AMERICAN ARBITRATION ASSOCIATION
Employment Arbitration Tribunal

LE LETONYA ASHTON

Claimant, AAA Case No.01-17-0006-8180

v.

PJ LOUISIANA, INC.,

Respondent.

INTERIM AWARD

After reviewing the evidence and the arguments of the parties, and for the reasons stated in the attached Reasons for Award, I hereby AWARD as follows:

1. Respondent shall pay claimant actual damages in the amount of $6947.05.
2. Respondent shall pay claimant liquidated damages in the amount of $6947.05.
3. Respondent shall pay claimant pre-judgment and post-judgment interest as provided by law.

Attorney's fees and costs will be awarded after submission of briefs in accordance with the schedule set forth on pages 20 and 21 of the Reasons for Award.

March 26, 2019 /s/ Denise M. Pilie´, Arbitrator

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REASONS FOR INTERIM AWARD

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the personnel manual or employment agreement entered into by the above-named parties and dated in or around August 2015, and having been duly sworn, and having duly heard the proofs and allegations of the Parties, and Claimant, LE LETONYA ASHTON, being represented by Richard Paul, et. al. of Paul LLP and Mark Potashnick of Weinhaus & Potashnick, and Respondent, PJ LOUISIANA, INC., being represented by William Hancock of Galloway Scott & Hancock LLC hereby ORDERS, as follows:

This matter was heard on December 18, 2019, in Shreveport, Louisiana before the undersigned Arbitrator. Post-hearing briefs have been filed by both parties. The arbitrator has reviewed the post-hearing briefs, the hearing exhibits, and other documents and rules as follows:

I. FACTS

Claimant, Le Latonya Ashton, was employed by PJ Louisiana, Inc. ("PJLA" or "respondent"), the franchisor of a Papa John's Pizza restaurant located in Shreveport, LA. Ashton worked as a delivery driver from August 2015 to January 2018 when she voluntarily terminated her employment. Delivery drivers worked both inside and outside the store. PJ LA paid Ashton an hourly cash wage of $7.25 per hour when she worked inside the store, and $7.25 per hour on deliveries, until May of 2016 when her pay was increased to $7.75 per hour on deliveries. Ashton also received tips when she was on delivery and was allowed to keep all of the tips she received.[1] Ashton's wages and tips are recorded on her pay stubs and Ashton does not dispute the accuracy of these records.

In addition to her wages and tips, Ashton also was paid $1.40 in cash per delivery as reimbursement for the use of her vehicle to delivery pizzas, or an average of $17.5 per mile. PJLA kept a "Checkout Report" that showed the addresses to which she delivered pizzas and the total amount she was paid for all of the deliveries she made on that shift.

During her employment with PJLA, Ashton drove a 2007 Chevy Malibu and a 2016 Kia Soul. The Kia Soul was purchased in her mother's name, but Ashton paid for it and for all expenses related to driving that vehicle.

II. ANALYSIS

Ashton claims that she was paid less than the minimum wage required by the FLSA because the reimbursement of the amount of vehicle expenses she incurred while delivering

[1] PJLA took a "tip-credit" against her minimum wage. The tip-credit is not an issue in this case.

pizzas was insufficient. She bases this claim on the Department of Labor ("DOL") regulation which provides that "the wage requirements of [the FLSA] will not be met where the employee 'kicks-back' directly or indirectly to the employer ... the whole or part of the wage delivered to the employee." 29 C.F.R. Section 531.25. A kickback occurs when an employer incurs out-of-pocket expenses for the tools necessary for the employee's work that "cut into the minimum wage or overtime wages required to be paid to him under [the FLSA]." *Id.* Ashton argues that PJLA's reimbursement for her vehicle costs was insufficient to the point that her unreimbursed costs "cut into" the minimum wage required by the FLSA.

The arbitrator finds that PJLA violated the minimum wage provisions of the FLSA by under-reimbursing Ms. Ashton for her driving expenses. There is little rationale for reimbursing $1.40 per delivery address as that number has no bearing on the number of miles driven. Each delivery is made to a different address, some of which are one mile away, some eight, and some much farther.[2] Reimbursement by a fixed rate does not take into account these differences. PJLA also underestimated the number of miles driven per delivery. Amended export report of Paul Lauria, p. 56. It estimates a "composite vehicle" that did not take into account the older or heavier vehicles, and significantly underestimated the maintenance costs of these and other vehicles in the fleet. *Id*. at 4 – 5. PJLA excluded age-based depreciation (as opposed to mileage-based), insurance costs, repairs, taxes, license fees, registration costs, finance charges and interest from its calculations. *Id*. 5, Saunders depo. at 113 – 14, 133. Eliminating these costs in their entirety significantly under-reimbursed Ms. Aston for her driving costs. As Ms. Ashton

[2] Ms. Ashton calculates the average delivery to be 8 miles.

made minimum wage or close to minimum wage throughout her employment, this under-reimbursement caused her pay to fall below the required minimum.

