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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' Corrected Answering Brief

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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. STATEMENT OF THE CASE.....	3
A. Facts	3
B. Procedural History	6
III. ARGUMENT	9
A. Defendants’ Piecework Compensation Plans Directly Pay Drivers for All Activities Associated With Completing Trips	9
1. Completed trips are the relevant “piece”	11
2. The work activities at issue are part of the “piece” of completing trips	14
B. Washington Determines Minimum Wage Compliance for Non-Agricultural Piecework Employees on a Workweek Basis and Applies Piecework Earnings to All Time Worked in a Workweek.....	16
1. WAC 296-126-021 unambiguously approves workweek averaging for non- agricultural employees paid “wholly” on a piecework basis.....	17
2. WAC 296-126-021 is a valid regulation within the scope of Department of Labor & Industries’ legislative mandate	22
3. WAC 296-126-021 is consistent with the Washington Minimum Wage Act.....	27
4. The permissibility of workweek averaging for non-agricultural piecework employees has been confirmed by federal courts, the Department of Labor & Industries, the Washington Attorney General, and this Court	35
C. Plaintiffs’ Position Elevates Form Over Substance and Imperils Traditional Piecework.....	41

D.	If Plaintiffs' Novel Theory Is Adopted, It Should Be Given Prospective Application Only	47
IV.	CONCLUSION.....	49

TABLE OF AUTHORITIES

	<u>Page(s)</u>
<u>State Cases</u>	
<i>Anderson v. State, Dep't of Soc. & Health Servs.</i> 115 Wn.App. 452 (2003)	25
<i>Anfinson v. FedEx Ground Package Sys., Inc.</i> 174 Wn.2d 851 (2012)	30
<i>Ass'n of Wash. Bus. v. Dep't of Revenue</i> 155 Wn.2d 430 (2005)	24
<i>Bravern Residential, II, LLC v. State, Dep't of Revenue</i> 183 Wn.App. 769 (2014)	20
<i>Carranza v. Dovex Fruit Co.</i> 190 Wn.2d 612 (2018)	<i>passim</i>
<i>Cascade Sec. Bank v. Butler</i> 88 Wn.2d 777 (1977)	48
<i>Cerrillo v. Esparza</i> 158 Wn.2d 194 (2006)	18, 22
<i>Dep't of Ecology v. Campbell & Gwinn, L.L.C.</i> 146 Wn.2d 1 (2002)	32
<i>Drinkwitz v. Alliant Techsystems, Inc.</i> 140 Wn.2d 291 (2000)	30
<i>Edelman v. State ex rel. P.D.C.</i> 152 Wn.2d 584 (2004)	23
<i>Hama Co. v. Shorelines Hearings Bd.</i> 85 Wn.2d 441 (1975)	28
<i>Hill v. Xerox Bus. Servs., LLC</i> 191 Wn.2d 751 (2018)	<i>passim</i>
<i>Inniss v. Tandy Corp.</i> 141 Wn.2d 517 (2000)	30, 43

<i>Lenander v. Dep't of Ret. Sys.</i> 186 Wn.2d 393 (2016)	23
<i>Lopez Demetrio v. Sakuma Bros. Farms, Inc.</i> 183 Wn.2d at 649 (2015)	<i>passim</i>
<i>Lunsford v. Saberhagen Holdings, Inc.</i> 166 Wn.2d 264 (2009)	47
<i>Martini v. Emp't Sec. Dep't</i> 98 Wn.App. 791 (2000)	35
<i>McDevitt v. Harborview Med. Ctr.</i> 179 Wn.2d 59 (2013)	48
<i>Mynatt v. Gordon Trucking, Inc.</i> 183 Wn.App. 253 (2014)	25
<i>Nat'l Can Corp. v. Dep't of Revenue</i> 109 Wn.2d 878 (1988)	48
<i>In re Pers. Restraint of Arnold</i> 198 Wn.App. 842 (2017)	36
<i>Piper v. Dep't of Labor & Indus.</i> 120 Wn.App. 886 (2004)	22
<i>Port of Seattle v. Pollution Control</i> 151 Wn.2d 568 (2004)	26, 39
<i>Postema v. Pollution Control Hearings Bd.</i> 142 Wn.2d 68 (2000)	28
<i>Saucedo v. John Hancock Life & Health Ins. Co.</i> 185 Wn.2d 171 (2016)	11
<i>Schilling v. Radio Holdings, Inc.</i> 136 Wn.2d 152 (1998)	24
<i>Schneider v. Snyder's Foods, Inc.</i> 116 Wn.App. 706 (2003)	25

<i>Seattle Prof'l Eng'g Emps. Ass'n v. Boeing Co.</i> 139 Wn.2d 824 (2000)	34, 46
<i>Silverstreak, Inc. v. Washington State Dep't of Labor & Indus.</i> 159 Wn.2d 868 (2007)	17, 26, 39
<i>State v. Delgado</i> 148 Wn.2d 723 (2003)	44, 45
<i>State v. Fjermestad</i> 114 Wn.2d 828 (1990)	44, 45
<i>Stevens v. Brink's Home Security, Inc.</i> 162 Wn.2d 42 (2007)	34
<i>Travelers Cas. & Sur. Co. v. Wn.Tr. Bank</i> 186 Wn.2d 921 (2016)	10
<i>Wash. Pub. Ports Ass'n v. Dep't of Revenue</i> 148 Wn.2d 637 (2003)	23, 28, 30
<i>Waste Mgmt. v. Utils. & Transp. Comm'n</i> 123 Wn.2d 621 (1994)	28
<i>Westberry v. Interstate Distrib. Co.</i> 164 Wn.App. 196 (2011)	25
<i>Whatcom Cty. v. City of Bellingham</i> 128 Wn.2d 537 (1996)	20
<u>Federal Cases</u>	
<i>Affiliated FM Ins. Co. v. LTK Consulting Servs.</i> 556 F.3d 920, 922 (9th Cir. 2009)	10
<i>Agrilink Foods, Inc. v. State, Dep't of Revenue</i> 153 Wn.2d 392, 396 (2005)	18
<i>Blankenship v. Thurston Motor Lines, Inc.</i> 415 F.2d 1193 (4th Cir. 1969)	31

<i>Chevron Oil Co. v. Huson</i> 404 U.S. 97 (1971).....	47
<i>Douglas v. Xerox Bus. Servs., LLC</i> 875 F.3d 884 (9th Cir. 2017)	30, 31
<i>Dove v. Coupe</i> 759 F.2d 167 (D.C. Cir. 1985).....	31
<i>Helde v. Knight Transportation, Inc.</i> 2:12-cv-00904-RSL at Dkt. 52 (W.D. Wash. 2016).....	<i>passim</i>
<i>Hensley v. MacMillan Bloedel Containers, Inc.</i> 786 F.2d 353 (8th Cir. 1986)	31
<i>Henson v. Santander Consumer USA Inc.</i> 137 S. Ct. 1718 (2017).....	22
<i>Hill v. Xerox Bus. Servs., Ltd. Liab. Co.</i> 868 F.3d 758 (9th Cir. 2017)	36
<i>Mendis v. Schneider Nat'l Carriers Inc</i> 2016 WL 6650992 (W.D. Wash. 2016).....	7, 41
<i>Morrison v. United States Dep't of Labor</i> 713 F. Supp. 664 (S.D.N.Y. 1989).....	43
<i>United States v. Klinghoffer Bros. Realty Corp.</i> 285 F.2d 487 (2d Cir. 1960).....	31
<i>United States v. Rosenwasser</i> 323 U.S. 360 (1945).....	44
<u>State: Statutes, Rules, Regulations, Constitutional Provisions</u>	
Dep't of Labor & Indus., Admin. Order No. 74-9	24
Industrial Welfare Act.....	23
RCW 34.05.570	23
RCW 43.22.270	23, 25, 27

RCW 43.22.282	27
RCW 49.12	23, 24, 40
RCW 49.12.005	24
RCW 49.12.091	23
RCW 49.46	23
RCW 49.46.020	24, 26, 28, 40
RCW 49.46.040	24
RCW 49.46.810	24
RCW 49.48.040	24
RCW 49.52.050	35
WAC 296-126.....	25, 27
WAC 296-126-001.....	2, 32
WAC 296-126-021.....	<i>passim</i>
WAC 296-131-020.....	32, 33
Wage Rebate Act	45
Washington Minimum Wage Act.....	<i>passim</i>
<u>Federal: Statutes, Rules, Regulations, Constitutional Provisions</u>	
49 C.F.R. § 396.1	14
28 U.S.C. § 1332(d)	7
29 U.S.C. § 206(a)	31
Class Action Fairness Act of 2004.....	7
Fair Labor Standards Act (FLSA).....	30, 31

Other Authorities

Black's Law Dictionary 1452 (10th ed. 2014)29

I. INTRODUCTION

WAC 296-126-021 has been the law in Washington for over four decades and is controlling of the certified question. This regulation provides that non-agricultural employees earning piecework wages are paid the minimum wage in accordance with the Washington Minimum Wage Act (MWA) when dividing their total earnings in a workweek by the hours worked in the same workweek results in a rate of pay greater than the legal minimum. The district court in this case correctly understood WAC 296-126-021 to permit workweek averaging in accordance with its plain language, but believed this Court's opinion in *Carranza v. Dovex Fruit Co.*, 190 Wn.2d 612 (2018) "called into question" this conclusion. The district court therefore certified the following question: "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?"

