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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
Washington Employment Lawyers Association**

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I. INTRODUCTION

The Washington Employment Lawyers Association's (WELA) brief is long on rhetoric, but short on substance, and fails to explain or justify the distinction it attempts to draw between "piecework time" and "non-piecework time." Because piecework pay is based on output, not time worked, there is no basis to deem certain work activities that are necessary or incidental to producing the relevant output uncompensated by piecework earnings. The examples that WELA relies on in fact refute its position by demonstrating that the proposed minute by minute theoretical separation between "piecework time" and "non-piecework time" is arbitrary and impractical.

Additionally, WELA's nonsensical reading of WAC 296-126-021 conflicts with the statute's plain language and how the Department of Labor & Industries (DLI) has interpreted it for decades, as confirmed in the DLI's amicus brief and Administrative Policies. The canon of liberal construction cannot interpret the words of a regulation to mean the opposite of what they clearly state.

Nor is the position advanced by WELA compelled by the Minimum Wage Act (MWA) or this Court’s decision in *Carranza v. Dovex Fruit Co.*, 190 Wn.2d 612 (2018). RCW 49.46.020(1) requires most Washington employees to be paid “wages at a rate of not less than [x] dollars per hour,” but is silent as to what the measuring period is for determining whether pay exceeds the minimum hourly rate when an employee is not paid straight hourly pay. WAC 296-126-021, which was not applicable to the agricultural workers in *Carranza*, fills this gap in the statute by establishing a *workweek* measuring period for workers “paid on a commission or piecework basis, wholly or partially...” See *Hama Co. v. Shorelines Hearings Bd.*, 85 Wn.2d 441, 448 (1975) (“It is [] valid for an administrative agency to ‘fill in the gaps’ via statutory construction – as long as the agency does not purport to ‘amend’ the statute”).

For these reasons, the Court should reject the positions taken by WELA in its amicus curiae brief.

II. ARGUMENT

A. **Piecework Pay Compensates Employees for All Hours Worked in a Workweek**

WELA's entire argument is based on the false premise that piecework pay necessarily compensates employees for only one type of work activity and all other activity constitutes a category of uncompensated "non-piecework time." No one disputes that Washington employees must and should be paid for total hours worked by at least the statutory minimum rate. Rather, the controversy in this case is whether an employer paying piecework pay complies with the MWA and WAC 296-126-021 when an employees' total earnings in a workweek exceed the minimum hourly wage rate multiplied by all hours worked, or whether employers are required to abandon traditional piecework pay and engage in a complex restructuring that formally allocates separate hourly pay to an arbitrary category of "non-piecework time" without actually increasing any employee's rate of pay per hour worked.

WELA takes the latter position, which suffers from a fundamental misunderstanding of the nature of piecework pay and how it functions. As this Court held in *Lopez Demetrio v. Sakuma*

Bros. Farms, Inc., 183 Wn.2d 649, 652 (2015), piecework pay “is tied to the employee’s output (for example, per pound of fruit harvested)” and not by time worked. Because piecework pay is based on output, not time, it cannot sensibly be allocated to specific work time or work activities, and workweek averaging under WAC 296-126-021 is therefore appropriate.

Take the example given by WELA of apple packers paid hourly and pear packers paid on a per-box piecework basis. WELA Br. 10-11. Suppose both groups of workers can typically complete 40 boxes of fruit during a 40 hour workweek with 30 minutes of “downtime” each day. If the hourly apple packers are paid \$15/hr and the pear packers are paid \$15/box, their hourly rates of pay for a typical workweek are equivalent. Efficient packers who can complete 50 boxes of fruit during a 40 hour workweek receive a *greater* per hour rate of pay if they are paid on piecework as opposed to hourly basis. Indeed, encouraging such efficiency is the very purpose of piecework pay. *See Morrison v. United States Dep't of Labor*, 713 F. Supp. 664, 674 (S.D.N.Y. 1989). But because of the existence of 30 minutes per day (2.5 hours per week) of so-called

“non-piecework time,” WELA irrationally contends that the more highly compensated and equally long working piecework employees have been “deprived” of compensation that would have been due to them had they been paid hourly. Not true. WELA’s position is plainly wrong, as also evidenced by the fact that it contradicts 40 years of consistent interpretation and application by the agency authorized to interpret and apply the MWA.

It is critical to note that under WELA’s position, piecework employees would not be paid a penny more, and efficient workers could very well end up with less pay. If, in the example above, separate hourly pay were required for the anticipated 2.5 hours of “downtime” each week, the employer of the piecework pear packers could respond in several ways. One solution would be to pay hourly at the minimum wage rate for the 2.5 hours of anticipated “downtime” and reduce the amount offered in piecework pay so that the wages earned under the new system would be roughly equal to those earned under a traditional piecework system.¹ Another option

¹ For example, under an ordinary piecework plan, the pear packer earns \$15 for 40 boxes packed during 40 hours of work for total pay of \$600, which results in an effective hourly rate of \$15/hr. Under WELA’s rule,

would be to convert the piecework pay into a production bonus given on top of hourly wages paid at the minimum wage rate.² Or the employer could simply abandon piecework pay altogether and pay hourly.

