No. 97867-1

SUPREME COURT OF
THE STATE OF WASHINGTON

NO. 77600-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

BAYLEY CONSTRUCTION,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON,

Respondent.

AMICUS CURIAE MEMORANDUM OF ASSOCIATED GENERAL CONTRACTORS OF WASHINGTON SUPPORTING PETITION FOR REVIEW

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Associated General Contractors of Washington ("AGC"), formed in 1922, is the oldest and largest professional trade association representing the vast majority of commercial, industrial, and public works contractors in the State. The AGC is one of the leading chapters chartered nationally that are affiliated with the Associated General Contractors of America, the leading U.S. professional association for the construction industry. The AGC represents the interests of member contractors and works to create a better climate for construction in Washington. The AGC's member contractors perform their work subject to many interrelated regulations designed to protect the safety of workers on construction sites. The AGC and its members therefore have a substantial interest in the Department of Labor & Industries' (the "Department") interpretation of regulations like those at issue in this case.

II. ISSUES OF CONCERN TO AMICUS CURIAE

The AGC generally agrees with the presentation of issues by Petitioner Bayley Construction ("Bayley") in its Petition for Review. However, the AGC presents this memorandum to highlight two issues of particular importance to general contractors and the construction industry in Washington. Because these issues impact construction projects and worker safety in this state, they are of significant public interest.

First, by affirming an interpretation of WAC 296-155-24615(3)(a)(ii) that requires contractors to use floor opening covers that can support four times any potential static or dynamic force, the Court of Appeals has effectively imposed per se liability on contractors for any failure of a floor opening cover to arrest a falling object. This new interpretation imposes an unachievable standard requiring a contractor to ensure that a floor cover be strong enough to arrest any fall onto it that could possibly occur, including those caused by unintended uses and unusual events. This is contrary to the language of the regulation in the context of the regulatory scheme and expands its scope without rulemaking and attendant opportunity for industry input and feedback. Moreover, it imposes an infeasible standard on contractors. If the Department wishes to impose per se liability for failure of floor opening covers to arrest a fall, it must do so via proper rulemaking subject to public input under Washington's Administrative Procedures Act ("APA").

Second, the Court of Appeals declined to decide whether the Department violated Bayley's constitutional right to due process by issuing a citation based on a regulatory interpretation at odds with the Department's prior interpretation and enforcement of the regulations. The court decided that because the record did not show the Department previously promulgated an official interpretation, due process was not a

concern. But 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. The possibility of enforcement by surprise interpretation makes it difficult or impossible for contractors to determine how to comply with worker safety regulations. Without adequate notice of the regulatory requirements, this presents a due process problem.

III. REASONS TO GRANT REVIEW

Review of the Court of Appeals' decision in this case is justified because the case involves issues of substantial public interest that should be determined by this Court, RAP 13.4(b)(4), as well as questions of constitutional law, RAP 13.4(b)(3). The facts of this case are tragic and emphasize both the importance of effective worker safety regulations for construction projects and the importance of regulatory clarity and achievability. Because contractors must plan for safety regulation compliance and incorporate the time and costs thereof into their bids, regulatory feasibility and predictability prevent unnecessary cost increases to public and private construction projects.

Absent review, the Court of Appeals' decision imposes an unachievable regulatory requirement by affirming a new agency interpretation of longstanding regulatory language. Moreover, the Department's unprecedented enforcement based on its new interpretation implicates Bayley's right to fair notice of the regulatory requirements and should defeat judicial deference to the agency's interpretation. This Court should accept review to clarify the meaning of the regulation and the law regarding surprise interpretation and enforcement of safety regulations.

A. The Department's Interpretation of WAC 296-155-24615(3)(a)(ii) Creates an Infeasible Standard Contrary to the Regulatory Scheme

This Court should accept review of this case to assess whether the Department acted reasonably in interpreting WAC 296-155-24615(3)(a)(ii) to require achievement of an infeasible standard that effectively imposes per se liability for any floor opening cover failing.

