

FILED
SUPREME COURT
STATE OF WASHINGTON
10/10/2018 4:38 PM
BY SUSAN L. CARLSON
CLERK

No. 96264-2

IN THE 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 on
behalf of all others similarly situated,

Petitioners/Plaintiffs,

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/Defendants.

PLAINTIFFS' OPENING BRIEF ON CERTIFIED QUESTION

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I. INTRODUCTION

The question presented in this case is whether the Washington Minimum Wage Act (MWA) requires non-agricultural employers to pay piece-rate employees per hour for time spent performing activities outside of piece-rate work. The answer is yes.

Plaintiffs Valerie Sampson and David Raymond are pursuing this proposed wage-and-hour class action against Defendants Knight Transportation, Inc., Knight Refrigerated, LLC, and Knight Port Services, LLC. Plaintiffs seek to represent hundreds of current and former employees who, like Plaintiffs, have driven trucks for the Knight companies on a piece-rate basis.

The truck drivers log work time under two separate categories: “driving” and “on-duty not driving.” The Knight companies pay on a piece-rate basis for driving work. Long-haul drivers with Knight Transportation and Knight Refrigerated receive a set amount for each mile driven. Short-haul drivers with Knight Port Services receive a set amount for each load delivered.

The Knight companies typically pay no compensation to drivers for time spent engaged in on-duty-not-driving work. Activities that fall into this category include pre and post-trip inspections, fueling, waiting

for loading or unloading, and otherwise being detained at the locations of shippers and consignees. Knight drivers often spend a substantial amount of time each day performing on-duty-not-driving work.

The MWA requires employers to pay their employees for all time worked. Piece rates are, by definition, tied to the output of employees and are earned only when the employees are actively producing. This is true for Knight drivers, who earn their mileage or load rates only when driving. Thus, Knight is violating the MWA by routinely requesting, suffering, permitting, or allowing drivers to engage in on-duty-not-driving work without compensation.

The Court should answer the certified question in the affirmative and hold that Knight and other non-agricultural employers are required to pay their piece-rate employees on a per-hour basis for time spent performing activities outside of piece-rate work.

II. CERTIFIED QUESTION

The United States District Court for the Western District of Washington certified the following question to this Court: “Does the Washington Minimum Wage Act require non-agricultural employers to pay their piece-rate employees per hour for time spent performing activities outside of piece-rate work?” Dkt. 92 at 17:3-6.

“For the purpose of answering this question,” the district court “considers ‘time spent performing activities outside of piece-rate work’ to include: loading and unloading, pre-trip inspections, fueling, detention at a shipper or consignee, washing trucks, and other similar activities.” *Id.* at 17:6-9.

III. STATEMENT OF THE CASE

A. Factual background.

Plaintiffs Valerie Sampson and David Raymond are Washington residents who worked as truck drivers for Defendants Knight Transportation, Inc., Knight Refrigerated LLC, and Knight Port Services LLC (collectively, “Knight”) under piece-rate compensation systems that paid primarily on a per-mile or per-load basis. Dkt. 53-20 at 134:11-13, 134:16-19; Dkt. 53-7 at 29:1–31:23; Dkt. 53-15 at 33:20–37:12, 44:23-25; Dkt. 53-17 at 25:18-22. Plaintiffs seek to represent a class of current and former Knight employees who are similarly situated. Dkt. 38 ¶ 10.

Knight employs drivers in three divisions: Dry Van, Refrigerated, and Port Services. Dkt. 53-7 at 21:4–23:4; Dkt. 53-4. Dry Van and Refrigerated drivers haul goods for Knight throughout the country and are often referred to as long-haul drivers. *See* Dkts. 55-69. Port Services

drivers haul goods primarily in and around Washington and are often referred to as short-haul drivers. *See id.*

1. Knight drivers record their work as “driving” or “on-duty-not-driving” activities.

All Knight drivers must comply with the United States Department of Transportation’s Hours of Service regulations. Dkt. 53-7 at 36:17–37:1; Dkt. 53-15 at 96:15–97:11; Dkt. 53-17 at 78:4-8. These regulations require drivers to classify their status in one of four categories: driving, on-duty not driving, off duty, or sleeper berth. 49 C.F.R. § 395.8(b).

