NO. 97867-1

SUPREME COURT OF THE STATE OF WASHINGTON

BAYLEY CONSTRUCTION,

Petitioner,

v.

WASHINGTON STATE DEPARTMENT OF LABOR & INDUSTRIES,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Fall protection regulations protect workers from falls—but Bayley Construction advocates an interpretation of a fall-protection regulation that would protect workers only against *static* loads, not falling loads. The Department of Labor and Industries inspected Bayley Construction after a worker jumped 32 inches onto an insufficient floor covering constructed by Bayley Construction and fell to his death. Arguing that it did not intend for a worker to jump onto the covering, Bayley Construction claims it complied with the fall-protection rule by protecting against static loads (e.g., walking) as opposed to dynamic loads (e.g., jumping). It claims the load to measure was the "intended" load and the "intended" load is the "static" load.

The standard violated, however, did not call for protection against only "intended" loads or "static" loads. Under the rule, "floor opening and floor hole covers must be capable of supporting the maximum potential load . . . ." WAC 296-155-24615(3)(a)(ii). "Potential" means "existing in possibility: capable of development into actuality."[1] Load means "the forces to which a structure is subjected due to superposed weight."[2] A

[1] *Merriam-Webster Dictionary*, https://www.merriam-webster.com/dictionary/potential.

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

potential load includes a dynamic load because that is a "force" that the cover might face.

Bayley Construction does not cite a standard under RAP 13.4 to argue for review. And none exists for this routine case of statutory interpretation and substantial evidence. Bayley Construction's proposed interpretation of the regulation conflicts with its plain language and would leave workers exposed to the risk of falling through inadequate floor coverings. This Court should deny review.

II. ISSUE

> Under WAC 296-155-24615(3)(a)(ii), an employer must cover holes in floors with materials that support the "maximum potential load" that will be on the floor covering. Bayley Construction covered a hole with a piece of plywood that was not strong enough to withstand the load of a worker jumping on it from a height of 32 inches. Did Bayley Construction violate the regulation?

III. STATEMENT OF THE CASE

The Court should disregard Bayley Construction's statement of the case because Bayley Construction frames the facts in the light most favorable to it (contrary to substantial evidence principles), and it lacks citation to the record. Pet. 3-8.

A. A Worker Jumped onto Bayley Construction's Floor Covering From a Short Wall While Retrieving a Clamp He Needed for His Work

Bayley Construction was the general contractor for a project

erecting a building at Bellevue College. *See* AR Babbitt 11-12; AR Chandler 55; AR Heist 7.[3] Evergreen Erectors was a structural steel subcontractor on the project. AR Chandler 58. During construction in 2014, a crew from Evergreen worked on the roof of the building. AR Chandler 62.

Theodore Merry, an Evergreen employee, was working on a ladder. AR Wahl (1/6/16) 64-66. He needed to get a clamp to use for the work he was doing. AR Wahl 67. So he stepped onto the top of a nearby 32-inch high wall that enclosed an area that included a hole in the floor that was covered by a piece of plywood. AR Wahl (1/6/16) 69, 78; AR Babbitt 23. To get the clamp, Merry had to walk either around or through the area enclosed by the 32-inch wall. AR Babbitt 32-33; AR Troxell 29-30. Although Bayley Construction says it instructed the workers to stay outside the wall, workers performed work inside the wall. Pet. 4; AR Troxell 29-30.

After jumping down from the wall, rather than landing on a solid surface, he landed on the plywood floor covering that Bayley Construction installed to cover the hole in the floor. AR Wahl (1/6/16) 77-78; Ex. 31, 32a. Unfortunately, the floor covering was not strong enough to support

[3] The certified appeal board record is cited as "AR." Witness's names refer to their testimony.

him, and he fell to his death. AR Sarmiento 122-23.

