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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' REPLY BRIEF ON CERTIFIED QUESTION

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I. INTRODUCTION

The district court certified to this Court the question of whether the Washington Minimum Wage Act (MWA) “require[s] 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 (emphasis added). Instead of addressing this question, Knight asserts that “what is actually in dispute” is whether “the MWA prohibit[s] piecework pay from compensating for all activities necessary or incidental to the production of the units of output?” Answering Br. at 10-11. Knight is wrong, and its efforts to reformulate the certified question should be rejected. As the district court made clear, the precise issue before this Court is whether pieceworkers are entitled to be paid for time during which they perform work but are unable to earn a piece rate. Because the MWA requires employers to compensate employees at no less than the minimum wage for all hours worked, the answer is yes.

In *Carranza v. Dovex Fruit Co.*, this Court held that agricultural pieceworkers are entitled to be separately compensated on an hourly basis for time spent performing activities outside the scope of piece-rate work. 190 Wn.2d 612, 614-15, 416 P.3d 1205. The Court based its analysis on the plain language of the MWA, finding the legislature’s decision to include the words “per hour” in the statute “evinces an intent to create a right to compensation for each individual hour worked, not merely a right to workweek averaging.” *Id.* at 614-15, 619 (emphasis added). The Court concluded that when it comes to “time spent on work

outside the scope of piece-rate [tasks],” which is “hourly” work, workweek averaging is inapplicable because it “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.” *Id.* at 622-23 (emphasis in original).

Carranza rests squarely on the plain language of the MWA, and the MWA applies equally to agricultural and non-agricultural employees. Accordingly, the Court should hold that the MWA requires Knight to separately compensate its Washington drivers at no less than minimum wage for all work performed outside of piece-rate work.

II. REPLY ARGUMENT

A. Knight’s proposed reformulation of the certified question improperly asks the Court to make a factual determination.

While it is true the Court has discretion to reformulate a certified question, the two cases on which Knight relies do not support doing so here. See Answering Br. at 10-11. In those cases, the Court reformulated questions only because they required the Court to make factual determinations. See *Travelers Cas. & Sec. Co. v. Wash. Trust Bank*, 186 Wn.2d 921, 931, 383 P.3d 512 (2016) (declining to answer first certified question because part of it required factual determinations); *Danny v. Laidlaw Transit Servs., Inc.*, 165 Wn.2d 200, 205, 193 P.3d 128 (2008) (same).

The certified question in this case, by contrast, is a pure question of law: “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?” In answering this question, the Court is not required to make any factual inquiries. Indeed, the question is nearly identical to the one the Court answered in *Carranza*, where the Court acknowledged that the parties may “disagree about which, if any, tasks are outside the scope of piece-rate picking work.” 190 Wn.2d at 614.

Moreover, in certifying the question, the district court stated that it “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.” Dkt. 92 at 17:6-9. It is not the province of this Court to make such factual determinations. See *Peck v. AT&T Mobility*, 174 Wn.2d 333, 351, 275 P.3d 304 (2012); see also *Broad v. Mannesmann Anlagenbau, A.G.*, 141 Wn.2d 670, 676, 10 P.3d 371 (2000) (“the court lacks jurisdiction to go beyond the question certified”). Nevertheless, the activities the district court lists as falling outside of piece-rate work are sensible. The piece-rate pay that Knight drivers receive, whether it is per-mile or per-load, is for driving from point A to point B. 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. The drivers do not earn any such rate when engaged in activities recorded as on-duty-not-driving time. 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.

More importantly, the district court's determination that on-duty-not-driving activities fall outside of piece-rate work aligns with a key principle in the *Carranza* decision. There the Court recognized that if a worker hired to pick fruit on a piece-rate basis "is not picking, the [worker] is not earning money." *Carranza*, 190 Wn.2d at 622 (quoting *Lopez Demetrio v. Sakuma Bros. Farms, Inc.*, 183 Wn.2d 649, 653, 355 P.3d 258 (2015)) (internal punctuation omitted). In other words, when piece-rate employees spend time engaged in activities outside their piece-rate work, the "employer is not compensating [the] employees for all hours worked because payment for some hours of piece-rate picking work is spread across all hours worked." *Id.* That is the case here.