Drivers record working hours under the status categories of driving and on-duty not driving. “Driving time” is defined as “all time spent at the driving controls of a commercial motor vehicle in operation.” 49 C.F.R. § 395.2. “On-duty[-not-driving] time” is defined as any work other than driving. *Id.* This includes all time spent in relation to the loading or unloading of a commercial motor vehicle; all time spent giving or receiving receipts for shipments; all time spent inspecting, servicing, or conditioning a commercial motor vehicle; all time spent repairing, obtaining assistance, or remaining in attendance upon a disabled commercial motor vehicle; all time spent at a plant, terminal, facility, or other property of a motor carrier or shipper waiting to be dispatched;

and all time spent “[p]erforming any other work in the capacity, employ, or service of, a motor carrier.” *Id.*

2. Knight pays drivers on a piece-rate basis for driving work.

With rare exception, Knight pays drivers only for the activity of driving. Dkt. 53-7 at 30:17–31:20; Dkt. 53-15 at 37:13–41:13; Dkt. 53-17 at 29:21–30:13, 46:23–47:2, 55:6-9. Long-haul drivers receive a piece rate for each mile driven, and short-haul drivers receive a piece rate for each load delivered. Dkt. 53-7 at 29:1–31:23; Dkt. 53-15 at 33:20–37:12, 44:23-25; Dkt. 53-17 at 25:18-22. The mileage rate for long-haul drivers is based on experience and total mileage; it is typically in the range of 34 to 54 cents per mile. Dkt. 53-6 at 6; Dkt. 53-23; Dkt. 61 ¶ 4; Dkt. 83-1 at 2. The load rate for short-haul drivers is based on the number of miles required for a roundtrip delivery, the difficulty of those miles (such as having to drive over a mountain pass), and the weight of the load. Dkt. 53-15 at 33:20–37:12; Dkt. 75 ¶ 14. Load rates are typically in the range of \$35 to \$500 per delivery. *See, e.g.*, Dkt. 53-24 at 12, 14, 20, 52, 55.

3. Knight fails to pay drivers for on-duty-not-driving work.

Knight drivers spend a substantial amount of time each day performing on-duty-not-driving work. Dkt. 55 ¶ 8; Dkt. 56 ¶ 6; Dkt. 57 ¶ 6; Dkt. 58 ¶ 6; Dkt. 59 ¶ 6; Dkt. 60 ¶ 6; Dkt. 61 ¶ 6; Dkt. 62 ¶ 6; Dkt. 63

¶ 6; Dkt. 64 ¶ 6; Dkt. 65 ¶ 6; Dkt. 66 ¶¶ 8-9; Dkt. 67 ¶ 7; Dkt. 69 ¶ 7.

Knight, however, routinely fails to compensate drivers for this work. *Id.*

Knight typically pays drivers only for the activity of driving because if the wheels are not moving, the truck is not being “productive.” Dkt. 53-20 at 205:8-12; *see also* Dkt. 53-3 (“We want you to be productive. It’s the key to making a good income for you, and to generating revenue for the company.”).

Knight drivers engage in a variety of work activities outside of driving. For example, the employees spend time performing mandatory inspections, fueling trucks and refrigeration tanks, and waiting for trucks to be loaded or unloaded. Dkt. 53-3; Dkt. 53-30 at 2; 49 C.F.R. § 395.2; Dkts. 55–69. The employees also spend time in “detention” at the location of a shipper or consignee. Dkt. 53-30 at 2. All of this work—which is usually recorded as on-duty-not-driving time and sometimes recorded as off-duty time—regularly goes uncompensated. *See, e.g.*, Dkt. 55 ¶ 8; Dkt. 56 ¶ 6; Dkt. 57 ¶ 6; Dkt. 58 ¶ 6; Dkt. 59 ¶ 6; Dkt. 60 ¶ 6; Dkt. 61 ¶ 4; Dkt. 62 ¶ 67; Dkt. 63 ¶ 6; Dkt. 64 ¶ 6; Dkt. 65 ¶ 6; Dkt. 66 ¶¶ 8-9; Dkt. 67 ¶ 7; Dkt. 69 ¶ 7.

On occasion, Knight will pay drivers for work other than driving. Dkt. 53-7 at 30:17–31:20; Dkt. 53-15 at 37:13–41:13; 53-30 at 3. For

example, Knight pays \$12 per hour to long-haul drivers and \$15 per hour to short-haul drivers for time spent in detention beyond the first two hours (those first two hours of detention are never compensated). Dkt. 53-30 at 3; Dkt. 53-15 at 37:13–39:25. Knight also pays a flat \$75 to drivers for “layovers” of 24 hours or more. Dkt. 53-15 at 40:1–41:13. And Knight maintains it will separately pay a driver “for assisting with the loading and unloading of products.” Dkt. 75 ¶ 16.