B. Bayley Construction's Floor Covering Used Thinner Plywood Than the Industry Standard

Christopher Babbitt, an employee of Bayley Construction, installed the floor covering. AR Babbitt 28-29. Not following industry standards, Bayley Construction used only 5/8 inch thick plywood to cover the hole and not the standard 3/4 inch plywood. AR Conley 22; AR Babbitt 15-16. The problem with the floor covering is that Bayley Construction did not consider whether it could safely sustain the dynamic load—meaning the load when someone falls or jumps onto the covering—as opposed to the static load. There is a difference between the two loads. If a worker were to place a hammer on the top of a nail without striking it, the load on the nail is only the weight of the hammer. AR Stranne 141-42. Such a load is static. AR Stranne 141-42. But striking a nail with a hammer adds a dynamic force to the load created by the hammer's weight. AR Stranne 141-42. The depth the nail is driven into the plywood depends on the force of the strike. Here, the testimony was the dynamic force exceeded the number of pounds the cover could withstand at impact when Merry jumped onto the cover. AR Stranne 168.

Right after the fatality, Babbitt recognized, "[i]n the future we need to strengthen our hole covers. Although it was not intended to be jumped

on, it is clearly a possibility." AR Babbitt 38-39.

C. This Case Appears to Be the First Time That a Floor Covering in Washington Has Failed

In preparation for his testimony, Conley researched whether there had ever been a prior incident in Washington in which 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. AR Conley 16-17. Conley's research concluded that the Department has issued no WISHA citations involving a failure of a floor covering before and that the Department had never issued any previous interpretations of this rule because it had not needed to address this question before. AR Conley 16-17. Steven Heist, Bayley Construction's construction industry expert and former Department employee, agreed. AR Heist 32-33.

D. The Superior Court and Court of Appeals Affirmed the Board's Decision that Bayley Construction Violated the Floor-Covering Rule

The Department investigated the fatality and cited Bayley Construction for a serious violation of failing to guard a floor opening. WAC 296-155-24615(3)(a)(ii); WAC 296-155-24609(4)(a). Bayley Construction appealed the citation to the Board, which affirmed. The Board considered the meaning of the Department's rule and rejected

Bayley Construction's argument that "maximum potential load" only included the static load and not the dynamic load. AR 8. It also rejected Bayley Construction's argument that "potential load" meant "intended load." AR 7-8.

The Board's findings of fact 8 and 9 state that the plywood could not support the dynamic weight of Merry jumping on the plywood:

> 8. The 5/8th-inch thick piece of plywood used by Bayley as the hole cover could support a load of 1,246 pounds. It could support the static weight of Mr. Merry and his tool belt, even when multiplying it by 4 as the required safety factor.
>
> 9. The dynamic load or force placed on the plywood-hole cover by Mr. Merry and his tool belt at the moment of impact after the jump on top of it exceeded 1,246 pounds. This resulted in the breaking of the plywood-hole cover and Mr. Merry's fall onto concrete 42 feet below.

The Board also entered findings and conclusions on the meaning of "maximum potential loads." AR 12 (FF 10; CL 2, 3). The Board determined that the plywood Bayley Construction installed did not guard against "maximum potential loads," which include the force of an employee jumping on the floor opening:

> The plywood-floor-opening cover was not sufficient to support the maximum potential load, which included the force of an employee jumping or falling from an elevation above the floor opening, with a safety factor of four (FF 10)

> The phrase "maximum potential loads" in WAC 296-155-24615(3)(a) encompasses all potential loads, not just intended loads (CL 2).
>
> The phrase "maximum potential loads" in WAC 296-155-24615(3)(a) includes dynamic loads or force as well as static loads or force (CL 3).

The Board also found that Bayley Construction knew of the hazard: "Bayley Construction knew or should have known that workers would have access to the hole in the roof inside the cage or wind wall and that a fall through that hole would result in serious bodily harm or death." AR 11 (FF 4).

The superior court affirmed the Board's order. Bayley Construction appealed. The Court of Appeals affirmed. *Bayley Constr. v. Dep't of Labor & Indus.*, __ Wn. App. __, 450 P.3d 647, 663 (2019).

IV. ARGUMENT

The Legislature designed the Washington Industrial Safety & Health Act (WISHA) to protect workers from workplace hazards like falls. This case presents a routine application of WISHA principles to the facts, and review is not warranted.

Bayley Construction raises three primary arguments: that the Board misinterpreted the regulation, imposed strict liability, and allowed the Department to change its interpretation of the rule, allegedly violating due process and "fair notice." Pet. 13-18. Bayley Construction offers no

argument about how any of its arguments meet the standards in RAP 13.4, and none exists. Pet. 1-18.

