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NO. 77600-2-I

**IN THE COURT OF APPEALS, DIVISION I
THE STATE OF WASHINGTON**

BAYLEY CONSTRUCTION
GENERAL PARTNERSHIP,

Appellant/Petitioner

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE
STATE OF WASHINGTON,

Respondent.

**PETITION FOR REVIEW BY
THE WASHINGTON SUPREME COURT**

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A. INTRODUCTION AND IDENTITY OF PETITIONER

The Petitioner is Bayley Construction General Partnership (“Bayley”). This case raises important issues regarding the Respondent, the Department of Labor and Industries (“Department”) citing employers, who otherwise satisfied the Department’s past interpretation of a cited regulation, by changing a regulation’s requirements to include uncertain, outside requirements that conflict with the overarching regulatory scheme and impose strict liability on an employer without any notice or opportunity to be heard.

Here, the Department cited Bayley for a violation of WAC 296-155-24609(4)(a)(ii), which states that floor openings must be guarded by “one of the following *fall restraint¹ systems*.” The cited regulation *does not address fall arrest² specifications*. Bayley provided a floor covering that met the Department’s known and written requirements of the cited regulation by using a sheet of 5/8-inch thick plywood to cover a floor opening that would easily exceed the cited fall restraint regulation.

In this case, however, the Department interpreted the cited regulation, for the first time, to contain the same weight or load requirements as those found in the fall arrest regulations, not the cited fall restraint regulation. Significantly, the weight or load requirements for fall restraint methods are different than the requirements for fall arrest systems.

¹ WAC 296-155-24603 defines a fall restraint system as one “in which all necessary components function together to restrain/prevent an employee from falling to a lower level” and include guardrail systems and warning line systems.

² WAC 296-155-24603 defines a fall arrest system as one that “will arrest a fall from elevation” and “include personal fall arrest systems that are worn by the user, catch platforms, and safety nets.”

Therefore, the Department's interpretation of the cited regulation, as advanced in this case, changed the regulation from a standard that promotes safety by providing clearly articulated goals that employers can adopt, to a regulation that is unreachable because an employer cannot determine what exactly is required. Accordingly, the Department and the Board of Industrial Insurance Appeals ("Board") transformed this regulation into a strict liability regulation where a violation occurs not because the written standard has been violated, but because an accident occurred regardless of the circumstances.

B. COURT OF APPEALS DECISION

Bayley seeks review of *Bayley Const. v. Dep't of labor and Indus.*, No. 77600-2-I, filed on October 21, 2019 [Published]. A copy of the opinion is attached to this Petition for Review at Appendix A, pages A1 through A27.

C. ISSUES PRESENTED FOR REVIEW

1. Where the Department for the first time changed its historic interpretation and requirements of the floor opening cover regulation to an admittedly unknown, unworkable engineering formula standard, without any public notice or notice to any construction industry employer, does the new interpretation impose strict liability on Bayley and violate Bayley's and the construction industry's right to Fair Notice and Due Process?
2. Where the Department bears the burden of proving all elements required by RCW 49.17.180(6) to issue a "serious" violation, is the Board's

Decision and Order supported by substantial evidence when the Department failed to establish employer knowledge?

3. Where the Board held that the term “maximum potential load” is more encompassing than the term “maximum intended load” and includes virtually any load, did the Board err by imposing an unreasonable interpretation to a performance standard, and further err in striking the testimony of Chris Babbitt, Kurt Stranne, Chris Troxell, Dan Pitts and the Department’s 30(b) (6) witness, who would have testified that the term “maximum potential load” is interpreted in a reasonable predictable manner?

D. STATEMENT OF THE CASE

1. Construction of the Health Sciences Building

Bayley was the general contractor on the project to construct a new three-story health and sciences building at Bellevue College. The heating, ventilation, and air conditioning (“HVAC”) system for the building was designed for installation on the roof of the building.

Bayley hired Evergreen Erectors, a steel subcontractor, to build a “wind wall” that would eventually surround the HVAC unit. The HVAC unit was designed to sit on top of a block of concrete within the wind wall, which was to be made by pouring concrete into forms for a 32-inch-tall “stem wall.”

The stem wall had two floor openings that were kept open, so the HVAC units could be installed. The floor openings were protected by 5/8-inch plywood covers that had the word “HOLE” written on top of them until

the HVAC units could be installed. All construction contractors and their employees at this worksite were specifically instructed at a safety meeting, on July 21, 2014, not to enter the stem wall area.

2. The new floor hole cover placed over the HVAC floor opening.

To allow workers to build the stem wall, a new floor opening cover was necessary because the cover originally installed interfered with the location of where the stem wall was to be built. Christopher Babbitt, a Bayley general foreman, testified that the method of selecting the proper piece of plywood depended upon the nature of the work to be performed and the size of the opening.

After measuring the opening, Mr. Babbitt determined who would be working in the area and what the maximum intended load would be. He testified this could vary depending on the size and location of the opening. Mr. Babbitt testified that he would determine the potential number of workers who would be working on the floor opening cover and include a 4 times safety margin of the weight of the heaviest worker “as a working surface.”

That is, Mr. Babbitt was trained to select a material that would withstand four times the intended load of the weight of the heaviest worker. This was in accord with his training that he received from Bayley, his OSHA 30-hour training course, and other companies he worked for as a journey level carpenter.

Mr. Babbitt determined that a sheet of 5/8-inch-thick MDO plywood would be suitable for the floor opening in question. Mr. Babbitt testified that he selected MDO plywood because it is extremely strong, as it is typically used for decks and can withstand thousands of pounds of concrete. He testified that MDO plywood is very rigid and is typically used for concrete forms. A yard of concrete weighs between 2,500 and 3,000 pounds.

