

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
5/1/2019 8:00 AM  
BY SUSAN L. CARLSON  
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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

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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.

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**Respondents/Defendants' Answer to Brief of Amicus Curiae  
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## I. INTRODUCTION

The Attorney General of Washington's brief contradicts the position taken by the Department of Labor & Industries (DLI), which is the Washington agency charged with administering the Washington Minimum Wage Act (MWA). Curiously, the DLI's amicus curiae brief was submitted by the Attorney General and his office appears to have drafted both of these conflicting briefs. The Attorney General's present brief also contradicts the positions he took in *Carranza v. Dovex Fruit Co.*, 190 Wn.2d 612 (2018). Because the Attorney General cannot take a consistent position, even within this case, his contradictory position in this brief should be disregarded.

Furthermore, the Attorney General's brief relies on an artificial and illogical distinction between "piece-rate work" and "activities outside of piece-rate work," and assumes without justification that the non-driving time at issue in this case falls within the latter category. The Attorney General also relies almost exclusively on *Carranza*, but *Carranza* was expressly limited to agriculture workers to whom WAC 296-126-021 is inapplicable.

And, the Attorney General ignores this Court's holding in *Hill v. Xerox Bus. Servs., LLC*, 191 Wn.2d 751 (2018) that WAC 296-126-021 permits workweek averaging for non-agricultural workers.

For these reasons, the Court should reject the positions taken by the Attorney General.

## II. ARGUMENT

### A. **The Attorney General's Shifting Positions Should Be Given Little Weight**

Although the DLI has confirmed that the plain meaning of WAC 296-126-021 permits workweek averaging for piecework employers and that *Hill* adopts this interpretation, the Attorney General's brief presents the issue as unresolved and urges the Court to interpret WAC 296-126-021 to require separate pay for an undefined category of "non-piecework time." A.G. Br. 5-6.

Because the DLI promulgated WAC 296-126-021, and is the agency charged with administering the MWA, its position should be given substantially more deference than that of the Attorney General. *See Waste Mgmt. v. Utils. & Transp. Comm'n*, 123 Wn.2d 621, 628 (1994) ("Where an agency is charged with the administration and enforcement of a statute, the agency's interpretation of an

ambiguous statute is accorded great weight in determining legislative intent”); *see also Silverstreak, Inc. v. Dep't of Labor & Indus.*, 159 Wn. 2d 868, 884-85 (2007) (“This court has made clear that [it] will give great deference to an agency’s interpretation of its own properly promulgated regulations”).

In fact, the Attorney’s General office appears to have drafted the DLI’s brief, and the Attorney’s General name appears as the DLI’s primary counsel of record. Thus, the Attorney General’s conflicting position in his own brief should be given no weight.

The Attorney General’s arguments in this case also conflict with those he made in *Carranza*, where he agreed that the MWA was ambiguous as to the measuring period of compliance for the obligation to pay pieceworkers at the minimum wage rate.

*Carranza*, Amicus Brief of the Attorney General of Washington at p. 6. The Attorney General argued in *Carranza* that “[b]y rule, DLI has approved workweek averaging in some circumstances for non-agricultural workers covered by the Industrial Welfare Act, RCW 49.12. WAC 296-126-021. **This rule is a valid resolution of RCW 49.46.020’s ambiguity for those workers.**” *Id.* (emphasis

added). The Attorney General further wrote that it was a “reasonable reading” of RCW 49.46.020 to permit workweek averaging for certain types of works and that “under this reading, the employer need not account for and compensate each discrete hour of work, provided that the employee’s total weekly wage divided by the number of hours worked meets or exceeds the minimum hourly rate in RCW 49.46.020.” *Id.* The Attorney General also noted that this was the view of at least five (now six) federal circuits interpreting the nearly identical minimum wage guarantee in the FLSA. *Id.*; *see also Douglas v. Xerox Bus. Servs., LLC*, 875 F.3d 884 (9th Cir. 2017); *U.S. Dep’t of Labor v. Cole Enter., Inc.*, 62 F.3d 775, 780 (6th Cir. 1995); *Hensley v. MacMillan Bloedel Containers, Inc.*, 786 F.2d 353, 357 (8th Cir. 1986); *Dove v. Coupe*, 759 F.2d 167, 171 (D.C. Cir. 1985); *Blankenship v. Thurston Motor Lines, Inc.*, 415 F.2d 1193, 1198 (4th Cir. 1969); *United States v. Klinghoffer Bros. Realty Corp.*, 285 F.2d 487, 490 (2d Cir. 1960); *see also Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 298 (2000)

(“Because the MWA is based upon the FLSA, federal authority under the FLSA often provides helpful guidance”).<sup>1</sup>

The Attorney General was correct in his *Carranza* briefing for all of the reasons set forth in Defendants’ principal brief. The Attorney General’s justification for abandoning his prior correct position is that after *Carranza*, “the legal landscape has changed.” A.G. Br. 6. But *Carranza* was specifically confined to agricultural workers, and this Court subsequently clarified in *Hill* that for non-agricultural workers “the regulations implementing the MWA make an exception to [the] right to earn the minimum wage for every hour worked: they permit workweek averaging for employees who are ‘paid on a commission or piecework basis’...” *Hill*, 191 Wn.2d at 751 (citing WAC 296-126-021). Thus, *Carranza* is consistent with WAC 296-126-021’s clarification of the MWA for non-agricultural work, and the Attorney General’s original position before *Carranza* was decided is correct and remains valid.