The Washington Industrial Safety and Health Act ("WISHA") serves to "assure, *insofar as may reasonably be possible*, safe and healthful working conditions" in Washington. RCW 49.17.010 (emphasis added). Worker safety regulations under statutes like WISHA generally fall into two categories: performance standards and specification standards. Performance standards like the one at issue in this case "are more flexible and leave the method of achieving the protection to the

employer." MARK A. ROTHSTEIN ET AL., 2 EMPLOYMENT LAW § 6:9 (6th ed. 2019); *see also* Petition for Review, Appendix A at A6-A7. This is important, because compliance with performance standards requires contractors to make decisions regarding the method of achieving the necessary degree of protection. Such regulations are not supposed to impose strict liability on contractors for accidents. *See, e.g., In re Longview Fibre*, BIIA Dkt. No. 02 W0321, 2003 WL 23269365, * 1 (Nov. 5, 2003); *In Re: Traffic Control Servs.*, BIIA Dkt. No. 06 W0021, 2007 WL 3054890, at *7 (July 16, 2007).

The regulatory scheme established by WAC 296-155-24601 to 24624 to address worker fall protection on construction projects does not impose per se liability for worker falls. The scheme comprehensively regulates fall protection by using two different types of systems—"fall restraint" protection systems and "fall arrest" protection systems. A "fall restraint system" is defined as "[a] system . . . to restrain/prevent an employee from falling to a lower level." WAC 296-155-24603. In contrast, a "fall arrest system" is defined as a system "that will arrest a fall from elevation." *Id.* Because fall arrest systems are supposed to fully arrest the momentum of a person who is falling, the applicable standards under the scheme specifically refer to dynamic downward forces produced by a fall. *See, e.g.*, WAC 296-155-24613(1)(d)(iv), (2)(d).

Floor openings must be guarded by one of several specified fall restraint systems, which include a floor opening cover. WAC 296-155-24609(4)(a). The performance standard for a cover requires that it "be capable of supporting the *maximum potential load* but never less than 200 pounds (with a safety factor of 4)." WAC 296-155-24615(3)(a)(ii) (emphasis added). The primary issue in this case is whether the phrase "maximum potential load" refers to all possible downward forces that could meet the cover, including the momentum of a falling person, or the maximum forces produced by the intended work and use of the cover under the circumstances. The former reading unreasonably and unforeseeably transforms a fall restraint system into a fall arrest system.

Moreover, of crucial importance to the industry, that reading renders the regulation infeasible to implement by making the use of a floor opening cover—which is specifically allowed--prohibitively difficult and risky. A contractor can, as Bayley did here, calculate and test the strength of a floor covering based on the downward forces produced by workers standing, working, or walking on the opening with their equipment, or performing other intended and foreseeable uses. But a contractor cannot feasibly determine all possible downward forces, including those of all possible falls from higher elevations that could occur under any circumstances. At the very least, such determinations would require

complex physics calculations. This is not realistically achievable by workers on a construction site—as the Board of Industrial Insurance Appeals (the "Board") acknowledged below, "the average person cannot calculate dynamic loads." *In re Bayley Constr.*, BIIA Dkt. No. 15 W1043, 2017 WL 548892, at *5 (Jan. 31, 2017). Requiring an advanced understanding of physics to comply with a construction safety regulation renders the regulation practically impossible for workers to implement at the site.

The Court of Appeals addressed this infeasibility argument only in a footnote. Petition for Review, Appendix A at A24 n.9. It noted that "AGC contends this interpretation imposes an impossible burden on an employer" but declined to address the argument because Bayley had not asserted infeasibility as an affirmative defense below. *Id.* However, Bayley's and the AGC's argument was that, in light of the infeasibility of the Department's new interpretation of the regulation, the agency sought to impose a requirement that not only departed from what the industry and the agency had understood the regulation to mean for decades, but also imposed an unreasonable interpretation. Bayley made that contention in the administrative proceedings, and the Court of Appeals erred in not addressing and acknowledging its validity. The court thus allowed the Department to impose a new requirement on the entire industry without

considering whether it could feasibly be implemented. This Court should review this issue to determine whether the Department's interpretation is reasonable when it imposes an unachievable and infeasible regulation at odds with the regulatory scheme.

