

IN THE SUPREME COURT OF THE STATE OF NEVADA

WESTERN CAB COMPANY,

Petitioner,

vs.

EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF
NEVADA, in and for the COUNTY
OF CLARK; and THE HONORABLE
LINDA MARIE BELL, District Judge,

Respondents,

and

LAKSIRI PERERA, IRSHAD
AHMED, MICHAEL SARGEANT
Individually and on behalf of others
similarly situated,

Real Parties in Interest.

Case No.: 69408

District Court Case No. A-14-707423-C

Electronically Filed
Apr 03 2017 02:48 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

PETITIONER'S PETITION FOR REHEARING ON FUEL COSTS

MALANI L. KOTCHKA

Nevada Bar No. 283

HEJMANOWSKI & McCREA, LLC

520 South Fourth Street, Suite 320

Las Vegas, Nevada, 89101

Telephone: (702) 834-8777

Facsimile: (702) 834-5262

Email: mlk@hmlawlv.com

Attorneys for Petitioner

Western Cab Company

Pursuant to NRAP 40(c)(2)(A), Petitioner Western Cab Company (“Western”) moves this Court to rehear this matter on the fuel costs because the Court has overlooked and misapprehended a material fact in the record and/or a material question of law in the case.

I. Western Did Not Deduct Fuel Costs From Paychecks.

On page 3 of this Court’s March 16, 2017 Opinion, 133 Nev. Adv. Op. 10, this Court said, “In 2012, petitioner Western began requiring its drivers to pay for fuel directly instead of deducting fuel costs from the drivers’ paychecks.” That is a misapprehension of a material fact in the record. Prior to and after the February 2012 change in its commission formula, Western did **not** deduct fuel costs from the drivers’ paychecks. According to plaintiff Perera’s declaration, “Prior to January 2012, the gasoline used to operate all of defendant’s taxicabs **was provided by defendant**. Drivers were not required to pay for gasoline. Beginning in January 2012, defendant changed its policy and mandated that taxicab drivers purchase and pay for gasoline at outside gas stations.” App. Vol. 1 at 166 (emphasis added). Thus, Western did **not** deduct fuel costs from the drivers’ paychecks prior to or after 2012.¹

Plaintiff Perera confirmed that in January 2012:

¹ Perera filed a minimum wage claim with the Labor Commissioner who determined he had been paid correctly. App. Vol. 1 at 92, 283. Perera never claimed anything regarding fuel costs before the Labor Commissioner. App. Vol. 1 at 281-83.

. . . defendant's procedure required the drivers to line their cabs up inside defendant's yard, and the mechanic would check each individual taxicab to see whether our gasoline tanks were full. If a taxicab was found to not have a full tank of gasoline, the mechanic would fill the tank to capacity using defendant's gasoline. At that point, the next taxicab in line would be checked by the mechanic.

App. Vol. 3 at 762, 763.

In 2011, Western was audited by the Department of Labor for minimum wage compliance with the FLSA. According to DOL's investigative report:

The employers Martha Sarver and Helen Tobman explained they have added an area in the trip sheets the drivers fill out daily where they must document the hours worked in the day, from start to end of shift. They are also verifying drivers' are documenting the work hours that they don't forget to complete this new section of the trip sheet. They are also closely tracking the work hours, adding them up weekly, and making sure the driver has earned minimum wage rate or higher.

. . . They are also working on implementing a change for the drivers to pay for a percentage of the gas, but have not yet decided what percent the drivers will pay. All these changes they stated will help eliminate potential future violations.

App. Vol. 1 at 180-81.

Martha Sarver, the General Manager for Western, said:

The Department of Labor said that Western Cab's **payment of gasoline** for the drivers could not be considered in determining whether the company complied with federal minimum wage requirements. Ms. Salazar said that only the amounts shown on a payroll check could be considered for minimum wage compliance. As a result,

Western Cab decided in February 2012 that the drivers would pay for their own gasoline. **However, Western Cab then decreased the trip charge and increased the drivers' commissions on their trips to compensate them for the direct purchase of their own gasoline.** In doing so, Western Cab was complying with the directions of the U.S. Department of Labor.

