NO. 97867-1

SUPREME COURT
STATE OF WASHINGTON

BAYLEY CONSTRUCTION,

Petitioner,

v.

DEPARTMENT OF LABOR & INDUSTRIES,

Respondent.

ANSWER TO AMICUS CURIAE MEMORANDUM

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I. INTRODUCTION

Associated General Contractors' support of Bayley Construction's petition for review hinges on a false premise: that the Department changed its interpretation of the floor-covering regulation to include protection against dynamic loads at the worksite. But, as the Court of Appeals recognized, the Department has not previously interpreted this regulation.[1] And the Court explained that the regulation's language—requiring a floor covering that protects against the "maximum potential load"—plainly encompasses dynamic loads.[2] Neither AGC nor Bayley disputes that "load" means "the forces to which a structure is subjected due to superposed weight . . . broadly: the forces to which a given object is subjected."[3] So the regulation's term "load" contemplates all kinds of loads (forces): static and dynamic. AGC is just wrong that the regulation exempts dynamic loads—no such exclusion appears in the regulation.

The record establishes that the Department has never interpreted the regulation to exclude dynamic loads. Indeed, it could not adopt such an interpretation, as it would conflict with the plain language of the regulation. There is no reason for review.

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[1] *Bayley Constr. v. Dep't of Labor & Indus.*, 450 P.3d 647, 662 (Wash. Ct. App. 2019).

[2] WAC 296-155-24615(3)(a)(ii); *Bayley Constr.*, 450 P.3d at 661.

[3] Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/load.

II. STATEMENT OF THE CASE

The Department relies on the statement of the case provided in its brief of respondent and answer to petition for review. But it wishes to emphasize two points.

First, the Department adopted the rule in 1986, and in preparation for his testimony, a Department expert, David Conley, researched Department records to see whether there had ever been any prior incidents where a floor covering failed and a worker fell through the cover. AR Conley 16-17. He could find no records of such an accident, and no one at the Department was aware of a prior failure or citation. AR Conley 16-17; AR Heist 39. Conley concluded that the Department had never had any previous interpretations of the floor-covering rule because it had not needed to address this question before. AR Conley 16-17; *see* AR Heist 32-33, 39 (Bayley's expert and former Department employee could recall no employer inquiries about floor-covering regulation or a floor-covering failure).

Second, Christopher Babbitt, an employee of Bayley, installed the floor covering by calculating only the intended (static) load. *See* AR Babbitt 16-17; AR 4, 7-8, 11-12. Babbitt received almost no training from Bayley in installing such coverings. AR Babbitt 9-10. Bayley never instructed Babbitt on how to determine whether a floor covering would

support the "maximum potential load" as WAC 296-155-24615(3)(a)(ii) requires; Bayley instructed he consider the intended load. AR Babbitt 11.

Babbitt failed to follow practices used in the industry when he installed the floor covering. *See* AR Conley 22; AR Sarmiento 68-69. The Department's construction industry expert, Conley, had worked in the construction industry for 22 years, installing floor coverings since 1989. AR Conley 5, 21. Department inspector Javier Sarmiento worked as a carpenter for 10-12 years, installing at least 100 floor coverings. AR Sarmiento 66-67. Both inspectors testified that they were trained to use plywood floor coverings at least 3/4-inch thick. AR Conley 22; AR Sarmiento 68-69. But Babbitt used only 5/8-inch-thick plywood to cover the hole. AR Babbitt 16-17. He did not use 3/4-inch-thick plywood. AR Babbitt 16-17.

III. ARGUMENT

The Legislature enacted the Washington Industrial Safety and Health Act (WISHA) to provide a safe and healthy workplace for all Washington workers. RCW 49.17.010. Yet AGC would have this Court interpret WISHA regulations to favor employer costs over worker safety. AGC Mem. 3. The Court should reject this attempt to subvert the Legislature's intent.

