S258966

In the

Supreme Court

of the

State of California

GUSTAVO NARANJO,
on behalf of himself and all others similarly situated,
Plaintiff, Respondent and Cross-Appellant,

v.

SPECTRUM SECURITY SERVICES, INC.,
Defendant, Appellant and Cross-Respondent.

REVIEW OF A DECISION BY THE COURT OF APPEAL
SECOND APPELLATE DISTRICT COURT · CASE NO. B256232
SUPERIOR COURT OF LOS ANGELES · HON. BARBARA M. SCHEPER · NO. BC372146

REPLY TO ANSWER TO PETITION FOR REVIEW

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I. SPECTRUM'S REPEATED REFERENCE TO "PIGGY-BACKING" STATUTORY PENALTIES DEMONSTRATES THE SIGNIFICANCE OF THE ISSUES PRESENTED

Spectrum makes repeated reference to the piggy-backing of statutory penalties and ultimately reframes the issue presented as "whether an employee who is denied compliant meal breaks can piggy-back on the statutory remedy of one hour of premium pay for each day a meal break was not provided, ..." (APR 6, 7.) By characterizing the issue as "piggy-backing" statutory penalties on the failure to pay premium wages under Labor Code section 226.7,[1] Spectrum highlights the reality concerning the provision of meal and rest periods: many employers, like Spectrum, make no effort to pay premium wages for missed meal or rest periods during the course of employment or upon separation therefrom by an employee. Rather, employers wait for an enforcement action against them pursuant to section 226.7 and claim (as Spectrum does here) that the additional penalties available for noncompliance with sections 203 and 226 constitute penalties on top of penalties or, as phrased by Spectrum, the piggy-backing of statutory penalties.

Absent from Spectrum's characterization is any acknowledgment that sections 203, 226, and 226.7 prescribe distinct statutory obligations on employers. Under Section 226.7, an employer must pay an employee one hour of pay if a meal or rest period is not provided. (Lab. Code § 226.7, subd. (c).) Pursuant to Section 226, employers must furnish employees with an itemized wage statement setting forth specific information,

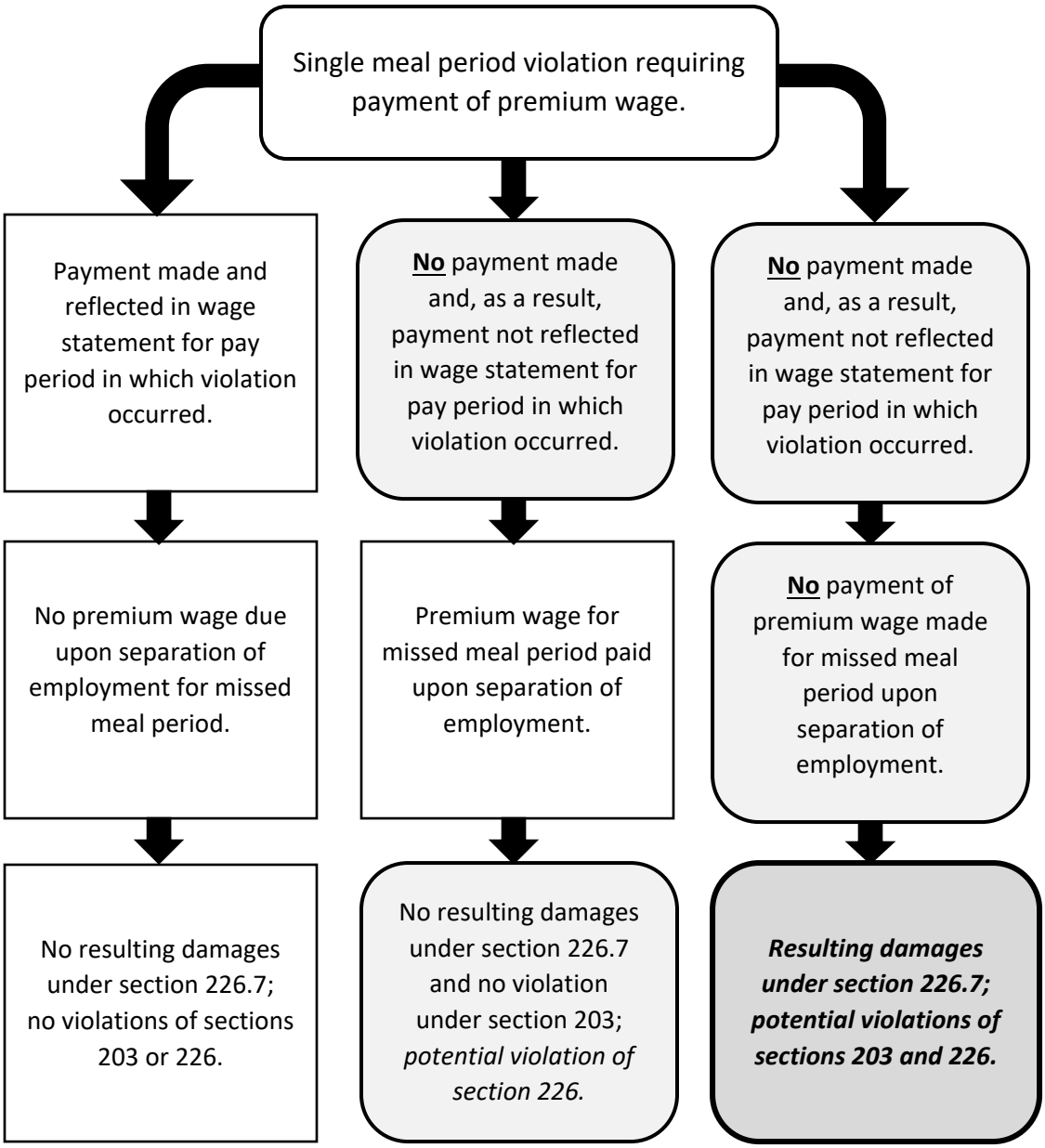
[1] Unless otherwise stated, all subsequent unlabeled statutory references are to the Labor Code.