4. Knight separately pays drivers for time spent on rest breaks.

Knight admits that until November 2016, the company failed to pay drivers for rest break time. *See* Dkt. 53 ¶ 24; Dkt. 53-22; Dkt. 53-20 at 182:1-19 (“Q. So there’s no separate compensation for a rest break; is that correct? A. That’s correct.”); Dkt. 53-7 at 39:16–40:1, 40:18–42:2 (confirming no separate compensation for rest breaks until late 2016); Dkt. 53-17 at 23:22–24:4, 110:17–112:22. Since then, Knight has paid drivers on an hourly basis for rest breaks. Dkt. 53-23; Dkt. 53-24. The rate that Knight uses is the quotient of the driver’s total pay for the week divided by the driver’s total hours. *See id.*

B. Procedural background.

Plaintiff Valerie Sampson filed a class action complaint in October

2016, claiming that Knight Transportation engages in a systematic course of unlawful conduct with respect to truck drivers who are paid on a piece-rate basis for driving work. *See Sampson v. Knight Transp., Inc.*, No. C17-0028-JCC, 2017 WL 4168273, at *1 (W.D. Wash. Sept. 19, 2017). After extensive discovery, Ms. Sampson amended her complaint to add David Raymond as a plaintiff and Knight Refrigerated and Knight Port Services as defendants. *Id.*

Plaintiffs Sampson and Raymond allege the Knight companies have failed to comply with Washington's wage laws in several ways, including by failing to pay for time spent engaged in on-duty-not-driving work, failing to pay for time spent attending mandatory orientation, failing to pay for rest break time, failing to pay overtime compensation for hours worked beyond 40 in a week, failing to keep true and accurate time records, and taking unlawful deductions and rebates from wages. *Id.*; *see also* Dkt. 38 ¶¶ 19-24.

This is the second lawsuit brought against Knight on behalf of Washington drivers. In the first case, which was also litigated in the U.S. District Court for the Western District of Washington, the Honorable Robert S. Lasnik certified a class of drivers alleging many of the same wage-and-hour abuses at issue here. *See Helde v. Knight Transp., Inc.*, No.

C12-0904RSL, 2013 WL 5588311, at *6 (W.D. Wash. Oct. 9, 2013). On cross-motions for summary judgment, Judge Lasnik rejected the drivers' claim that Knight was violating the MWA by failing to pay the minimum wage rate for each hour spent engaged in on-duty-not-driving work. *Helde*, 2016 WL 1687961, at *1-3 (W.D. Wash. April 26, 2016). The case subsequently settled on a class-wide basis. *Helde*, 2017 WL 4701323, at *1-2 (W.D. Wash. Oct. 19, 2017).

Shortly after this Court accepted review in *Carranza v. Dovex Fruit Co.*, Plaintiffs asked the district court to certify under RCW 2.60.020 the question of whether the MWA requires non-agricultural employers to pay pieceworkers for time spent performing activities outside of piece-rate work or, alternatively, to stay the proceedings pending the outcome in *Carranza*. See Dkt. 92 at 15 n.12. The district court denied Plaintiffs' motion, citing to the holding in *Helde. Id.*

Plaintiffs continued litigating their claims and moved for class certification in March 2018. Dkt. 52. A month later Knight moved for partial summary judgment on Plaintiffs' on-duty not driving claim. Dkt. 71. The parties fully briefed both motions. See Dkts. 52-69, 71-85. In response to Knight's motion for partial summary judgment, Plaintiffs again asked the district court to certify the following legal question to this

Court: “Does Washington’s Minimum Wage Act require non-agricultural employers to pay their pieceworkers per hour for time spent performing activities outside of piece-rate work?” Dkt. 80 at 3. By then, this Court had issued its decision in *Carranza*. See *Carranza v. Dovex Fruit Co.*, 190 Wn.2d 612, 416 P.3d 1205 (2018).

In addressing Plaintiffs’ second request for certification to this Court, the district court concluded that *Carranza* “call[s] into question” previous rulings of the district court, including the *Helde* decision. Dkt. 92 at 15:14-15. The court noted that “[a]side from involving agricultural workers, the type of uncompensated work addressed in [*Carranza*] appears analogous to the work Plaintiffs allege to support their on duty, not driving claim” against Knight. *Id.* at 16. But because *Carranza* does not address how this Court’s interpretation of the MWA affects “the validity of WAC 296-126-021, which ostensibly allows non-agricultural employers to pay their employees a piece rate based on workweek averaging,” the district court held that “the law underlying Plaintiffs’ on duty, not driving claim is not clearly determined, and that the Washington Supreme Court is in a better position . . . to answer this question.” *Id.* at 16-17. The district court therefore certified the question to this Court. *Id.*

IV. ARGUMENT

A. Standard of review.

The Washington Supreme Court “answer[s] certified questions de novo and in light of the federal court record.” *Lopez Demetrio v. Sakuma Bros. Farms, Inc.*, 183 Wn.2d 649, 655, 355 P.3d 258 (2015); *see also Carlsen v. Global Client Solutions, LLC*, 171 Wn.2d 486, 493, 256 P.3d 321 (2011) (“Certified questions from federal court are questions of law that we review de novo . . . based on the certified record provided by the federal court.”). When the certified issue “pertain[s] to a motion for summary judgment,” the Court “perform[s] the same inquiry as the district court.” *Saucedo v. John Hancock Life & Health Ins. Co.*, 185 Wn.2d 171, 178, 369 P.3d 150 (2016) (citing *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 483, 78 P.3d 1274 (2003)). “All facts and reasonable inferences are viewed in the light most favorable to the nonmoving part[ies],” which in this case are Plaintiffs Sampson and Raymond. *Smith*, 150 Wn.2d at 485.