A. THE MOTION FOR SUMMARY JUDGMENT

On October 9, 2018, Claimant brought a motion for partial summary judgment seeking a ruling on the several legal issues. On November 28, 2018, the arbitrator made the following rulings that are relevant here.

1. The claimant may reasonably estimate her vehicle costs;
2. The respondent must reimburse a portion of the fixed costs of driving to the claimant if those costs caused her pay to fall below minimum wage;
3. The respondent's "good faith" and "de minimis" defenses are stricken; and
4. The mileage reimbursement rate need not be the IRS business mileage rate.

These rulings will govern this award.

B. THE DAMAGE MODELS

Claimant had set forth several damage models to estimate her damages. The first and second models presents an estimate of damages based on Ms. Ashton's actual costs for her 2007 Chevrolet Malibu and her 2016 Kia Soul, the two vehicles she drove during her employment. The third, fourth, fifth and sixth models are the American Automobile Association rates for her two vehicles, the Edmunds rate and the IRS rate. The seventh and eighth models are based on Paul Lauria's composite estimate and his estimate for an SUV, similar to Ms. Ashton's Kia Soul, in the Southern region.

1. PJLA's General Objections to the Damage Models.

Respondent has objected to these estimates on various grounds, both general and specific. As to its general arguments, PJLA argues that fixed costs need not be reimbursed. Recognizing that this argument was rejected on summary judgment, it questions here what portion of fixed costs must be attributable to PJLA. It also rejects Ms. Ashton's argument that PJLA's portion should be a percentage of the total miles she drove for work. This latter number is calculated by determining the total miles she drove as of the end of her employment by the number of miles she drove for work, which she took from PJLA's checkout reports.[3] In this way, Ms. Ashton apportioned her fixed costs between the mileage she drove for work and her personal mileage. PJLA's Post-Trial Brief (hereinafter "PJLA brief," p. 9).

As for her Kia Soul, PJLA accepts this calculation as a fair way to apportion her fixed costs between her personal driving and her driving for PJLA because she purchased that vehicle after she began to work. It objects to the calculation pertaining to her Chevy Malibu on the ground that she drove it for many miles and many years before she began to work. Ms. Ashton testified at the hearing that it had about two miles on the Malibu when she bought it and about 78,000 miles when she traded it in for her Kia Soul. She also shows, based on PJLA's checkout reports, that she drove it for about 22,050 for work. She then apportions her fixed costs as a percentage of the 22050 miles driven for work compared to the 78,000 total miles on her car. PJLA argues that the apportionment should be based on the total miles driven for work as a

[3] PJLA argues that Ashton offered no evidence of the miles she drove for work. PJLA is incorrect. Ashton calculated these miles based on PJLA's check-out reports that were kept daily. Trans. 31- 32, 52-53.

percentage of total miles driven during the time of her employment, not the entire time she owned the car. But this calculation would produce a higher percentage than the calculation used, which would mean that PJLA would be allocated a higher percentage of the fixed costs.

PJLA objects to Ms. Ashton's and Lauria's estimates because they refer to other mileage calculations, such those made by as Edmunds, AAA and the IRS, which PJLA contends is hearsay. However, Steven Saunders, who made the calculations on which PJLA's reimbursement model was based, also relied, in part, on these calculations when he calculated the reimbursement rate used by PJLA. Ex. 1, p. 114, 116. Further, these reports are exceptions to the hearsay rule pursuant to 29 CFR 18.803 which excludes from hearsay "market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations." Mr. Lauria, claimant's expert, reports that these "data sources are commonly relied on in his profession. Ex. 7, Declaration and report by Paul Lauria, ("Lauria Report"), p. 36. This hearsay exception applies here.

