take all required rest breaks promotes the health and safety of workers and skipping rest breaks should

⁴ The intermittent rest break provision, WAC 296-126-092(5), does not apply when “[t]he nature of the work, on a production line *when employees engaged in continuous activities*, for example, does not allow for intermittent rest periods. In this circumstance, employees must be given a full ten-minute rest period.” E.S.C.6., ¶ 12, p. 5 (emphasis added).

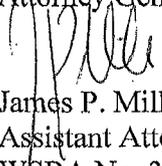
be discouraged by employers rather than encouraged for the purposes of increasing productivity.

V. CONCLUSION

Paid rest breaks are a requirement under WAC 296-131-020(2), and are particularly important when the nature of the work requires continuous labor in outdoor conditions with limited amenities. The Department currently enforces rest break violations through a civil infraction process under RCW 49.30.040. The Department does not have an administrative policy addressing agricultural rest breaks similar to the published policy available for non-agricultural rest breaks, and has no current policy or interpretation addressing the certified questions in this case. The Court should address these certified questions, but it should not read the Department's forms and informal publications to suggest that the Department has addressed these questions.

RESPECTFULLY SUBMITTED this 30th day of January, 2015.

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The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, hereby certifies that the document to which this proof of service is attached, Amicus Curiae Brief of the Department of Labor & Industries and Motion for Leave to File Amicus Curiae Brief on Behalf of the Department of Labor and Industries State of Washington, were delivered as follows:

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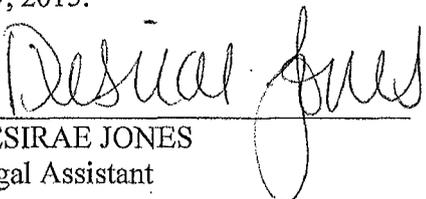
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Good Afternoon,

Attached for filing please find the following documents:

1. Motion for Leave to File Amicus Curiae Brief on Behalf of the Department of Labor & Industries
2. Amicus Curiae Brief of the Department of Labor & Industries; and
3. Proof of Service.

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