Knight's proposed reformulation of the certified question seeks to erase this principled line between compensated and uncompensated work and replace it with an impracticable test. Under Knight's approach, courts would be required to make arbitrary factual determinations about whether certain otherwise uncompensated work activities are "necessary" or "incidental" to piece-rate work. But the fundamental right secured by the MWA—the right to be paid for each hour of work—does not turn on such distinctions. A shovel is certainly necessary to ditch digging, but the law does not allow an employer to require an employee to pay for that shovel out of the wages he earns in the first two hours of a ten-hour dig. See RCW 49.46.090(1); RCW 49.52.050. For the same reason, it is a violation of the MWA for an employer to require a piece-

rate employee to fund out of his own pocket—that is, perform for free—work activities falling outside the scope of his piece-rate work.

The Court should decline to reformulate the certified question.

B. An employer may not use an “all-inclusive” piece rate to pay for activities outside of active production.

Knight maintains it incorporates pay for both production and non-production work into its per-mile and per-load piece rates, which Knight refers to as “trip pay” for purposes of this litigation. Answering Br. at 11-16. But Washington law does not permit such “all-inclusive” piece rates. This Court succinctly described the work that can be covered by a piece rate in *Lopez Demetrio*: “A piece rate is tied to the employee’s output (for example, per pound of fruit harvested) and is earned only when the employee is actively producing.” 183 Wn.2d at 652 (emphasis added); see also *Hill v. Xerox Bus. Servs., LLC*, 191 Wn.2d 751, 764, 426 P.3d 751 (2018) (describing a piece rate as “‘a fixed amount per unit of work’—for example . . . per apple picked . . . per widget produced . . . [or] per mile driven”) (quoting DLI Admin. Policy ES.A.8.2 (July 15, 2014)). Accordingly, the Court held that “employers must pay employees for rest breaks separate and apart from the piece rate” because rest breaks are “hours worked” and an “all-inclusive piece rate compensates employees for rest breaks [only] by deducting pay from the wages the employee has accumulated that day.” *Lopez Demetrio*, 183 Wn.2d at 653, 661-662.

Knight’s “trip pay” label suffers from the same defect recognized in *Lopez Demetrio*. Knight compensates drivers with per-mile and per-

load rates that are earned only when driving. 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. This has been Knight’s practice since before Plaintiffs filed their lawsuit, and the practice continues to this day. See Dkt. 53-6 (representing to Washington Department of Labor and Industries in 2009 that long-haul drivers are paid per-mile rates); see also *Helde v. Knight Transp., Inc.*, 2:12-cv-00904-RSL at Dkts. 1-2 (representing in removal notice filed in previous action that drivers are paid on “per-mile basis”); Dkt. 53-23 (paystub showing mile units multiplied by per-mile rates); Dkt. 53-24 (paystubs showing load rates). Indeed, Knight internally categorizes drivers by the primary piece-rate that the company pays to them, either “miles” for drivers paid at per-mile rates or “flat” for drivers paid at per-load rates. Dkt. 91-2.

Drivers receive no compensation for time spent engaged in on-duty-not-driving tasks because no pay accrues unless they are driving their trucks. For example, when drivers are detained at a shipper, waiting to be loaded or unloaded, washing trailers, performing maintenance, conducting pre-trip inspections, or fueling trucks and generators, they are unable to earn money. Thus, while Knight may prefer to label its compensation system as “trip pay,” the company pays drivers on a per-mile or per-load basis because “the truck is not being productive if it’s not logging miles.” Dkt. 83-4 at 205:8-12 (“that’s how the business works”).

The application of wage and hour laws “is not fixed by labels that parties may attach to their relationship.” *Powell v. U.S. Cartridge Co.*, 339 U.S. 497, 528 (1950). Otherwise, employers could easily escape their statutory obligations to employees. Under Knight’s approach, for example, the employer in *Lopez Demetrio* could have avoided liability simply by asserting that the per-pound or per-box piece rate paid to fruit pickers is aggregated into something called “daily field pay,” which covers all hours worked “in the field” each day, including rest break time. But as this Court held, such an “all-inclusive” approach is unlawful. *Lopez Demetrio*, 183 Wn.2d at 653-54. For the same reason, Knight may not avoid paying for on-duty-not-driving tasks by simply aggregating the piece-rate compensation and labeling it “trip pay.”