B. Summary of argument.

Under the MWA, employees have a fundamental right to be paid at no less than the minimum wage for all time worked. Employers may not require, suffer, permit, or allow employees to perform work without compensation.

When an employee is paid on a piece-rate basis, the employee earns the piece rate only while actively producing. If the employee spends time performing activities outside the scope of his piece-rate work, the employer must separately pay for that time. Otherwise, the employee will be performing work without compensation.

An employer may not escape its obligation to pay an employee for all time worked by spreading piece-rate pay across other unpaid hours worked. Any time spent engaged in activities not covered by the piece-rate pay is hourly work, and workweek averaging is inapplicable to hourly work.

For these reasons, Plaintiffs respectfully ask the Court to answer the certified question in the affirmative. The MWA requires non-agricultural employers to pay their piece-rate employees per hour for time spent performing activities outside of piece-rate work.

C. The MWA requires employers to pay their piece-rate employees per hour for time spent performing activities outside of piece-rate work.

1. The MWA is liberally construed to protect employees.

Washington has a “long and proud history of being a pioneer in the protection of employee rights.” *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 298, 996 P.2d 582 (2000). Indeed, the state legislature

“has evidenced a strong policy in favor of payment of wages due employees by enacting a comprehensive statutory scheme to ensure payment of wages.” *See, e.g., Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 157, 961 P.2d 371 (1998) (citing cases). The centerpiece of these laws is the Washington Minimum Wage Act, chapter 49.46 RCW.

“The legislature enacted [the MWA] to protect the health, safety, and general welfare of its citizenry by ensuring that minimal employment standards were met.” *Hill v. Xerox Bus. Servs., LLC*, ___ P.3d ___, 2018 WL 4499755, at *4 (Wash. Sept. 20, 2018) (citing RCW 49.46.005(1)). As a remedial statute, “the MWA ‘is given a liberal construction’ in accordance with the legislature’s intent of protecting employees.” *Carranza*, 190 Wn.2d at 625 (quoting *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 870, 281 P.3d 289 (2012)). The Court has a “duty” to “construe the provisions of the MWA, [and] its corresponding regulations, in favor of workers’ protections and their right to be paid a minimum wage for each hour worked.” *Hill*, 2018 WL 4499755, at *5.

2. The MWA requires employers to pay employees for all time worked.

“The plain language of the MWA requires employers to pay their adult workers ‘at a rate of not less than [the applicable minimum wage]

per hour.” *Carranza*, 190 Wn.2d at 614-15 (brackets and emphasis in original) (quoting RCW 49.46.020(1)-(3)). On several occasions, this Court has interpreted that fundamental provision as requiring employers to pay employees for all work performed.

The most recent example is *Hill*, where the Court was tasked with deciding how to characterize an employer’s payment plan. 2018 WL 4499755, at *1. Citing past decisions, the Court stated: “an employment contract requiring an employee to [perform work] without pay is unenforceable” because “it violates the rule that the employer must pay the employee at least the minimum wage for work performed.” *Id.* at *4 (citing *Seattle Prof’l Eng’g Emps. Ass’n v. Boeing Co. (“SPEEA”)*, 139 Wn.2d 824, 838, 991 P.2d 1126 (2000), and *Stevens v. Brink’s Home Security, Inc.*, 162 Wn.2d 42, 49, 169 P.3d 473 (2007)). Simply put, “the MWA gives an employee the right to compensation for all time worked.” *Id.* (emphasis added). Accordingly, the Court held employers may not use compensation arrangements that circumvent the obligation to pay employees on a per-hour basis for hourly work. *Id.* at *5-6.

Earlier this year, in *Carranza*, the Court again recognized that the MWA “requires employers to compensate employees for their work.” 190 Wn.2d at 614. Construing RCW 49.46.020, the Court concluded that

“[t]he legislature’s choice of the words ‘per hour’ evinces an intent to create a right to compensation for each individual hour worked” *Id.* at 619. Applying the statute to facts remarkably similar to this case, the Court held: “agricultural workers may be paid on a piece-rate basis only for the hours in which they are engaged in piece-rate picking work,” and “[t]ime spent performing activities outside the scope of piece-rate picking work must be compensated on a separate hourly basis.” *Id.* at 615.