PJLA argued that the FLSA provides that the minimum wage must be paid by workweek and that the calculations provided by Ms. Ashton do not reflect this. This is incorrect. Her damage calculations specifically are based on the number of hours worked per workweek, the number of hours spent making deliveries, the number of deliveries she made per week, the number of miles driven and her pay for that week. See Ashton's excel worksheet. She then applied her price per mile reimbursement rate to the miles she drove each week, subtracts the amount she was reimbursed each week, and compares that to the amount of wages she was paid that week to calculate her under-reimbursement. Clearly her damage claim is calculated per work week.

Finally, PJLA objects to the damage models because they rely on estimates rather than actual numbers. As stated in the summary judgment ruling: "The respondents cite no authority for the proposition that actual costs must be proved; they argue only that the claimant's authorities are distinguishable. Claimant's authorities, on the other hand, state clearly and repeatedly that estimated vehicle costs may be used to prove her claim." Ruling on summary judgment, p.8. Summary judgment was granted on this issue with order stating that "the claimant may reasonably estimate her vehicle costs." *Id*. at 17. Any arguments to the contrary are rejected.

PJLA argues that her damage estimates must be based on the week in which a fixed cost was paid, rather than spread over time. This would not make sense because the use of the item paid for is spread over time. For example, Ashton may pay $400 one day for insurance, but the benefit she derives is spread over more than one day. The same is true for the other fixed costs, as it is for variable costs. To allocate this cost to only the day of purchase ignores this fact.

PJLA notes with disapproval that the various costs included in the estimates were averaged on a per mile basis but makes no argument as to why this method is unreasonable. It cites no authority to support its argument that these costs can't be averaged. Every reimbursement calculation used in this case, including the IRS, rate uses this method, and it is generally accepted that the IRS rate is appropriate for reimbursements made in the business context. The DOL handbook also approves of this methodology by its approval of the IRS rate.

2. <u>PJLA's Objections to the Specific Damage Models</u>

In the ruling on the motion for summary judgment, the arbitrator rejected Ms. Ashton's argument that the IRS rate must be used as a basis for reimbursement. Although the IRS rate, as well as the AAA rate and the Edmunds rate, may be used to as the basis for reimbursement, they will not be used here. Instead, the arbitrator finds that Ms. Ashton's calculations and those provided by Mr. Lauria are most closely related to the facts.

These calculations show very similar damage totals. Ms. Ashton calculates her damages to be $6486.50 based on her 2007 Chevy Malibu and $7201.78 based on her 2016 Kia Soul. Mr. Lauria calculates her damages to be $5051.57 if based on a "composite vehicle" of all pizza delivery drivers for a related pizza chain and $7017.25 if based on a small SUV (like Ms. Ashton's Kia Soul) in the southern region. Ms. Ashton worked for PJLA for approximately 28 months. She drove her Chevy Malibu for about one month and her Kia Soul for about 27 months. Prorating her damage estimates to include 27 months of her use of the Kia and one month to her use of the Malibu shows her damages to be $7176.33. ($7201.78/28 x 27 + 6486.50/28 x 1 = $7176.63). Similarly, prorating Mr. Lauria's figures to include 27 months of his estimate for an SUV in the southern region and one month of his composite vehicle shows $6947.05 in damages. ($7017.25/28 x 27 + 5051.57/28 x 1 = $6947.05). These two figures are closer than the any of the other damage calculations based on any other method (assuming the AAA figures for the Kia Soul and the Chevy Malibu are prorated similarly), which tends to indicate their reliability. They are also lower than all but one of the other damage estimates which tends to show that they are not based on overreach.

a. Ms. Ashton's damage model

i) Ms. Ashton's Kia Soul

PJLA challenges Ashton's calculations for her Kia Soul on numerous specific grounds. It first argues that her proposed price of $2.40 per gallon for gasoline is improper because it is based on her gas receipts, only one of which is legible. It then refers to three other gas receipts, presumably legible, to support its allegation that the $2.40 figure is too high. PJLA Brief, p. 21. Ms. Ashton counters by noting that of the seventeen pages of gas receipts she placed into evidence, several of them show that she paid more than $2.40 per gallon. Ex. 7 to Ms. Ashton's deposition. PJLA does not show that Ms. Ashton's calculated average is higher than the average of these receipts.

PJLA argues that Ms. Ashton purchased premium gas when she was not required to do so by PJLA. PJLA also did not tell her that she could not purchase premium gas. Instead, it chose to have its employees use their own cars to deliver pizzas rather than retain a fleet of company cars to make deliveries. By delegating this part of its business to individual drivers, it took the risk that it may have to reimburse drivers based on this higher rate in the event its reimbursement rate was deemed insufficient. It is not unreasonable for Ms. Ashton to purchase premium gas and there is an argument to be made that purchasing this gas cut down on her maintenance expenses.