Pursuant to WAC 296-126-021, the answer to the district court's question is "no." Under the regulation, if the piecework pay for completed trips divided by the number of hours worked by the employee in the workweek results in an hourly rate in excess of the minimum wage, then Defendants have complied with the MWA. *Carranza* does not call this conclusion "into question" because the *Carranza* opinion 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...”).

In any event, here, Plaintiffs are guaranteed to be paid the minimum wage because Defendants calculate drivers’ wages first, by multiplying the hours a driver worked times the minimum wage and then **adding to it**, the amount by which the piece rate for the trip exceeded that minimum wage calculation.

Additionally, Plaintiffs’ case is built on an incorrect and unsupported assumption: that Defendants only pay their truck driver employees for the time they spend behind the wheel driving, and not for the time they spend on other tasks integral or necessary to completing the trip. But piecework pay is tied to an employee’s output and not time worked. It is **product**-based. As a result, it compensates for all activities that are related and incidental to creating the relevant “piece.” In this case, the “piece” is a fully completed trip. That means Defendants’ employee drivers are “productive” and earn their piecework pay whenever they perform **any** work activities related to completing a trip. Driving counts, of course, but so do many other activities that are required to

complete the trip. Plaintiffs' argument that Defendants' trip pay compensates them for driving time only is arbitrary and not supported by the record or the law.

Plaintiffs' proposed interpretation of WAC 296-126-021 and understanding of piecework are not reasonable. Further, they threaten to undermine and potentially negate the use of piecework compensation in Washington altogether. To avoid that result, the Court should confirm that Defendants defining the relevant "piece" as a trip is consistent with Washington law, and uphold WAC 296-126-021 to permit minimum wage workweek averaging for non-agricultural piecework employees, in accordance with its plain meaning.

II. STATEMENT OF THE CASE

A. Facts

Defendant Knight Transportation, Inc. is a national motor carrier headquartered in Phoenix, Arizona. Dkt. 75 at ¶ 3. Defendants Knight Refrigerated, LLC and Knight Port Services, LLC are subsidiaries of Knight Transportation, also based in Phoenix, Arizona. *Id.* at ¶ 2.

Knight Transportation employs some Washington residents as truck drivers for its dry van freight business. *Id.* at ¶ 3. These truck drivers are based out of the company's Fairview, Oregon service center and are long-haul drivers, meaning they are on the road for several weeks

at a time and complete trips throughout the United States. *Id.* at ¶¶ 3-4. Knight Refrigerated employs some Washington residents as truck drivers for its refrigerated freight business. *Id.* at ¶ 5. Knight Refrigerated's Washington resident truck drivers are based out of a facility in Idaho Falls, Idaho, and are also long haul drivers. *Id.* at ¶ 5. Knight Port Services no longer operates in Washington, but during the relevant period employed some Washington residents, based out of a facility in Kent, Washington, as short-haul truck drivers to deliver containers coming to and from the Seattle and Tacoma seaports. *Id.* at ¶ 6.

Like nearly every carrier in the country, Defendants compensate their employee drivers, in part, on a per trip piecework basis. Dkt. 75 at ¶¶ 7-16; Dkt 53-7 at 29:9-31:23; *see also Helde v. Knight Transportation, Inc.*, 2:12-cv-00904-RSL at Dkt. 52 at ¶¶ 7 & 12 (W.D. Wash.). Completed trips involve much more than just driving: Defendants' drivers must also complete legally mandated pre-trip and post-trip truck inspections, fill out paperwork, fuel and wash their trucks, secure cargo, maintain their equipment, and occasionally wait for a shipper or consignee. Dkt. 75 at ¶¶ 8, 11 & 15; Dkt. 53-7 at 29:9-31:23; *see also Helde*, 2:12-cv-00904-RSL at Dkt. 39-2 p. 117. Defendants structured trip pay to compensate for all work activities normally or typically associated with completing the trip. *Id.*

Long-haul drivers' trip pay is calculated based on the estimated length of the trip and a base per-mile rate. Dkt. 75 at ¶ 10. The miles are estimated using the starting and ending zip codes of the trip stated in a guide published by Rand McNally. *See, e.g., Helde*, 2:12-cv-00904-RSL at Dkt. 39-2 p. 117 & Dkt. 52 at ¶ 8. A long haul driver's base per-mile rate varies depending on the length of the trip, with shorter trips paid at a higher per-mile rate than longer ones. Dkt. 75 at ¶ 10. This is because most routine non-driving duties required to complete a trip are required regardless of the length of the trip. *Id.* For that reason, applying a higher per-mile rate for shorter trips, where non-driving tasks will take a greater proportion of the total trip time, equalizes the trip rate for long-haul drivers on both shorter and longer trips. *Id.* Long-haul drivers are also issued extra pay for certain additional duties that are sometimes required in delivering a load that are not routine and therefore are not calculated into the trip pay rate. *Id.* at ¶¶ 8 & 12; Dkt. 53-7 at 30:17-31:23. This extra pay covers such things as making extra stops or pickups, hand loading or unloading, delivering hazardous materials, detention at shipper or consignee for more than two hours, layovers, and border crossing. *Id.*

Short-haul drivers' trip pay, sometimes called "load pay," is a flat amount for each trip to and from either the Seattle or Tacoma seaports. Dkt. 75 at ¶¶ 13-14. Trip pay for short-haul drivers is determined by the

length of the trip, the weight of the shipment, the difficulty of trip (accounting for mountain crossings and inclement weather) and whether the trip involves a refrigerated load. *Id.* at ¶ 14. Short-haul trip pay does not use a mileage rate at all. *Id.* at ¶¶ 13-14. Like long-haul drivers, short-haul drivers receive additional pay for non-routine items, such as detention pay if drivers are required to stay at a port for more than two hours, pay for layovers, and pay for assisting with the loading and unloading of products. *Id.* at ¶ 16.

Defendants' Washington resident employee drivers are protected by a minimum wage guarantee, which ensures that their total pay in a workweek never falls below the legal minimum. Dkt. 53-23 & 53-24. Defendants pay the 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. *Id.* If a driver's trip pay does not exceed the minimum wage rate times all hours worked, the driver is simply paid for all hours at the minimum wage rate. *Id.*

B. Procedural History

Plaintiff Valerie Sampson initiated this case on October 14, 2016 by filing a putative class action complaint against Defendant Knight Transportation in the Superior Court of Washington for King County.

Dkt. 1 at Exh. A. On January 6, 2017, Knight Transportation removed this case to the United States District Court for the Western District of Washington pursuant to the Class Action Fairness Act of 2004. Dkt. 1; 28 U.S.C. § 1332(d).

Plaintiffs filed a first amended complaint on September 22, 2017, adding plaintiff David Raymond and defendants Knight Refrigerated and Knight Port Services as parties. Dkt. 38. Plaintiffs' first amended complaint includes a cause of action arising under the Minimum Wage Act ("MWA") alleging that Defendants did not pay their Washington resident employee drivers for non-driving work time. *Id.* at ¶¶ 21 & 30.