App. Vol. 1 at 257 (emphasis added). Plaintiff Ahmed declared, "My method of compensation as a taxicab driver for defendant consisted of a 50% 'split' of the fares I collected each day, minus certain deductions known as 'trip charges.'" App. Vol. 3 at 749-50. Sarver said, "Western Cab's drivers retain all of their tips and no tip pool arrangement applies." App. Vol. 1 at 258. She also said, "As soon as the *Thomas* decision came down, Western Cab has excluded the tips when determining whether it has met the minimum wage requirement in the State of Nevada." App. Vol. 1 at 258. *See also* App. Vol. 2 at 356-57. Western did not deduct fuel costs from the drivers' paychecks. Prior to February 2012, it provided fuel on the property at no cost to the drivers.

II. The MWA Does Not Require Western To Pay For Fuel.

The Court further misapprehended a material question of fact and/or law when it states on page 5 of the March 16, 2017 Opinion, "The petition also asks this court to interpret the MWA and determine whether fuel costs may be deducted from drivers' wages when checking for compliance with the MWA." That is a misapprehension of fact and/or law and is not accurate. Western's Petition asked the

Court to consider “that fuel costs need not be deducted from non-tip wages prior to determining minimum wage.” January 13, 2016 Order Directing Answer; December 18, 2015 Petition for Writ of Mandamus or Prohibition, pp. 38-40. Western does not deduct fuel costs from the drivers’ wages and did **not** ask this Court to determine whether fuel costs may be deducted from drivers’ wages. It asked the Court to reverse the District Court’s order that plaintiffs could amend their complaint to allege that fuel payments should be deducted from their total compensation, excluding tips and vendors’ fees, to determine whether Western was making the correct minimum wage payments. App. Vol. 1 at 27; December 18, 2015 Petition for Writ of Mandamus or Prohibition, pp. 38-40.

The District Court said, “What I believe that Mr. Greenberg was saying was not that the payment of gas was reflected as income, but the expectation that the cab drivers would pay for the gas should actually reduce the amounts of their income when looking at whether they’re being paid minimum wage.” App. Vol. 2 at 356.

After the District Court’s decision, this Court determined in *MDC Restaurants, LLC v. Diaz*, 132 Nev. Adv. Op. 76, 383 P.3d 262, 267 (2016), that, “Pursuant to the plain language of the MWA, we conclude that employee tips do not count toward taxable income for determining the 10-percent wage cap for premiums.” Thus, tips are not part of the employee’s wages or income from the employer.

On September 16, 2014, plaintiffs' counsel Leon Greenberg sent a letter to Western's drivers informing them that "tips are **not** counted for purposes of Nevada's Minimum Wage law." App. Vol. 1 at 289. Western agrees and required its drivers to pay for their own fuel costs from their declared and undeclared tips and vendors' fees (*see* App. Vol. 1 at 278). Plaintiff Michael Sargeant said:

During the entire time I was employed by the defendant, defendant mandated that all taxicab drivers purchase and pay for gasoline from their own personal funds for use in the taxicab. At no point did Western Cab Company pay for the gasoline, or reimburse taxicab drivers for the cost of gasoline. All drivers were required to return the taxicabs back to defendant's yard with a full tank of gas that was purchased from the taxicab drivers' own personal funds.

App. Vol. 3 at 744. Ahmed agreed. App. Vol. 3 at 750, 747-48.² The "personal funds" were the drivers' tips and vendors' fees which were not part of their wages from Western.

The MWA does not address gas expenses or any expenses of employees. This Court held in *MDC Restaurants, LLC*, "Under the plain language of this constitutional provision, the MWA's 10-percent cost cap can only pertain to compensation and wages paid by the employer to the employee, which necessarily excludes any tips earned by the employee." 383 P.3d at 267. Similarly, the plain

² Ahmed did not enroll in Western's offered group health insurance. App. Vol. 1 at 259; Vol. 3 at 676.

language of the MWA does not address fuel costs or expenses of any kind. It does **not** prohibit the use of declared and undeclared tips and vendors' fees to pay for gas.

In *Perry v. Terrible Herbst, Inc.*, 132 Nev. Adv. Op. 75, 383 P.3d 257, 258 (2016), this Court held that MWA claims are closely analogous to those provided for in NRS Chapter 608 and, thus, the two-year statute of limitations in NRS 608.260 controls. Wages is defined in NRS 608.012 as:

1. The amount which an employer agrees to pay an employee for the time the employee has worked, computed in proportion to time; and
2. Commissions owed the employee, but excludes any bonus or arrangement to share profits.

