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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.

**Respondents/Defendants' Answer to Brief of Amicus Curiae
Department of Labor & Industries**

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I.INTRODUCTION

The brief of the Washington Department of Labor & Industries (DLI) confirms that WAC 296-126-021 means what it says and permits compliance with the Washington Minimum Wage Act (MWA) to be computed on a workweek basis for employees paid on a piecework or commission basis. The DLI further confirms that it has consistently applied the MWA to permit workweek averaging for piecework earnings for decades and that its approach was approved by this Court in *Hill v. Xerox Bus. Servs., LLC*, 191 Wn.2d 751 (2018).

Because the DLI has unequivocally clarified that WAC 296-126-021 permits workweek averaging for piecework, and that Plaintiffs' interpretation of the regulation "is not correct," the Court should hold that the workweek is the relevant measuring period for determining whether an employer has compensated its piecework employees by at least the minimum rate. DLI Br. 6.

If the Court is in any way inclined to invalidate WAC 296-126-021 or adopt Plaintiff's impractical and unreasonable construction, the Court's judgment should be given prospective

effect only in light of Washington piecework employers’ reasonable reliance on WAC 296-126-021, the DLI’s administrative guidance, and this Court’s statements in *Hill*.

II. ARGUMENT

A. **The DLI Confirms that WAC 296-126-021 Permits Workweek Averaging for Piecework Earnings**

To the extent there was any doubt about the plain meaning of WAC 296-126-021, the DLI’s brief has dispelled it. The DLI explains that pursuant to its authority under RCW 49.12.001, it “adopted WAC 296-126-021, which allows employers to *average employees’ piece-rate earnings, and all other earnings, over the course of a workweek* to meet the required minimum wage rate per hour in RCW 49.46.” DLI Br. 3 (emphasis added). The DLI further states:

“Under [the DLI]’s interpretation of WAC 296-126-021, an employer may count all hours worked during the workweek and divide the total earnings by all hours worked to meet and employer’s obligation under the MWA. In this way, [the DLI] has allowed employers to ‘credit’ the piece-rate and commission earnings to other hours worked and *has not required employers to compensate employees separately for hours employees might be engaged in non-piece-rate or commission work.*” DLI Br. 4 (emphasis added).

Additionally, the DLI refers to Plaintiffs' tortured interpretation of WAC 296-126-021 as "not correct;" and explains how the agency "has not distinguished between whether 'hours worked' were for one purpose or another" and "has not told employers that they must track non-piecework time and compensate employees separately for time spent performing tasks ancillary to piece-rate earnings." DLI Br. 4 & 6. The DLI's interpretation of WAC 296-126-021 and the MWA is expressed not only in its amicus brief, but also in several published Administrative Policies. *See, e.g.,* DLI Admin. Policy ES.A.3, ES.A.8.1 & ES.A.8.2.

As "the agency tasked by the legislature with enforcing the MWA," the DLI's regulations (including WAC 296-126-021) are accorded "great weight" in interpreting the MWA. *Hill*, 191 Wn.2d at 761-63; *Waste Mgmt. v. Utils. & Transp. Comm'n*, 123 Wn.2d 621, 628 (1994). Furthermore, the DLI's interpretations of its own regulation are given "great deference... 'absent a compelling indication' that the agency's regulatory interpretation conflicts with legislative intent or is in excess of the agency's authority." *Silverstreak, Inc. v. Dep't of Labor & Indus.*, 159 Wn.2d 868, 884-85

(2007). And its regulations are valid and enforceable as long they are “reasonably consistent with the controlling statute.” *Wash. Pub. Ports Ass'n v. Dep't of Revenue*, 148 Wn.2d 637, 646 (2003); *see also Lenander v. Dep't of Ret. Sys.*, 186 Wn.2d 393, 402-03 (2016) (“An agency rule may be invalidated only if the court determines it (1) is unconstitutional, (2) is outside the statutory authority of the agency, (3) is arbitrary or capricious, or (4) was adopted without complying with statutory rule making procedures.”).