PJLA argues that Ms. Ashton did not spend any more on oil changes as a result of her work for PJLA than she would have had she had not worked there because she had her oil changed every two to three months rather than based on her mileage. But the fact that she changed her oil every two to three months does not mean that she didn't have to change it that often or that she would not have had to change it less often had she not worked for PJLA.

PJLA then argues that these costs must be allocated to the week in which they were incurred rather than averaged over the miles driven. It cites no authority for this proposition. It is also contravened by the fact that Mr. Saunders averaged certain costs when he calculated the amount to be reimbursed to the drivers. It would be virtually impossible to require an FLSA claimant to be able to determine the exact week in which he or she incurred a specific cost. Such precision is not necessary to prove a claim.[4] *Perrin v. Papa John's Int'l, (Perrin II)*, 2013 WL 6885334 (holding that "the regulatory framework [of the FLSA] does not require that reimbursement be based on actual expenses.").

PJLA objects to Ms. Ashton's depreciation calculations. It argues that she had no evidence for estimating the trade in value of her[5] Kia Soul at $8,000 in December of 2016. It then acknowledges that she obtained the value from Kellybluebook.com. PJLA objects to this source as hearsay, which argument the arbitrator has already rejected.[6] PJLA then argues that the Kelly Blue Book trade-in value for that time reflects a range of $6,413 - $7,360. As noted by Ms. Ashton, however, using these lower numbers as trade in values would result in a higher depreciation value, to the detriment of PJLA. PJLA's argument that its own internet searches (which source it has already challenged as hearsay) shows that new Kia Souls are valued from $16,000 – 35,000. Again, the fact that Ms. Ashton used $16,000, the lowest new car value, inures to the benefit of PJLA.

[4] In direct contravention of this argument, PJLA argues on page 20 of its brief that if PJLA reimbursed Ashton too much in one week, she could use the excess pay in the following week to avoid kickbacks.
[5] PJLA refers to her Kia Soul as her mother's vehicle throughout its brief. The record reflects that Ms. Ashton paid 100% of the car notes and 100% of the vehicle maintenance, insurance and other expenses. As the arbitrator has already ruled on summary judgment, the fact that her mother's name is on the title is of no moment. Order issued Nov. 28, 2018, p. 11.
[6] PJLA suggests that Ms. Ashton should have asked someone in the Shreveport area what her Kia was worth which would be hearsay not excepted from the hearsay rule.

PJLA makes a number of arguments regarding Ms. Ashton's purchase of a new car. First, it argues that Ms. Ashton should not have purchased a new car because there is greater depreciation in the first years of ownership than in the later years which PJLA should not have to reimburse her for. In another section of its brief it argues that Ms. Ashton had no maintenance costs because all of these costs, except for oil changes, were covered by Ms. Ashton's new car warranty.[7] PJLA cannot claim the benefit of the new car's reduced expenses but reject the detriment of its greater depreciation. PJLA's argument that Ms. Ashton's car would have depreciated whether or not she worked for PJLA also ignores the fact that the additional miles she drove for her job accelerated her car's depreciation. The fact that Ms. Ashton's car would have depreciated had she not worked for PJLA does not mean that PJLA is exempt from reimbursing a portion of that expense.

PJLA complains that Ms. Ashton would have purchased insurance even if she did not work for PJLA and that her premiums did not increase as a result of her job. This argument is rejected on the same grounds that was rejected in the ruling on the motion for summary judgment. *Id*. at 8-11. The fact that Ms. Ashton would have bought insurance had she not worked for PJLA does not mean that PJLA didn't benefit from her insurance. In fact, PJLA required her to have insurance.