Thus, "wages" under NRS Chapter 608 do not include tips. Furthermore, NAC 608.120(3) provides that all commissions paid to an employee may be used to meet the minimum wage requirement. Nothing in the MWA contradicts these provisions in Chapter 608. The drivers' commission wages at Western and Western's minimum wage compliance are not affected in any way by their tips or their fuel costs.

Sometimes Nevada law includes tips in the computation of wages. For example, in NRS 612.190, "wages" is defined as "all remuneration paid for personal services" and "income from tips reported by an employee to his or her employer". Similarly, in Chapter 616A on Industrial Insurance, "wage" is defined as including

“the amount of tips reported by an employee to his or her employer”.³ NRS 616A.065(2)(b)(2).

In the MWA, “wage” is not defined but “[t]ips or gratuities received by employees shall not be credited as being any part of or offset against the wage rates required by this section.” Nev. Const. art. 15, §16(A). Thus, in determining whether its drivers have been paid the correct minimum wage rate under the Nevada Constitution, Western does not consider their tips. Western considers only their commissions which are paid by Western. App. Vol. 1 at 258. Western considers only the drivers’ commissions and time worked in determining “the wage rates” required by the MWA.

In *Perry*, this Court held:

When the MWA was adopted in 2006, Nevada already had in place a statutory scheme providing for payment of minimum wages. *See* NRS Ch. 608. NRS 608.250 delegates to the Labor Commissioner the obligation to, “in accordance with federal law, establish by regulation the minimum wage [and to] prescribe increases in the minimum wage in accordance with those prescribed by federal law, unless the Labor Commissioner determines that those increases are contrary to the public interest.” NRS 608.260 gives employees the right to sue for back pay if their employers fail to pay the minimum wage rate established by Labor Commissioner regulation. Unlike the MWA, which is silent as to a statute of limitations period, NRS 608.260 imposes a two-year limitations period on statutory back-pay claims”

³ “Wages” under the FLSA includes tips. 29 U.S.C. §203(m).

383 P.3d at 259. This Court continued, “But these distinctions do not alter the fact that Perry’s claim is that Terrible Herbst failed to pay the minimum wage required by Nevada law, specifically, the Nevada Constitution.” *Id.* at 260. Here, as in *Perry*, the MWA’s silence and NRS 608.012 and NAC 608.120(3) are capable of co-existence so long as the statute is understood, as it may reasonably be, to supplement gaps in the MWA’s terms.

Plaintiffs never alleged that Western had deducted fuel costs from their paychecks. The actual allegation in the Proposed Second Amended Complaint was:

In or about January of 2012,⁴ defendant started requiring the plaintiffs and the class members to pay from such plaintiffs’ and class members’ own, personal funds, 100% of the cost of the fuel consumed in the operation of the taxicabs they drove for the defendant. That fuel was essential for the operation of defendant’s taxi cab business and plaintiffs could not work for defendants unless they agreed to pay for that fuel from their personal funds. By requiring the plaintiff and the class members to personally pay for the cost of such fuel the defendant was reducing the wages it actually paid the plaintiff and the class members to an amount below the minimum hourly wage required by Article 15, Section 16, of the Nevada Constitution.

App. Vol. 1 at 221-22.⁵

⁴ January 2012 is outside the statute of limitations in this case. Two years before this action was filed was September 23, 2012.

⁵ Plaintiffs have not alleged that their fuel costs ever exceeded their tips or vendors’ fees. *See* App. Vol. 1 at 272, 285.

Uber drivers who compete with Western pay for their own gasoline and vehicle expenses. See <https://www.uber.com/driver-jobs/>, p. 11/30, 3/29/2017. Taxicab drivers are only covered by the MWA because of the implied repeal of NRS 608.250. *Thomas v. Nevada Yellow Cab Corp.*, 130 Nev. Adv. Op. 52, 327 P.3d 518 (2014). In *Nevada Yellow Cab Corp. v. Eighth Judicial District Court*, 132 Nev. Adv. Op. 77, 383 P.3d 246, 251 (2016), this Court held that it declares what the law is. It does not create the law. The MWA does not address employee expenses such as fuel costs. This Court concluded in *MDC Restaurants* that the obvious absence of language in the MWA suggesting that an employee enroll in health insurance was controlling. 383 P.3d at 266. Here, the omission of any mention of employee expenses in the MWA is presumed to be intentional.