After the floor opening cover was installed and secured against accidental displacement, both Mr. Babbitt and Mr. Ellis, the heaviest worker who weighed over 250 pounds, tested the cover by taking turns standing on it. Mr. Babbitt testified that there was no deflection, or any other issues with the floor opening cover. Mr. Babbitt also verified the floor opening cover would not displace by giving it the recognized kick test. Mr. Babbitt further used red spray paint to paint the word "HOLE" in letters that were 8 inches by 16 inches tall.

3. No one was allowed inside of the stem wall and there was no reason for anyone to go inside the stem wall on July 21, 2014.

Mr. Babbitt testified that there was no need for the Evergreen Erector employees to work inside of the stem wall forms on July 21, 2014, and they did not work inside that access-restricted guardrail equivalent enclosure on July 21, 2014. Likewise, Allen Wahl, an Evergreen Erectors' journey level steelworker, testified that none of the Evergreen Erectors' employees had to go inside of the stem wall for any work they did on the top floor on July 21, 2014.

4. Theodore Merry's idiosyncratic jump onto the floor cover causing him to fall could not have been reasonably anticipated.

On July 21, 2014, Evergreen Erectors' structural steelworkers were welding angle iron onto the wind wall. Mr. Wahl was working on the outside of the wind wall, and Theodore Merry, an Evergreen Erectors journey level steelworker, was working on the inside of the wind wall.

Mr. Merry weighed 257 pounds and was wearing a 20-pound tool belt. While Mr. Merry was standing on a ladder approximately five feet above the surface of the roof, Mr. Wahl told Mr. Merry that he needed another clamp. Mr. Wahl watched Mr. Merry climb down the ladder, step onto the stem wall, and intentionally jump onto the plywood floor hole cover. Mr. Merry did not slip or accidently fall from the stem wall. Unfortunately, when Mr. Merry jumped from the stem wall onto the plywood floor hold cover, the plywood broke under his weight and he fell to his death.

Mr. Wahl testified he had no reason to anticipate that Mr. Merry would jump onto the floor opening cover, or that the floor opening cover was inadequate in any way. As a journey level steelworker, Mr. Wahl learned about ladder safety. He learned to always keep 3 points of contact and to come down the whole ladder and not to jump off the ladder. He was also taught not to step or jump onto floor opening covers.

In the 12 years of being in construction, Mr. Wahl testified that it was not a common practice for construction workers to jump from the height of the stem wall onto a floor opening cover. In fact, Mr. Wahl

testified he would never jump onto a floor opening cover, and he has no recollection of any steelworker ever jumping onto a floor opening cover. In addition, Mr. Babbitt testified that he had never known anyone to jump off a ladder or stem wall onto a floor opening cover marked with "HOLE".

There was no evidence that any worker at the Bayley Construction site had ever jumped off of a ladder or a stem wall to come down from a higher elevation.

Kurt Stranne, the only Professional Engineer who testified in this matter, concluded that 5/8" MDO plywood would hold 1,246 pounds of support and his opinion was based on a more probable than not degree of engineering certainty. That is, Mr. Stranne testified that using two different methodologies, he calculated the dynamic force created by a 257 pound³ employee plus tools jumping onto the floor hole cover from a height of 32 inches, the stem wall height. In both methodologies, Mr. Stranne's calculations exceeded the 1,246 pounds that Mr. Schaeffer calculated the board was capable of supporting.

Indeed, the Department's Compliance Safety and Health Officer ("CSHO") Chris Troxell testified that 277 pounds times four would be 1,108 pounds. Officer Troxell even agreed that in order to be compliant with the code, at a minimum, the plywood needed to support at least 1,108 pounds. It was undisputed that the 5/8-inch plywood floor cover was strong enough to support 1,108 pounds.

³ Based on the medical examiner's report, Officer Troxell learned that Mr. Merry weighed 257 pounds. He added 20 pounds for his tools and considered his total weight to be 277 pounds.

5. The Department's Citation.

The Department conducted an inspection after Mr. Merry's unfortunate accident, through CSHO Troxell and CSHO Javier Sarmiento. As a result of the inspection, the Department issued a citation against Bayley for a serious violation of WAC 296-155-24609(4)(a)(ii), and alleged that Bayley, "did not ensure that all floor opening had floor covers that were capable of supporting the maximum potential load with a safety factor of four as required by WAC 296-155-24615(3)(a)(ii)."

The Board concluded at page 5, lines 24 - 28 of the Decision & Order that:

"The Department maintains that the phrase is "maximum potential load" is more encompassing than a "maximum intended load." Because the former term could also include an *"unintended" load, it is clear the Department is correct.*" (Emphasis added).

All of the safety experts and professionals that testified agree that the Department has never previously interpreted the floor cover regulation to contain the same weight or load requirements as those in the fall arrest regulations; yet, that is what the Department argued and what the Board adopted. This new adoption, which is contrary to the Department's past interpretations that Bayley relied upon, gave Bayley no notice or opportunity to be heard and held Bayley strictly liable for this accident.

E. ARGUMENT

- 1. In passing the federal Occupational Safety and Health Act, which the Washington Industrial Safety and Health Act is based on, Congress recognized the tension between promoting worker safety and not creating absolute or strict liability.**

The Court of Appeals correctly held at page 12 that the purpose of WISHA, as set forth in RCW 49.17.010⁴, is, “to assure, insofar as may reasonably be possible, safe and healthful working conditions for every man and woman working in the state of Washington.” To that end, courts must liberally construe WISHA statutes and regulations.