PJLA also complains that she did not have to purchase full-coverage insurance because PJLA required only minimum coverage.[8] However, PJLA did not specify what kind of insurance coverage she had to purchase. Full coverage provides assurance to PJLA that its

[7] Ms. Ashton does not include any costs for maintenance in her mileage calculation.
[8] PJLA refers the arbitrator to a website to determine what the required insurance would have cost, which is the exact type of website PJLA objects to as hearsay.

drivers will have functioning vehicles. If a driver had a collision that caused damage to her vehicle which she could not afford to fix, then PJLA would have lost that driver. It is in PJLA's interest that its drivers be fully insured, rather than be insured by the minimum coverage it requires its drivers to purchase.[9]

Finally, PJLA submits a damage model on p. 21 of its brief[10] which shows that PJLA over-reimbursed Ms. Ashton for her expenses. It reduces Ms. Ashton's insurance cost from $16.06 to $6.27 for the reasons rejected above. It includes no separate line item showing costs for depreciation but says that it has allocated PJLA's "share" of depreciation, with no explanation for what that share may be. Claimant's Brief, p. 21. It includes no repair costs. It selects gas costs based on three receipts showing gas prices at $2.23, $2.31, and $2.07 per gallon, but ignores receipts showing gas prices at $2.799 (at least nine receipts), $2.899 (at least three receipts) and $2.759, per gallon and many more receipts showing gas prices higher than the $2.40 average gas price Ashton used. (Ashton's depo. ex. 7).[11] PJLA provides no explanation for why using three of the gas receipts showing lower prices is more reasonable than using an average of all of the many legible gas receipts in evidence. It then deducts from its damage model "approximate actual costs of premium unleaded gas, oil and insurance" but provides no explanation of the bases for these costs. Claimant's brief, p. 22.

[9] PJLA does not reimburse its drivers for any insurance costs. Ex. 1., 110: 5-8, 113:2-114:7, 133:10-17, 157:23 – 158:10.

[10] This damage model is different from one on the spreadsheet that PJLA produced at trial.

[11] PJLA states that it 'has not run a calculation similar to the ones above for each workweek because Ashton has produced no evidence of the amount she spent on gas in each workweek (or the prevailing price of the regular unleaded)." Claimant's brief at 22. To require Ms. Ashton to perform specific gas calculations by work-week would be to require her to base her calculations on actual costs rather than estimates, an argument that has already been rejected in the ruling on the motion for summary judgment. Ashton has produced 17 pages of gas receipts with multiple receipts on each page. Quite a few of these receipts are legible and reflect significantly higher gas prices than the ones used by PJLA.

PJLA concludes, based on these numbers that Ashton was actually overpaid for her transportation cost in at least some weeks, and that "[e]xcess reimbursements carry forward as pre-reimbursements for the simple reason that if Ashton has the cash in hand ahead of paying an expense, she would not need to kick-back wage (sic) to pay the expense." *Id*. In other words, if Ashton received too much pay in one workweek, she could use the excess to pay for expenses she would incur in the next. This argument directly contravenes its previous argument that each workweek must be treated separately. Claimant's brief p. 12. For these reasons, PJLA's damage model is rejected as unreasonable.

ii) Ms. Ashton's Chevy Malibu

As previously stated, Ms. Ashton estimated her costs for the Kia separately from the Chevy. PJLA challenges her Chevy estimates on similar. Before briefly addressing these arguments, it is worth noting that the impact on Ms. Ashton's damage claim for errors in her estimates for her Chevy Malibu would be minimal as Ms. Ashton only drove that car for 4 – 6 weeks.

PJLA complains that all of the gas receipts for the time that Ms. Ashton drove the Malibu reflect prices lower than her $240.00 average. This loses sight of the fact that the $240.00 price is just that – an average -- which was spread out over the entire time she worked for PJLA. It argues that there was no depreciation in the 4-6 weeks that she drove the Malibu. However, it concedes that "employment relate driving may have some effect on parts, fluids, repair, maintenance and depreciation; this is why [Respondents] provide a reimbursement to drivers for the use of private vehicles." *Sullivan*, ECF Doc. 142, at 4. Clearly some depreciation occurred, regardless of how little. PJLA's attempts to reduce the amount of insurance costs to be

reimbursed because she had to purchase insurance anyway is rejected on the same grounds as stated above and in its opposition to claimant's motion for summary judgment. Finally, PJLA notes a mistake in Ashton's insurance calculation which claimant has corrected. Ashton's Reply Brief, p. 17. None of these reasons are sufficient to show that the small amount awarded to Ms. Ashton is unreasonable for the Chevy Malibu.

