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NO. 96264-2

SUPREME COURT OF THE STATE OF WASHINGTON

CERTIFICATION FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN DISTRICT
OF WASHINGTON

VALERIE SAMPSON and DAVID RAYMOND,
on their own behalf and of all other similarly situated,

Petitioners,

v.

KNIGHT TRANSPORTATION, INC, an Arizona corporation, KNIGHT
REFRIGERATED, LLC, an Arizona limited liability company, and
KNIGHT PORT SERVICES, LLC, an Arizona limited liability company,

Respondents.

**AMICUS CURIAE BRIEF OF THE
DEPARTMENT OF LABOR & INDUSTRIES**

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I. INTRODUCTION

All workers covered under the Minimum Wage Act (MWA) have a right to receive wages at a rate of not less than the applicable minimum wage for all hours worked. RCW 49.46.020. The Department of Labor & Industries has looked at the “total earnings” paid during a workweek to determine whether an employer has met its obligations to non-agricultural piece-rate workers under the MWA. WAC 296-126-021. L&I has not distinguished between whether “hours worked” were for one purpose or for another—for example looking at piecework time compared to non-piecework time—because an employer must pay for all work when an employee is “on duty on the employer’s premises or at a prescribed work place.” WAC 296-126-002(8); WAC 296-128-600(9).

This Court recently concluded the MWA does not allow employers to use workweek averaging to compensate agricultural workers for non-piecework time (i.e. “down-time” or “work outside piece rate work”) because the plain language of the MWA requires employers to pay for each individual hour worked. *Carranza v. Dovex Fruit Co.*, 190 Wn.2d 612, 619-21, 416 P.3d 1205 (2018). But the Court has also recognized that when a compensation agreement is a true piece-rate compensation structure for a non-agricultural employee, WAC 296-126-021 allows workweek averaging. *See Hill v. Xerox Business Services, LLC*, 191

Wn.2d 751, 752, 761-62, 426 P.3d 703 (2018). This case will answer whether workweek averaging may include activities outside of piece-rate work for non-agricultural workers.

II. IDENTITY AND INTEREST OF AMICUS

L&I 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). L&I enforces the workweek averaging regulation for commissions and piecework, WAC 296-126-021, and the regular rate of pay regulation, WAC 296-128-550, and thus has an interest in Court’s interpretation of them.

III. SPECIFIC ISSUE ADDRESSED BY AMICUS CURIAE

Does the MWA require non-agricultural employers to pay their piece-rate employees per hour for time spent performing activities outside of piece-rate work?

IV. ARGUMENT¹

A. L&I’s Guidance Allows Employers to Include Piecework and Non-Piecework Time in Workweek Averaging Calculations

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 [the applicable minimum wage rate for that calendar

¹ L&I relies on the fact statements of the parties.

year] per hour.” RCW 49.46.020. The Industrial Welfare Act provides L&I the authority to adopt rules that limit conditions of employment that are detrimental to health, including rules about minimum wages, so long as the minimum wage requirements are “not otherwise governed by minimum wage requirements fixed by state or federal statute, or a rule or regulation adopted under such statute” RCW 49.12.091. Under this statute, L&I adopted WAC 296-126-021, which allows employers to average employees’ piece-rate earnings, and all other earnings, over the course of a workweek to meet the required minimum wage rate per hour in RCW 49.46:

Where employees are paid on a commission or piecework basis, wholly or partially,

(1) The amount earned on such basis in each work-week period may be credited as a part of the total wage for that period; and

(2) The total wages paid for such period shall be computed on the hours worked in that period resulting in no less than the applicable minimum wage rate.

WAC 296-126-021.

L&I has long interpreted the MWA to allow non-agricultural employers to compensate employees on a piece-rate basis so long as the piece-rate earnings meet the minimum wage requirements set forth in RCW 49.46. WAC 296-126-021; *see also* WAC 296-128-550. L&I rules ensure employers who pay their workers on a piece-rate basis meet their

obligations under the MWA by requiring employers to pay at least the minimum wage when considering the “total earnings” over the course of a workweek.

All workers covered under the MWA have a right to receive wages at a rate of not less than the applicable minimum wage for all hours worked. “Hours worked” means “all hours during which the employee is authorized or required by the employer to be on duty on the employer’s premises or at a prescribed work place.” WAC 296-126-002(8); WAC 296-128-600(9). L&I has not distinguished between whether “hours worked” were for one purpose or another—for example looking at active production compared to non-production work—because employers must pay for all work when an employee is “on duty on the employer’s premises or at a prescribed work place.” WAC 296-126-002(8); WAC 296-128-600(9).

Under L&I’s interpretation of WAC 296-126-021, an employer may count all hours worked during the workweek and divide the total earnings by all hours worked to meet an employer’s obligation under the MWA. In this way, L&I has allowed employers to “credit” the piece-rate and commission earnings to other hours worked and has not required employers to compensate employees separately for hours employees might be engaged in non-piece-rate or commission work. *See*

WAC 296-126-021. This rule applies to workers covered under the Industrial Welfare Act as employees. RCW 49.12.005; WAC 296-126-001, -002. The rule does not cover some groups, such as agricultural workers. *See* WAC 296-126-001(2)(c); *Carranza*, 190 Wn.2d at 623-24.