However, it is well recognized that the intent to promote worker safety is not absolute as it does not create strict liability to employers. In H. Rept. No. 91-1291 at 21-22, it is noted that the Committee's intent that an employer exercise care to furnish a safe and healthful place to work and to provide safe tools and equipment. Moreover, the Committee declared that this is not a vague duty but is protection of the worker from *preventable* dangers. (Emphasis added).

A majority of the federal circuits have adopted this legislative intent or a similar one. See, e. g., *National Steel & Shipbuilding Co. v. OSHRC*, 607 F.2d 311, 313-16 (9th Cir. 1979); *Georgia Electric Co. v. Marshall*, 595 F.2d 309, 317-19 (5th Cir. 1979); *Kent Nowlin Constr. Co. v. OSHRC*, 593 F.2d 368, 372 (10th Cir. 1979); *Empire-Detroit Steel v. OSHRC*, 579 F.2d 378, 384-85 (6th Cir. 1978); *Intercounty Constr. Co. v. OSHRC*, 522 F.2d 777, 779-81 (4th Cir. 1975), cert. denied, 423 U.S. 1072, 96 S. Ct. 854, 47 L.Ed.2d 82 (1976); *F. X. Messina Constr. Corp. v. OSHRC*, 505 F.2d 701, 702 (1st Cir. 1974).

⁴ The Washington legislature adopted the exact language set forth in 29 U.S.C. § 651(b)

Moreover, it has long been established that OSHA was created to be preventative in nature and imposes an obligation on employers to suppress hazardous employee conduct which is predictable and therefore feasibly preventable. See *Butler Lime and Cement Company*, OSHRC Docket No. 855 (1977). For the reasons set forth below, the Department's interpretation of the floor cover rule, to take into account the greatest amount of force that could be placed on that cover including *unintended loads* is unreasonable because employers cannot take into account unintended loads that are not reasonably predictable or foreseeable.

Furthermore, it has been long-established that OSHA does not impose absolute (or strict) liability on employers for harmful workplace conditions; instead, it focuses liability where harm can, in fact, be prevented. See, e.g., *Central of Ga. R.R. Co. v. Occupational Safety & Health Review Comm'n*, 576 F.2d 620, 623 (5th Cir.1978) (collecting cases); *Brennan v. Occupational Safety & Health Review Comm'n*, 502 F.2d 946, 951 (3d Cir.1974); *Brennan v. Occupational Safety & Health Review Comm'n*, 511 F.2d 1139, 1145 (9th Cir.1975) (noting that there must be "some nexus between the employer and the alleged violation," otherwise employers would be "strictly and absolutely liable for all violations" contrary to what Congress intended).

As held by the *Butler* court, *supra*, the Act does not impose strict liability, e.g., it does not impose liability for failure to prevent employee conduct which is "idiosyncratic," or "implausible in motive."

Thus, while courts have emphasized the importance of proper instruction and adequate supervision in safety-related matters, “they have consistently refused to require measures beyond those which are reasonable and feasible.” *See Horne Plumbing & Heating Co. v. Occupational Safety & Health Review Comm'n*, 528 F.2d 564, 569 (5th Cir.1976) (discussing cases).

Similarly, the Board has also declined to impose strict liability in WISHA cases. *See In Re: Traffic Control Services*, Dkt. No. 06-W0021, 2007 WL 3054890 (Wash. Bd. Ind. Ins. App.) (2007) (vacating a citation due to trained flagger’s unforeseeable unsafe act). Moreover, the Board has not automatically found that a safety standard has been violated merely because an accident occurred.

2. The cited regulation is a “performance standard” which must be applied reasonably.

The floor cover regulation at issue, WAC 296-155-24609 is a “performance” standard because it identifies an objective, but does not specify the specific means for accomplishing it. *See Central Florida Equipment Rentals, Inc.*, 25 BNA OSHC 2147, 2150 (No. 08-1656, 2016). “Because performance standards ... do not identify specific obligations, they are interpreted in light of what is reasonable.” *Thomas Indus. Coatings, Inc.*, 21 BNA OSHC 2283, 2287 (No. 97-1073, 2007); *see also McGraw Constr. Co.*, 15 BNA OSHC 2144, 2148 (No. 89-2220, 1993) (applying reasonable person test); *Siemens*, 20 BNA OSHC at n. 8 (employer's exercise of discretion is judged by reasonable person or “reasonably prudent employer” standard). Citing employers for failing to install floor covers that will withstand forces that are not intended or foreseeable amounts to a strict or absolute interpretation.

The main issue in this case is whether Bayley complied with the WAC 296-155-24609 by installing a floor cover that met the strength and load capacities under the fall restraint standards codified in WAC 296-155-24615(3); not the fall arrest standards for fall protection. WAC 296-155-24609 states, in relevant part:

Fall protection required at four feet or more.

(1) You must ensure that the appropriate fall protection system is provided, installed, and implemented according to the requirements in this part when employees are exposed to fall hazards of 4 feet or more to the ground or lower level when on a walking/working surface.

...

(4) Guarding of floor openings.

(a) You must guard floor openings by one of the following *fall restraint* systems.

(i) A standard guardrail system, or the equivalent, as specified in WAC 296-155-24615(2), on all open sides, except where there is entrance to a ramp, stairway, or fixed ladder. The railing must be provided with a standard toe board wherever, beneath the open sides, persons can pass, or there is moving machinery, or there is equipment with which falling materials could create a hazard.

(ii) A cover, as specified in WAC 296-155-24615(3).

(Emphasis added)

...

(3) Cover specifications.