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<sup>1</sup> To Defendants’ knowledge, no federal circuit has adopted Plaintiffs’ proposed rule under the FLSA.

Indeed, any other analysis effectively kills piecework because, by its nature, some hours are more productive than others. Take, for example, an employee making widgets that require the use of a complex machine. The employee arrives at work and switches the machine on, which takes about 12 minutes to warm up before the employee can begin making widgets. While the machine warms up, and for 18 minutes thereafter, the efficient employee collects and aligns the components ready to make the widgets for the entire day, which accounts for the first 30 minutes of the employee's shift. For the remaining 30 minutes of the first hour of work, the employee makes 3 widgets (one every ten minutes). If the employee receives \$3 per widget, he is paid \$9 for that first hour, which would be a minimum wage violation under the Attorney General's new position. Thereafter, however, the employee continues to make one widget every ten minutes and so earns \$18 per hour (6 x \$3), well-above the minimum wage rate. Over an 8-hour shift, the employee earns \$135 (\$18 x 7 hrs, + \$9 first hour). That is significantly more than minimum wage for eight hours of work. The rationale behind this

piecework compensation system is that it allows efficient workers to make significantly more money than the hourly minimum wage.<sup>2</sup>

This situation becomes infinitely more complex where the piecework extends beyond making simple widgets. Here, for example, the Attorney General argues that any time not driving is uncompensated. That position is untenable. A driver hired to deliver a package must complete many more tasks than simply driving the vehicle, and in fact is legally required to perform certain tasks necessarily associated with each trip (pre- post-trip inspections, fuel, complete paperwork, load/unload, etc.). The Attorney General now wants to artificially curtail what a delivery involves. This is but

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<sup>2</sup> Compare for example, a different employee with the same job who does not gather the components at the start of the day and instead gathers the components for each widget as they make each widget. This second employee takes 12 minutes to make each widget (due to the time taken to collect the components) and therefore earns \$15 per hour (5 x \$3). For this second employee, collecting the components to make each widget is clearly part of making the widget and part of the “productive” time. This second employee earns \$12 in the first hour of work because she immediately begins making widgets as soon as the machine is ready, and there is no minimum wage violation. But in an 8-hour shift, the second employee earns \$117 (\$15 x 7, +\$12 first hour), whereas the first employee earns \$135. So the second employee earns \$18 less than the first employee for the same 8-hour shift, but the Attorney General takes the position that the first employee suffers a minimum wage violation. The argument is irrational, placing form over substance.

one example of the morass of litigation that would be borne out of a rule that each hour must be separately compensated at the minimum wage rate, as the only way to determine what is “productive” time for a particular piecework compensation system will be to litigate to conclusion.

**B. All of the Disputed Worktime in This Case Is Directly Compensated by Piecework Trip Pay and Defendants Guarantee That its Driver Employees Always Receive Pay of at Least the Minimum Wage Rate for All Hours Worked.**

Like Plaintiffs’ briefing, the Attorney General’s argument is premised on the fallacy that there is a rational and meaningful distinction between so-called “piece-rate work” and “activities outside of piece-rate work.” Both generally, and under the facts of this case, there is not. The Attorney General and Plaintiffs assume without explanation that Defendants’ trip-based pay does not directly compensate for “non-driving tasks” such as pre-trip inspections and fueling. A.G. Br. 3. But these work activities are integral and necessary to complete the product that serves as the basis for Defendants’ piecework pay (i.e., a completed trip). Plaintiffs’ and the Attorney Generals’ attempt to carve out driving

time and designate all other work that is equally necessary to produce a completed trip as “activities outside of piece-rate work” is completely arbitrary, and no workable standard is proposed for how employers and courts are to reliably distinguish “piece-rate work” and “activities outside of piece-rate work.”

The Attorney General also makes the puzzling statement that “if the piece rate wage standing alone exceeds the minimum hourly rate for a given time period, the worker receives no additional compensation. This is true even if a worker would have earned more money under a straight hourly rate that accounts for each work hour separately.” A.G. Br. 3. But Defendants pay a minimum wage guarantee equal to the applicable minimum wage rate multiplied by all hours worked, with all piecework earnings paid in excess of the guarantee.<sup>3</sup> Dkt. 53-23 & 53-24. It therefore is not possible for an employee to “earn[] more money under a straight hourly rate that accounts for each work hour separately,” since Defendants’

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<sup>3</sup> Defendants pay drivers the applicable minimum wage rate multiplied by all hours worked, and trip pay is then computed as an additional amount based on the difference between the full trip pay earned and the minimum wage rate times all hours worked. Dkt. 53-23 & 53-24.

minimum wage guarantee with additional trip pay ensures that total pay will always exceed or equal a straight hourly wage at the minimum wage rate multiplied by each work hour.

### III. CONCLUSION

For all of the foregoing reasons, the Court should reject the Attorney General's arguments and apply WAC 296-126-021 as written.

April 30, 2019

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Dated this 30th day of April, 2019.

*/s/ Sarah Smith*  
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**April 30, 2019 - 5:18 PM**

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