Like the piece rates in *Lopez Demetrio*, Knight’s per-mile and per-load rates are “earned only when the employee is actively producing.” *Id.* at 652. “Actively producing” in this case means driving. Dkt. 83-4 at 205:8-12. But driving is not all that Knight’s employees do. Each day the employees are also required to spend time 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. With rare exception, the drivers receive no piece rate or other compensation for these activities. *Id.*¹

¹ For example, drivers receive no pay for the first two hours in detention. Dkt. 53-30 at 3. But if a driver is detained beyond two hours, Knight will pay her an hourly rate for that work. Dkt. 53-30 at 3; Dkt. 53-15 at 37:13–39:25. Knight will also pay a flat rate to drivers for “layovers” if they are unable to drive for 24 hours. Dkt. 53-15 at 40:1-41:13.

Knight maintains the company considered “necessary” non-driving duties when it set piece rates, but this assertion is irrelevant. The employer in *Lopez Demetrio* made a similar claim, that the company “set[] the piece rate with rest periods in mind,” and the Court rejected it. 183 Wn.2d at 653-54. As the Court concluded, an employer may not incorporate non-production work hours into a piece rate. *See id.* at 656. Otherwise, the employer is paying for non-production work activities by “deducting pay from the wages the employee has accumulated that day” for production work. *Lopez Demetrio*, 183 Wn.2d at 652-663. This is unlawful. *Id.*; *Carranza*, 190 Wn.2d at 622.²

As a last-ditch argument, Knight maintains the company pays drivers a minimum hourly wage plus a piece rate. *See* Answering Br. at 44. This is both disingenuous and demonstrably false. Knight pays either per-mile or per-load piece rates to drivers. *See, e.g.*, Dkts. 53-23 at 2 (per-mile rates) and 53-24 at 2 (per load rates). At the end of each week, Knight sums these piece-rate “[e]arnings” to arrive at a “TOTAL.” *Id.* Knight then takes the hours worked during the week, multiplies those

Finally, Knight maintains it will separately pay a driver “for assisting with the loading and unloading of products” (but not for time spent waiting on others). Dkt. 75 ¶ 16.

² Having several per-mile piece rates does not change the fact that the piece is a mile driven and the piece rate is a per-mile rate. Knight maintains that shorter trips have a higher per-mile rate because “most of the routine non-driving duties associated with the hauling and delivery of a load on a long trip are also necessary for a short trip.” Dkt. 75 ¶ 10. Setting aside that this argument is irrelevant to whether separate payment is required for other hours worked, Knight presents no evidence, outside of its own self-serving declaration, in support of the assertion. It is more likely that shorter trips have higher per-mile rates because they require a higher proportional amount of driving in more urban areas, where it takes longer to drive a mile than on the interstate.

hours by the applicable minimum wage rate, and subtracts the resulting product from the “TOTAL” piece-rate earnings. *See id.* Knight labels the product as “Hourly Pay” and the remaining difference as “Production Pay.” *Id.* But the “TOTAL” with which Knight begins is entirely piece-rate pay. *Id.* (“Production Pay is calculated by subtracting your Hourly Pay from your Trip Calculations amount.”); *see also* Answering Br. at 11 (asserting that “trip pay is ‘piecework’ or ‘piece rate’ pay”). Thus, the resulting amounts are also piece-rate pay.

In short, Knight’s so-called “Hourly Pay,” which is calculated only for “Washington resident Company Driving Associates,” is simply an accounting trick done to make it appear as though Knight is complying with the MWA. Dkts. 53-23 and 53-24. Indeed, if Knight were truly compensating drivers on an hourly basis, it would be unnecessary for the company to pay them separately for rest breaks. But Knight does this because the drivers are piece-rate employees, and the law requires Knight to separately compensate them for rest break time. *Id.*; *see also Lopez Demetrio*, 183 Wn.2d at 653. As with all other non-production hours worked, drivers are unable to earn their piece rates when they stop driving to take rest breaks. *Id.* at 652. Knight only compensates for on-duty-not-driving work by taking piece-rate earnings and spreading them across all time worked, including time spent performing activities outside the piece rate. This is unlawful.

C. Washington determines MWA compliance on a per-hour basis.

The MWA provides employees a per-hour right to minimum wage. RCW 49.46.020. Workers paid solely on a piece-rate basis earn money only when “actively producing.” *Lopez Demetrio*, 183 Wn.2d at 652. It is, of course, permissible for an employer to pay entirely on a piece-rate basis if the employee is engaged solely in active production. *See id.* The certified question does not concern that situation. Instead, the question focuses on time during which the employer requires the piece-rate employee to perform other tasks—that is, tasks that fall outside the piece-rate work. Dkt. 92 at 17.