Because the MWA is silent as to a measuring period for determining whether a non-hourly piecework employee has been paid at the least the minimum “rate...per hour,” the workweek standard established by WAC 296-126-021 is “reasonably consistent with the controlling statute” and should thus be given dispositive weight.¹ RCW 49.46.020(1); *Wash. Pub. Ports Ass'n*, 148 Wn.2d at 646; *see also Hama Co. v. Shorelines Hearings Bd.*, 85 Wn.2d 441, 448 (1975) (“It is [] valid for an administrative agency to ‘fill in the

¹ The MWA’s reference to “per hour” does not mean that each individual hour of work must be separately compensated by at least the minimum wage, because “per hour” describes the “rate” at which minimum wages must accrue without specifying a compliance measuring period.

gaps’ via statutory construction – as long as the agency does not purport to ‘amend’ the statute.”); *see also Edelman v. State ex rel. P.D.C.*, 152 Wn.2d 584, 590 (2004) (“An agency charged with the administration and enforcement of a statute may interpret ambiguities within the statutory language through the rule-making process.”).

B. *Hill v. Xerox Bus. Servs., LLC Is Dispositive and Consistent with Carranza v. Dovex Fruit Co.*

The DLI’s brief rejects Plaintiffs’ interpretation of *Hill* and agrees with Defendants that the decision “recognized that when a compensation agreement is a true piece-rate compensation structure for a non-agricultural employee, WAC 296-126-021 allows workweek averaging.” DLI Br. 1. The DLI believes that this holding in *Hill* is “in tension” with *Carranza v. Dovex Fruit Co.*, 190 Wn.2d 612 (2018), but the two cases are reconcilable. *Carranza* was expressly limited to agriculture workers, to whom WAC 296-126-021 is inapplicable. *Carranza*, 190 Wn.2d at 617 (“The certified questions present a narrow issue that limit our conclusion to the context of agricultural workers”); WAC 296-126-001(2)(c) (“These rules do not apply to...Agricultural labor...”). *Hill*, on the

other hand, cited WAC 297-126-021 for the proposition that the MWA “permits workweek averaging to determine minimum wage compliance for commission or piece rate workers” and included a footnote distinguishing the holding in *Carranza* as applying only to agricultural workers. *Hill*, 191 Wn.2d at 756 n. 6; *see also id.* at 761 (“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’”).

Because WAC 297-126-021 did not apply to the agricultural work at issue in *Carranza*, the “tension” the DLI identifies between *Carranza* and *Hill* is largely illusory. Where WAC 297-126-021 governs, as it does here, minimum wage compliance is determined on the basis of workweek averaging for piecework and commission pay.

C. Any Decision Invalidating WAC 297-126-021 or Interpreting It to Not Permit Workweek Averaging Should Be Prospective Only

If the Court is inclined to rule in Plaintiffs’ favor by either invalidating WAC 297-126-021 or construing it to mean something

other than its plain language entails, the decision must be given prospective effect only, in light of the DLI's position.²

WAC 297-126-021 has been on the books for 45 years and the DLI confirms that it has consistently applied the regulation to permit workweek averaging. DLI verifies that it has never required piecework employers to engage in the fool's errand of trying to identify "activities outside of piece-rate work" and pay for them on a different basis from whatever work tasks a judge or jury might arbitrarily consider to be "true" piece-rate work. Non-agricultural employers have justifiably relied on WAC 297-126-021, the DLI's additional guidance, and this Court's statements in *Hill* in crafting piecework compensations so that it would be substantially inequitable to retroactively impose a new unforeseeable rule. *C.f.*, *McDevitt v. Harborview Med. Ctr.*, 179 Wn.2d 59, 76 (2013) (overruling prior precedent upon which parties had relied denied

² In Washington, a judicial decision should be given prospective effect when: (1) the decision establishes a new rule of law that either overrules 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. *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 272 (2009).

retroactive effect); *Bond v. Burrows*, 103 Wn.2d 153 (1984) (decision declaring tax statute unconstitutional denied retroactivity because of parties' justifiable reliance on the statute).

Retroactive invalidation of WAC 297-126-021 would also serve no legitimate policy purpose, because the rule Plaintiffs propose does not require any employee to be paid more money for his or her hours worked; it only requires that piecework pay be structured in a different (more confusing and less transparent) manner. Retroactive application, then, would serve no purpose other than to provide an unjustified windfall to plaintiffs and their attorneys at the expense of honest businesses scrupulously following the regulations and guidance from the agency charged with administering Washington's wage and hour laws.

III. CONCLUSION

The Court should apply WAC 297-126-021 and the MWA consistently with the DLI's position and uphold the permissibility of workweek averaging to determine minimum wage compliance for piecework. Any contrary decision must be given prospective effect

only in light of employers' reasonable reliance on the long standing position of the DLI.

April 30, 2019

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Dated this 30th day of April, 2019.

/s/ Sarah Smith

Sarah Smith

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