A. The Plain Language of the Regulation Gives Notice That Employer Must Protect Against Static and Dynamic Loads

The plain language of WAC 296-155-24615 provides that an employer must consider all "potential load[s]" on the floor covering:

> (3) Cover specifications.
>
> (a) Floor opening or floor hole covers must be of any material that meets the following strength requirements:
>
> . . . .
>
> (ii) All floor opening and floor hole covers must be capable of supporting the *maximum potential load* but never less than two hundred pounds (with a safety factor of 4).

WAC 296-155-24615 (emphasis added).

Because the rule does not define "potential" or "load," the ordinary dictionary definitions apply. "Potential" means "existing in possibility: capable of development into actuality." Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/potential. "Load" means "the forces to which a structure is subjected due to superposed weight . . . broadly: the forces to which a given object is subjected." Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/load. The record establishes that there are two types of loads: static and dynamic. AR Stranne 139-41. Thus, under the rule's plain language, an employer must ensure that a floor covering can support any static or dynamic load that the covering could encounter at the employer's worksite.

AGC's arguments about the regulation's meaning lack merit. WAC 296-155-24615(3)(a)(ii) does not exempt dynamic loads, as AGC suggests. AGC Mem. 6-7. Instead, it covers all "load[s]." WAC 296-155-24615(3)(a)(ii). And AGC's argument that "potential load" means "intended load" not only contradicts the dictionary definition (and common sense), but the Department's use of "intended load" in another subpart of the same provision shows that it meant for the two terms to have different meanings. *See* WAC 296-155-24615(3)(a)(i).

AGC relies on Bayley's argument that the floor covering regulation cannot protect against dynamic loads because the rule is codified in the fall restraint provisions, not the fall arrest system provisions. AGC Br. 5-6; Pet. 15. But as the Court of Appeals correctly noted, fall restraint systems require protection against falling. Under WAC 296-155-24605, "fall restraint" means "[r]estrained from falling." *Bayley Constr.* 450 P.3d at 661. As the Court observed, the definition of "fall restraint system" is not limited to a static load. *Id.*

Although AGC claims the regulation is ambiguous, there is only one reasonable interpretation. AGC Mem. 3, 10. There is no regulatory exception for dynamic loads, and "potential" does not mean "intended." Instead, an employer must ensure that a floor covering can support any

static or dynamic load that the covering could potentially encounter at the employer's worksite.

B. The Department Did Not Change Its Interpretation of the Floor-Covering Regulation

AGC repeatedly argues that there is a "new" or "surprise" interpretation of the regulation to include all loads, not just static loads. AGC Mem. 2-4, 7-10. But AGC concedes that there has been no official interpretation of the floor covering regulation. AGC Mem. 3. It argues that "in the absence of an official interpretation or guidance from the agency, contractors must be able to rely on industry understandings of internal department interpretations and enforcement history to determine how to comply with ambiguous performance standards." AGC Mem. 3. As support for its assertion of a "new interpretation," AGC points to a mistaken comment in the Board's memorandum decision that "Bayley insists that the phrase ['maximum potential load'] actually means 'maximum intended load,' an interpretation that all of the experts acknowledge had been used by the Department in the past." AGC Mem. 8; AR 7.

But as the Court of Appeals emphasized, the Board's statement was incorrect. The Court explained instead that the "uncontroverted record establishes the Department had not previously interpreted 'maximum

potential load.'" 450 P.3d at 662, n.10; *see* AR Conley 16-17 (Department expert testified that there had been no previous interpretation of the regulation); AR Heist 32-33, 39 (Bayley's expert and former Department employee could recall no employer inquiries about floor-covering regulation or a floor-covering failure). The Department's published policies do not include a policy on floor coverings.[4] And, as the record also establishes, not only was there no formal interpretation, there was no informal one either. *See* AR 16-17.

After incorrectly claiming that the Department changed its interpretation, AGC argues that there is a due process violation in not providing notice about the "new" interpretation. AGC Mem. 8. But not only is there no new interpretation, the Department also has given notice of its position: it adopted WAC 296-155-24615. And the regulation's plain language provides all the notice that is required. Neither Bayley nor AGC cites authority for the proposition that an agency must provide interpretations of a regulation's plain language. Indeed, it is well established in Washington that the Court does not consider such interpretations of plain language binding. *Bostain v. Food Exp., Inc.*, 159 Wn.2d 700, 716, 153 P.3d 846 (2007).