(a) Floor opening or floor hole covers must be of any material that meets the following strength requirements:

(i) Conduits, trenches, and manhole covers and their supports, when located in roadways, and vehicular aisles must be designed to carry a truck rear axle load of at least two times the maximum *intended* load;

(ii) All floor opening, and floor hole covers must be capable of supporting the maximum potential load but never less than 200 pounds (with a safety factor of 4).

(A) All covers must be secured when installed so as to prevent accidental displacement by the wind, equipment, or employees.

(B) All covers must be color coded or they must be marked with the word "hole" or "cover" to provide warning of the hazard.

Significantly, the weight or load requirements for fall restraint methods, such as a floor opening cover, are different than the requirements for fall arrest systems. See WAC 296-155-24615 for fall restraint protection, and WAC 296-155-24613 for fall arrest protection. The basic weight requirement for fall restraint protection to be provided by a floor opening cover is to support at a minimum a 200-pound load with a safety factor of 4 added per WAC 296-155-24615(3)(a)(ii).

Here, Bayley provided floor opening covers that met the Department's known and written requirements because it used a sheet of 5/8-inch thick plywood. Bayley checked the coverings in advance for structural and displacement weaknesses, but none were found. Indeed, Mr. Babbitt had the heaviest worker walk on the 5/8-inch thick plywood and noted no flexion or bending of it. Satisfied that the plywood cover would support a load of 250 pounds with a safety factor of 4, as required by the cited regulation, Mr. Babbitt spray painted the required "HOLE" warning on top of the floor opening cover, which was affixed to the hole with two large nails. Mr. Stranne testified that the rated strength of the 5/8-inch plywood of this type was 1,246 pounds.

When Bayley first installed the floor opening cover it only intended workers to be standing or working on the floor level itself. It was never intended for anyone to jump on it from a height of 32 inches or more. At the time of installation, the 5/8-inch thick floor opening cover easily exceeded the fall restraint safety standard pursuant to the Department's interpretations and requirements of the cited regulation. It was both

reasonable and predictable to assume that workers would be walking, standing, running or even falling from the floor level on top of the floor cover. As testified by Mr. Stranne, the 5/8-inch floor cover was fully capable of sustaining the impact of all of those activities with a safety factor of four.

Particularly where an employer may face substantial penalties, he is entitled to fair notice of the proscribed conduct "and a reasonably clear standard of culpability to circumscribe the discretion of the enforcing authority and its agents." *Diamond Roofing Co., Inc. v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976). See also *B & B Insulation, Inc. v. OSHRC*, 583 F.2d 1364, 1371-72 (5th Cir. 1978).

Mr. Merry's decision to jump onto the floor opening cover was both idiosyncratic and could not be reasonably predicted. Under the Board's decision, a jump from any height would be included because it would constitute an "unintended load" which must be protected against by the Employer. This was never the interpretation of the Department nor the industry.

Yet, the Department, for the first time, in this case, interpreted the phrase "maximum potential load" in the floor opening cover specifications to include unintended dynamic loads which are addressed in fall arrest regulations, even though the actual language of the cited regulation only requires employers to meet fall restraint standards.

Not only did Bayley meet the fall restraint standards, it also acted reasonably. As Mr. Babbitt noted, the type of plywood sheet he selected

could support a concrete pour weighting thousands of pounds, as the vector of the dynamic force from pouring the concrete is lessened because its magnitude (dynamic force) is decreased because it is spread over the entirety of the plywood sheet. On the other hand, a fall or jump off a ladder or wall directly onto the plywood sheet, as in this case, produces a vector that is perpendicular to the surface of the plywood floor cover, which focuses the dynamic force of the jump onto a smaller area of the plywood, subjecting that part of the cover to a much greater magnitude of stress. However, as pointed out by Bayley, and the entirety of the Department's own past interpretation of this regulation, such an unintended force is not within the "maximum possible force" language of that regulation.

That is, unlike the fall restraint regulations, dynamic forces are clearly factored into the fall arrest standards, which are the standards pertaining to safety systems used to prevent bodily injury when a fall occurs. The weight or force requirements for the fall arrest systems, such as body harnesses and lanyards, is considerably greater than what is required of fall restraint devices. For example, the fall arrest standards of WAC 296-155-24613 require the use of equipment and anchors that can absorb the dynamic forces in the thousands of pounds, which are unequivocally absent in the fall restraint standard at issue.

If the Department wanted to arrest falls created by dynamic loads in the floor opening cover standards, it easily could have done so, but it failed to do so.

Overall, the Department's interpretation of the phrase "maximum potential load" as advocated in this case changes the regulation from a standard that promotes safety by providing clear and articulated safety goals that employers can adopt, to a regulation that is unreachable because an employer cannot determine what is required. Indeed, the Board acknowledged the validity of Bayley's contention that the average person cannot calculate these dynamic loads that are absent from the cited regulation.

Thus, the Department has advocated, and the Board has allowed, the adoption of a new unreachable requirement that invokes strict liability on an employer in which a violation occurs not because the written standard has been violated, as Bayley complied with the cited regulation as previously interpreted, a violation occurs because an accident occurred regardless of the circumstances.

It is evident that the Department changed its long-held interpretation of the cited standard only after the Merry fatality occurred.

3. The Department's Change of a Fall Arrest Standard to a Fall Restraint Standard, in Contrast to its Past Interpretations and Without Public Notice or Notice to the Construction Industry, Violated Bayley's Right of Fair Notice and Due Process.

Bayley respectfully asserts that the majority Board erred in failing to consider the regulation as a whole and in allowing improper deference to the Department's unprecedented new legal interpretation of the cited regulation. As a result of these failures, the majority Board added new substantive requirements to the cited regulation without prior notice and

rulemaking to Bayley's legal detriment. This violated Bayley's right to due process and constitutes an unfair surprise that threatens the 40-year accepted method of temporary floor opening covers as fall restraint devices.