In *Carranza*, this Court confirmed that “[t]he 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*.’” 190 Wn.2d at 614-15 (emphasis in original; quoting RCW 49.46.020(1)-(3)). The decision makes clear that the time a pieceworker spends on tasks outside of piece-rate work are “hours worked” for which the employee must be separately paid “at least [the] minimum wage ‘per hour.’” *Id.* at 619 (quoting RCW 49.46.020(1)-(3)). While the Court’s holding is limited to the context of agricultural workers, the analysis of the MWA applies equally to all employees. Thus, any otherwise unpaid non-production work that a pieceworker performs must be separately compensated.

Knight’s argument to the contrary relies on a misinterpretation of WAC 296-126-021, which does not implement the MWA. Knight argues the regulation exempts non-agricultural employers from paying piece-

rate employees for all hours worked. Knight's interpretation is inconsistent with RCW 49.46.020 and must be rejected.

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

Knight does not dispute that chapter 296-126 WAC implements the Industrial Welfare Act (IWA), Chapter 49.12 RCW, not the MWA. Instead, Knight responds that the Department of Labor and Industries is statutorily authorized to administer and interpret all of Washington's wage and hour laws, including the MWA, citing RCW 43.22.270(4). *See* Answering Br. at 22-23. But RCW 43.22.270(4) does not support Knight's position. That statute provides the Department with the power to administer all laws respecting the employment of employees "in accordance with the provisions of chapter 49.12 RCW"—the IWA. This statutory provision therefore does not answer whether WAC 296-126-021 is outside the authority of the Department with respect to the MWA.

Knight's argument also overlooks the fact that the Department exercises its statutory authority to enforce the MWA through chapter 296-128 WAC. Note, for example, that the legislature recently charged the Department with "adopt[ing] and implement[ing] rules to carry out and enforce" newly enacted provisions of the MWA. RCW 49.46.810. The Department did this through chapter 296-128 WAC. *See, e.g.,* WAC 296-128-620 through 860.

Finally, if chapter 296-126 WAC is meant to implement the MWA, why does it exclude agricultural workers? *See* WAC 296-126-001(2)(c). With limited exceptions not relevant here, agricultural workers are

covered by the MWA. See RCW 49.46.010(3)(a). The IWA, on the other hand, explicitly excludes from its coverage all agricultural workers (as well as newspaper vendors, domestic or casual laborers in or about private residences, and “sheltered workshops”). RCW 49.12.185; RCW 49.12.091. Under Knight’s argument, the MWA would protect most agricultural workers employed on a piece-rate basis but would not protect any non-agricultural workers employed on a piece-rate basis. Such an outcome is illogical and fails to comport with Washington’s liberal policy of ensuring the payment of wages due all employees.

2. To the extent it applies, WAC 296-126-021 must be read to permit workweek averaging only after crediting all wages owed, including hourly pay for non-production work.

Relying on a single word in WAC 296-126-021, Knight argues that it may “wholly” compensate drivers using per-mile and per-load piece rates even though the drivers perform other work tasks beyond driving. “A single word in a statute should not be read in isolation. Rather, the meaning of a word may be indicated or controlled by reference to associated words.” *State v. Flores*, 164 Wn.2d 1, 12, 186 P.3d 1038 (2008). Knight’s interpretation reads the term “wholly” in isolation and ignores subsection (1) of WAC 296-126-021.

Plaintiffs do not dispute that employers may pay “wholly” on a piecework basis when an employee performs only piecework. But nothing in WAC 296-126-021 provides that an employer may pay “wholly” on a piecework basis where the employee engages in both piecework and non-piecework activities. To the contrary, the regulation

explicitly contemplates that the employee will receive additional pay for the non-piecework activities. It states that “the amount earned on [a piecework] basis in each work-week period may be credited as part of the total wage for that period.” WAC 296-126-021(1) (emphasis added). Compensation to which the employee is entitled for work performed on some other basis—that is, an hourly or other non-production basis—must also be credited in order to obtain the “total wages paid” for the period. WAC 296-126-021(2). It is only then that the workweek averaging of subsection (2) is applied. Knight asserts that the regulation allows the company to refuse to pay separately for non-production work and to use piece-rate pay as an offset by averaging across the workweek when any part of the compensation for that period is piece-rate pay. See Answering Br. at 18-19. This interpretation ignores subsection (1) of WAC 296-126-021 (specifically, the phrase “as part”) and the requirement set forth in the MWA to pay at least minimum wage for each hour worked.

