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NO. 100309-9

SUPREME COURT OF THE STATE OF WASHINGTON

DEPARTMENT OF LABOR AND INDUSTRIES OF THE
STATE OF WASHINGTON,

Respondent,

v.

PHILLIPS 66 COMPANY dba PHILLIPS 66 COMPANY
REFINERY,

Petitioner.

ANSWER TO AMICI CURIAE MEMORANDUM

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I. INTRODUCTION

Alleging error in the Court of Appeals’ decision, Amici Western States Petroleum Association and the Northwest Pulp & Paper Association (“Associations”) mischaracterize both the court’s opinion and this Court’s case law. The Associations contend that the Court of Appeals impermissibly held Phillips 66 liable for breaking an interpretive rule. The Court of Appeals, of course, did no such thing. Instead, it held that Phillips 66 must inspect and test its fire water system under the mechanical integrity regulation, WAC 296-67-037—a significant legislative rule adopted pursuant to the Washington Industrial Safety and Health Act (WISHA). Courts routinely look to agency interpretations when construing statutes and regulations, and, in referencing the Department of Labor & Industries’ longstanding guidance in WAC 296-67-291(9), the Court of Appeals did not err by noting this guidance aligned with the mechanical integrity regulation’s plain language. As the court properly held, Phillips 66’s duties stem, not from any

interpretive rule, but from the mechanical integrity regulation itself.

The Associations' other arguments merely echo Phillip 66's petition and likewise show no basis for review. As did the petition, the Associations assert that the plain language of the mechanical integrity regulation shows it applies only to systems that "hold [or] transport . . . highly hazardous chemicals."

Amicus Br. 5. But like the petition, the Associations provide no analysis of the regulatory text to support this view. The Associations argue that the Court of Appeals did not properly apply the substantial evidence standard of review to the Board of Industrial Insurance Appeals' decision. But like the petition, they fail to explain how the court could adequately review Phillips 66's compliance with an inspection standard when the Board did not identify the applicable standard in its findings.

Because the Associations raise no issue warranting review, this Court should deny the petition.

II. ARGUMENT

The Associations substantially misread the Court of Appeals’ opinion in urging this Court to accept review. The court did not, as the Associations contend, sanction Phillips 66 for any violation of an interpretive rule. Rather, the Court properly viewed the Department’s guidance in WAC 296-67-291(9) as nonbinding persuasive authority, explaining that this guidance aligned with the plain language of the mechanical integrity regulation, WAC 296-67-037. Contrary to the Associations’ assertions, the Court of Appeals imposed no “affirmative obligation” based on an interpretive rule. Amicus Br. 13.

Nor do the Association’s other arguments merit review. These contentions are identical to those raised in Phillips 66’s petition, and, as explained in the Department’s answer, the Court of Appeals’ straightforward interpretation of the mechanical integrity regulation breaks no new ground. Similarly, because the Board made no finding about what

standard applied to inspections of Phillips 66’s fire water tank, the Court of Appeals appropriately remanded to the Board to make this finding.

The Court of Appeals’ decision comports with this Court’s precedent and raises no issue of substantial public interest.

A. The Court of Appeals Did Not Impose Any Obligation Based on an Interpretive Rule When It Held that Phillips 66’s Duties Arose from the Mechanical Integrity Regulation, a Significant Legislative Rule

The Court of Appeals’ analysis of the mechanical integrity regulation, WAC 296-67-037, does not conflict with any Washington appellate decision. The Associations contend that the court improperly imposed liability based on an “interpretive rule,” the violation of which cannot subject a person to a penalty or sanction. Amicus Br. 7-13 (citing RCW 34.05.328(5)(c)). But as a cursory review of the court’s decision shows, it is the mechanical integrity regulation—plainly a significant legislative rule—that requires Phillips 66 to inspect and test its fire water system. While the Court of

Appeals noted that the Department’s administrative guidance in WAC 291-67-291(9) aligned with the mechanical integrity regulation’s plain language, it did not find Phillips 66 liable for violating this guidance. Instead, as the court properly held, the company’s duties arose from the mechanical integrity regulation itself.