In any of these scenarios, neither employer nor employee is better off. As the brief of the American Trucking Associations documents, employers have reacted in these ways in the only jurisdiction (California) that to Defendants' knowledge has rejected workweek averaging for pieceworkers.³ ATA Br. 10-11. There is

2.5 hours of downtime must be paid at the minimum wage rate of \$12/hr, so the employer will simply reduce the piece-rate from \$15 per box to \$14.25 per box, resulting in the employee still earning the same \$600 for 40 hours of work ($\$14.25/\text{box} \times 40 \text{ boxes} = \570 piecework pay ; $\$12/\text{hr} \times 2.5 \text{ hours} = \30 hourly pay; $\$570 \text{ piecework pay} + \$30 \text{ hourly pay} = \600 total pay).

² The pear packer's employer could pay a direct hourly rate of \$12/hr for each hour worked and a production bonus computed under the formula: $\$15 \text{ per box} - \$12/\text{hr} \times \text{hours worked}$. This results in the same \$600 for 40 hours of work and 40 boxes packed ($\$12/\text{hr} \times 40 \text{ hours} = \480 hourly pay; $[\$15/\text{box} \times 40 \text{ boxes}] - [\$12/\text{hr} \times 40 \text{ hours}] = \120 production bonus; $\$120 \text{ production bonus} + \$480 \text{ hourly pay} = \600 total pay). Notably, this is the functional equivalent of how Defendants compute trip pay on top of their minimum wage guarantee. Dkt. 53-23 & 53-24.

³ California's legislature explicitly adopted the no-averaging rule, so there is no basis for importing it into Washington's MWA, which is based on the FLSA. Cal. Labor Code § 226.2; *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 868 (2012) ("We have repeatedly recognized that the 'MWA is based on the [FLSA]'").

no reason to suspect employers in Washington will react differently if workweek averaging is forbidden here. The only thing that would be accomplished by adopting WELA's and Plaintiffs' position would be the replacement of a long-standing and well-understood system of incentive-based pay with either hourly pay or new compensation structures that are more confusing and opaque, and which punish more efficient employees by reducing the amount available in piecework pay. Wages, however, would remain the same.

B. Distinguishing Between “Piecework Time” and “Non-Piecework Time” Is Impractical and Undermines the Purpose of Piecework Compensation

WELA further fails to propose a workable standard for determining which work activities should be deemed “piecework time” and which are “non-piecework time.” WELA suggests that “non-piecework time” is time in which “a worker cannot increase his or her pay through more efficiency or productivity,” yet an employee *can* increase pay through increased efficiency for most of the non-driving work activities at issue in this case. WELA Br. 5. Fueling, pre-trip inspections, completing paperwork, and assisting with

loading and unloading are all activities that a driver can perform more efficiently to complete more trips and thus earn more piecework pay. And these activities are just as necessary or incidental to completing a trip as driving, which Plaintiff and WELA arbitrarily assume is the only “piecework time” compensated by Defendants’ trip-based pay. Conversely, driving is not always something a driver can perform more efficiently, because a driver cannot lawfully drive faster than the speed limit and may be constrained by traffic conditions.

WELA further assumes that employers calculate piecework pay under the assumption of 100% efficiency performing one particular activity, such as driving in this case. But this is not true. Piecework compensation plans are designed with the understanding that there will be “downtime” or multiple activities necessary or incidental to completing the relevant “piece,” and are intended to directly compensate for all of this time. Defendants, for example, factor the anticipated non-driving tasks into the piece-rate and pay a higher per mile rate for shorter trips with the understanding that the

same non-driving tasks will be required on short trips as on longer trips. Dkt. 75 at ¶¶ 10-11 & 14-15.

As noted above, if WELA's position is adopted and employers are required to allocate hourly pay to vague categories of "non-piecework" time, employers will simply reduce the piecerate to compensate for the increase in hourly pay. Economically, the expected work hours in a pay period are worth the same to employers and employees regardless of how the law characterizes the pay allocated to those hours. And as long as total pay in a week is greater than or equal to the minimum wage rate multiplied by all hours worked, the purpose of the MWA to ensure a decent standard of living and a fair rate of pay is satisfied.