The use of the word “wholly” in WAC 296-126-021 does not exempt an employer from paying for each hour worked or permit an employer to refuse to pay for non-piecework hours.³ Rather, the inclusion of “wholly” simply anticipates situations in which there are no non-piecework activities.

³ “Exemptions from remedial legislation, such as the MWA [] are narrowly construed and applied only to situations which are plainly and unmistakably consistent with the terms and spirit of the legislation.” *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 301, 996 P2d 582 (2000).

Under Knight’s reading of WAC 296-126-021, an employer could require an employee to perform 25 hours of “production” piece-rate work and 15 hours of other work in a week and refuse to pay for the 15 hours of “non-production” work so long as the employee receives at least the minimum wage when averaging out the 25 hours of piece-rate pay over the entire 40-hour week. For example, Knight could require a driver to attend an uncompensated all-day meeting or scrub all of the toilets at the home port so long as the employee’s per-mile pay for driving the remainder of the week meets a weekly minimum wage requirement. These types of compensation schemes violate the MWA. Just as hourly pay for certain hours worked cannot be used to offset the obligation to pay for other hours worked, piece-rate pay may not be used to offset hours spent working outside of piece-rate tasks.

As Knight admits, the Department of Labor and Industries has an administrative policy that anticipates crediting piece-rate employees with separate wages for non-piecework activities if the employee is paid “partially” on a piecework basis. See Answering Br. at 21 (citing DLI Admin. Policy ES.A.3). The policy provides that piecework pay is “credited toward the total wage.” DLI Admin. Policy ES.A.3 (emphasis added). It is only when the employee has received her “total earnings” for all hours worked that workweek averaging is applied. *Id.*

Other Department policies similarly anticipate that pieceworkers will be separately paid for all hours worked outside of piece-rate work. For example, the “Overtime” policy states that for piece-rate employees,

the “regular rate” is computed by “adding together the total earnings for the workweek from piece rate and all other earnings,” including “any sums that may be paid for other hours worked,” and then dividing that total by the number of hours worked. DLI Admin. Policy ES.A.8.1 (emphasis added). Thus, the Department presumes that where an employer pays piece-rate wages, the employer will also pay separate wages for any “other hours worked.” *Id.*⁴

This Court should hold that non-agricultural employers must pay piece-rate employees on an hourly basis for time spent performing activities outside of piece-rate work. This includes on-duty-not-driving time, during which drivers lack the ability to log miles and earn piece-rate wages. Such a conclusion follows the plain language of the MWA, the Court’s holding in *Carranza*, and the logical recognition that piece-rate pay is based on output and productivity and is therefore earned only when the employee is actively producing.

3. To the extent it applies, WAC 296-126-021 must be construed to further the MWA’s primary purpose—the payment of minimum wages for each hour of work.

To the extent WAC 296-126-021 implements the MWA, it must be construed in a manner that is “consistent” with “the intent and purpose” of that statute. *Ravsten v. Dept. of Labor & Indus.*, 108 Wn.2d 143, 154,

⁴ Even if the Department of Labor and Industries had interpreted WAC 296-126-021 in a way that would allow Knight to refuse to pay for certain work hours, such an interpretation would be entitled to no deference because Washington courts defer to Department interpretations only when they are consistent with the plain language, remedial purpose, and liberal construction of the MWA. See *Bostain v. Food Exp., Inc.*, 159 Wn.2d 700, 712-15, 153 P.3d 846 (2007).

736 P.2d 265 (1987). If WAC 296-126-021 is applied as Knight argues, the regulation would contravene the MWA. Plaintiffs' interpretation, on the other hand, is consistent with the MWA's requirement that employers pay for all hours worked before applying workweek averaging.

In a tacit acknowledgement that its interpretation of WAC 296-126-021 contravenes the MWA, Knight seeks to reinterpret the MWA instead. Knight argues the MWA "does not specify over what period of time [the minimum wage] 'rate' must be calculated." Answering Br. at 28-29. Once again, Knight focuses on a single word, reading the term "rate" in isolation and ignoring the "per hour" requirement of RCW 49.46.020.