For all of the reasons stated above, Ashton has shown that her reimbursement calculations are reasonable. However, PJLA correctly notes that Ms. Ashton only drove her Chevy Malibu for 4 – 6 weeks of her 28-month employment which would make reimbursement based on her Chevy Malibu improper. For this reason, the arbitrator declines to use Ms. Ashton's damage claim based on the Chevy Malibu model, except to the extent it is pro-rated to account for one month of her employment.

b. Mr. Lauria's Damage Model

Ms. Ashton submitted the Declaration and Report of Mr. Paul Lauria as the basis for her last damage models. Claimant's ex. 7. PJLA submitted his deposition and deposition exhibits into evidence. Mr. Lauria's report was made and his deposition given in a separate lawsuit in which 720 drivers sued PJ United, a related entity, for the same cause of action asserted here: under-reimbursement of their automobile expenses which inappropriately reduced their minimum wage.

Mr. Lauria is one of the world's foremost vehicle costing experts. He has 33 years of experience in fleet management and operation and has evaluated fleet management practices for both private companies and government entities as demonstrated by his lengthy curriculum vitae.

Claimant's ex. 8. Mr. Lauria has been accepted as an expert in previous litigation in which his credentials have been scrutinized pursuant to Fed. R. Evid. 702 and *Daubert* standards. *Perrin v. Papa John's Int'l*, 2013 U.S. Dist. LEXIS 182749, *8-15 (E.D. Mo. Dec 31, 2013. Respondent does not challenge his credentials.

PJLA does challenge Mr. Lauria's report on several grounds. First, it objects on the ground that it is not based on figures related specifically to Ms. Ashton. However, unlike the IRS rate, the AAA rate and the Edmund's rate, Mr. Lauria's mileage calculations do relate to the claimant. Mr. Lauria based his estimates on PJLA's check-out reports and its pay records for the plaintiffs in the PJ United case, their questionnaires,[12] and the depositions, exhibits and written discovery from that case. Mr. Lauria's calculations are tailored to very similar facts, even if they are not tailored specifically to Ms. Ashton.

Further, Mr. Lauria's estimate need not be based on Ms. Ashton's actual expenses. First, PJLA's reimbursement rate was not based on each drivers' actual expenses and there is no reason why there is greater need to do so here. Second, composite estimates based on data from numerous sources are not inherently unreliable. The IRS rate is such a model and Section 30c15(b) Department of Labor handbook states specifically that the IRS rate may be used in lieu of actual costs. Third, this arbitrator has already ruled that estimates rather than actual expenses may be used.

PJLA objects to Mr. Lauria's report on the ground that he is not an FLSA expert. But the role of an expert witness is not to be expert in the law; it's to be expert in the field in which they are giving an opinion. PJLA complains that Mr. Lauria's calculations are measured in "work

[12] Mr. Lauria stated that he relied on the 720 questionnaires taken in the class-action suit primarily to determine the types of vehicles driven by PJ drivers. Lauria report, p. 19.

years" rather than "work weeks." But these are the calculations he made to determine the mileage reimbursement figure, which is but one element of Ms. Ashton's damage claim. As previously stated, Ms. Ashton's damage calculations are based on the various mileage reimbursement figures as they apply to the miles, she spent on the road each week, the hours she worked on delivery rather than in the store, the number of deliveries she made and how much she was paid, all of which were taken from her weekly check-out reports.

PJLA cites language from Mr. Lauria's deposition stating that he has estimated a "reasonable rate" based on owning and operating the vehicles the PJ United delivery drivers were driving. PJLA objects on the ground that the FLSA does not require reimbursement based on a "reasonable rate." It also states that Ms. Ashton "does not challenge the plan used by PJ Louisiana to determine the daily cash reimbursement provided to her (Reg. Mileage shown on the Checkout Reports.)." Claimant's Brief, pp. 31-32. Although not clear, it appears as though PJLA is arguing that the FLSA does not require that a company's reimbursement rate be reasonable, only that Ms. Ashton be reimbursed to the extent that under-reimbursement of her driving costs cause her to be paid less than the minimum wage. This is true. However, once it is determined that the reimbursement rate used by the company has under-reimbursed Ms. Ashton, then the measure of damages used to make the victim whole must be based "the actual or reasonably approximate amount expended by an employee." *Sullivan v. PJ United, Inc.,* Case No. 13-cv-01275-LSC (N.D. Ala.) (internal quotations omitted). After determining liability then the reasonableness of the damage calculations is of paramount importance.[13]

[13] Mr. Lauria testified not only that his rate was reasonable, but also that it represented the "minimum amount necessary to reimburse drivers." Lauria report, p. 55.