Defendants moved for partial summary judgment on Plaintiffs' MWA cause of action. Dkt. 71. In its order on Defendants' motion, the district court noted that WAC 296-126-021 "allows non-agricultural employers to pay their employees a piece rate based on workweek averaging" and that "[c]ourts in this district...have previously held that Plaintiffs' on-duty, not driving claim[s] are not cognizable under Washington law." Dkt. 92 at 15:1-4; 16:14-15, citing *Helde v. Knight Transportation, Inc.*, 2016 WL 1687961, at *1-3; *Mendis v. Schneider Nat'l Carriers Inc*, 2016 WL 6650992, at *3-4 (W.D. Wash. 2016). Despite the plain language of WAC 296-126-021 and the unanimous view of courts that have addressed Plaintiffs' theory, the district court believed

that this Court’s decision in *Carranza v. Dovex Fruit Co.*, 190 Wn.2d 612 (2018) “called into question” the prior holdings rejecting Plaintiffs’ claims. Dkt. 92 at 15:14-15. The district court acknowledged that this Court in *Carranza* “made clear that its holding only applied to agricultural workers” but felt that Washington law was unsettled because *Carranza* “did not address how its interpretation of the MWA affects the validity of WAC 296-126-021...” *Id.* at 16:8-14.

Thus, the district court certified the following question: “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?” *Id.* at 17:4-6. The district court stated: “For the purpose of answering this question, the 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. The Court does not intend its framing of the question to restrict the Washington State Supreme Court’s consideration of any issues that it determines are relevant. If the Washington State Supreme Court decides to consider the certified questions, it may in its discretion reformulate the questions.” *Id.* at 17:6-12.

III. ARGUMENT

A. **Defendants' Piecework Compensation Plans Directly Pay Drivers for All Activities Associated With Completing Trips**

As initial matter, in this case there are no “activities outside of piece-rate work” at issue, and Defendants are therefore entitled to judgment without ever reaching the permissibility of workweek averaging under WAC 296-126-021.

Plaintiffs' legal theory is based on the incorrect assumption that Defendants' trip pay compensates drivers only for time spent driving. This arbitrary assumption is asserted as fact throughout Plaintiffs' brief, yet the basis for it has never been adequately explained. Plaintiffs agree that Defendants' trip pay is a piecework compensation system, but refuse to acknowledge that the relevant “piece” is completed trips. Because the piece is a trip, all activity regularly or typically associated with completing trips is directly compensated by Defendants' trip pay.

Plaintiffs' unsupported assumption that trip pay compensates only for driving time appears based on the premise that piecework pay can only compensate for one type of activity, and that all other activities integral or incidental to producing the relevant piece are “activities outside of piece-rate work.” Neither Washington law nor the record supports this premise. Piecework pay is based on the output of an employee, not time worked, and naturally encompasses a variety of tasks incidental to creating the

applicable output. Plaintiffs' belief that Defendants' trip pay can only lawfully compensate for a single activity, which they have determined is the driving aspect of the trip, is not how piecework functions.

The district court's certified question appears to implicitly accept Plaintiffs' premise by referring to "time spent performing activities outside of piece-rate work" and defining such activities to include a number of non-driving tasks essential to the completion of trips. But this Court is not bound by the district court's framing. *See, e.g., Travelers Cas. & Sur. Co. v. Wn.Tr. Bank*, 186 Wn.2d 921, 931 (2016); *Danny*, 165 Wn.2d at 205 n.1 ("This court may reformulate a certified question"); *Affiliated FM Ins. Co. v. LTK Consulting Servs.*, 556 F.3d 920, 922 (9th Cir. 2009) ("If the Washington State Supreme Court decides to consider the certified question, it may in its discretion reformulate the question"). Indeed, the district court here expressly stated that "[t]he Court does not intend its framing of the question to restrict the Washington State Supreme Court's consideration of any issues that it determines are relevant. If the Washington State Supreme Court decides to consider the certified questions, it may in its discretion reformulate the questions." Dkt. 92 at 17:9-13. The Court should therefore reformulate the certified question and answer what is actually in dispute: "Does the MWA prohibit piecework pay from compensating for all activities necessary or incidental

to the production of the units of output?” The answer to this question must be “no.” Washington law expressly permits piecework, and piecework by definition compensates for all activities associated with producing pieces. *See* WAC 296-126-021 (permitting employees to be compensated “wholly” on a piecework basis).

Further, the undisputed facts in the district court establish that the relevant piece in this case is a fully completed trip and that each of the tasks Plaintiffs claim are uncompensated are directly related and integral to producing trips. Thus, the district court should have granted Defendants’ motion for summary judgment on this basis. *See Saucedo v. John Hancock Life & Health Ins. Co.*, 185 Wn.2d 171, 178 (2016) (“Certified questions are matters of law reviewed de novo and in light of the record certified by the federal court....Because the questions in this case pertain to a motion for summary judgment, we perform the same inquiry as the district court”).

1. Completed trips are the relevant “piece”

Plaintiffs do not dispute that Defendants’ trip pay is “piecework” or “piece rate” pay. This Court in *Hill v. Xerox Bus. Servs., LLC*, 191 Wn.2d 751, 761-62 (2018) explained that the Department of Labor and Industries “describes ‘[p]iece rate employees’ [] as ‘usually paid a fixed amount per unit of work.’” *Accord Hill*, 191 Wn.2d at 764 (“[p]iece rate

employees are usually paid a fixed amount per unit of work’—for example, \$0.75 per apple picked, \$0.10 per widget produced, or \$5.00 per mile driven.”) (Stephens, J., dissenting); *see also* Wn.Dep’t of Labor & Indus., Emp’t Stds. Admin. Policy ES.A.8.2. The central feature of piecework is that it “is tied to the employee’s output (for example, per pound of fruit harvested) and not by time worked.” *Demetrio*, 183 Wn.2d at 652.

Because piecework pay is not based on time worked, to determine what is being compensated on a piecework basis the Court must answer the threshold question: what is the relevant “piece?” Plaintiffs make no effort to answer this question and instead simply assume that Defendants’ trip pay is akin to hourly pay compensating for driving time only. But the evidence demonstrates that the piece being compensated is completed trips. The pay at issue is called “trip pay” or “load pay,” and it is calculated and paid upon completion of a trip. Dkt. 75 at ¶¶ 7-10 & 13-14. A driver does not complete a trip, the output, if he or she drives only 90 miles of a 100 mile trip and abandons his or her truck. In such a scenario the trip, which is the piece, would not have been completed.

Furthermore, the evidence supports the conclusion that trip pay is intended to compensate for all tasks associated with completing a trip and the trip is “priced” accordingly. Defendants know that completing trips

require activities such as fueling, waiting at shippers and consignees, performing legally required inspections, etc., and Defendants calculate the base trip pay taking these activities necessary to the trip into account (just like they also take driving into account). Dkt. 75 at ¶¶ 10-11 & 14-15. One example evidencing this practice is the fact that shorter trips for long-haul drivers are paid at a higher rate per mile than longer trips to account for the regular non-driving activities that are necessary regardless of the length of the trip. *Id.* at ¶ 10.

The fact that trip pay for long-haul drivers is based in part on a rate per mile and sometimes referred to as “mileage pay” does not transform the relevant “piece” into a mile. Long-haul trip pay is not based on actual miles driven, but instead on estimated zip code to zip code miles in the Rand McNally Household Movers Guide. *See Helde v. Knight Transportation, Inc.*, 2:12-cv-00904-RSL, at Dkt 39-2 p. 117 & Dkt. 52 at ¶ 8. Short-haul trip pay uses no mileage rate at all and is simply a flat amount per trip completed. Dkt. 75 at ¶¶ 13-14. Characterizing the piece as a mile is an artificial characterization of a driver’s work. Each component part of the trip is necessary to the “piece”: fuel is necessary to move the truck, federal Department of Transportation mandated inspections are necessary before beginning or ending a trip, and

paperwork to show what has been delivered and to whom is a common sense necessity for any delivery.

Plaintiffs' arguments are ultimately based on the fallacy that piecework pay only compensates for doing an isolated activity, such as driving, as opposed to pay for producing a particular thing, like a trip. Because piecework pay compensates for producing units of output, it directly compensates for all work activities incidental to producing that output. And because the unit of output Defendants' piecework pay is based on is completed trips, the trip pay compensates employees for all work activities associated with completing trips.