A. Review Is Not Warranted to Reconsider the Interpretation of Maximum Potential Load as the Court of Appeals Correctly Applied Dictionary Definitions to Undefined Terms

The plain language of WAC 296-155-24615 provides for potential load, not intended load, and an employer must consider both dynamic and static loads to best protect workers. Bayley Construction argues that the regulation means "intended" load not "potential" load and that an employer need not consider dynamic load to protect falling workers. *See* Pet. 13-16. It argues that the employer need only consider static load from an employee doing things like walking on the cover. *See* Pet. 13-16. The rule provides the contrary:

> (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).

The rule requires covers to support the "maximum potential load." The rule does not say maximum "intended" load, contrary to Bayley Construction's interpretation. Pet. 13, 18.

Because the rule does not define "potential" or "load," the Court of Appeals correctly applied the ordinary dictionary definitions. *Bayley Constr.*, 450 P.3d at 660. "Potential" means "existing in possibility: capable of development into actuality." *Merriam-Webster Dictionary*, https://www.merriam-webster.com/dictionary/potential. "Load" means in this context: "the forces to which a structure is subjected due to superposed weight or to wind pressure on the vertical surfaces; broadly: the forces to which a given object is subjected." *Merriam-Webster Dictionary*, https://www.merriam-webster.com/dictionary/load. When read together, the two words mean the forces, existing in possibility and capable of development into actuality, to which a given object would be subjected.

The Department's intent to establish broader safety protections than the "maximum intended load" is shown by the fact the Department used "maximum intended load" in another part of the same regulation for a different standard. WAC 296-155-24615(3)(a)(i). A difference in terms is presumed to have a difference in meaning.

WAC 296-155-24615(3)(a)(ii) is a rule designed to protect against the hazards of a cover that does not stop someone from falling down a hole. Bayley Construction argues that because the floor-covering rule is in the "fall restraint" section of the rules, and not in the "fall arrest" section,

it did not have to protect from a dynamic load such as a fall from the 32-inch wall. Pet. 15. As the Court of Appeals observed, the definition of "fall restraint system" is not limited to a static load. Under WAC 296-155-24605, "fall restraint" means '[r]estrained from falling." 450 P.3d at 661.[4]

B. Review Is Not Warranted to Reconsider Factual Issues Reviewed Under the Substantial Evidence Standard

Substantial evidence supports that the Department proved every element of the WISHA citation. Bayley Construction argues that the Board imposed strict liability on it. Pet. 1-2, 11. Using a dictionary definition of statutory terms does not impose strict liability. And because the Department must prove every element of a WISHA citation (including whether the employer knew or should have known of the violation), there is no strict liability. *See Potelco v. Dep't of Labor & Indus.*, 191 Wn. App. 9, 34, 361 P.3d 767 (2015) (no strict liability because the Department must prove every element to a WISHA citation).

Bayley Construction argues that it was not foreseeable that a worker would jump on the cover. Pet. 11, 14. This argument goes to the substantial evidence question of constructive knowledge. An employer must act with reasonable diligence to discover a WISHA violation or

[4] The hole-cover rule is not ambiguous. But even if Bayley's arguments point to an ambiguity, well-established principles show that this Court should adopt the interpretation that best protects workers. RCW 49.17.010.

it will be held to have constructive knowledge of the violation. RCW 49.17.180(6); *Erection Co. v. Dep't of Labor & Indus.*, 160 Wn. App. 194, 207, 248 P.3d 1085 (2011). Substantial evidence supports the Board's finding of knowledge. A reasonable inspection of the worksite would show that it was likely that workers would be within the 32" high wall area near the hole. Bayley Construction argues that it told its workers not to go inside the wall. Pet 4. But the Board could disregard this testimony for two reasons. First, testimony established that the workers worked inside the wall. AR Troxell 29-30. Second, both inspectors testified that they found it difficult to walk around the wall because of the many obstacles, showing that it would have been likely for workers to go over the wall enclosure instead of walking around it.[5] AR Sarmiento 86-87; AR Troxell 13. Substantial evidence thus supports that it was foreseeable that a worker would jump down from the wall, rather than walk around it.