The primary effect of adopting WELA's and Plaintiffs' position will not be to increase piecework employees' pay, but instead will generate needless metaphysical litigation over what work is true "piecework time" as opposed to "non-piecework time." Indeed, this has been the consequence of eliminating the workweek standard in California. *See, e.g., Moss v. USF Reddaway, Inc.*, 2018 WL 5099291 (C.D. Cal. 2018); *Cole v. CRST, Inc.*, 2017 WL

1234215 (C.D. Cal. 2017); *Ayala v. U.S Xpress Enterprises, Inc.*, 2016 WL 7586910 (C.D. Cal. 2016). Under the rule proposed by WELA and Plaintiffs, employers and courts would be required to parse out every second of work time to determine whether it is sufficiently related to the output being compensated on piecework basis to be deemed “piecework time,” with no economic benefit to workers. This does not advance any conceivable purpose of the MWA and should be rejected.⁴

C. Workweek Averaging Is Mandated by WAC 296-126-021 and Consistent With the MWA and *Carranza v. Dovex Fruit Co.*

WELA advances the same nonsensical interpretation of WAC 296-126-021 as Plaintiffs, which is difficult to even articulate and not what the regulation says. WAC 296-126-021 clearly states that

⁴ The same problems arise if commission-based pay cannot rely on workweek averaging. If a commissioned salesperson who is attending an in-person sales call must collect sales paperwork before leaving the office, drive to the meeting, attend the meeting, and send a follow-up email to the customer and a vendor, which of these tasks are “commission time” as opposed to “non-commission time?” As with piecework, neither Plaintiffs nor WELA propose a workable standard. If the Court is inclined to rule that piecework or commission earnings compensate only for particular tasks, the tasks deemed directly compensated should be those necessary or incidental to producing the output that is compensated on a piecework or commission basis.

“[w]here employees are paid on a commission or piecework basis, wholly or partially,” piecework earnings are “credited as a part of the total wage” for “ each work-week period,” and “the total wages paid for such period [the workweek] shall be computed on the hours worked in that period [the workweek] resulting in no less than the applicable minimum wage rate.” WELA invokes the principle that labor regulations are to be given a liberal construction in favor of employees, but this canon of construction has no application when a regulation is unambiguous. *Lopez Demetrio v. Sakuma Bros. Farms, Inc.*, 183 Wn.2d 649, 652 (2015) (“First, we examine the plain language of the regulation; if that language is unambiguous, it controls.”).

To the extent there were any ambiguity, the DLI has confirmed, in both its amicus brief and Administrative Policies, that Plaintiffs’ and WELA’s interpretation of WAC 269-126-021 is “not correct.” See DLI Br. 6; DLI Admin. Policy ES.A.3, ES.A.8.1 & ES.A.8.2; see also *Silverstreak, Inc. v. Dep’t of Labor & Indus.*, 159 Wn. 2d 868, 884-85 (2007) (“we will give great deference to an agency's interpretation of its own properly promulgated

regulations”). Furthermore, this Court in *Hill v. Xerox Bus. Servs., LLC*, 191 Wn.2d 751 (2018) held that WAC 297-126-021 “permits workweek averaging to determine minimum wage compliance for commission or piece rate workers” and “make[s] an exception to [the] right to earn the minimum wage for every hour worked: [it permits] workweek averaging for employees who are ‘paid on a commission or piecework basis, wholly or partially.’” *Hill*, 191 Wn.2d at 761 & 756 n. 6.⁵

WELA also argues that the obvious natural meaning of WAC 297-126-021 conflicts with the MWA, but the MWA is silent as to the proper measuring period for determining whether the minimum wage rate has been paid. WELA relies exclusively on the phrase “per hour” in RCW 49.46.020(1), but ignores that “per hour” refers to the “rate” for which minimum wages must accrue, not the period over which the minimum rate must be satisfied. *See Black's Law*

⁵ Like Plaintiffs, WELA argues that WAC 296-126-021 is an “interpretation of the Industrial Welfare Act (RCW 49.12, not the MWA (RCW 49.46).” This argument has no merit for the reasons stated at pp. 22-27 of Defendants’ Corrected Answering Brief. *See Hill*, 191 Wn.2d at 761-63 (holding that the DLI is “the agency tasked by the legislature with enforcing the MWA” and that WAC 296-126-021 is a “regulation implementing the MWA”); *see also* DLI Br. 3 (noting that WAC 296-126-021 was adopted pursuant to the DLI’s authority under RCW 49.12.091).

Dictionary 1452 (10th ed. 2014) (a “rate” is a [p]roportional or relative value the proportion by which quantity or value is adjusted”). If a person drives 280 miles from Seattle to Spokane in 5 hours, one would say in ordinary English that the trip was completed “at a rate of not less than [56 miles] per hour,” even if the driver was not traveling at that rate for every continuous second of the trip, or over the course of each of the 5 individual hours. *C.f.* RCW 49.46.020(1) (employers must pay “wages at a rate of not less than [x] dollars per hour”). While an hour by hour analysis might be appropriate in the case of an employee earning straight hourly pay, nothing can be deduced from the MWA’s use of the phrase “per hour” in the context of piecework and commission earnings without a measuring period over which the minimum hourly “rate” must be obtained. *See Helde v. Knight Transportation, Inc.*, 2016 WL 1687961, at *2 (W.D. Wash. 2016) (“Plaintiffs’ underlying assumption is faulty: the MWA does not require payment on an hourly basis.”).