2. The work activities at issue are part of the “piece” of completing trips

The non-driving work activities Plaintiffs allege are uncompensated are each integral parts of completing trips and therefore are directly compensated by Defendants' trip pay. Plaintiffs claim that Defendants do not pay employee drivers for pre and post-trip inspections, fueling, and waiting at a shipper or consignee, but a driver must complete these tasks to complete a trip. Pre and post-trip inspections are required by the federal Department of Transportation, meaning trips cannot be lawfully completed without them. 49 C.F.R. §396.1, *et seq.* The laws of physics denote that a truck cannot move without fuel. And wait time (up

to two hours) regularly occurs in the course of completing a trip, and so it is factored into Defendants' trip pay.¹ Dkt. 75 at ¶ 11. For this reason, Plaintiffs are wrong when they argue drivers work “for free” or “earn[] nothing” while waiting for loads. They are compensated by the trip pay that includes in its calculus up to two hours of wait time.² *Id.*

Nothing in the record supports Plaintiffs' assumption that driving is the only activity compensated by trip pay. Plaintiffs' sole citation to deposition testimony from Knight Transportation's chief operations officer does not provide the evidentiary support Plaintiffs would need to prove their argument. Plaintiffs' counsel posited the leading question that a “**truck** is not being productive if it's not logging miles,” and the COO agreed. Dkt 53-20 at 205:8-12 (emphasis added).³ But whether a truck is being productive is a different question to whether a driver is being productive. A **driver's** production piece is a completed trip, and driving the truck down the road is not the only task the driver must do to complete

¹ When a driver is required to wait at a shipper or consignee for more than two hours, the driver receives additional detention pay to ensure he or she is compensated for any unusually long delay. Dkt. 75 at ¶¶ 12 & 16.

² There is always going to be some amount of delay when delivering freight, be it ten seconds, ten minutes or some other amount of time, and so a line must be drawn somewhere. Two hours is a common industry standard.

³ Plaintiffs also cite a poster used by Defendants encouraging its employees to be productive. Dkt. 53-3. Productivity is something every business encourages; the fact that Defendants encourage productivity has nothing to do with whether their trip pay is lawful.

the trip. These other tasks are integral to the completion of a trip, and are directly compensated by Defendants' trip pay.

To summarize, Plaintiffs' MWA claims are built on the fallacious premise that employees earn trip pay only when they are actually driving their truck down the road. The premise is false because the "piece" drivers are paid to produce is completed trips, and all of the activities Plaintiffs claim are uncompensated are necessary for completion of the piece. Therefore, there are no "activities outside of piece-rate work" at issue, and Defendants are entitled to judgment as a matter of law without ever reaching the permissibility of workweek averaging under WAC 296-126-021.

B. Washington Determines Minimum Wage Compliance for Non-Agricultural Piecework Employees on a Workweek Basis and Applies Piecework Earnings to All Time Worked in a Workweek

Even if Plaintiffs' assumption that driving is severable from the other activities necessary for the completion of a trip had any credence, Defendants' trip pay is lawful. WAC 296-126-021 expressly permits MWA compliance for non-agricultural employees paid piecework pay to be determined on a workweek basis with all piecework earnings during the workweek averaged across all hours worked in the same period.

Plaintiffs' tortured interpretation of WAC 296-126-021 is not a reasonable construction. In contrast to every court that has addressed WAC 296-126-021, the DLI's administrative policies, and the Washington Attorney General, Plaintiffs would have the Court interpret WAC 296-126-021 to mean the opposite of what its plain language states. WAC 296-126-021 means what it says and it is a valid and reasonable interpretative regulation of the MWA to which the Court must give deference.

The district court's certified question should therefore be answered negatively.

1. WAC 296-126-021 unambiguously approves workweek averaging for non-agricultural employees paid "wholly" on a piecework basis

Regulations in Washington are interpreted according to the same rules used to interpret statutes. *Demetrio*, 183 Wn.2d at 652. Courts begin with the plain language of the regulation; "if that language is unambiguous it controls." *Id.*; see also *Silverstreak, Inc. v. Washington State Dep't of Labor & Indus.*, 159 Wn.2d 868, 881 (2007) ("where a regulation is clear and unambiguous, words in a regulation are given their plain and ordinary meaning unless a contrary intent appears"). Regulatory language is unambiguous if it has only one reasonable interpretation. *Demetrio*, 183 Wn.2d. at 653. To create ambiguity, an interpretation must

be reasonable; a regulation “is not ambiguous merely because different interpretations are conceivable.” *Cerrillo v. Esparza*, 158 Wn.2d 194, 201 (2006) (quoting *Agrilink Foods, Inc. v. State, Dep't of Revenue*, 153 Wn.2d 392, 396 (2005)). Here, WAC 296-126-021 is unambiguous and Plaintiffs have identified no contrary intent.

WAC 296-126-021 provides: “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 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 meaning of this regulation is clear and unambiguous from its plain language: when an employee is paid either wholly or partially on a piecework or commission basis, the amount earned on such basis is credited to the **total** wages earned for the **workweek**, and compliance with the MWA is computed based on the **total** wages earned for the same **workweek** and must result in a rate no less than the applicable minimum wage. For example, if a non-agricultural employee is paid \$20 per widget and produces 50 widgets while working 40 hours in a workweek, the employee’s wages are in compliance with the MWA pursuant to WAC 296-126-021 as follows: 1) the employee’s \$1,000 piecework earnings (\$20 x 50) are applied to the

total wage for workweek, regardless of when they were earned; and 2) the total wages for the workweek are computed on the hours worked for the same workweek and result in more than the applicable minimum wage rate (\$1,000 total wages ÷ 40 hours = \$25/hr rate).

WAC 296-126-021 in no way limits this calculation to hours worked on a piece rate. “(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** paid for such period shall be computed on the **hours worked in that period** resulting in no less than the applicable minimum wage rate.” (emphasis added). This is simple: total wages divided by hours worked. There is no language whatsoever that can reasonable limit the interpretation to only hours worked on the piece rate.

Plaintiffs’ interpretation of WAC 296-126-021, rather than being reasonable, is entirely divorced from the regulation’s actual language. Plaintiffs contend that because subsection 1 of WAC 296-126-021 refers to the “amount earned on a [piecework] basis,” and states that such amount is credited “as a part of the total wage for that period,” the regulation contains an implicit requirement that certain work be compensated on a **non**-piecework basis. Plaintiffs’ construction reads the word “wholly” out of WAC 296-126-021 and conflicts with its plain meaning. Because WAC 296-126-021 contemplates that an employee

may be compensated “wholly” on a piecework or commission basis, it cannot mean that employees are entitled as a matter of law to hourly compensation that is separate from their piecework earnings. *See Bravern Residential, II, LLC v. State, Dep’t of Revenue*, 183 Wn.App. 769, 777 (2014) (“We [] interpret a regulation in a manner that gives effect to all its language without rendering any part superfluous.”); *see also Whatcom Cty. v. City of Bellingham*, 128 Wn.2d 537, 546 (1996). The converse is also true, in that Plaintiffs’ interpretation would also write out of the regulation the reference to “partially” which would be unnecessary under Plaintiffs’ strained interpretation. Whether an employee is paid partially or wholly on a piecework basis, the calculation for minimum wage purposes is to add up total wages for that workweek and divide by hours worked in that same workweek.

Plaintiffs attempt to avoid this by misleadingly editing out the phrase “in each work-week period” from subsection 1 of WAC 296-126-021. That regulation establishes that piecework earnings are credited to the “total wage” for an entire “work-week period,” and then “total wages paid for such [work-week] 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.

Interpreting WAC 296-126-021 as written does not render subsection 1 superfluous as Plaintiffs contend. Subsection 1 explains that piecework earnings in a workweek are credited to total wages for hours worked in the same workweek, and subsection 2 goes on to describe how dividing the total wage for a workweek by all hours worked in that workweek must result a rate greater than the minimum wage. WAC 296-126-021(1)'s reference to the "amount earned on a [piecework] basis" and "part of the total wage for that period" do not require that non-piecework compensation be paid to workers paid "wholly" on a piecework basis; rather the language is permissive and permits all forms of compensation paid in a workweek to be added together to determine MWA compliance when an employee is paid "partially" on a piecework basis. Indeed, this is how the DLI has interpreted WAC 296-126-021 in the administrative guidance Plaintiffs cite. *See* Dep't of Labor & Indus., Emp't Stds. Admin. Policy ES.A.3 ("If the pay period is weekly, the employee's total weekly earnings are divided by the total weekly hours worked... 'Total earnings' is meant to include all compensation received for hours worked in the pay period, as well as any additional payments...").

Washington's policy of liberal construction of its wage and hour laws does not aid Plaintiffs' position here because the policy is applied as an aid to interpretation only where the regulatory or statutory language is

ambiguous. *Demetrio*, 183 Wn.2d at 655 (“First, we examine the plain language of the regulation; if that language is unambiguous, it controls.”); *see also Piper v. Dep't of Labor & Indus.*, 120 Wn.App. 886, 890 (2004). For the reasons described above, WAC 296-126-021 is not ambiguous and Plaintiffs’ proposed interpretation is not a reasonable one. *Demetrio*, 183 Wn.2d. at 65; *Cerrillo*, 158 Wn.2d at 201 (“A statute is ambiguous if it is susceptible to two or more reasonable interpretations, but a statute is not ambiguous merely because different interpretations are conceivable”) (quotations omitted); *see also Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017) (“it is quite mistaken to assume... that ‘whatever’ might appear to ‘further[] the statute’s primary objective must be the law’”).