including wages earned. (Lab. Code § 226, subd. (a).) Lastly, Section 203 requires that an employer pay an employee all wages owed and due if the employee is terminated or resigns. (See Lab. Code §§ 201-203.)

The interaction of these statutory provisions creates several possible factual scenarios related to the payment of premium wages under section 226.7, all of which are based upon the employer's compliance to the various statutory obligations. For example:

- Upon violation of section 226.7, an employer pays its employee the premium wage and reflects the payment in the itemized wage statement following the failure to provide the meal or rest period.
- Upon violation of section 226.7, an employer fails to pay the resulting premium wage and, as a result, no payment is reflected in the itemized wage statement for the pay period in which the violation occurred, but the employer nonetheless provides the premium pay to the employee upon separation of employment.
- Upon violation of section 226.7, an employer fails to pay the resulting premium wage at any time and, as a result, no payment is reflected in the itemized wage statement for the pay period in which the violation occurred, and no payment is made upon separation of employment.

To further illustrate the interaction of these independent statutory obligations, the flow chart on the following page depicts the relationship with respect to a single meal period violation:



Spectrum, like many other employers, followed the path on the far right of the flow chart, by failing to ever pay, record, or acknowledge employees' premium wages required by section 226.7, or provide the payment to its employees at the time of termination or resignation.[2] Instead, Spectrum now posits whether an employee can "piggy-back on the

[2] Spectrum acknowledges that the premium pay at issue was "owed and not paid." (APR 11.)

statutory remedy" under section 226.7, while ignoring the independent statutory obligations under sections 203 and 226.[3]

Admittedly, the analysis above presupposes that employers are legally required to treat premium wages owed under section 226.7 like any other wages for purposes of sections 203 and 226. (PR 7, 16.) The appropriate focus of the issue presented is not whether the imposition of additional penalties—which subsumes a wholesale failure of the employer's statutory obligation—will further incentivize employers to comply with the law, but rather to define the statutory obligations with respect to premium wages owed under section 226.7 in the first place. Does premium pay constitute wages earned that must be reflected in an itemized wage statement (Lab. Code § 226), and/or wages that are due and payable upon separation of employment (Lab. Code §§ 201-203)? This manifests an important question of law affecting all employees in California who are subject to the protections of the Labor Code and denied prompt and proper payment of premium wages for meal and rest period violations.