Under Knight's tortured interpretation of the MWA, an employer could satisfy its minimum wage obligations by paying double the minimum wage for the first hour of work but nothing for the second. The MWA does not permit such a payment scheme. Just like an employer that pays employees on an hourly basis may not use workweek averaging to conceal the fact that it is not compensating for all hours worked, an employer who pays employees on a piecework basis also cannot use workweek averaging in this way.

This Court has not yet addressed WAC 296-126-021. In *Carranza*, the regulation was not at issue. The Court's statement that WAC 296-126-021 "arguably" supports workweek averaging was therefore made without a full analysis of the regulation. 190 Wn.2d at 623-624.

Knight's reliance on *Lopez Demetrio*, 183 Wn.2d 649, is also unavailing. In that case, the Court held that rest breaks must be

compensated separate and apart from the piece-rate specifically because rest breaks constitute “hours worked.” *Id.* at 661-662. Knight’s assertion that the *Lopez Demetrio* Court “was distinguishing work time from rest break time” is thus incorrect. *See* Answering Br. at 32-33. *Lopez Demetrio* also did not address MWA compliance, as Knight suggests. *See* Answering Br. at 33-34. Instead, the Court looked to workweek averaging solely for purposes of calculating the regular rate at which rest break hours must be paid. *Lopez Demetrio*, 183 Wn.2d at 660-661.

Here, only one of the two interpretations of WAC 296-126-021 protects the welfare of Washington employees by ensuring the payment of minimum wages for each hour of work performed in accordance with the MWA. That is the interpretation advanced by Plaintiffs.

4. The Court’s decision in *Hill* supports Plaintiffs’ position.

Knight maintains the Court’s recent decision in *Hill v. Xerox Bus. Svcs. LLC*, 191 Wn.2d 751, 426 P.3d 703 (2018), resolves the certified question in Knight’s favor. Answering Br. at 35. Knight is wrong. Indeed, much of the language on which Knight relies is taken from the dissenting opinion, a fact Knight neglects to mention. *See* Answering Br. at 37-38 (quoting from *Hill*, 191 Wn.2d at 764-65 (Stephens, J., dissenting)).

In *Hill*, the majority concluded that workweek averaging is “a concept applicable to piece rate work, but not to hourly work.” 191 Wn.2d at 756. As previously noted, “time spent on work outside the scope of piece-rate [tasks] . . . is hourly work” under the MWA. *Carranza*,

190 Wn.2d at 623. Thus, workweek averaging does not apply to such work, which includes the uncompensated work of Knight drivers.

Nothing in *Hill* conflicts with this conclusion. The Court notes, for example, that when workweek averaging is applied to piece-rate work, “a higher production hour might subsidize a lower production hour.” *Hill*, 191 Wn.2d at 752 (emphasis added). This is a far cry from what Knight argues here, which is that a production hour can be used to subsidize a non-production hour. Because the latter is outside of piece-rate work, it is hourly and cannot be subjected to workweek averaging. *See Hill*, 191 Wn.2d at 756; *Carranza*, 190 Wn.2d at 623.

Moreover, the *Hill* Court concluded that the employee in that case was not a pieceworker. 191 Wn.2d at 753. As such, it was unnecessary for the Court to analyze how workweek averaging applies to a piece-rate employee who also performs non-production work. *See id.* at 759 (declining to reformulate question to determine “whether Xerox failed to pay its employees” for “nonproduction” work). Nevertheless, the Court made two statements that strongly support Plaintiffs’ position.

First, the Court noted that “[p]ursuant to the MWA, agricultural workers who are paid by the piece must also receive an hourly wage of at least minimum wage for work performed outside the scope of ‘piece-rate-picking.’” *Id.* at 756 n.6 (emphasis added; quoting *Carranza*, 190 Wn.2d at 617). Because the MWA applies equally to non-agricultural workers those workers must also receive an hourly wage of at least minimum wage for such work.

Second, the Court said that “WAC 296-126-021 authorizes employers to pay employees on a piecework basis and establishes a formula for calculating minimum wage compliance for such pay,” a formula that “includes workweek averaging.” *Hill*, 191 Wn.2d at 761 (emphasis added). To the extent the regulation applies here, the Court’s statement comports with Plaintiffs’ reading. Workweek averaging does not govern time spent performing tasks outside of piece-rate work; rather, such time must be separately compensated and credited in accordance with subsection (1) of WAC 296-126-021. Once that is done—meaning once the employee is paid at least the minimum wage for all non-production time—workweek averaging can be applied to ensure the piecework compensation also comports with the requirement.