The plain language of the regulation permits workweek averaging for employees paid on a piecework basis and dictates that the certified question be answered in Defendants’ favor.

2. WAC 296-126-021 is a valid regulation within the scope of Department of Labor & Industries’ legislative mandate

Plaintiffs’ argument that WAC 296-126-021 does not implement the MWA and is therefore entitled to no deference has no merit. It is well established that “[a]n agency charged with the administration and enforcement of a statute may interpret ambiguities within the statutory

language through the rule-making process.” *Edelman v. State ex rel. P.D.C.*, 152 Wn.2d 584, 590 (2004). The burden of showing the invalidity of an administrative rule is on challenger, and “[a]n 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.” *Lenander v. Dep’t of Ret. Sys.*, 186 Wn.2d 393, 402-03 (2016); *see also* RCW 34.05.570(2)(c). “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.” *Wash. Pub. Ports Ass’n v. Dep’t of Revenue*, 148 Wn.2d 637, 646 (2003). The test here, therefore, is only that WAC 296-126-021 be “reasonably consistent” with the MWA.

Plaintiffs argue that WAC 296-126-021 is invalid because it appears in a chapter of the Washington Administrator Code that refers to Industrial Welfare Act (IWA; RCW 49.12) in its introductory section, rather than the MWA (RCW 49.46). Plaintiffs’ argument has no merit. The DLI is statutorily authorized to administer and interpret **all** of Washington’s wage and hour laws, including the MWA.

RCW 43.22.270(4) provides the DLI with the power to “supervise the administration and enforcement of **all laws** respecting the employment

and relating to the health, sanitary conditions, surroundings, **hours of labor, and wages** of employees employed in business and industry in accordance with the provisions of chapter 49.12 RCW.” (emphasis added). Similarly, RCW 49.12.091 provides the DLI with the “authority 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, or a rule or regulation adopted under such statute, and, at the same time have the authority to prescribe rules and regulations fixing standards, conditions and hours of labor for the protection of the safety, health and welfare of employees for all or specified occupations subject to chapter 16, Laws of 1973 2nd ex. sess.”⁴ Furthermore, the DLI is authorized to enforce the MWA under RCW 49.46.040 & 49.48.040, and state agencies possess the implied authority to promulgate interpretive regulations of the statutes they enforce. *Ass'n of Wash. Bus. v. Dep't of Revenue*, 155 Wn.2d 430, 440-43 (2005); *see also Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 158

⁴ “[C]hapter 16, Laws of 1973 2nd ex. sess.” refers to a set of 1973 revisions to RCW 49.12. The employees “subject to” that chapter are those who meet the expansive definition supplied by RCW 49.12.005, which includes all employees in Washington except certain junior hockey players.

(1998) (“The Department of Labor and Industries was given concurrent administrative enforcement powers for claims of failure to pay wages”).⁵

Indeed, this Court in *Hill*, 191 Wn.2d at 761-63, acknowledged the DLI as “the agency tasked by the legislature with enforcing the MWA” and identified WAC 296-126-021 as one of the MWA’s “corresponding regulations” and a “regulation implementing the MWA.” This Court has effectively already determined that Plaintiffs’ argument to the contrary is without merit.

And, all three divisions of the Washington Court of Appeals have upheld the DLI’s authority to interpret and administer the MWA, citing RCW 43.22.270(4). *Mynatt v. Gordon Trucking, Inc.*, 183 Wn.App. 253, 260 (2014) (Div. 1); *Westberry v. Interstate Distrib. Co.*, 164 Wn.App. 196, 208 (2011) (Div. 2); *Schneider v. Snyder’s Foods, Inc.*, 116 Wn.App. 706, 717 (2003) (Div. 3) (“The Department of Labor and Industries has the authority to supervise, administer, and enforce all laws pertaining to employment, including wage and hour laws. RCW 43.22.270(4).”); *Anderson v. State, Dep’t of Soc. & Health Servs.*, 115 Wn.App. 452, 455-57 (2003) (Div. 2). Particularly noteworthy is *Anderson*. There, the court interpreted the MWA in reliance on a DLI regulation defining hours

⁵ The DLI’s authority to “adopt and implement rules to carry out and enforce” RCW 49.46.020 (the provision of the MWA Plaintiffs rely on) was recently made express in a 2017 ballot initiative raising the minimum wage. RCW 49.46.810.

worked found in chapter 296-126 of the WAC and specifically noted that the regulation was adopted under the authority of the IWA. *Anderson* thus refutes Plaintiffs’ argument that a regulation appearing in WAC 296-126 and adopted pursuant to the IWA cannot implement the MWA. If WAC 296-126-021 did not implement the MWA, then every provision in WAC 296-126, like the definition of hours worked applied in *Anderson*, would be invalid as applied to the MWA.

Moreover, the DLI itself interprets WAC 296-126-021 as implementing the MWA. “This court has made clear that [it] will give great deference to an agency’s interpretation of its own properly promulgated regulations, ‘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); *see also Port of Seattle v. Pollution Control*, 151 Wn.2d 568, 593 (2004) (“deference to an agency’s interpretation of its own regulations is also appropriate”).

First of all, WAC 296-126-021 is titled “Minimum wages—Commissions and piecework,” clearly indicating that the DLI intended the regulation as an implementation of the MWA, regardless of the particular chapter of the WAC in which it appears. The DLI has also issued an administrative policy on the subject of the “Minimum Hourly Wage” in

which it relies on WAC 296-126-021 as providing the governing rules for application of the MWA (specifically, RCW 49.46.020) to piecework employees. Dep't of Labor & Indus., Emp't Stds. Admin. Policy ES.A.3. Additionally, the 1974 order promulgating WAC 296-126-021 included minimum wages that reflected the new minimums adopted by the MWA in 1973, further demonstrating that the DLI and its predecessor agency views the MWA as supplemental to, not separate from, the IWA.⁶ Dep't of Labor & Indus., Admin. Order No. 74-9; Chapter 9, Laws of 1973 2nd ex. sess.

For these reasons, WAC 296-126-021 is an authorized regulation within the scope of the DLI's statutory duties and it properly implements the MWA.

3. WAC 296-126-021 is consistent with the Washington Minimum Wage Act

Plaintiffs' argument that the plain language of the MWA bans compensation wholly on a piecework basis and requires hourly pay for certain work duties ignores the impact of WAC 296-126-021. Agency

⁶ WAC 296-126-021 was originally promulgated in 1974 by the now defunct Industrial Welfare Committee, relying on the authority vested in the DLI Director now codified at RCW 43.22.270(4). Dep't of Labor & Indus., Admin. Order No. 74-9. The Industrial Welfare Committee was abolished in 1982, and all of its "powers, duties, and functions" were transferred to the Director of the DLI. RCW 43.22.282. In 2009, the DLI overhauled WAC 296-126 to "updat[e] the current industrial welfare rules, which were adopted in 1974 and have not been reviewed by the department" and chose to leave WAC 296-126-021 intact, thus giving the DLI's imprimatur to the regulation's continuing validity. WSR 09-22-099.

rules, such as WAC 296-126-021, are used to “fill in the gaps” in legislation when such rules are “necessary to the effectuation of a general statutory scheme.” *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 gaps’ via statutory construction – as long as the agency does not purport to ‘amend’ the statute.”) Therefore, “[w]here 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.” *Waste Mgmt. v. Utils. & Transp. Comm’n*, 123 Wn.2d 621, 628 (1994). “The primary foundation and rationale for this rule is that considerable judicial deference should be accorded to the special expertise of administrative agencies. Such expertise is often a valuable aid in interpreting and applying an ambiguous statute in harmony with the policies and goals the legislature sought to achieve by its enactment.” *Hama Co.*, 85 Wn.2d at 448; *see also Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 77 (2000) (“Where a statute is within the agency’s special expertise, the agency’s interpretation is accorded great weight, provided that the statute is ambiguous”).

The operative provision of the MWA that Plaintiff relies on states “every employer shall pay to each of his or her employees who has

reached the age of eighteen years wages at a rate of not less than [x] dollars per hour.” RCW 49.46.020(1). The MWA requires pay at a “rate” of a certain number of dollars per hour (depending on the year), but does not specify over what period of time that “rate” must be calculated.⁷ One interpretation of the MWA could be that each individual hour worked in a pay period must be compensated at the minimum wage “rate” regardless of the method of compensation, but this is not the only reasonable construction of the statutory language. Because piecework and commission pay are not tied to time worked and generally cannot be practically allocated to any specific hour or minute of work, the legislature reasonably could have intended for piecework and commission earnings to be allocated to the entire work period in which they were earned, so long as the employee’s rate of pay exceeds the legal minimum for that same period.