PJLA shows that it included certain cars in its composite vehicle and that Mr. Lauria used others. In the battle over which is correct, the arbitrator sides with Mr. Lauria whose composite was taken from the 720 questionnaires from PJ United delivery drivers that showed that older, heavier vehicles were being driven than those included in PJLA's composite. PJLA argues that it may have based its composite on even more than 720 vehicles but offers no evidence of this fact. Mr. Saunders testified about the automobiles he used, and Mr. Lauria found that older, heavier vehicles were not included. There is no need to determine the pool of vehicles on which Mr. Saunders based his calculation; it is only relevant that these vehicles were excluded and that a significant number of the PJLA drivers drove them.

Similarly, PJLA complains that Mr. Lauria included calculations based on operating costs in the southern region using four southern cities. Confining costs to the region that most closely reflects her own does not make these calculations less reliable. Instead, it makes them more closely related to Ms. Ashton's costs. Notably, Mr. Saunders opined that basing reimbursements for all PJ United delivery drivers on Pelham, Alabama costs is a reasonable reimbursement method. Saunders depo., p. 156

Finally, PJLA complains that maintenance costs are included in Mr. Lauria's calculations and that Ashton did not have any. This is true. But it is also true that Ms. Ashton had wear and tear on her vehicle that contributed to the maintenance costs she would have in the future. PJLA admitted as much in *Sullivan*. ECF Doc. 142.

During the trial, PJLA submitted its own damage model (different from the one shown on p. 21 of its brief) showing that Ms. Ashton was actually over-reimbursed for her automobile costs. This model includes only gas as a reimbursable expense. It leaves out costs for depreciation, insurance, parts, repairs, taxes, license fees, registration costs, finance charges and interest. For

the reasons stated above and in the ruling on the motion for summary judgment, these costs must be included. The claimant's damage model is rejected.

3. Which Damage Model Should Be Used?

The arbitrator finds that both Ms. Ashton's damage model and Mr. Lauria's damages model are reasonable estimates of Ms. Ashton's damages. Ms. Ashton's model may more closely hew to her actual costs, but Mr. Lauria is an expert in his field and based his figures a vast amount of information, extensive research, and years of experience. The arbitrator finds that Mr. Lauria's damage model is the most reliable. Based on the calculations on pp. 8-9 above, using the SUV in the southern region to calculate 27 months of damages and the composite vehicle to calculate one month, Ms. Ashton is awarded $6947.05 in damages.

C. LIQUIDATED DAMAGES

Section 216(b) of the Fair Labor Standards Act provides that any employer who is found liable for breach of the minimum wage standards of that act "shall be liable to the employee or employees affected in the amount of their unpaid minimum wages … in an additional amount as liquidated damages." Section 260 grants courts the discretion to reduce or eliminate liquidated damages "if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act."

PJLA pleaded "good faith" as an affirmative defense in its Answering Statement. Affirmative Defense 2, p. 4. On summary judgment, claimant moved to dismiss this defense on the ground that Mr. Saunders, who was deposed as PJLA's corporate representative in its 30(b)(6) deposition, did not state any facts in its support. PJLA did not oppose this motion.

Therefore, this arbitrator granted summary judgment striking this defense. Accordingly, Claimant is awarded liquidated damages in.

D. WILLFULNESS

With a showing of willfulness, a claimant can extend her claim back in time for three years, rather than the typical two years allowed by the FLSA statute of limitations. Claimant cites to *Smith v. Pizza Hut, Inc*., for the test to determine willfulness. *Smith* is a similar case by pizza delivery drivers who claimed under-reimbursement of automobile expenses. 2011 U.S. Dist. LEXIS 76793, *18-20 (D. Colo. July 14). In that case, the court found that the test for willfulness was "whether the employer 'knew or showed reckless disregard for the matter of whether its conduct was prohibited by the [FLSA].'" Id. (further citations omitted). This court examined three factors to determine willfulness. First, it found that there was a significant gap between the amount reimbursed and the claimant's actual expenses. This factor is easily met here where PJLA reimbursed approximately $.175 per mile[14] and the reimbursement rates provided by Ms. Ashton, Mr. Lauria, AAA, Edmunds and the IRS show reimbursement rates between .40 and .59 per mile, which by any measure is a significant difference.

Second, the *Pizza Hut* court found that the claimant in that case had brought the issue to management's attention, but nothing was done about it. Ms. Ashton may not have personally brought this issue to management's attention, but management certainly knew for years that pizza delivery drivers from related and unrelated companies were challenging their reimbursement rates. PJLA itself spent years defending against such a claim. *Sullivan v. PJ*

[14] This per mile rate is based on its $1.40 reimbursement per delivery divided by the average delivery distance of 8 miles.