Phillips 66’s responsibilities for inspecting its fire water system flow directly from the mechanical integrity regulation. As the Court of Appeals held, the regulation’s plain language shows that its provisions apply to this system. *Dep’t of Lab. & Indus. v. Phillips 66 Co.*, 18 Wn. App. 2d 57, 70-71, 489 P.3d 1153 (2021). Based on the court’s analysis of the process safety management rule, the court concluded that “the fire water system falls within the ‘process’ definition of [this] rule” and that the mechanical integrity regulation therefore applied. *Id.* at 70. The court explained that the regulation applies to “pressure vessels and storage tanks; piping systems (including components such as valves); relief and vent systems and

devices; emergency shutdown systems; controls (including monitoring devices and sensors, alarms, and interlocks); and pumps.” *Id.* at 70 (quoting WAC 296-67-037(1)). Because “[m]uch of the fire water system falls squarely within this list of applicable components,” Phillips 66 needed to inspect the system in accordance with the mechanical integrity regulation’s requirements. *Id.* at 70-71.

Nothing in this analysis imposes any obligation based on an interpretive rule. *Contra* Amicus Br. 7-13. The mechanical integrity regulation is plainly a significant legislative rule, and it carries the same “force and effect” as a statute. *See Ass’n of Wash. Bus. (AWB) v. Dep’t of Revenue*, 155 Wn.2d 430, 439, 120 P.3d 46 (2005). A significant legislative rule “adopts substantive provisions of law pursuant to delegated legislative authority, the violation of which subjects a violator of such rule to a penalty or sanction.” RCW 34.05.328(5)(c)(iii). The Department promulgated the mechanical integrity regulation under the statutory authority

granted in RCW 49.17.040, and a violation of the regulation carries a civil penalty. *See* RCW 49.17.180. Having determined that this significant legislative rule applied to Phillips 66's firewater system, the Court of Appeals properly held that the company must comply with its requirements.

The Court of Appeals did not base its decision on the provisions of any interpretive rule. The Associations assert that the court improperly referenced WAC 296-67-291(9) in determining the scope of the mechanical integrity regulation. *See* Amicus Br. 7-13. This section of the process safety management rules provides guidance to employers about how to comply with the Department's regulations.¹ It "serves as a nonmandatory guideline to assist employers and employees in complying with [the Department's process safety management

¹ WAC 296-67-291 is not really an interpretive rule. An interpretive rule "sets forth the agency's interpretation of *statutory provisions it administers*." RCW 34.05.328(5)(c)(ii) (emphasis added). By contrast, WAC 296-67-291 provides guidance for complying with regulations promulgated by the Department.

standards].” WAC 296-67-291. In its decision, the Court of Appeals stated that this guidance—which identifies fire protection system components in its discussion of an employer’s mechanical integrity program—“clearly contemplates that the fire water system should be included as process equipment.” *Phillips 66*, 18 Wn. App. 2d at 71.

The Court of Appeals’ reference the Department’s guidance in its analysis of the mechanical integrity regulation conflicts with no decision of this Court. Nor does it constitute error. Courts routinely look to agency interpretations when examining statutes and regulations, and they accord those interpretations great weight when they fall within an agency’s expertise. *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 587, 90 P.3d 659 (2004). In WISHA appeals, courts have long given substantial weight to the Department’s interpretations of the regulations it administers. *Shimmick Constr. Co., Inc. v. Dep’t of Lab. & Indus.*, 12 Wn. App. 2d 770, 778, 460 P.3d 192 (2020). Nothing about Court of

Appeals' reference to the Department's guidance strays from these principles.

Nor does this Court's decision in *AWB* aid the Associations. The Associations quote this opinion at length, noting the Court's statements that "[t]he public cannot be penalized or sanctioned for breaking [interpretive rules]" and that such rules "are not binding on the courts and are afforded no deference other than the power of persuasion." Amicus Br. 10 (quoting *AWB*, 155 Wn.2d at 447). But the Associations omit the opinion's next sentence, which explains that "[w]hen the public violates an interpretive rule that accurately reflects the underlying statute, the public may be sanctioned and punished, not by authority of the rule, *but by authority of the statute.*" *AWB*, 155 Wn.2d at 447 (emphasis in original).

This is precisely the situation here. As explained above, the Court of Appeals held that the plain language of the mechanical integrity regulation—a significant legislative rule—required Phillips 66 to test and inspect its fire water system.

The Department's guidance in WAC 296-67-291(9) merely "accurately reflects" this rule. Thus, as in *AWB*, Phillips 66's duties arise, not from the Department's guidance, but from the authority of the mechanical integrity regulation itself.