The lead, and most recent, appellate decision on unfair surprise and lack of fair notice of the Occupational Safety and Health Administration ("OSHA") using an unprecedented legal interpretation to re-write the requirements of a regulation is *Perez v. Loren Cook Co.*, 25 BNA OSHC 1689 (8th Cir. 2015) (*en banc*), dated Oct. 13, 2015. The Court held:

"Finally, the Secretary's announcement of such unprecedented interpretation in the citation against Loren Cook amounted to unfair surprise." When "an agency's announcement of its interpretation is preceded by a very lengthy period of conspicuous inaction, the potential for unfair surprise is acute."

The Eighth Circuit found that the lack of fair notice of OSHA's unprecedented citations and stretching of the all-industry general machine guarding standard prevented deference to the Secretary's interpretation.

The Court rejected the *Martin* type deference to OSHA because:

- The Secretary of Labor's interpretation strains a common sense reading of the standard.
- OSHA failed to provide any proof that the Agency had consistently enforced or interpreted this standard to cover the ejection of large objects or workpieces from lathes or spinning machinery, and
- Most importantly, the "Secretary's announcement of such an unprecedented interpretation in the citation against Loren Cook amounted to unfair surprise." Because OSHA's citation contradicted 30 years of prior enforcement and interpretation of never requiring that type of interpretation.

OSHA was not allowed to rewrite the standard to change the scope from in-running nip points guarding to ejected workpieces guarding.

Similarly, in the present case, since 1971 the Department has never required or interpreted the cited regulation to apply to dynamic loads, or free falls from ladders or other objects onto “walking-working surfaces.”

Despite making this conclusion, the Board did not allow testimony from the Department’s own CSHOs who conducted the investigation, prepared the investigative reports, and recommended that this violation be issued against Bayley. Clearly, this testimony is relevant because it demonstrates that the phrase “maximum potential load” is **NOT** more encompassing than the term “maximum intended load,” as erroneously found by the Board.

F. CONCLUSION

The Board and courts below erred by applying a strict liability standard to Bayley. Contractors are required to protect employees against hazards that are predictable or foreseeable. Contractors must be able to rely on the clear language of a regulation, and not be cited for idiosyncratic behavior of employees. For the above reasons, Bayley’s Petition for Review should be granted.

Respectfully submitted this 18th day of November 2019.

s/ Aaron K. Owada

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CERTIFICATE OF SERVICE

I certify that on November 18, 2019, I caused the original and copy of the **Petition for Review to Supreme Court** to be filed via Electronic Filing, with the Court of Appeals, Division I and that I further served a true and correct copy of same, on:

- (X) **Via Hand Delivery to Supreme Court of Washington/Temple of Justice with Petition for Review filing fee check:**

Clerk of the Court
Supreme Court
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DATED this 18th day of November 2019, in Lacey, Washington.

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

BAYLEY CONSTRUCTION A)	No. 77600-2-I
GENERAL PARTNERSHIP,)	
)	
Appellant,)	
)	
v.)	PUBLISHED OPINION
)	
WASHINGTON STATE DEPARTMENT)	
OF LABOR & INDUSTRIES,)	
)	
Respondent.)	FILED: October 21, 2019

SCHINDLER, J. — A structural steelworker fell 42 feet to his death through a 5/8-inch-thick plywood floor-hole cover. The Washington State Department of Labor and Industries (Department) cited the general contractor Bayley Construction General Partnership (Bayley) for a serious violation of the Washington Industrial Safety and Health Act of 1973, chapter 49.17 RCW, and the floor hole cover regulation, WAC 296-155-24615(3)(a)(ii).¹ The serious violation citation states Bayley violated WAC 296-155-24615(3)(a)(ii) by failing to ensure the 5/8-inch-thick plywood cover was capable of supporting the “maximum potential load” of the worker. The Board of Industrial Insurance Appeals (Board) affirmed the decision to issue the serious violation citation.

¹ We note that in 2016, the Department amended chapter 296-155 WAC to replace the word “shall” with “must” and to use roman numerals. Wash. St. Reg. 16-09-085 (May 20, 2016). We quote the language of the WAC provisions in effect in 2014 throughout the opinion.

Bayley appeals the superior court order affirming the Board. We conclude substantial evidence supports finding the existence of a work site hazard, that Bayley knew or should have known the work site created a substantial probability of serious physical harm or death, and the Board did not err in concluding Bayley violated WAC 296-155-24615(3)(a)(ii). We also conclude Bayley was not denied fair notice of the Department's interpretation of WAC 296-155-24615(3)(a)(ii). We affirm the superior court order affirming the Board decision.

