NO. 94229-3

SUPREME COURT OF THE STATE OF WASHINGTON

MARIANO CARRANZA and ELISEO MARTINEZ, individually and on behalf of all others similarly situated,

Plaintiffs/Petitioners,

v.

DOVEX FRUIT COMPANY,

Defendant/Respondent.

AMICUS BRIEF OF THE ATTORNEY GENERAL OF WASHINGTON

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I. INTRODUCTION

Agricultural pieceworkers should be rewarded for their backbreaking work with, at least, a wage that allows them to afford " 'the bare necessities of life.' " *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 870, 281 P.3d 289 (2012) (quoting *United States v. Rosenwasser*, 323 U.S. 360, 361, 65 S. Ct. 295, 89 L. Ed. 301 (1945)). This wage should account for and compensate each hour of work.

The Washington Minimum Wage Act (MWA) permits piece rate compensation but fails to specify a measure of compliance. One reasonable interpretation is that RCW 49.46.020 requires separate hour-by-hour compensation for non-piecework tasks like "traveling between orchards, attending meetings, storing equipment and materials, and transporting ladders to trailers." Pet'rs' Opening Br. at 1. Another reasonable interpretation is that the statute in some circumstances allows "workweek averaging," so long as every hour worked is accounted for.

Because no administrative rule resolves this ambiguity in the context of agricultural piecework, this Court should consider all reasonable interpretations and select the most worker-protective approach. *Anfinson*, 174 Wn.2d at 870 (the MWA is a remedial law that should be liberally construed to benefit employees); *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 300, 996 P.2d 582 (2000) (courts should construe the MWA to

uphold "Washington's long and proud history of being a pioneer in the protection of employee rights"). Of the interpretations available here, the hour-by-hour approach is more worker-protective. Accordingly, this Court should hold that, for agricultural workers, RCW 49.46.020 requires separate hour-by-hour compensation for non-piecework time.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

This Court has long recognized the Attorney General's power to submit amicus curiae briefs on matters affecting the public interest. *See Young Americans for Freedom v. Gorton*, 91 Wn.2d 204, 588 P.2d 195 (1978). This case presents an issue of significant public interest. Agricultural pieceworkers need to know how they will be paid for their non-piecework time, and employers need to know how to properly compensate that time. With this issue in mind, the Attorney General urges this Court to answer the district court's certified questions in a manner that protects worker rights and clarifies the law for employers.

III. ISSUE ADDRESSED BY AMICUS CURIAE

The Attorney General will address the district court's first certified question: "Does Washington law require agricultural employers to pay their pieceworkers for time spent performing activities outside of picking work (e.g., 'Piece Rate Down Time' and similar work) that is paid on a piece rate basis?" Dkt. 41 at 2. The Attorney General urges an affirmative answer.

IV. STATEMENT OF THE CASE

Many agricultural employees in Washington earn a "piece rate" wage for each unit of fruit picked. *E.g.*, Dkt. 39, Ex. 3, ¶ 5. But these pieceworkers routinely "perform work in addition to picking." *Id.*, p. 3, ¶ 4; *see also* Br. of Resp't at 2 (acknowledging that pieceworkers "regularly" perform non-piecework tasks). For example, pieceworkers must transport ladders to and from the company trailer, travel between orchard blocks, attend meetings and trainings, and store equipment and materials. Dkt. 39, p. 3-4, ¶ 4. They must also spend time waiting for equipment and materials, or waiting to travel between orchard blocks. *Id.*, p. 4, ¶ 4.

Some employers, like Dovex here, do not pay for non-piecework time directly. Instead, at the end of each workweek, a software program checks for MWA compliance. *Id.*, Ex. 3, ¶ 3. If an employee's weekly piece rate wage divided by the number of hours worked falls below the minimum hourly rate, Dovex "grosses up" or augments the wage until it meets or exceeds the minimum hourly rate. *Id.*; *see* Br. of Resp't at 6-7. If the employee's weekly piece rate wage standing alone exceeds the minimum hourly rate, the employee receives no additional compensation. Dkt. 39, Ex. 3, ¶ 4. This compliance scheme is known as "workweek averaging." Br. of Resp't at 4.

V. ARGUMENT

The Legislature and the Department of Labor and Industries (DLI) have adopted protections for agricultural workers that recognize the unique working conditions of agricultural workers and their limited bargaining power. *See* RCW 19.30 (Farm Labor Contractor Act); RCW 49.30 (Agricultural Labor Act); WAC 296-131 (Agricultural Employment Standards); WAC 296-310 (regulatory regime requiring licensing and wage protections for workers hired by farm labor contractors); WAC 296-155-140 (safety and health regulations that apply to agricultural workers). These protections overlay the protections of the MWA, which are available to agricultural and non-agricultural workers.

A. The MWA Specifies No Measure of Compliance for Piecework

The MWA provides that "every employer shall pay to each of his or her employees who has reached the age of eighteen years wages at a rate of not less than [minimum wage] per hour." RCW 49.46.020. The phrase at issue is "rate of not less than [minimum wage] per hour." *Id.*

A statute is ambiguous if it is susceptible to more than one reasonable interpretation. *Wingert v. Yellow Freight Sys., Inc.*, 146 Wn.2d 841, 852, 50 P.3d 256 (2002). RCW 49.46.020 is ambiguous in the context of piecework because it fails to establish a measure of compliance.