This Court found in *MDC Restaurants*, 383 P.3d at 267, “Under the plain language of this constitutional provision, the MWA’s 10-percent cost cap can only pertain to compensation and wages paid by the employer to the employee, which necessarily excludes any tips earned by the employee.” Thus, tips are not part of the wages paid by Western to its drivers and Western’s requirement that its drivers pay for fuel from their tips and vendors’ fees is not a deduction from their wages.

The Court concluded in *MDC Restaurants* that the MWA clearly trumped the Labor Commissioner’s inconsistent regulations and that its affirmation of the MWA’s clear language was foreseeable. *Id.* at 268. Here, the MWA is clear and it

trumps the District Court's interpretation. The District Court should not have allowed the plaintiffs to amend their complaint to make their allegation concerning fuel costs which are not and have not been deducted from the drivers' wages on their paychecks. The MWA applies only to minimum wage. If Western pays the applicable minimum wage rate to its drivers based on their commissioned wages and their time, that is all that is required by the MWA. Because this Court has overlooked or misapprehended a material fact in the record and/or a material question of law in this case, Western respectfully requests that the Court rehear the issue "that fuel costs need not be deducted from non-tip wages prior to determining minimum wage."

Respectfully submitted,

HEJMANOWSKI & McCREA, LLC

/s/ Malani L. Kotchka

MALANI L. KOTCHKA

Nevada Bar No. 283

520 South Fourth Street, Suite 320

Las Vegas, Nevada, 89101

Telephone: (702) 834-8777

Facsimile: (702) 834-5262

Email: mlk@hmlawlv.com

Attorneys for Petitioner

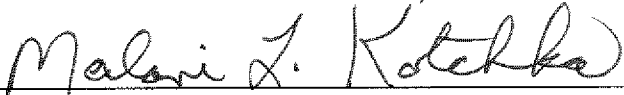
CERTIFICATE OF COMPLIANCE

I hereby certify that this Petition complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) as it is prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point font size and Times New Roman.

I further certify that this Petition complies with the page or type volume limitations of NRAP 40(b)(3) because it does not exceed 10 pages or 2,455 words.

Finally, I hereby certify that I have read this Petition for Rehearing on Fuel Costs and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this Petition complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 40(a)(2), which requires every claim that the Court has overlooked or misapprehended a material fact be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying Petition is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

HEJMANOWSKI & McCREA, LLC


MALANI L. KOTCHKA, Nevada Bar No. 283
520 South Fourth Street, Suite 320
Las Vegas, Nevada, 89101

Attorneys for Petitioner

CERTIFICATE OF SERVICE

The undersigned does hereby certify that pursuant to NRAP 25(c), a true and correct copy of the foregoing **PETITIONER'S PETITION FOR REHEARING ON FUEL COSTS** was filed electronically with the Nevada Supreme Court Electronic Filing System, and a copy was served electronically on this 3rd day of April, 2017, to the following:


Leon Greenberg, Esq.
GREENBERG, P.C.
2965 S. Jones Blvd., Suite E4
Las Vegas, NV 89146
Telephone: (702) 383-6085
Facsimile: (702) 385-1827
Email: leongreenberg@overtimelaw.com

Joshua D. Buck
NEVADA NELA
7287 Lakeside Drive
Reno, NV 89511
Telephone: (775) 284-1500
Facsimile: (775) 703-5027

Bradley Schrager
Wolf, Rifkin, Shapiro, Schulman &
Rabkin, LLP
3556 E. Russell Road
2nd Floor
Las Vegas, NV 89120
Telephone: (702) 341-5200
Facsimile: (702) 341-5300

And a true and correct copy of the foregoing **PETITIONER'S PETITION FOR REHEARING ON FUEL COSTS** was served via first class, postage-paid U.S. Mail on this 3rd day of April 2017, to the following:

The Honorable Linda Marie Bell
District Court Judge
Eighth Judicial District Court of Nevada
200 Lewis Avenue, #3B
Las Vegas, NV 89101



An Employee of Hejmanowski & McCrea LLC