United, et.al., AAA Case NO. 30 160 597 13, (where PJLA was joined as a defendant in 2013). Regardless of whether those claims were successful, they at least put PJLA on notice that there were challenges to its reimbursement policy. Despite this, PJLA did change its reimbursement rate from 2008 to at least 2017. Ex. 1, 42:14-22, 77:8-14.

PJLA, through Mr. Saunders, did revisit its calculations in 2013 to determine whether they were still reasonable. Ex. 7, p. 121 In order to determine what kind of cars its divers used, he "grabbed a stack off the top" of a stack of applications from new drivers that were in his risk management department. *Id.* He assumed the amount of work mileage the drivers drove, the number of hours they worked per week, the number of hours they worked on the road and the average number of deliveries per hour. *Id.* at 124 – 125. As before, he did not include any costs for insurance, finance charges, taxes, license or registration.[15] *Id*. at 133. The total reimbursement rate he calculated in 2013 was an average of $.24 per mile. *Id*. at 132. Mr. Saunders testified that he believed "that is a reasonable approximation for incremental cost occurred (sic) for vehicles that are typically used in pizza delivery." *Id*. at 133. Yet despite the $.065 difference between this and the $.175 reimbursement rate PJLA was then using, it still did not increase its rate. *Id*. at 133 - 134. There is no explanation for why it knowingly chose to under-reimburse its drivers.

[15] In *Perrin v. Papa John's Int'l. (Perrin III), Inc.,* 114 F.Supp. 3d 707 (E.D. Mo. 2015) the court stated that "a brief survey of regulatory guidance and industry practice reveals a general acceptance that at least a portion of such fixed costs are for the benefit of the employer and are thus properly reimbursable expenses under the FLSA." Id. at 730. PJLA still did not include these costs in its reimbursement rate and continues to argue here that these costs are unreimburseable.

Third, the court in *Smith v. Pizza Hut* found that PJ United had the raw information necessary to determine whether its drivers' claims had merit and did not do so. Similarly, here PJLA had information regarding the miles its drivers drove for work, the approximate mileage of their deliveries, the hours they made deliveries versus the hours they worked in the store, the number of deliveries they made, their pay rates, their total pay and the amount they were paid over minimum wage. It could have recalculated its reimbursement at any time and made adjustments as necessary.

PJLA, on the other hand, cites *Fabela v. AT&T Commc'ns. Corp.*, No. EP-06-CA-409FM, 2007 WL 3310714 at *2 (W.D. Tex. Oct 30, 2007), for the proposition that a willful violation as used in section 255(a) of the FLSA must be more than merely negligent and that where there is a legitimate disagreement as to the FLSA's application to the facts at hand, "a court should be reluctant to find a knowing violation of the FLSA." To perform a calculation in 2013 that determines that the reimbursement rate should be higher than the reimbursement rate it was using, and to ignore that information, is more than merely negligent. To ignore case law from a similar case stating that the reimbursement rate must include a portion of fixed costs and yet not include any is more than negligence. As noted in the ruling on summary judgment, respondent cites no authority to support its position that fixed costs need not be reimbursed. The DOL guidance states that reimbursement at the IRS business rate would comply with the FLSA, and that rate includes fixed costs. AAA and Edmunds both include fixed costs. Where there is litigation across the country involving thousands of claimants challenging this same issue, it is reckless disregard to exclude these costs. Mr. Saunders, who does not consider himself a vehicle costing expert, testified that he had no outside consultants review his rate formulations and that

as far as he could recall, the only person who reviewed his methodology in detail was Doug Stephens ten years earlier. Id. at p. 116 – 17.

For these reasons, the arbitrator finds that PJLA showed reckless disregard in calculating the reimbursement rate paid to its drivers and whether that rate would bring their pay below minimum wage. The three-year statute of limitations will apply.

E. ATTORNEYS' FEES

Section 29 USC § 216(b) provides for the award of attorney's fees and costs "in addition to any judgment awarded to the plaintiff." The briefing schedule for this issue is as follows:

Claimant's original brief: April 29, 2019

Respondent's opposition brief: May 20, 2019

Claimant's reply brief: June 3, 2019

The parties may request a hearing. If no hearing is requested, the arbitrator will determine whether a hearing is necessary.

March 26, 2019 /s/ Denise M. Pilie´, Arbitrator