B. Surprise Regulatory Enforcement According to an Agency's Unprecedented Interpretation Implicates the Right to Due Process and Renders Judicial Deference Inappropriate.

In this case, the Department's enforcement not only imposed an infeasible standard, it imposed that standard on Bayley by surprise. This is of concern to contractors in Washington, who have a due process right to fair notice of regulatory requirements with which they must comply.

An administrative agency of the State may be equitably estopped from enforcing a new regulatory interpretation after regulated entities have relied on a prior official interpretation. *Silverstreak, Inc. v. Washington State Dep't of Labor & Indus.*, 159 Wn.2d 868, 890, 154 P.3d 891 (2007). Similar inequity exists when an agency breaks from prior informal interpretations and enforcement of a regulation and enforces a new, more stringent interpretation in the wake of an accident.

As the Court of Appeals recognized, the Board majority noted 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." Petition for

Review, Appendix A at A24 n.10. Bayley argued that the Department's decision to depart from this prior interpretation constituted unfair surprise, as it did not have adequate notice that the Department would interpret "maximum potential load" to encompass all possible dynamic forces. The Court of Appeals determined only that the record did not show the Department had previously expressed an interpretation of the regulation, seemingly conflating estoppel and due process.

An agency must follow APA rulemaking procedures if it "adds a new requirement to an already well defined regulation." *Providence Physician Servs. Co. v. Washington State Dep't of Health*, 196 Wn. App. 709, 726, 384 P.3d 658 (2016). As the AGC argued below, a regulation may be "well defined" not only by official published guidance but also by prior enforcement, around which industry practices and training develop. Here, the record showed that the Department never previously cited a contractor based on the interpretation to which it held Bayley, and that industry practices and training had developed that are at odds with the new interpretation. *See* Petition for Review, Appendix A at 5-7.

The problem posed by this sort of unfair surprise is especially acute where, as here, the regulation is subject to multiple reasonable interpretations. This Court has held that agencies may not "adopt new and changing interpretations" of vague regulations without offending due

process. *Silverstreak*, 159 Wn.2d at 890. Similarly, as the U.S. Supreme Court has held, "[t]o defer to the agency's interpretation [for conduct that preceded announcement of the interpretation] would seriously undermine the principle that agencies should provide regulated parties 'fair warning of the conduct [a regulation] prohibits or requires.' " *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156, 132 S. Ct. 2156, 183 L. Ed. 2d 153 (2012). Yet the Court of Appeals held that even if the regulation here is ambiguous, it would defer to the Department's new interpretation. *Id.* at A24.

This Court should review this issue and hold that an agency may not enforce an ambiguous regulation based on a new interpretation that departs from the course of prior enforcement without fair notice, and that judicial deference to such an interpretation is improper. The Court of Appeals' analysis simply incentivizes agencies to avoid issuing guidance interpreting ambiguous regulations—which regulated entities often need to plan for and achieve compliance. This both harms regulatory efficacy and imposes inequitable, unpredictable burdens on regulated entities.

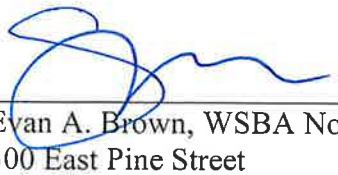
IV. CONCLUSION

For the foregoing reasons, the AGC respectfully requests that the Court grant Bayley Construction's Petition for Review and decide these issues of substantial public importance.

DATED this 17th day of January, 2020.

Respectfully submitted,

GROFF MURPHY, PLLC



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