[4] *See* Washington State Department of Labor & Industries Division of Occupational Health & Safety, *Enforcement Policies*, https://www.lni.wa.gov/safety-health/safety-rules/enforcement-policies/.

AGC cites cases about the need for notice of agency positions that do not apply here. AGC Mem. 9-10 (citing *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156, 132 S. Ct. 2156, 183 L. Ed. 2d 153 (2012); *Silverstreak, Inc. v. Dep't of Labor & Indus.*, 159 Wn.2d 868, 890, 154 P.3d 891 (2007)). Each of these cases involved an ambiguous regulation with a previous agency policy or acquiescence to a well-documented industry practice. *Christopher*, 567 U.S. at 156-58; *Silverstreak*, 159 Wn.2d at 890. Here, by contrast, the regulation is not ambiguous, there has been no change in agency interpretation or enforcement practice, and there is no well-documented industry practice or agency acquiescence. Indeed, the evidence was that the Bayley worker who installed the cover went against practices of experts in the industry by using plywood that was only 5/8-inch thick, not the usual 3/4-inch to one-inch. AR Conley 22; AR Sarmiento 68-69. Such circumstances hardly support AGC's estoppel argument.

C. No Review Is Necessary to Consider an Incorrect Claim That the Regulation Imposes Strict or Per Se Liability

AGC argues that the regulation's plain language imposes "per se" liability and "strict liability." AGC Mem. 2, 4-5. Not so. WAC 296-155-24615(3)(a)(ii)'s plain language shows there is no strict or per se liability when the regulation protects only against "potential load[s]." "Potential"

means "existing in possibility: capable of development into actuality." Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/potential. So under the regulation, a contractor must only guard against circumstances that could occur on the jobsite—a floor covering must support potential loads, not all loads. Here the "potential" load was a fall from the adjacent 32-inch wall or a nearby ladder. AR Chandler 110; Ex. 31, 32, 32a.

AGC argues that the rule's plain language creates an "infeasible standard." AGC Mem. 4. But it admits that Bayley did not assert the affirmative defense of infeasibility at the agency level, which is why the Court of Appeals properly did not consider the argument. AGC Mem. 7. When, as here, "'a specific standard exists, the standard is presumed feasible and the burden is on the *employer* to prove that it is not.'" *Bayley Constr.*, 450 P.3d at 661 n.9 (quoting *SuperValu*, *Inc. v. Dep't of Labor & Indus.*, 158 Wn.2d 422, 434, 144 P.3d 1160 (2006)); *Frank Coluccio Constr. Co. v. Dep't of Labor & Indus.*, 181 Wn. App. 25, 37, 329 P.3d 91 (2014) (infeasibility is affirmative defense). Bayley waived this affirmative defense when it failed to raise it at the Board.

Seeking to dodge the waiver, AGC appears to assert that the Court should consider feasibility in interpreting the regulation. AGC Mem. 7. But it cites no authority that the courts consider feasibility in interpreting

the plain language of a regulation. Instead, if properly raised the inquiry into the validity of the regulation goes only to whether the rule exceeds statutory authority or is arbitrary and capricious. RCW 34.05.570(2).

While AGC suggests the rule is infeasible because the "average person" cannot calculate dynamic loads, the average person also cannot perform many construction tasks. *See* AGC Mem. 7. AGC's members construct multistory buildings using skills well beyond the abilities of average persons. The "average person" is not the standard for a court to consider when judging the affirmative defense of infeasibility. *See Frank Coluccio Constr. Co.*, 181 Wn. App. at 37 (outlining infeasibility affirmative defense requirement).

Finally, contrary to AGC's arguments, the facts show the standard is not unachievable. AGC Mem. 2, 4. The Department has recorded no floor covering failures—plainly, contractors have been able to meet the standard for decades. AR Conley 16-17; AR Heist 39.

IV. CONCLUSION

AGC shows no reason this Court should accept review.

RESPECTFULLY SUBMITTED this 30th day of January 2020.

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SUPREME COURT OF THE STATE OF WASHINGTON

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