Construction of Health and Sciences Building

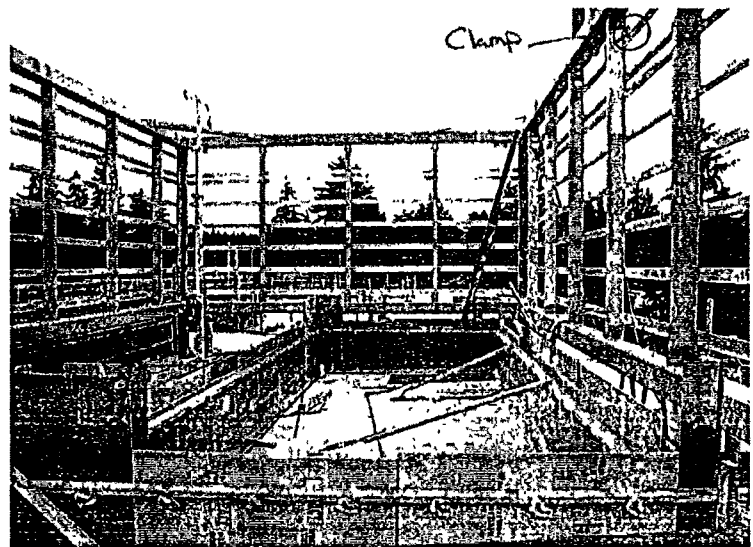
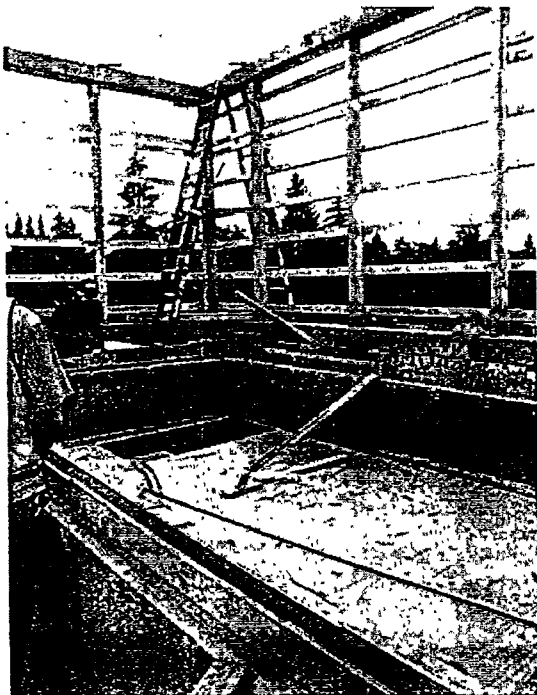
Bayley Construction was the general contractor on the project to construct a new three-story health and sciences building at Bellevue College. The heating, ventilation, and air conditioning (HVAC) system for the building was designed for installation on the roof of the building.

Bayley workers constructed a 32-inch-tall "stem wall" on the roof of the building to enclose a 32-inch-wide by 62-inch-long rectangular hole for HVAC equipment. Bayley general foreman Christopher Babbitt used 5/8-inch-thick plywood to construct a 48-inch-wide by 60-inch-long floor hole cover and spray-painted the word "HOLE" on the cover.

Bayley hired Evergreen Erectors as the structural steel subcontractor to construct a 16-foot-high "wind wall" to surround the HVAC system. Evergreen Erectors structural steelworker journeymen Theodore (T.J.) Merry and Allen Wahl and third year apprentice Bryan Johnson worked on construction of the wind wall.

July 21, 2014 Accident

On July 21, 2014, the Evergreen structural steelworkers were welding angle iron onto the wind wall. The workers used clamps to secure the angle iron. Wahl was working on the outside of the wind wall. Merry was using a large stepladder to work on the inside of the wind wall. The ladder was positioned in the southeast corner of the wind wall next to the stem wall and the floor hole cover. Bayley construction workers had attached 2-inch by 4-inch "whalers" on the outside of the stem wall in preparation for pouring concrete in the stem wall that day.



Merry weighed 257 pounds and was wearing a 20-pound tool belt. While Merry was standing on the ladder approximately five feet above the surface of the roof, Wahl told Merry that he needed another clamp. Wahl watched Merry climb down the ladder, step onto the top of the stem wall, and jump onto the plywood floor-hole cover.

Johnson was working on the outside of the wind wall when he heard someone "yell[] my name." Johnson "turned around" and saw Merry standing on top of the stem wall, then jump and land with both feet on the plywood floor-hole cover. The plywood broke under his weight. Wahl saw Merry "tr[y] to grab the edge" before he fell 42 feet to his death.

Serious Violation of WAC 296-155-24615(3)(a)(ii)

Department safety compliance officers Javier Sarmiento and Christopher Troxell conducted an investigation of the accident. Sarmiento and Troxell interviewed Babbitt and a number of workers, including Wahl and Johnson. Sarmiento and Troxell took photographs and measurements of the work site, including the wind wall, the stepladder, the stem wall, and the hole opening.

The Department issued a citation and notice of assessment against Bayley for a serious violation of WAC 296-155-24615(3)(a)(ii). The citation states, in pertinent part:

As the exposing employer (Bayley Construction employees) and creating and controlling contractor (Evergreen Erector's employees), the employer did not ensure that all floor openings had floor covers that were capable of supporting the maximum potential load with a safety factor of four as required by WAC 296-155-24615(3)(a)(ii).

Appeal to the Board

Bayley appealed the citation and notice of assessment for a serious violation of WAC 296-155-24615(3)(a)(ii) to the Board of Industrial Insurance Appeals (Board). Bayley alleged the Department could not establish a serious violation of WAC 296-155-24615(3)(a)(ii). Bayley argued it complied with the fall restraint requirement for a floor hole cover by using 5/8-inch-thick plywood that was capable of supporting the maximum

"intended" load. Bayley asserted the decision of Merry to jump on the plywood cover was not foreseeable.

The Board of Industrial Insurance Appeals judge (IAJ) held a hearing. The Department presented the testimony of Bayley foreman Babbitt, Evergreen steelworkers Wahl and Johnson, safety compliance officers Sarmiento and Troxell, and Department Division of Occupational Safety and Health (DOSH) standards and technical services expert David Conley.