The MWA is silent on this question, but WAC 296-126-021 “fills the gap.” It establishes a workweek standard for non-agricultural commission and piecework employees, providing that their “rate” of pay be determined by averaging their earnings across the workweek. Because WAC 296-126-021 reflects a reasonable interpretation of the MWA for

⁷ Black’s Law Dictionary defines a “rate” as a “[p]roportional or relative value the proportion by which quantity or value is adjusted.” Black’s Law Dictionary 1452 (10th ed. 2014).

piecework and commission workers, it is entitled to great deference and must be accepted by the Court. *See Wash. Pub. Ports Ass'n*, 148 Wn.2d at 646 (agency regulations are applied “if they are reasonably consistent with the controlling statute”).

The rule WAC 296-126-021 grafts on to the MWA also is consistent with how federal courts have unanimously interpreted the federal Fair Labor Standards Act (FLSA), on which the MWA is based and which uses substantially similar language. *See, e.g., 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].’”); *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.”); *Inniss v. Tandy Corp.*, 141 Wn.2d 517, 524 (2000) (“When construing provisions of the [MWA], this Court may consider interpretations of comparable provisions of the [FLSA] as persuasive authority.”).

Both the FLSA and MWA provide for payment of minimum wages at a particular “rate,” and the Ninth Circuit rejected Plaintiffs’ legal theory under the FLSA in *Douglas v. Xerox Bus. Servs., LLC*, 875 F.3d 884 (9th Cir. 2017). The Ninth Circuit held that “the relevant unit for determining minimum-wage compliance is the workweek as a whole” rather than “each

individual hour within the workweek” and noted that the Second, Fourth, Eighth, and D.C. Circuits had all reached the same conclusion. *Id.* at 885 & 888; *see also United States v. Klinghoffer Bros. Realty Corp.*, 285 F.2d 487, 490 (2d Cir. 1960); *Blankenship v. Thurston Motor Lines, Inc.*, 415 F.2d 1193, 1198 (4th Cir. 1969); *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). The Ninth Circuit relied on administrative guidance from the federal Department of Labor, which, like what the DLI did in WAC 296-126-021, adopted a workweek standard for determining minimum wage compliance.⁸ *Id.* at 887-88.

The cases cited by Plaintiffs in support of their position are inapposite. In *Carranza*, 190 Wn.2d 612, the Court held that for **agricultural workers**, the MWA required separate hourly pay for work deemed to be “outside the scope of piece-rate picking work.” The Court

⁸ Unlike the MWA, the minimum wage provision of the FLSA includes a prefatory clause that states it applies to “each of [an employer’s] employees who in any workweek is engaged in commerce or in the production of goods for commerce” 29 U.S.C. § 206(a). The “in any workweek” language in the prefatory clause of the FLSA does not distinguish the FLSA from the MWA, because the language describes *when* and *to whom* the FLSA applies to (i.e., to employees who engage in commerce in a workweek), not the scope of the requirement to pay minimum wages at a particular rate. *See Douglas*, 875 F.3d at 886 n.1 (“We cannot infer anything stronger from the ‘in any workweek’ language because it appears as part of a prefatory clause that determines applicability of the minimum-wage requirement, not compliance with the minimum-wage requirement.”). Furthermore, the “in any workweek” language did not appear in the FLSA at the time the MWA was enacted with almost identical language, yet by this time the workweek averaging standard was well entrenched. *See Carranza*, 190 Wn.2d at 636-37 (J. Stephens dissenting).

in *Carranza* was careful to limit its holding to the agriculture context, where WAC 296-126-021 is inapplicable. *Id.* at 617 (“The certified questions present a narrow issue that limit our conclusion to the context of agricultural workers”). The *Carranza* majority agreed that “WAC 296-126-021 arguably allows workweek averaging when an employer pays its workers on a piece-rate basis” but held that the regulation “has no role here because agricultural workers are expressly exempt.” *Id.* at 623-24; *see* WAC 296-126-001(2)(c) (“These rules do not apply to...Agricultural labor...”). Thus, *Carranza*’s holding has no relevance to the present question which involves non-agricultural employees who are subject to WAC 296-126-021. Indeed, the fact that four justices of this Court (in dissent) would have held that the plain language of the MWA permits workweek averaging for piecework employees is strong evidence that the statute is at least ambiguous and that WAC 296-126-021 reflects a reasonable interpretation that must be given deference. *Carranza*, 190 Wn.2d at 627-50 (2018) (J.J. Fairhurst, Stephens, Johnson, and Owens, dissenting); *see Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 12 (2002) (a statute is ambiguous “if it is susceptible to more than one reasonable meaning”).

Plaintiffs’ reliance on *Demetrio*, 183 Wn.2d 649, is similarly flawed. *Demetrio* held that language in WAC 296-131-020(2) requiring

agricultural employers to provide their employees ten minute rest breaks “on the employer’s time” required that rest break time be paid separately from piecework compensation. *Demetrio* held “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 paid ‘on the employer's time.’” *Id.* at 661 (emphasis added). *Demetrio*’s holding therefore cannot be imported into the MWA. Plaintiffs repeatedly quote a line from *Demetrio* where the Court stated “[a] piece rate is tied to the employee's output...and is earned only when the employee is actively producing,” but this out-of-context quotation has nothing to do with whether WAC 296-126-021 and the MWA permit averaging of piecework earnings across all hours worked. The Court was distinguishing work time from rest break time, which by definition is not hours worked. The question here is whether piecework earnings can be allocated to and averaged across all **worktime** in a week pursuant to the MWA and WAC 296-126-021, not whether a piecework employer can satisfy its obligation to provide rest breaks “on the employer’s time” without separate compensation for such periods of **non-work**.

Demetrio’s discussion of how a piecework employer can satisfy its minimum wage obligations also supports the permissibility of averaging. In determining the rate at which rest breaks must be paid, the Court held:

“the starting point for the calculation is the applicable minimum wage. The MWA sets the floor below which the agreed rate cannot fall without violating the statute. . . . The second sentence of WAC 296-131-020(2) references the MWA’s floor by ensuring **the quotient of an employee’s piece rate earnings by the number of hours he or she worked, inclusive of the time spent on rest breaks, is at least the minimum wage.** If this de facto hourly rate falls below the minimum wage, the employer must bring up the employee’s pay to the minimum.” *Id.* at 660-61 (emphasis added, internal quotations, citations, and footnotes omitted). The Court therefore described and approved a system where MWA compliance is computed based on total piecework earnings divided by all hours worked with a guaranteed hourly floor when the resulting rate is below the applicable minimum wage. This is exactly how WAC-296-126-021 permits MWA compliance to be determined and how Defendants pay their employee drivers earning trip pay.

Plaintiffs’ citations to *Seattle Prof’l Eng’g Emps. Ass’n v. Boeing Co.*, 139 Wn.2d 824, 838 (2000) and *Stevens v. Brink’s Home Security, Inc.*, 162 Wn.2d 42, 49 (2007) are inapposite because both cases involve hourly employees who were not paid for all hours worked. Neither case involved piecework or commission earnings and neither had the occasion to address WAC 296-126-021.

Martini v. Emp't Sec. Dep't, 98 Wn.App. 791 (2000) is a decision from a lower court that addressed a former employee's eligibility for unemployment benefits. The opinion provides little detail as to why the court concludes the employee was not paid properly, but its decision appears to be based on that fact that the employee's **hourly average** earnings under a piecework compensation system would sometimes fall below the legal minimum wage rate with no guaranteed floor. *Id.* at 793. In any event, the court did not address the applicability of WAC 296-126-021 and the opinion is thus not authority for Plaintiffs' argument.

For these reasons, WAC 296-126-021 is consistent with and reflects a reasonable interpretation of the MWA, and the cases cited by Plaintiff do not establish its inapplicability. The Court should therefore defer to the DLI's expertise and authority on wage and hour issues and uphold the validity of WAC 296-126-021 for non-agricultural workers.