As demonstrated by these and other decisions from the Court, employers may not require, suffer, permit, or allow employees to perform work without compensation. *See, e.g., Stevens*, 162 Wn.2d at 44 (employer violated MWA “by failing to compensate [employees] for time they spent driving company trucks”); *SPEEA*, 139 Wn.2d at 826 (employer violated MWA by requiring employees “to attend, without compensation, mandatory pre-employment orientation sessions”). That, however, is precisely what the Knight companies do.

3. Knight must pay drivers on a per-hour basis for time spent engaged in on-duty-not-driving work.

Knight compensates drivers on a piece-rate basis for driving work: long-haul drivers receive a set amount for each mile driven, and short-haul drivers receive a set amount for each load delivered. Dkt. 53-7 at

29:1–31:23; Dkt. 53-15 at 33:20–37:12, 44:23-25; Dkt. 53-17 at 25:18-22; Dkt. 75 ¶ 14; *see also Hill*, 2018 WL 4499755, at *5 (“piece rate employees” are “paid a fixed amount per unit of work”) (internal marks omitted) (quoting DLI Admin. Policy ES.A.8.2 (July 15, 2014)). But Knight drivers do more than drive. Indeed, they spend a substantial amount of time each day engaged in on-duty-not-driving work. Dkt. 55 ¶ 8; Dkt. 56 ¶ 6; Dkt. 57 ¶ 6; Dkt. 58 ¶ 6; Dkt. 59 ¶ 6; Dkt. 60 ¶ 6; Dkt. 61 ¶ 6; Dkt. 62 ¶ 6; Dkt. 63 ¶ 6; Dkt. 64 ¶ 6; Dkt. 65 ¶ 6; Dkt. 66 ¶¶ 8-9; Dkt. 67 ¶ 7; Dkt. 69 ¶ 7. This includes time spent performing inspections, fueling, waiting to be loaded or unloaded, and otherwise being detained. Dkt. 53-3; Dkt. 53-30 at 2; 49 C.F.R. § 395.2; Dkts. 55–69.

“A piece rate is tied to the employee’s output . . . and is earned only when the employee is actively producing.” *Lopez Demetrio*, 183 Wn.2d at 652. Consequently, a piece-rate employee who spends time toiling outside the scope of piece-rate work “is not earning money” for that labor. *Carranza*, 190 Wn.2d at 622 (quoting *Lopez Demetrio*, 183 Wn.2d at 653).

The on-duty-not-driving tasks that Knight’s employees perform fall outside of their piece-rate work. When a Knight driver is being detained at a shipper’s location, for example, he is unable to drive his

truck. Thus, he is unable to earn his mileage or load rate. As such, the time he spends in detention is work he performs for free unless Knight separately compensates him.

Such an arrangement violates the MWA, as was found in *Martini v. Emp't Sec. Dep't*, 98 Wn. App. 791, 798, 990 P.2d 981 (2000). There the Court of Appeals analyzed a compensation system in which the employer, a transportation company, paid a long-haul driver on a piece-rate basis "for each mile he drove." *Martini*, 98 Wn. App. at 792. The employer also paid the driver on a per-minute basis "for some of the time he had to wait." *Id.* at 792-93. But the employer "did not compensate [the driver] for the first 30 minutes of wait time," and the employer "did not compensate [the driver] for time spent cleaning, fueling, inspecting, and maintaining the vehicle" *Id.* The Court of Appeals held that these facts "present a clear violation" of the MWA. *Id.* at 798.

In sum, "the MWA requires payment of at least [the] minimum wage for all hours worked" *Carranza*, 190 Wn.2d at 618-19. "It is undisputed that time spent on work outside the scope of piece-rate [activities] is work and, pursuant to the MWA, is hourly work." *Id.* at 623. The MWA "provid[es] employees with a right to hourly compensation for hourly work." *Id.* at 625. Thus, under the MWA, Knight is obligated to pay

its piece-rate drivers at no less than the minimum wage for each hour spent engaged in on-duty-not-driving work.

This conclusion is consistent with *Carranza*, where the Court held “that agricultural workers who are paid on a piece-rate basis are entitled to separate hourly compensation for the time they spend performing tasks outside of piece-rate picking work.” 190 Wn.2d at 626. It is also consistent with *Lopez Demetrio*, where the Court held that piece-rate workers are entitled to “a wage separate from the piece rate” for “hours spent resting,” which “are treated the same as hours spent working.” 183 Wn.2d at 653, 659, 661. In both situations the Court recognized that the employers were violating Washington law by failing to pay their piece-rate employees for all hours worked. The same is true here.

4. Knight may not use workweek averaging to avoid paying drivers on a per-hour basis for tasks performed outside of piece-rate work.