Indeed, the Court of Appeals was careful to note that the guidance in WAC 296-67-291(9) was non-mandatory and merely "instructive." *Phillips 66*, 18 Wn. App. 2d at 70. The Department agrees that this guidance cannot enlarge a refinery owner's responsibilities under the mechanical integrity regulation. As the preamble notes, "[this guidance] neither adds nor detracts from the requirements [of the process safety management rules]." WAC 296-67-291. But as the Court of Appeals recognized, it is not WAC 296-67-291 that establishes what refinery equipment is subject to these rules. Rather, it is the rules themselves, including the definition of "process" in WAC 296-67-005, that establish what is covered. And, as the Court of Appeals explained, under this definition, the mechanical integrity regulation applied to the fire water system.

The musings of an industrial appeals judge in a proposed decision likewise provide no basis for review. *Contra Amicus* Br. 11-12. Not only are the cited statements contrary to the law described above, they lack any relevance here. Courts give no weight to a proposed decision and order. *Shimmick*, 12 Wn. App. 2d at 779 (citing *Stratton v. Dep't of Lab. & Indus.*, 1 Wn. App. 77, 79, 459 P.2d 651 (1969)). “A hearing examiner is merely an employee of the Board.” *Stratton*, 1 Wn. App. at 79. Proposed decisions and orders are not the decisions and orders of the Board. *Id.* Because the Board did not adopt the industrial appeals judge’s proposed decision, the Associations cannot properly rely on this decision to support their arguments.²

The Court of Appeals’ routine application of well-established statutory interpretation principles raises no issue of

² The Department’s current rulemaking to revise all process safety management rules likewise has no bearing on the Court of Appeals’ holding. *Contra Amicus* Br. 12. The court properly looked to the regulation’s language in effect at the time of the alleged violation.

substantial public interest. As the court correctly held, safety systems like Phillips 66's fire water system are part of a refinery's covered processes, and the mechanical integrity regulation applies to the components of such systems. The Associations offer no alternative analysis of this regulatory language. *See* Amicus Br. 1-17. Because the court did not impose liability based on an "interpretive rule," the Court of Appeals did not err, and the Court should deny review.

B. The Court of Appeals' Determination that Meaningful Appellate Review Required Remand Complies with This Court's Precedent

The Associations' remaining arguments merely echo Phillips 66's petition for review. Contrary to these assertions, because the Board's findings did not allow for meaningful appellate review, the Court of Appeals properly remanded for the Board to determine the applicable standard for inspection of the refinery's fire water tank. As explained in the Department's answer to the petition, the court's determination comports with this Court's precedent and raises no issue of substantial public

interest. *See* Dep't Answer 23-29 (citing *Groff v. Dep't of Lab. & Indus.*, 65 Wn.2d 35, 40, 395 P.2d 633 (1964)).

While the Associations make no new arguments, they identify the wrong statute in arguing the Court of Appeals did not properly apply the standard of review. *See* Amicus Br. 13-14. The judicial review provisions of the Administrative Procedure Act (APA) do not apply in WISHA appeals. *Danzer v. Dep't of Lab. & Indus.*, 104 Wn. App. 307, 319 n.5, 16 P.3d 35 (2000), *as amended* (Jan. 19, 2001) (citing RCW 34.05.030(2)(a)); *see also* *Cobra Roofing Servs., Inc. v. Dep't of Lab. & Indus.*, 157 Wn.2d 90, 100-01, 135 P.3d 913 (2006). Instead, judicial review is governed by RCW 49.17.150. While this statute also requires courts to review the Board's findings under a substantial evidence standard, the Court should disregard the Associations' citations to cases arising under the APA.

The Court of Appeals properly remanded to the Board to identify the inspection standard applicable to Phillips 66's fire

water tank and assess the company's compliance with that standard. This reasonable resolution comports with this Court's precedent and raises no issue of substantial public interest. The Court should deny review.³

III. CONCLUSION

Like Phillips 66, the Associations fail to identify any issue meriting this Court's review. The Court should deny the petition.

This document contains 2,227 words, excluding the parts of the document exempted from the word count by RAP 18.17.

³ Like Phillips 66, the Associations claim the Court of Appeals' decision will affect numerous industries. Amicus Br. 6, 17. But as explained in the Department's answer to the petition, the mechanical integrity regulation applies only when a facility's activities involve large quantities of highly hazardous chemicals. *See* Dep't Answer 29-30. When a fire water system's intended uses do not relate to such chemicals (or the chemicals are not present in sufficient amounts), the regulation does not apply to the system. *See* WAC 296-67-001, -005. The Associations' unsubstantiated assertion about the decision's effect on industry provides no basis for review.

RESPECTFULLY SUBMITTED this 13th day of
January, 2022.

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