Babbitt testified the first step is to "[f]ind the right material to cover [the] hole and understand what the intended load will be on that hole." Babbitt said the "intended load" "varies depending on the size of the opening" and "the location." Babbitt testified that to determine the intended load, he "typically" used the weight of the heaviest worker, or approximately 250 pounds, multiplied by four. Babbitt said the floor hole cover has to be "able to withstand four times the intended load." But Babbitt testified, "[i]t's basically up to the journeyman carpenter to determine whether that is sufficient or not because it could vary depending on the size of the hole." Babbitt decided to use medium density 5/8-inch-thick plywood to construct the floor hole cover for the 32-inch by 62-inch hole in the roof near the stem wall. Babbitt testified that " '[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.' "

Department safety compliance officer Sarmiento testified that when he inspected the work site after the accident, Bayley's on-site superintendent told him that after the accident, Bayley replaced the 5/8-inch floor hole covers with thicker 3/4-inch floor hole

covers. Sarmiento testified that he was taught to use at least 3/4-inch-thick plywood for a floor cover and never used 5/8-inch-thick plywood.²

Department safety compliance officer Troxell testified that using the weight of a worker plus a tool belt multiplied by four is not sufficient to comply with the requirement under WAC 296-155-24615(3)(a)(ii) to install a floor hole cover capable of supporting the "maximum potential load." Troxell said calculating the weight of the heaviest worker plus a tool belt times four is a "starting point." Troxell testified the contractor needs to take into account work site conditions and dynamic forces created by a worker tripping or falling onto the floor hole cover.

Troxell testified Wahl and Johnson admitted that while working on the wind wall, the Evergreen steelworkers frequently were "[g]oing in and out" of the stem wall enclosure.

The Department designated DOSH standards and technical expert Conley to testify about construction safety rules and WAC 296-155-24615(3)(a)(ii). Conley said WAC 296-155-24615(3)(a)(ii) had been in effect since 1986 and before this accident, the Department had not previously interpreted the WAC or the meaning of "maximum potential load."

Conley testified WAC 296-155-24615(3)(a)(ii) is a "performance standard," not a "specification standard." WAC 296-155-24615(3)(a)(ii) does not specify "what material has to be used. Only that it meets certain strength requirements."

A performance standard gives general requirements for an employer to follow, and a . . . specification standard is more specific to, say, a certain requirement for, say, tensile strength of a vertical lifeline must be 5,000

² DOSH expert Conley also testified that he was taught to use "no less than 3/4 inch plywood."

pounds, where we actually give specific information about what we want the requirement to be.

Conley testified the phrase "maximum potential load" as used in WAC 296-155-24615(3)(a)(ii) means "what is possible or what is the greatest load that could be imposed on that cover." Conley said that in determining the "maximum potential load" for a floor hole cover, the employer must consider the potential that a worker will slip, trip, or fall on the cover because a "dynamic load" creates more force than a "static load." Conley testified that in calculating the "maximum potential load," the employer must therefore "tak[e] into account the greatest amount of force that could be placed on that cover" at the work site. "[I]f you multiply that by a factor of four, it should really be strong enough to withstand just about anything."

Engineering and safety expert Kurt Stranne, third-party safety director Steven Heist, and Bayley safety director Joseph Chandler testified on behalf of Bayley.

Stranne testified that when teaching compliance with the WAC 296-155-24615(3)(a)(ii) floor hole cover standard, he uses the phrase "maximum intended load" instead of "maximum potential load" because the phrase "intended load" is used to describe the fall restraint specifications for a personal fall restraint system with anchorage points. See WAC 296-155-24615(1)(e) (a "personal fall restraint system" "shall be rigged to allow the movement of employees only as far as the unprotected sides and edges of the walking/working surface, and shall consist of . . . [a]nchorage points used for" a personal fall restraint system "capable of supporting four times the intended load").

Stranne testified that dynamic load should be taken into consideration only for fall arrest regulations³ and not fall restraint regulations. Stranne described a static load as a worker standing on a floor hole cover. However, Stranne conceded that walking as well as tripping or falling onto a floor hole cover is a dynamic load.⁴

Stranne reviewed a September 10, 2014 report that Pacific Engineering Technologies structural engineer Mark Schaefer prepared for the Department. The report addressed the strength of 5/8-inch-thick plywood. Schaefer concluded a 5/8-inch-thick "MDO⁵ style of plywood" could support 1,246 pounds.

Stranne testified that he used "two different ways" to calculate the strength of the plywood with the weight of a worker at "310 pounds" and "the weight at 257 plus a 25-pound tool belt." Stranne testified that "a 310-pound man falling[,] . . . assuming he's falling instead of jumping[,] from the stem wall to the cover" would create a force "greater than the value of the plywood." Stranne concluded the floor hole cover would not have been able to sustain a fall from the 32-inch stem wall.

Using deceleration distance, I came out with 1,690 pounds. And using the time as the deceleration distance or the deceleration factor, I came out with 1,265 pounds, both of them greater than the value of the plywood.

Third-party safety administrator Heist testified that when training safety compliance officers about the WAC "cover specification requirements," he uses the

³ See WAC 296-155-24613.

⁴ Stranne testified:

Q. And if an employee were to trip and fall onto a floor covering, that fall would be imposing a dynamic load, correct?

A. Yes. That's where the factor of safety of 4 would begin.

Q. And if an employee fell off a 32-inch stem wall onto a floor covering, that would impose a dynamic load, right?

A. Yes.

⁵ Medium density overlay.

phrase "maximum intended load" because the word "intended" is used in the subsection of WAC 296-155-24615(3)(a) that governs a manhole cover in a roadway. See WAC 296-155-24615(3)(a)(i) (manhole covers must be "designed to carry a truck rear axle load of at least two times the maximum intended load"). Heist testified that he calculates the "maximum intended load" for workers at a work site by using the weight of the heaviest worker with a tool belt times four.