WAC 297-126-021 reasonably fills this gap in the statute by applying a workweek standard to piecework and commission

earnings, consistent with the FLSA upon which the MWA is based. *See Douglas v. Xerox Bus. Servs., LLC*, 875 F.3d 884, 885 (9th Cir. 2017) (under the FLSA, “the relevant unit for determining minimum-wage compliance is the workweek as a whole,” not “each individual hour within the workweek”); *see also Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 868 (2012) (“We have repeatedly recognized that the ‘MWA is based on the [FLSA]’.”). A workweek standard makes good sense as it is highly unusual for employees to receive their wages more frequently than weekly.

In fact, WELA does not argue for an hourly standard at all, despite purporting to place dispositive weight on the words “per hour.” WELA contends that when an employee is engaged in “non-production work” he or she should be paid “no less than the minimum wage rate for each hour (*or partial hour*) of work.” WELA Br. 7 (emphasis added). Thus, WELA arbitrarily seeks to apply the MWA to a minute-by-minute analysis without any support for how it reaches that conclusion.

The hypotheticals WELA gives also involve minutes, or even seconds, of “non-piecework time,” not entire hours. *Id.* at 9-11 (e.g.,

filling out paperwork, waiting for supplies, donning and doffing, 5 minutes of “downtime,” etc.). Thus, even if the phrase “per hour” in the MWA could be read to artificially impose an hour by hour measuring period for piecework and commission minimum wage compliance, it would not support the minute by minute or second by second approach advanced by WELA.⁶

Furthermore, *Carranza* does not compel abandonment of the workweek standard adopted by the DLI in WAC 297-126-021. The Court in *Carranza* was careful to limit its holding to agriculture workers, where 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.”). Because WAC 297-126-021 covers non-agricultural workers and reflects a reasonable application of the MWA consistent with the statutory language, it governs here.⁷ *Wash. Pub. Ports Ass'n v. Dep't*

⁶ If a driver completes a trip in one hour and receives \$50 in piecework pay for the trip, WELA would apparently contend this driver suffered a minimum wage violation if he or she spent 10 minutes fueling, even though the driver would have earned \$50 during one hour of work.

⁷ WELA’s reliance on *Lopez Demetrio v. Sakuma Bros. Farms, Inc.*, 183 Wn.2d 649 (2015) is misplaced, because *Lopez Demetrio* held that “a pieceworker’s right to separate pay for rest breaks springs not from the MWA but rather from WAC 296-131-020(2)’s mandate that rest breaks be

of Revenue, 148 Wn.2d 637, 646 (2003) (“We presume that administrative rules adopted pursuant to a legislative grant of authority are valid, and we will uphold such rules if they are reasonably consistent with the controlling statute.”).

III. CONCLUSION

The rule that Plaintiffs and WELA propose does not require that any piecework employees be paid additional sums for the hours they work. Instead, it requires employers to *calculate* piecework pay differently, or to simply abandon piecework to avoid the inevitable challenges to what is arbitrarily considered “piecework time.” The reality is that WELA and Plaintiffs’ proposal will result in fewer earnings for employees who traditionally earned more by being more efficient. The proposed no-averaging rule is one of accounting, not substance, and adopting it would serve no public purpose. Indeed, the primary beneficiaries would be plaintiffs’ attorneys like WELA’s members who could then exploit businesses who have operated in

paid ‘on the employer's time.’” *Id.* at 661. *Lopez Demetrio* dealt with rest break time, which by definition is not hours worked. Rest break time must be separately compensated from piecework pay not by virtue of the MWA but by WAC 296-131-020(2)’s special rule that rest breaks be “on the employer’s time.” In fact, *Lopez Demetrio*’s discussion of the MWA supports workweek averaging. *Id.* at 660-61.

accordance with the decades old regulations of the DLI and the unanimous view of federal circuit courts to have considered the issue. The lawsuits that would follow by WELA members would accomplish nothing except to confer on them an unjustified windfall and compel employers to make complex, but ultimately non-substantive changes to the way piecework pay is computed going forward that are neutral (or even harmful) to employees.

The purpose of the MWA is to ensure a fair wage to workers, which piecework pay and workweek averaging provide, not to punish honest, well-paying businesses for using those legitimate and fair payment methods. The arguments advanced by WELA should be rejected.

April 30, 2019

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Dated this 30th day of April, 2019.

/s/ Sarah Smith

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