In the district court, Knight argued that the MWA provides employers “the flexibility to structure piece-rate pay to compensate for all regular tasks in a workweek so long as total weekly wages equal more than the minimum wage when divided by all hours worked,” a process commonly referred to as “workweek averaging.” Dkt. 92 at 13:13-19. This argument is erroneous.

It is true that employers can pay various forms of compensation to employees. See DLI Admin. Policy ES.A.8.2 (July 15, 2014) (noting employers may pay “a single hourly rate,” “two or more . . . different rates,” “a salary for a specified number of hours per week,” a salary for “hours that fluctuate each week,” “a fixed amount per unit of work,” or “a pre-set rate for a particular task”). But whatever the “compensation structure,” Washington employees retain a right to be paid “at least [the] minimum wage ‘per hour’” for all hours worked. *Carranza*, 190 Wn.2d at 619 (quoting RCW 49.46.020(1)-(3)).

For purposes of minimum wage compliance, workweek averaging is “a concept applicable to piece rate work, but not to hourly work.” *Hill*, 2018 WL 4499755, at *2. As noted above, “time spent on work outside the scope of piece-rate [tasks] . . . is hourly work” under the MWA. *Carranza*, 190 Wn.2d at 623. Thus, an employer may not use workweek averaging to evade its obligation to pay employees at least the minimum wage per hour for that time.

The assertion that Knight’s piece rates are all-inclusive, meaning they purportedly compensate drivers for both driving and on-duty-not-driving activities, does not change the analysis. Indeed, this Court has rejected that very argument. In *Carranza*, for example, the employer

maintained its employees “are already fully compensated by the piece rate because all of the tasks they perform are part of piece-rate picking work.” 190 Wn.2d at 617. As is the case here, the employer’s statement was belied by the fact that the employer admittedly “pa[id] its employees additional compensation for time spent on some [non-piece-rate] activities.” *Id.*; see also, e.g., Dkt. 53-23 (paying hourly for rest break time); Dkt. 53-30 at 3 (paying hourly for detention time beyond two hours). Noting “[s]tatutes should be interpreted to further, not frustrate, their intended purpose,” the Court held that “[l]iberally construing the MWA favors interpreting its minimum wage mandate as providing employees with a right to hourly compensation for hourly work.” *Carranza*, 190 Wn.2d at 625 (internal marks omitted) (quoting *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 712, 153 P.3d 846 (2007)).

In *Lopez Demetrio*, the employer similarly asserted “that it sets the piece rate with rest periods in mind and that breaks are therefore ‘on the employer’s time’ as regulated.” 183 Wn.2d at 654. The Court disagreed, holding:

An all-inclusive piece rate compensates employees for rest breaks by deducting pay from the wages the employee has accumulated that day. Hourly employees do not finance their own rest breaks in this way, and requiring pieceworkers to do so strips

the phrase 'on the employer's time' of any practical meaning.

Id. at 653.

The result is no different when workweek averaging is applied to time spent outside of piece-rate work. Drivers only earn piece-rate pay when they drive from point A to point B. Regardless of what Knight maintains, the time drivers spend engaged in non-driving activities goes uncompensated unless Knight separately pays on an hourly basis for that work. This can be seen in a simple example. Two Knight drivers are tasked with hauling loads at a piece-rate of 45 cents per mile. The length of each trip is 200 miles, and the drivers reach their respective destinations in four hours. When the first driver arrives, he promptly drops his load and receives a new one. As he heads back out to the highway, he continues earning piece-rate pay. But when the second driver arrives, he must wait two hours for unloading before he receives another load to deliver. For those two hours, the second employee earns nothing. That violates Washington law. *See Hill*, 2018 WL 4499755, at *4 (“an employment contract requiring an employee to [perform work] without pay is unenforceable”).

As the Court properly recognized in *Carranza*, “[w]orkweek averaging ignores the per hour right to compensation that the MWA imposes by making it possible to conceal the fact that an employer is not compensating its employees for all hours worked because payment for *some* hours of piece-rate [production] work is spread across *all* hours worked.” 190 Wn.2d at 622 (emphasis in original). For that reason, the use of “workweek averaging to measure compliance with the MWA” for hours spent performing tasks outside of piece-rate work is “inconsistent with Washington’s ‘long and proud history of being a pioneer in the protection of employee rights.’” *Id.* at 625 (quoting *Drinkwitz*, 140 Wn.2d at 300).

D. WAC 296-126-021 does not implement the MWA and even if it did, the regulation would not allow employers to avoid paying piece-rate employees per hour for time spent performing activities outside of piece-rate work.

In support of its argument for workweek averaging, Knight relies on WAC 296-126-021. Dkt. 92 at 13:13-19. The regulation provides in full:

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 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.

For the following reasons, WAC 296-126-021 fails to support Knight's position.