Consistent with its interpretation of the regulation, L&I has provided the following guidance in its Administrative Policy ES.A.3:

In order to determine whether an employee has been paid the statutory minimum hourly wage when the employee is compensated on other than an hourly basis, the following standards should be used:

- If the pay period is weekly, the employee's total weekly earnings are divided by the total weekly hours worked (including hours over 40). Earnings must equal minimum wage for each hour worked. If such earnings do not equal minimum wage, the employer must pay the difference.
- If the regular pay period is not weekly, the employee's total earnings in the pay period are divided by the total number of hours worked in that pay period. The result is the employee's hourly rate of pay. Earnings must equal minimum wage for each hour worked. If such earnings do not equal minimum wage, the employer must pay the difference.
- *For employees paid on commission or piecework basis, wholly or in part, other than those employed in bona fide outside sales positions, the commission or piecework earnings earned in each workweek are credited toward the total wage for the pay period. The total wage for that period is determined by dividing the total earnings by the total hours worked; the result must be at least the applicable minimum wage for each hour worked. See WAC 296-126-021.*

-
- “Total earnings” is meant to include all compensation received for hours worked in the pay period, as well as any additional payments, i.e., split-shift bonus or stand-by pay

(Emphasis added). The only payments that are not included in “total earnings” are vacation pay, holiday pay, and any gratuities, tips, or service fees. Admin. Policy ES.A.3 at 3; *see also* WAC 296-126-022. In other words, L&I has not told employers that they must track non-piecework time and compensate employees separately for time spent performing tasks ancillary to piece-rate earnings.²

It is not correct to say that it is “only when the employee has received her ‘total earnings’ for all hours worked that workweek averaging is applied.” Pet. Br. 14. Instead, Administrative Policy ES.A.8.1 tells employers to add together the total earnings from both piece-rate and “all other earnings” and divide them “by the total hours actually worked.” Admin. Policy ES.A.8.1 at 4. The employer then must pay an additional half-time for any overtime hours, because “[t]he employee has already

² Likewise, consistent with WAC 296-126-021, L&I has provided guidance about how to compute overtime for piece-rate and flat rate compensation structures that presupposes that all hours are averaged. *See* Admin. Policy ES.A.8.1; Admin. Policy ES.A.8.2. The overtime rate for piece-rate truckers subject to the Federal Motor Carrier Act must be “reasonably equivalent” to one and one-half times the driver’s usual hourly rate. WAC 296-128-011, -012; Admin. Policy ES.A.8.1 at 8. WAC 296-128-011 provides a recommended formula for establishing a uniform rate of pay to compensate piece-rate work, which includes overtime compensation. Although overtime is not at issue here, the rule and policy confirms that L&I has not required employers to compensate non-piecework time separately under its interpretations of WAC 296-126-021.

received straight-time compensation for all hours worked[.]” Admin. Policy ES.A.8.1.³ This is also consistent with WAC 296-128-550’s direction to divide “the amount of compensation received per week by the total number of hours worked during that week.”

L&I has told employers that they have satisfied their obligations to pay minimum wage so long as the employee’s total earnings, including piece-rate earnings, are greater than the applicable minimum wage rate when divided by the total number of hours worked for that employer during the workweek. ES.A.8.1; ES.A.8.2.

B. L&I Has Not Yet Updated Its Guidance Because *Carranza* and *Hill* Are in Tension

It is unclear how employers who pay piece-rate compensation must treat time their employees spend performing activities “outside of piece rate work” to satisfy their MWA obligations. *Carranza* and *Hill* are in tension because the *Carranza* Court concluded that the plain language of the MWA requires employers to compensate employees for each individual hour worked, but the *Hill* Court suggested it was still permissible to workweek average for non-agricultural workers. *Carranza*, 190 Wn.2d at 614-15; *Hill*, 191 Wn.2d at 752, 761-62.

³ ES.A.8.2 provides a sample calculation for piece-rate earnings. The calculation presumes that the piece-rate earnings covers all wages in that example including downtime.

Petitioners argue for “a clear line for determining when activities must be separately compensated: If an employer requires a piece-rate employee to perform work for which no piece rate can be earned because no pieces are being produced, the employer must separately pay for that work.” Pet. Br. 20. Respondents advocate for an inclusive view of piece rate that treats “all activities that are related and incidental to creating the relevant ‘piece.’” Resp. Br. 2. Given *Hill*, L&I has not updated its guidance addressing workweek averaging and awaits further direction.

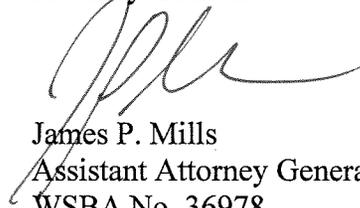
V. CONCLUSION

L&I’s rule has allowed employers to apply workweek averaging to all hours worked by non-agricultural piece-rate workers under WAC 296-126-021. L&I requests direction about whether workweek

averaging may include activities outside of piece-rate work for non-agricultural workers.

RESPECTFULLY SUBMITTED this 29th day of March, 2019.

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