II. THE ISSUES PRESENTED DEMONSTRATE MATTERS OF STATEWIDE IMPORTANCE THAT NECESSITATE A DECISION BY THIS COURT

Spectrum dismisses the import of the unresolved question certified for consideration in *Stewart v. San Luis Ambulance, Inc.* (2017) 878 F.3d 883 (*Stewart*). In doing so, Spectrum discards the incongruity of lower court interpretations, stating that "there is no reason for the federal courts to be

[3] Although Spectrum ignores these independent statutory obligations through its characterization of "piggy-backing" penalties, it does acknowledge that the imposition of "penalties under Sections 203 and 226 are not automatic" in challenging the petition on different grounds. (APR 17.)

in disagreement in the future," given the decisions in *Maldonado v. Epsilon Plastics, Inc.* (2018) 22 Cal.App.5th 1308; *Ling v. P.F. Chang's China Bistro, Inc.* (2016) 245 Cal.App.4th 1242 (*Ling*); and with the Opinion of the Court of Appeal here (hereinafter "Opinion"). (APR 13.) A brief comparison of *Ling* and the Opinion demonstrates the inconsistency necessitating a decision from this Court.

Relying on *Kirby v. Immoos Fire Protection, Inc.* (2012) 53 Cal.4th 1244 (*Kirby*), the appellate court in *Ling* stated (in dicta) that "section 226.7 cannot support a section 203 penalty because section 203, subdivision (b) tethers the waiting time penalty to a separate action for wages." (*Ling*, *supra*, 245 Cal.App.4th at p. 1261.) Yet, the appellate court in *Ling* did not reconcile use of the term "any wages" in section 203, subdivision (a), which would include premium wages under section 226.7 pursuant to *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1114 (*Murphy*). Conversely, the analysis of the Opinion ignored *Kirby* and *Murphy* altogether and limited its analysis to the definition of wages contained in section 200, holding that "the statutory definition of 'wages' was not expanded to include the payment of a remedy rather than simply the payment for labor." (Slip Op. at p. 37.) Without more, these two decisions—both highlighted by Spectrum—demonstrate inconsistent approaches to interpreting the term "wages" as used in neighboring provisions of the Labor Code when assessing the treatment of premium wages under section 226.7. How premium wages should be considered with respect to sections 203 and 226 must be settled by this Court.

With respect to the applicable prejudgment interest rate on premium wages under section 226.7, the issue is a matter of first impression. Although Spectrum denies the applicability of *Bell v. Farmers Ins. Exchange*,

135 Cal.App.4th 1138 (2006), which provided for a prejudgment interest rate of ten percent on unpaid wages, it offers no contrary authority or case law justifying seven percent prejudgment interest on unpaid premium wages. Given the holding in *Kirby*, which presumably denies interest under section 218.6 for the same rationale of denying recovery of attorneys' fees under section 218.5, the applicable prejudgment interest rate for unpaid wages under section 226.7 must be settled by this Court.

III. THERE ARE NO OPEN QUESTIONS OF FACT OR LAW THAT WOULD IMPEDE THE COURT'S ABILITY TO CONSIDER THE ISSUES PRESENTED

Spectrum acknowledges that many of the lower court decisions assessing the legal availability of claims under sections 203 and 226 for attendant violations of section 226.7, "did so in preliminary rulings." (APR 13.) Accordingly, review of the Opinion presents a unique opportunity for this Court to address these important questions from an ideal procedural posture that is not likely to reoccur for years to come, if ever.

Spectrum attempts to obscure the operative question here—the legal availability of sections 203 and 226—by focusing on factual issues that would revive if this Court were to reverse the Court of Appeal. (APR 17.) Certainly, factual issues would be returned to the lower court if sections 203 and 226 were held to be legally available when they previously were deemed by the Court of Appeal to be legally unavailable (thereby obviating any factual determination). Yet, this does not interfere with the Court's ability to consider the issues presented because the sole condition precedent—the award of premium wages pursuant to section 226.7—was adjudged and affirmed. (Slip Op. at p. 21.) Regardless of whether factual considerations revive as a product of this Court's ruling on the law, the instant case

presents a rare opportunity for the Court to provide clear instruction regarding an employer's obligations to an employee under the Labor Code with respect to premium wages under section 226.7.

CONCLUSION

For the reasons set forth in the Petition for Review and above, Representative Plaintiff, Respondent, and Cross-Appellant respectfully urges this Honorable Court to grant review in this matter.

Dated: December 2, 2019

/s/ Jason C. Marsili

Respectfully Submitted
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CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c)(l) of the California Rules of Court, the undersigned counsel for Respondent and Cross-Appellant certifies that this opening brief contains **1,483** words in proportionately-spaced, 13-point Equity B type, exclusive of tables of contents and certificate of service, as determined by the word processing system used in the preparation of this brief, Microsoft Word 2013.

Respectfully submitted this 2nd day of December, 2019.

By: /s/ Jason C. Marsili
Jason C. Marsili

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