1. WAC 296-126-021 does not implement the MWA.

Chapter 296-126 WAC implements the Industrial Welfare Act (IWA), Chapter 49.12 RCW. See WAC 296-126-001 ("These rules apply to employers and employees in the state as defined in RCW 49.12.005(3) and (4)."). Originally enacted in 1913, the IWA was "designed to provide special protection for women and children from conditions of labor 'which have a pernicious effect on their health and morals.'" *Kness v. Truck Trailer Equip. Co.*, 81 Wn.2d 251, 254, 501 P.2d 285 (1972) (quoting RCW 49.12.010). The statute did not set a minimum wage rate; instead, the statute more generally provided that "[i]t shall be unlawful to employ workers in any industry within the state of Washington at wages which are not adequate for their maintenance." RCW 49.12.020.

In 1973, the legislature revised the IWA and extended its protections to "all employees," including men, women, and minors.

McGinnis v. State, 152 Wn.2d 639, 642, 99 P.3d 1240 (2004). At the same time, the legislature authorized the “industrial welfare committee” to “prescribe rules and regulations for the purpose of adopting minimum wages for occupations not otherwise governed by minimum wage requirements fixed by state or federal statute,” like the MWA. Laws of 1973, 2d Ex. Sess., ch. 16 § 6 (enacting RCW 49.12.091). The legislature also authorized the committee “to prescribe rules and regulations fixing standards, conditions and hours of labor for the protection of the safety, health and welfare of [all other] employees . . . subject to [chapter 49.12 RCW].” *Id.*

In 1974, the industrial welfare committee promulgated several regulations pursuant to the authority granted it by RCW 49.12.091, one of which was WAC 296-126-021. “Agencies,” of course, “may exercise only those powers conferred on them expressly or by necessary implication.” *In re Impoundment of Chevrolet Truck*, 148 Wn.2d 145, 156, 60 P.3d 53 (2002). Because the authority for WAC 296-126-021 comes from the IWA, the regulation does not affect the right employees have under the MWA to be paid for all hours worked. Indeed, if the Department were to apply WAC 296-126-021 in a manner contravening that right, the regulation would have no validity. *Id.*, 148 Wn.2d at 156-57

(“If an enabling statute does not authorize a particular regulation . . . that regulation must be declared invalid”) (internal marks and citation omitted). To hold otherwise would be to “defer to [the Department] the power to determine the scope of its own authority,” which this Court will not do. *In re Elec. Lightwave, Inc.*, 123 Wn.2d 530, 540, 869 P.2d 1045 (1994).

The MWA gives Knight drivers the right to be paid per hour for time spent performing activities outside of piece-rate work. *Carranza*, 190 Wn.2d at 626. The MWA’s implementing regulations are found in Chapter 296-128 WAC. *See, e.g.*, WAC 296-128-010 (establishing rules for employers of “employees who are subject to RCW 49.46.020.”). Nothing in those regulations authorizes Knight to avoid paying drivers on a per-hour basis for tasks that fall outside of piece-rate work. Thus, Knight’s “workweek averaging” argument fails.

2. To the extent WAC 296-126-021 applies to drivers, it must be construed to protect their right to be paid for each hour worked.

Even if WAC 296-126-021 were intended to implement the MWA, the regulation may not override the obligation employers have to pay their piece-rate employees on a per-hour basis for time spent performing

activities outside of piece-rate work. *See Chevrolet Truck*, 148 Wn.2d at 156-57.

This Court interprets regulations under the same rules that are used to interpret statutes. *Lopez Demetrio*, 183 Wn.2d at 655. First, the Court “examine[s] the plain language of the regulation; if that language is unambiguous it controls. Language is unambiguous if it has only one reasonable interpretation.” *Id.*

There are two reasonable interpretations of WAC 296-126-021. One allows employers to establish compliance with minimum wage requirements solely through workweek averaging. The other requires employers to satisfy their obligation to pay for all hours worked before applying workweek averaging.

When construing a regulation, the Court “resolve[s] ambiguities in ways that ‘further, not frustrate, the intended purpose’ of the regulation.” *Lopez Demetrio*, 183 Wn.2d at 656 (internal marks omitted) (quoting *Bostain*, 159 Wn.2d at 712). As noted above, the industrial welfare committee was authorized to prescribe WAC 296-126-021 “for the protection of the safety, health and welfare of employees” in Washington. Laws of 1973, 2d Ex. Sess., ch. 16 § 6 (enacting RCW 49.12.091). And to the extent the regulation implements the MWA, it

must be “consistent” with “the intent and purpose” of that statute.

Ravsten v. Dept. of Labor & Indus., 108 Wn.2d 143, 154, 736 P.2d 265

(1987). The MWA’s primary purpose is to protect the welfare of

Washington employees by ensuring payment of minimum wages for work

performed. *Hill*, 2018 WL 4499755, at *4; *Schilling*, 136 Wn.2d at 157.