One reasonable reading is that RCW 49.46.020 requires hourly compliance, with each hour having discrete significance. This approach is consistent with the statute's plain language, which uses the singular form of the noun "hour." The word "hour" arguably expresses the Legislature's intent to require separate compensation for each hour of work (including non-piecework time), rather than on a workweek basis.

An hour-by-hour approach is consistent with a California case that mandated an hour-by-hour compliance approach under similar statutory language. *Gonzalez v. Downtown LA Motors, LP*, 155 Cal. Rptr. 3d 18, 23 (Cal. Ct. App. 2013) (holding that automotive service technicians were entitled to separate hour-by-hour pay for time spent waiting for repair work or performing other nonrepair tasks under California law guaranteeing pay of " 'not less than the applicable minimum wage for all hours worked in the payroll period' " (quoting Cal. Code Regs., tit. 8, § 11040, subd. 4(B)).

It is also consistent with a federal district court decision that mandated an hour-by-hour compliance approach under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 206, which guarantees "wages . . . [of] not less than . . . [minimum wage] an hour." *Norceide v. Cambridge Health Alliance*, 814 F. Supp. 2d 17 (D. Mass. 2011) (holding that hourly hospital employees were entitled to separate hour-by-hour pay for work performed during lunch breaks and around the edges of scheduled shifts).

Another reasonable reading is that RCW 49.46.020 permits workweek averaging in some circumstances, such as employees being paid on a commission basis. *See* WAC 296-126-021. Under this reading, the employer need not account for and compensate each discrete hour of work, provided that the employee's total weekly wage divided by the number of hours worked meets or exceeds the minimum hourly rate in RCW 49.46.020. At least five federal circuits have approved workweek averaging for purposes of FLSA compliance. *See D'Arezzo v. Providence Ctr., Inc.*, 142 F. Supp. 3d 224, 229 (D. R.I. 2015) (citing cases).

By rule, DLI has approved workweek averaging in some circumstances for non-agricultural workers covered by the Industrial Welfare Act, RCW 49.12. WAC 296-126-021. This rule is a valid resolution of RCW 49.46.020's ambiguity for those workers. *Edelman v. State ex rel. Pub. Disclosure Comm'n*, 152 Wn.2d 584, 597, 99 P.3d 386 (2004) (if a statute is ambiguous, an agency has the authority to "fill in the gaps and interpret the statute through rulemaking"). But DLI did not include an analogous provision in WAC 296-131, the parallel regulatory scheme for agricultural workers. *See* WAC 296-126-001(2) (WAC 296-126-021 does not apply to "[a]gricultural labor."). Thus, DLI has not resolved RCW 49.46.020's ambiguity for agricultural pieceworkers.

B. The MWA Should Be Construed to Disallow Workweek Averaging for Agricultural Pieceworkers

Because RCW 49.46.020 is ambiguous, and because DLI has no rule that resolves this ambiguity for agricultural pieceworkers, this Court should consider all reasonable interpretations and select the most worker-protective approach. *Anfinson,* 174 Wn.2d at 870 (the MWA is a remedial law that should be liberally construed to benefit employees). Here, this Court should require separate compensation for each hour of non-piecework time because an hour-by-hour compliance approach is more worker-protective than is workweek averaging.

In *Demetrio v. Sakuma Brothers Farms, Inc.*, this Court recognized that non-productive time is distinct from the work that generates the employee's piece rate wage. 183 Wn.2d 649, 652, 355 P.3d 258 (2015). Specifically, it understood that "[i]f the picker is not picking . . ., the picker is not earning money." *Id.* at 653 (internal quotation marks omitted).

Because non-picking time is a distinct category of hourly work during which the pieceworker "is not earning money," *id.*, it is reasonable to conclude that RCW 49.46.020 requires separate hour-by-hour compensation for such work.

This approach recognizes that agricultural labor involves discrete work harvesting a product, with other times that are delineated as non-

piecework time. So while DLI may have resolved RCW 49.46.020's ambiguity differently for non-agricultural workers covered by WAC 296--126-021—presumably recognizing differences in the types of work—here the Court should resolve the ambiguity in favor of hour-by-hour compensation. The MWA is a remedial law, and an hour-by-hour approach is more protective of agricultural pieceworkers than is workweek averaging. *Anfinson*, 174 Wn.2d at 870.

C. The Plaintiffs Cannot Consent to Dovex's Violation

Dovex suggests that the Plaintiffs are complicit in the company's MWA violation because they "returned year after year to work for Dovex and Dovex never offered to separately track and pay Plaintiffs for the non-picking tasks they now complain of." Br. of Resp't at 16. To the extent that Dovex implies some sort of waiver by its employees, its argument should be rejected.

It is beyond dispute that the MWA's protections are substantive rights that cannot be waived through negotiation. *Hisle v. Todd Pac. Shipyards*, 151 Wn.2d 853, 865, 93 P.3d 108 (2004); RCW 49.46.090. Further, a worker does not acquiesce in a violation simply because he "continued working under conditions that violated the Washington Minimum Wage Act." *Martini v. Emp't Sec. Dep't*, 98 Wn. App. 791, 799, 990 P.2d 981 (2000) (commenting that the MWA violation at issue was

"clear" even though the worker endured the burden of inadequate wages for a "protracted period of time").

VI. CONCLUSION

To protect agricultural pieceworkers, this Court should construe RCW 49.46.020 to require separate hour-by-hour compensation for non-piecework time.

RESPECTFULLY SUBMITTED this 31st day of July 2017.

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SOLICITOR GENERAL OFFICE

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