In addition to *Hill*, Knight points to the opinions of two judges in the United States District Court for the Western District of Washington as well as statements made in an amicus brief that the Washington Attorney General’s Office filed in *Carranza*. None of these weighs in favor of Knight’s arguments. With respect to the judicial opinions, “a federal district court case . . . is not controlling on this [C]ourt when state substantive law is interpreted.” *Berschauer/Phillips Const. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 823-24, 881 P.2d 986 (1994). Moreover, one of the two judges certified the question presented in this case, and he recognized that *Carranza* “call[s] into question” the previous rulings. Dkt. 92 at 15:14-15.

As for the amicus brief, the Attorney General concluded that when it comes to non-production work performed by piece-rate employees, the per-hour approach “is more worker-protective” and “consistent with the [MWA’s] plain language” Amicus Br. of the Atty. Gen. of Wash. at 2, 5.⁵ The Attorney General also recognized that non-production work “is a distinct category of hourly work during which the pieceworker ‘is not earning money,’” and “it is reasonable to conclude that RCW 49.46.020 requires separate hour-by-hour compensation for such work.” *Id.* at 7 (quoting *Lopez Demetrio*, 183 Wn.2d at 653). Though the Attorney General certainly acknowledged that the Department of Labor and Industries “has approved workweek averaging in some circumstances,” the Attorney General did not specify those circumstances or explain how the Court’s subsequent decision in *Carranza* impacts any previous interpretation by the Department of WAC 296-126-021. *Id.* at 6.

D. Plaintiffs’ position protects all Washington piece-rate workers from the all-inclusive rates *Lopez Demetrio* prohibits.

Plaintiffs propose 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. This includes loading and unloading, pre-trip inspections, fueling, detention at a shipper or consignee, washing trucks, and other

⁵ Available at https://agportal-s3bucket.s3amazonaws.com/uploadedfiles/Another/News/Press_Releases/AmicusCarranzaVDovex.pdf.

similar activities—all time worked that drivers log as on-duty-not-driving. Because Knight pays no compensation for the time drivers log as on-duty-not-driving, there are no “complexities or uncertainties” regarding compliance with the MWA as Knight protests. Knight already tracks the on-duty-not-driving time that is not covered by its piece rates.

Plaintiffs’ proposed ruling also would have no impact on the piece-rate pay received by an employee who is more productive than other employees. Knight’s assertion to the contrary is disproved by its own examples of two similarly situated employees each paid \$20 per widget and each required to complete 10 hours per week on activities outside of piece-rate work. *See* Answering Br. at 45-46. In the first, Employee A is paid \$800 for 30 hours of piece-rate work and nothing for an additional 10 hours of work during which no piece can be earned. Under the MWA, Employee A is entitled to \$115 in pay for the 10 hours of uncompensated work, assuming a minimum wage rate of \$11.50 per hour. Thus, Employee A’s total pay for the week is \$915, which averages out to \$22.875 per hour. The employee who produced fewer widgets, Employee B is paid \$400 for 30 hours of piece-rate work and nothing for the additional 10 hours of work during which no piece can be earned. Under the MWA, Employee B is also entitled to \$115 for the 10 hours of uncompensated work. Thus, Employee B’s total pay for the week is \$515, which averages out to \$12.875 per hour. In other words, the piece-rate still incentivizes increased productivity even when employees are paid for all hours worked before applying workweek averaging.

Consider a third example, Employee C who is paid the same \$20 per widget and who is also required to spend 10 hours each week on activities outside of piece-rate work. If Employee C produces eight widgets in 30 hours, her total pay for the week is \$275 (\$160 for the piece-rate work plus \$115 for the hourly work). Under WAC 296-126-021, compliance with the MWA is determined by dividing her 40 hours of work into \$275, which results in an hourly average of \$6.875. This is well below the required minimum rate of \$11.50 per hour. Thus, Employee C must be paid an additional \$185, which will bring the total weekly pay to \$460 (40 total hours of work multiplied by the minimum wage rate of \$11.50). Plaintiffs' proposed ruling preserves the use of piece-rate compensation to incentivize productivity while also protecting workers' right to be paid a minimum wage for each hour worked.

E. The Washington Supreme Court's holding that the plain language of the MWA creates a right to compensation for each hour worked applies to Knight for the entire class period.