WAC 296-126-021 can be fairly read to promote these goals. The regulation explicitly contemplates that employers like Knight will separately compensate employees for work that is performed on some basis other than a piece-rate basis. Subsection (1) provides: “The amount earned on [a piece-rate] basis . . . may be credited as a part of the total wage for that period.” WAC 296-126-021(1) (emphasis added). This means the employer must also credit the employee for wages earned for work performed on some other basis during the period. Because such work is not piece-rate work, the default rule of compensation at no less than the minimum wage rate per hour applies. *See Carranza*, 190 Wn.2d at 625 (holding MWA provides piece-rate employees with “right to hourly compensation for hourly work”). Accordingly, for each “hour worked” on something other than a piece-rate basis, the employee is entitled to be paid an hourly rate that is no less than the minimum wage rate and to have that compensation credited toward the total wage for the period.

Once the employee's piece-rate pay and hourly pay are added together, the calculation under subsection (2) of WAC 296-126-021 may be performed. This ensures the employee has averaged at least the minimum wage rate for the time spent performing piece-rate work when accounting for the "total wages paid" in the workweek. *See Hill*, 2018 WL 4499755 ("a higher production hour might subsidize a lower production hour"). Such an interpretation gives meaning to subsection (1) and is consistent with the MWA's requirement that employees be paid at least the minimum wage for each hour of work performed.

Washington courts interpret regulations like WAC 296-126-021 "in a manner that gives effect to all [the] language without rendering any part superfluous." *Bravern Residential, II, LLC v. Dep't of Revenue*, 183 Wn. App. 769, 778, 334 P.3d 1182, 1187 (2014); *see also Whatcom Cnty. v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996) (holding statutes must be construed such that no portion is rendered superfluous). If adopted, Knight's interpretation of WAC 296-126-021 would render subsection (1) of the regulation superfluous. Specifically, if Knight were correct in asserting that a workweek averaging approach for minimum wage compliance is exclusively used whenever an employee receives some piece-rate pay during the week, regardless of how little,

subsection (1) would have been omitted entirely, and the regulation would have read: “Where employees are paid on a commission or piecework basis, wholly or partially, 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.” The Court must construe WAC 296-126-021 in a manner that gives subsection (1) effect.

The administrative policies of the Department of Labor and Industries support Plaintiffs’ interpretation of WAC 296-126-021. The “total wages” used to perform the calculation in subsection (2) must “include all compensation received for hours worked in the pay period,” not just piece-rate compensation. DLI Admin. Policy ES.A.3 at 3 (July 15, 2014) (emphasis added). The Department has defined “hours worked” to mean “all work requested, suffered, permitted or allowed,” including “wait time, on-call time, [and] preparatory and concluding time.” DLI Admin. Policy ES.C.2 at 1 (Sept. 2, 2008). “If the work is performed, it must be paid.” *Id.* “The reason or pay basis is immaterial.” *Id.*

The fallacy of Knight’s argument is that workweek averaging, by itself, fails to ensure piece-rate employees are compensated for all work performed because piece-rate pay is earned “only when the employee is actively producing.” *Lopez Demetrio*, 183 Wn.2d at 653 (emphasis

added). It is for this reason that employers are required to pay “separate hourly compensation” to employees for time spent performing activities outside of piece-rate work. *Carranza*, 190 Wn.2d at 626.

Where there are two reasonable interpretations of a law applicable to Washington-based employees, the one that “ultimately provides greater protection for [the] workers” is “the better approach.” *Brady v. Autozone Stores, Inc.*, 188 Wn.2d 576, 583-84, 397 P.3d 120 (2017). Here, that is the interpretation advanced by Plaintiffs.

Moreover, the MWA must “be liberally construed in favor of the employee,” and any exceptions to coverage must “be narrowly confined.” *Hill*, 2018 WL 4499755, at *5 (internal marks omitted) (quoting *Int’l Ass’n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 34, 42 P.3d 1265 (2002)). Knight’s reading of WAC 296-126-021 would allow “[a] limited exception for workweek averaging to swallow up the general rule barring workweek averaging for hourly employees.” *Id.* Such an interpretation “is inconsistent with [the Court’s] duty to liberally construe the provisions of the MWA, including its corresponding regulations, in favor of workers’ protections and their right to be paid minimum wage for each hour worked.” *Id.*

V. CONCLUSION

The MWA requires non-agricultural employers like Knight to pay their piece-rate employees per hour for time spent performing activities outside of piece-rate work. Accordingly, the Court should answer the certified question in the affirmative.

RESPECTFULLY SUBMITTED AND DATED this 10th day of October, 2018.

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October 10, 2018 - 4:38 PM

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