4. The permissibility of workweek averaging for non-agricultural piecework employees has been confirmed by federal courts, the Department of Labor & Industries, the Washington Attorney General, and this Court

The Court does not write on a blank slate when construing WAC 296-126-021 as it applies to the MWA. In *Hill*, 191 Wn.2d 751, the Court interpreted WAC 296-126-021 consistent with Defendants' position, and did not question the regulation's validity. *Hill* is dispositive of the

certified question. See *In re Pers. Restraint of Arnold*, 198 Wn.App. 842, 846-47 (2017) (“Adherence to past decisions through the doctrine of stare decisis promotes clarity and stability in the law, thereby enabling those impacted by the courts’ decisions to make personal and professional decisions that comply with legal mandate”).

Hill also came before the Court on a certified question, but from the Ninth Circuit. *Hill v. Xerox Bus. Servs., Ltd. Liab. Co.*, 868 F.3d 758 (9th Cir. 2017). The Ninth Circuit had held:

Under Washington law, when an employee is paid on a piecework basis, as opposed to an hourly basis, it is permissible for an employer to determine whether the employee’s compensation complies with the MWA on the basis of a work-week period. See Wash. Admin. Code § 296-126-021; Dept. of Labor and Indus. Admin. Policy ES.A.3. In other words, as long as the total wages paid for a given week, divided by the total hours worked that week, averages to at least the applicable minimum wage, an employee’s compensation complies with Washington law. *Hill*, 868 F.3d at 759 (9th Cir.)

The Ninth Circuit thus applied WAC 296-126-021 as written – it approved applying piecework earnings to all hours worked in a workweek and computing compliance with the MWA on a workweek averaging basis. The question certified to this Court was whether the compensation scheme used by the defendant employer qualified as a “piecework” pay plan for purposes of WAC 296-126-021. *Hill*, 868 F.3d at 760 (9th Cir.)

This Court held that the plan before it was not “piecework” compensation, but in reaching that conclusion the Court agreed with the Ninth’s Circuit’s framing of the issue and cited WAC 296-126-021 for the proposition that “**Washington’s Minimum Wage Act (MWA), chapter 49.46 RCW, permits workweek averaging to determine minimum wage compliance for commission or piece rate workers.**” *Hill*, 191 Wn.2d at 756 (emphasis added). Immediately after this dispositive sentence, *Hill* included a footnote distinguishing the holding in *Carranza* as applying only to agricultural workers. *Hill*, 191 Wn.2d at 756 n. 6 (“Pursuant 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.’”) (citing *Carranza*).

Later in the decision, *Hill* explained how “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, wholly or partially,’**” citing WAC 296-126-021. *Id.* at 761. The dissent in *Hill* agreed with the majority opinion and described how “minimum wage compliance under Washington law is determined differently for piece-rate employees than for hourly employees. When an employee is paid on a piecework basis, as opposed to an hourly basis,

employers may use workweek averaging to determine whether the employee's overall compensation complies with the MWA. *See* WAC 296-126-021; Wash. Dep't of Labor & Indus., Emp't Stds. Admin. Policy ES.A.3." *Hill*, 191 Wn.2d at 764-65 (Stephens, J., dissenting). Consistent with the majority, the *Hill* dissent quoted from the Ninth Circuit with approval: **"In other words, as long as the total wages paid for a given week, divided by the total hours worked that week, averages to at least the applicable minimum wage,' the piece-rate employee's compensation complies with Washington law."** *Hill*, 191 Wn.2d at 765 (Stephens, J., dissenting) (quoting *Hill*, 868 F.3d at 759 (9th Cir.) (emphasis added)).

Plaintiffs cannot avoid these clear and unequivocal statements, and their reliance on the *Hill* is puzzling. Although the specific issue **before** the Court in *Hill* was whether a particular compensation structure qualified as a piecework plan under WAC 296-126-021, both the majority and dissenting Justices clearly agreed that if it was a piecework plan, workweek averaging would be permissible. *Hill*, 191 Wn.2d at 761 & 764-66. Indeed, there would have been no point in answering the certified question if this were not the case.⁹

⁹ As described above, the Court in *Demetrio*, 183 Wn.2d at 660-61 also embraced workweek averaging for minimum wage purposes for piecework employees.

The DLI has acted consistently with this Court’s analysis in *Hill*, by issuing several administrative policies interpreting WAC 296-126-021 and the MWA which embrace workweek averaging for piecework employees. Agency interpretations of the agency’s own regulations are entitled to “great deference.” *Silverstreak*, 159 Wn.2d at 884-85; *Port of Seattle*, 151 Wn.2d at 593. Dept. of Labor and Indus. Admin. Policy ES.A.3 provides:

In order to determine whether an employee has been paid the statutory minimum hourly wage when the employee is compensated on other than an hourly basis, the following standards should be used:

- If the pay period is weekly, the employee's total weekly earnings are divided by the total weekly hours worked (including hours over 40). Earnings must equal minimum wage for each hour worked. If such earnings do not equal minimum wage, the employer must pay the difference.
-
- For employees paid on commission or piecework basis, wholly or in part, other than those employed in bona fide outside sales positions, the commission or piecework earnings earned in each workweek are credited toward the total wage for the pay period. The total wage for that period is determined by dividing the total earnings by the total hours worked; the result must be at least the applicable minimum wage for each hour worked. See WAC 296-126-021.

Wash. Dep’t of Labor & Indus., Emp’t Stds. Admin. Policy

ES.A.8.2 addresses computing the regular rate for purposes of the overtime provisions of the MWA and states: “Piece rate employees are

usually paid a fixed amount per unit of work. The regular rate of pay for an employee paid on a piece rate basis is essentially identical to that of a commissioned employee, and is obtained by dividing the total weekly earnings by the total number of hours worked in the same week.”

Dep’t of Labor & Indus., Emp’t Stds. Admin. Policy ES.C.3 is titled “Commissions, Piecework And Minimum Wage Requirements” and states:

To determine whether commission or piecework employees have received minimum wage, the following rules are applied:

1. WAC 296-126-021(1): Wages earned in each workweek period may be credited as part of the total wage for the period.
2. WAC 296-126-021(2): To obtain the regular rate of pay, the total earnings for the pay period are to be divided by the total hours worked in that period.
3. If the regular rate for the pay period is less than the minimum hourly wage, the employer must pay the difference to comply with the Minimum Wage Act.

The DLI’s interpretation of WAC 296-126-021 is exactly the same as Defendants’.

The Washington Attorney General has also concluded that WAC 296-126-021 permits non-agricultural piecework employees’ piecework earnings to be averaged across all hours worked in the workweek under the MWA. The Attorney General filed an amicus brief in *Carranza*, 190

Wn.2d 612, in which he argued that WAC 296-126-021 did not apply to agricultural workers, but agreed that the MWA was ambiguous and 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.**” *Carranza*, Amicus Brief of the Attorney General of Washington at p. 6 (emphasis added).

Furthermore, several federal district courts have had the opportunity to pass on the meaning of WAC 296-126-021, and each has concluded that the regulation permits workweek averaging of piecework earnings consistent with the MWA. *See, e.g., Helde*, 2016 WL 1687961 at *1-3; *Mendis*, 2016 WL 6650992 at *3-4. In fact, *Mendis* held that Washington law on this point is so clear that the issue should not be certified to this Court. *Mendis*, 2016 WL 6650992, at *4.

Thus, every court (including this court), agency, and even the Washington Attorney General, establishes the lawfulness of workweek averaging for non-agricultural pieceworkers and Defendants’ trip pay.

C. Plaintiffs’ Position Elevates Form Over Substance and Imperils Traditional Piecework

While unstated, Plaintiffs’ position in this lawsuit amounts to a full-fledged assault on piecework compensation itself. In most

circumstances, it will be impractical, if not completely impossible, to parse out which hours worked are “activities outside of piece-rate work” and devise a scheme to somehow track and pay separately for this time. The rule embraced by WAC 296-126-021 reflects this reality. For example, if a nurse is paid by the number of injections he or she administers, how is a court to classify time spent preparing (filling) and cleaning the needle and walking to and from patients, as opposed to the time literally injecting drugs into patients arms? Or consider a journalist paid by the word. It would be impractical and illogical to sort out time spent actually typing as distinguished from time spent thinking or researching. In light of these practicalities, the DLI has made the reasonable policy determination that all worktime in a week is deemed compensated by piecework compensation and MWA compliance is determined by averaging the piecework wages across all hours worked in the workweek. Critically this serves the fundamental policy of ensuring that employees receive at least the minimum wage rate multiplied by all hours worked.