A "fundamental rule of statutory construction" is that once language in a statute "has been construed by the highest court of the State, that construction operates as if it were originally written into [the statute]." *Hale v. Wellpinit Sch. Dist. No. 49*, 165 Wn.2d 494, 506, 198 P.3d 1021 (2009).

The *Carranza* Court concluded that the plain language of the MWA "evinces an intent to create a right to compensation for each individual hour worked, not merely a right to workweek averaging." 190 Wn.2d at 614-15, 619. This construction operates as if "it were originally

written into” the MWA. *Hale*, 165 Wn.2d at 506. Knight nevertheless argues *Carranza* should not apply “retroactively,” but the argument is misplaced. Knight was subject to the requirement to separately pay for each hour of work well before *Carranza*. See, e.g., *Stevens v. Brink’s Home Sec., Inc.*, 162 Wn.2d 42, 47, 169 P.3d 473 (2007) (under “MWA, employees are entitled to compensation for regular hours worked”); *Miller v. Farmer Bros Co.*, 136 Wn. App. 650, 656, 150 P.3d 598 (2007) (“Under the Act, employees must be paid per hour, and must receive at least the minimum wage.”); see also DLI Admin. Policy ES.A.5 at 1 (interpreting MWA to apply “for each hour of employment”).

Even if this Court were to consider Knight’s argument, “[r]etroactive application, by which a decision is applied both to the litigants before the court and all cases arising prior to and subsequent to the announcing of the new rule, is “overwhelmingly the norm.” *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 270, 208 P.3d 1092 (2009) (quotations omitted). It is the “general rule that a new decision of law applies retroactively.” *Id.* at 271. And it is only “in rare instances” that courts apply a decision only prospectively. *McDevitt v. Harbor View Med. Ctr.*, 179 Wn.2d 59, 75, 316 P.3d 469 (2013).

Knight fails to cite any authority supporting a departure from the general rule in these circumstances. Indeed, the cases on which Knight relies concern changes in the law or pronouncements of a new rule after the overruling of a previous decision. See Answering Br. at 47-48.

Carranza concerned the proper interpretation of language in an existing statute, not a request to overrule prior precedent or change the law.

Even if *Carranza* had overruled a previous decision or established new law, retroactive application would still apply. To determine whether application of a new rule of law should depart from the general rule of retroactivity, Washington courts apply the United States Supreme Court's *Chevron Oil* test. See *Lunsford*, 166 Wn.2d at 272 (citing *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971)). Under the *Chevron Oil* test, the Court may depart from the presumption of retroactivity only if the following three conditions are all met: "(1) the decision established a new rule of law that either overruled clear precedent upon which the parties relied or was not clearly foreshadowed, (2) retroactive application would tend to impede the policy objectives of the new rule, and (3) retroactive application would produce a substantially inequitable result." *Id.* (citing *Chevron Oil*, 404 U.S. at 106-07) (emphasis added).

None of the three requirements is satisfied here. First, in *Carranza*, the Washington Supreme Court did not establish a new rule of law that overruled any precedent or that was not clearly foreshadowed. Indeed, the *Carranza* Court explained that "[i]n addition to the statute itself, analogous case law further supports" that the MWA requires payment for each hour worked. 190 Wn.2d at 620 (citing *Stevens*, 162 Wn.2d at 47). No Washington case has ever held that employers need not compensate employees at least minimum wage for each hour

worked. Thus, it can come as no surprise to Knight that the company must pay its drivers for all hours worked.

Second, retroactive application would not “impede the policy objectives of the new rule.” The objective of minimum wage compliance on a per-hour basis is to protect workers’ wage rights. This is satisfied through both retroactive and prospective application.

Finally, retroactive application does not produce a “substantially inequitable result.” Instead, it allows pieceworkers who have not been paid for time during which they perform work but are unable to earn a piece rate to pursue proper claims for deprivation of their wages. A refusal to apply the MWA’s per hour requirement to Knight would be a “substantially inequitable result” for Knight drivers who already face difficult work conditions and violations of their employment rights.

III. CONCLUSION

The drivers ask this Court to uphold the right of all pieceworkers to be separately paid for all work time in which they are unable to earn a piece rate. Plaintiffs’ request amounts to nothing more than applying *Carranza* to all Washington workers. Because the holding in *Carranza* rests on a plain language interpretation of the MWA and the MWA applies equally to both agricultural and non-agricultural employees, the certified question should be answered in the affirmative.

RESPECTFULLY SUBMITTED AND DATED this 21st day of
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