C. Review Is Not Warranted to Consider the Effect of a New Interpretation of a Rule Because There Is No New Interpretation

Bayley Construction's brief assumes that the Department's interpretation of the floor-covering rule is a "new" interpretation and that

[5] In any event, this would go to the affirmative unpreventable employee misconduct defense, RCW 49.17.120, not a defense against knowledge.

the Department has once interpreted the phrase "maximum potential load" to mean "maximum intended load." Pet. 2, 8, 13, 16. But as the Court of Appeals concluded, the Department never had an "old" interpretation of the statute. *Bayley Constr.*, 450 P.3d at 662, n.10. The Department has never had an official interpretation as shown by its absence in its policies.[6]

The evidence shows there was no prior interpretation. To prepare for his testimony, Department construction industry expert Conley researched whether there had ever been a previous incident in Washington in which a floor covering failed and a worker fell through the covering. AR Conley 16-17. He could find no records of such an accident, and no one at the Department knew of a prior failure. AR Conley 16-17. Conley's research concluded that the Department has issued no WISHA citations involving a failure of a floor covering before and that the Department had issued no previous interpretations of this rule or the phrase "maximum potential load." AR Conley 16-17.

Bayley Construction relied on Steven Heist, a former Department construction industry expert, who testified how he calculated the load when he worked for the Department. AR Heist 20. He considered only static load. AR Heist 20. But a former Department employee's personal

[6] *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/.

practice does not provide the Department's policy positions. *Cf. Sleasman v. City of Lacey,* 159 Wn.2d 639, 646-47, 151 P.3d 990 (2007) (finding anecdotal litigation experiences not evidence of an agency's policy). He also is not a Department representative and does not speak for the Department.

In any event, Heist agreed with Conley that the Department had not officially ruled on the matter:

> Q While you were working at L&I, did you ever run into a situation where you were aware of any incidents where someone fell through a floor covering?
> A I know that there were times where workers had fallen through a piece of material, but not—it wasn't a floor hole covering—floor hole opening. Not that I can remember of the investigations that I was brought into.
> Q And while you were there, isn't it true that you never received any inquiries from employers as to what the phrase "maximum potential load" meant in the WAC, right?
> A I can't say that that's either correct or incorrect.
> Q But you don't have any memory of—
> A I have no memory of that discussion.
> Q Of anybody asking?
> A No.
> . . .
> Q Are you aware of any previous inspections or citations issued by the Department involving someone who had fallen through a floor covering?
> A Not a floor covering.
> Q So this case is the first one that you're aware of, right?
> A I would agree. From memory I would agree with that.

AR Heist 32-33; AR Heist 38-39.

Even if it were true that the Department once applied a different interpretation, which it did not, it would not change the result here for at least two reasons. First, Bayley Construction does not dispute that the Department has not provided a publicly available interpretation of its rule, so Bayley Construction could not have relied on it.[7] Second, Bayley Construction argues that there is some right to "fair notice," but it cites no Washington case law for this proposition. And the plain wording of the WAC provided Bayley Construction notice of the regulatory requirements.

To obtain a reversal on its notice theory, Bayley Construction would have to prove that the Department was equitably estopped from arguing a new position. *See Silverstreak, Inc. v. Dep't of Labor & Indus.*, 159 Wn.2d 868, 888, 154 P.3d 891 (2007) (public agency estopped from enforcing changed policy after the fact). But Bayley Construction did not argue equitable estoppel, nor is there proof of the elements of equitable estoppel. Bayley Construction did not show that Christopher Babbitt, who installed the cover, relied on any statement from the Department—a necessary element to equitable estoppel. *Silverstreak*, 159 Wn.2d at 887-88. Without this showing, the Department may enforce its regulations even if there were a different application in a prior case (which there was

[7] *See* Enforcement Policies, https://www.lni.wa.gov/safety-health/safety-rules/enforcement-policies/.

not). *See Longview Fibre Co. v. Dep't of Ecology*, 89 Wn. App. 627, 636-37, 949 P.2d 851 (1998).

Finally, Bayley Construction postures this issue as including a "due process" issue but does not provide authority for this proposition. Pet. 1, 16-18. This Court should disregard the argument.

V. CONCLUSION

For the above reasons, this Court should deny review.

RESPECTFULLY SUBMITTED this 17th day of January, 2020.

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No. 97867-1

SUPREME COURT OF THE STATE OF WASHINGTON

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DATED this 17th day of January, 2020.

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