Plaintiffs’ theory is ultimately a matter of semantics and introduces needless complexity into piecework pay without any benefits for employers or employees. The predictable result of requiring an employer to allocate separate hourly compensation for certain activities (assuming

this can be done at all) would be that the employer simply reduces the amount offered in piecework pay. *See Inniss*, 141 Wn.2d at 531–32 (“in the Minimum Wage Act, the Legislature apparently intended to allow a broad and flexible interpretation of the term [regular rate] so long as the purposes of the Washington Minimum Wage Act are satisfied”).

The complexities and uncertainties of attempting compliance with the rules Plaintiffs’ propose (*i.e.*, trying to accurately predict which activities a court might deem non-piece rate activities, and devise a system to track and allocate hourly pay to those activities) is likely to force many employers to abandon piecework pay altogether. If employers switch to offering hourly pay only, employees could easily earn **less** for their work than they would under a piecework system. This is especially true for ambitious and productive employees who stand to benefit from a piecework system. When Plaintiffs suggest it is somehow improper for two employees who work the same number of hours to be paid differently because one of the employees is able to complete more pieces in that time, they are attacking the very concept of piecework incentive compensation which the MWA permits. *See Morrison v. United States Dep't of Labor*, 713 F. Supp. 664, 674 (S.D.N.Y. 1989) (“the piece-rate wage is an incentive method. Use of a piece-rate results in increased productivity over the use of an hourly wage”). Plaintiffs would have the efficient and

more productive employees punished by being paid the same as less efficient and less productive workers, essentially defaulting all workers down to the minimum wage rate, instead of protecting only the less productive workers from falling below minimum wage. Workweek averaging protects those less productive workers, while allowing more productive workers to earn higher incomes. *See United States v. Rosenwasser*, 323 U.S. 360, 361 (1945) (“minimum wage laws have a remedial purpose of protecting against the evils and dangers resulting from wages too low to buy the bare necessities of life and from long hours of work injurious to health”) (quotations omitted).

Furthermore, the availability of minimum wage floor like the one Defendants offer demonstrates the sophistry of Plaintiffs’ arguments. Defendants pay trip pay **on top of** a minimum wage guarantee based on actual hours worked times minimum wage. Dkt. 53-23 & 53-24. No one would argue that paying employees a straightly hourly wage at the minimum wage rate is unlawful under the MWA, yet Plaintiffs contend paying employees **more money** for the same hours worked with productivity based pay is illegal. This is an absurd result that conflicts with the purpose of the MWA. *See State v. Delgado*, 148 Wn.2d 723, 733 (2003) (“a reading that results in absurd results must be avoided”); *State v. Fjermestad*, 114 Wn.2d 828, 835 (1990) (“statutes should be construed to

effect their purpose and unlikely, absurd or strained consequences should be avoided”).

A couple of examples demonstrate just how absurd Plaintiffs’ theory is when taken to its logical conclusion. If a driver completed a trip in five hours and is paid \$1,000,000 in trip pay, Plaintiffs would contend the driver suffers a minimum wage violation if he or she performs a pre-trip inspection for 10 minutes of those five hours. Despite having received \$1,000,000 for five hours of work, Plaintiffs’ reading of Washington law requires the conclusion that this very wealthy driver was not paid minimum wage for all hours worked; yet if the same driver was paid an hourly rate of \$11.50 for the same exact five hours of work (including 10 minutes of pre-trip inspection) for \$57.50 in total pay, he or she would have indisputably been paid in accordance with the MWA. Such result is absurd, and the law shall not be interpreted to create absurdities. *Delgado*, 148 Wn.2d 723 at 733 (2003); *Fjermestad*, 114 Wn.2d 828 at 835.

Or consider two similarly situated employees each paid \$20 per widget produced with a guaranteed minimum wage floor. Suppose the first employee is particularly productive and is able to make 40 widgets in 30 hours of “piece-rate work” and 10 hours on “activities outside of piece-rate work” in a workweek. According to Plaintiffs, this employee suffers a minimum wage violation if she is paid her piece work wages of \$800

because 10 hours¹⁰ were supposedly uncompensated, despite the employee receiving an average rate of \$20/hr for all hours worked. But if the other employee is less productive and he was only able to make 20 widgets in same 30 hours of “piece-rate work” and 10 hours on “activities outside of piece-rate work” in the same workweek, this employee receives the minimum wage hourly floor because his piece rate earnings are too low to exceed the minimum wage multiplied by all hours worked. Thus, this second employee receives \$460 as direct hourly pay equal to the minimum wage times all hours worked (\$11.50 x 40 hrs). Even though the second employee received less money for the same work as the more productive employee who was paid more money, under Plaintiffs’ theory the person earning less money does not suffer an MWA violation because he was paid hourly while there is a MWA violation as to the more highly compensated employee. This, again, is absurd and does not advance the purpose of the MWA.

¹⁰ Depending on the reason these 10 hours of work were not spent producing widgets, the employee could conceivably have a breach of contract claim or claim under the Wage Rebate Act. RCW 49.52.050(2); *see Helde*, 2016 WL 1687961 at *2. However, it is no concern of the MWA, because the employee was paid at a rate greater than the minimum wage for all hours worked pursuant to WAC 296-126-021. *See also Seattle Prof'l Eng'g Empl. Ass'n*, 139 Wn.2d at 835 (“The WMWA does not assure payment of contractually agreed wage rates; it requires only that an employer pay the *minimum wage* for straight time”) (original emphasis).

D. If Plaintiffs' Novel Theory Is Adopted, It Should Be Given Prospective Application Only

If the Court were to agree with Plaintiffs' unwarranted interpretation of WAC 296-126-021, or somehow finds that it is an invalid regulation, the Court's decision should only be given prospective effect.

A judicial decision should be given prospective effect only when three conditions are satisfied: (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. *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 272 (2009); *see also Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971). Should the Court adopt Plaintiffs' position, each of these conditions would be satisfied.

Given that WAC 296-126-021 has existed in its present form since 1974, and every judicial decision and all administrative guidance before now has read the regulation to permit workweek averaging for employees paid on a piecework basis, declaring WAC 296-126-021 retroactively invalid would upend an established rule of law upon which the parties and all piecework employers in Washington have relied for decades. Invalidating WAC 296-126-021 retroactively would further serve no

policy objective in light of the fact that employees paid on a piecework basis and in accordance with WAC 296-126-021 earn at least as much as workers paid hourly at the minimum wage rate. Invalidation of WAC 296-126-021 will simply cause piecework employers to pay hourly with no additional earnings beyond those hourly rates. And it would produce a substantially inequitable result to subject Defendants and other piecework employers to liability for relying on a validly promulgated regulation by the agency charged with administering the MWA.

This Court has found that reliance on previously settled law is a compelling reason to give a new decision prospective effect. *See, e.g., Cascade Sec. Bank v. Butler*, 88 Wn.2d 777, 786 (1977) (overruling prior precedent given prospective effect only, because retroactive application “could conceivably produce in some instances unnecessary hardship and injustice”); *McDevitt v. Harborview Med. Ctr.*, 179 Wn.2d 59, 76 (2013) (overruling prior precedent upon which parties had relied denied retroactivity); *Nat'l Can Corp. v. Dep't of Revenue*, 109 Wn.2d 878, 881-95 (1988) (decision declaring tax statute unconstitutional denied retroactivity because of parties’ justifiable reliance on the statute). In fact, Knight Transportation has obtained summary judgment in its favor on identical claims to those in this case brought by the same Plaintiffs’

attorneys here on the basis of WAC 296-126-021. *See Helde v. Knight Transportation*, 2016 WL 1687961, at *1-3.

Although Defendants' position in this case is correct, any potential ruling in Plaintiffs' favor would need to be given prospective effect only to avoid producing a substantially inequitable result, not only for these Defendants, but for all companies paying piecework wages that have relied on these precedents and the DLI's own interpretations, including the many mom and pop trucking businesses operating from Washington state.

IV. CONCLUSION

The Court should reformulate the certified question to resolve the parties' primary dispute: "Does the MWA prohibit piecework pay from compensating for all activities necessary or incidental to the production of the units of output." The answer to this question is undoubtedly "no" and requires judgment in Defendants' favor. The relevant "piece" in this case is a completed trip and the activities Plaintiffs allege are uncompensated are a necessary part of completing trips.

But even assuming that the non-driving activities alleged by Plaintiffs are "time spent performing activities outside of piece-rate work" Defendants' compensation plans are lawful under WAC 296-126-021. WAC 296-126-021 is a valid regulation and permits piecework wages to be applied to all hours worked in a workweek for purposes of the MWA.

The district court's certified question ("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") must therefore be answered "no."

January 4, 2019

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/s/ Sarah Smith

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