Heist testified the phrase "maximum potential load" does not apply to "a worker falling from a ladder." However, Heist admitted a floor hole cover should be "sufficient for it to be able to take the static or potentially any other loads that might be on it working in that area."

Q So you're — so if I'm understanding what you're saying, you're saying that the rule would cover a dynamic load if someone trips and falls. But if, say, they're 35 inches above — 36 inches, whatever, on a ladder and fall onto a floor covering, that the rule does not cover that? Is that what you're saying?

A If I were to be working from an elevation, the same level, then the hole cover should be able to sustain the forces that are being put on it. And a qualified person is the one that would make that determination as to, would it be sufficient for it to be able to take the static or potentially any other loads that might be on it working in that area.

Bayley safety director Chandler testified that he had no knowledge that the subcontractors were "going inside [the] stem wall." Chandler said that on July 21, 2014, workers were scheduled to pour concrete into the stem wall. Chandler testified the Evergreen workers attended the safety meeting that morning. At the meeting, Chandler instructed that all the workers stay out of the stem wall area "because we have a pour that day."

In the posthearing brief, Bayley argued the Department did not establish Bayley had actual or constructive knowledge of the hazard because it was not foreseeable that a worker would jump off the stem wall onto the floor hole cover. Bayley asserted the Department erred in interpreting the meaning of the phrase "maximum potential load" as used in WAC 296-155-24615(3)(a)(ii). Bayley argued the term "potential" is synonymous with the term "intended" and the maximum "intended load" is calculated by taking the weight of the heaviest worker plus tools and multiplying by four. Bayley also argued it did not have fair notice of the Department's interpretation of WAC 296-155-24615(3)(a)(ii).

The IAJ issued a proposed decision and order affirming the citation against Bayley for a serious violation of WAC 296-155-24615(3)(a)(ii). The IAJ concluded WAC 296-155-24615(3)(a)(ii) applied, Bayley violated the regulation, and Bayley had constructive knowledge of the hazardous condition. The proposed decision and order stated, "Because Mr. Merry and others clearly were working in areas near the floor opening, Bayley should have considered the potential load created by a worker stumbling, falling, or jumping onto the cover."

The IAJ rejected the argument that Bayley did not have fair notice of the Department's interpretation of WAC 296-155-24615(3)(a)(ii).

Bayley asserts that the Department's interpretation of the regulation should be rejected because Bayley did not have fair notice of the interpretation. But there is no evidence that the Department previously interpreted the regulation in a way that was inconsistent with an interpretation upon which Bayley relied.

Bayley filed a petition for review of the proposed decision and order to the Board. Bayley argued the Department did not prove a prima facie case that Bayley committed a

serious violation of WAC 296-155-24615(3)(a)(ii), expert testimony established the plywood floor-hole cover was strong enough for the "intended use," and it was "unforeseeable that the employee would have access to the floor hole and its cover." Bayley argued substantial evidence did not support finding Bayley had constructive knowledge of the violation.

The Board issued a 14-page "Decision and Order" and entered findings of fact and conclusions of law. The Board affirmed the citation and notice against Bayley for a serious violation of WAC 296-155-24615(3)(a)(ii) but modified the amount of the penalty.⁶

Bayley appealed the Decision and Order to superior court. The superior court affirmed.

Appeal of Board Decision and Order

Bayley seeks reversal of the Board Decision and Order. Bayley contends the Department did not meet its burden of proving Bayley committed a serious violation of WAC 296-155-24615(3)(a)(ii). Bayley argues the Board erred in interpreting the meaning of "maximum potential load" and the 5/8-inch-thick plywood floor-hole cover met the requirements of WAC 296-155-24615(3)(a)(ii). Bayley also claims the Department's interpretation of WAC 296-155-24615(3)(a)(ii) violated its right to fair notice and due process and challenges evidentiary rulings.

WISHA and Standard of Review of Board Decision

The Washington Industrial Safety and Health Act of 1973 (WISHA), chapter 49.17 RCW, governs our review of a Board decision. RCW 49.17.150(1).

⁶ One member of the Board dissented, arguing "maximum potential load" applies only to a static load and the Department's interpretation is an "unreachable" strict liability standard.

The Washington State Constitution mandates protection of workers at a construction work site. Art. II, § 35. Article II, section 35 provides, "The legislature shall pass necessary laws for the protection of persons working in mines, factories and other employments dangerous to life or deleterious to health; and fix pains and penalties for the enforcement of the same."

The legislature enacted WISHA in 1973. LAWS OF 1973, ch. 80. The purpose of WISHA is "to assure, insofar as may reasonably be possible, safe and healthful working conditions for every man and woman working in the state of Washington." RCW 49.17.010.

[T]he legislature in the exercise of its police power, and in keeping with the mandates of Article II, section 35 of the state Constitution, declares its purpose by the provisions of this chapter to create, maintain, continue, and enhance the industrial safety and health program of the state, which program shall equal or exceed the standards prescribed by the Occupational Safety and Health Act of 1970 (Public Law 91-596, 84 Stat. 1590).

RCW 49.17.010. We must construe WISHA statutes and regulations liberally to achieve the purpose of providing safe working conditions for workers in Washington. Frank Coluccio Constr. Co. v. Dep't of Labor & Indus., 181 Wn. App. 25, 36, 329 P.3d 91 (2014); see also RCW 49.17.050, .120, .180.

The legislature delegates broad authority to the Department to adopt regulations to meet the general safety principles set forth in WISHA. RCW 49.17.040. WISHA requires an employer to "furnish to each of his or her employees a place of employment free from recognized hazards." RCW 49.17.060(1). WISHA imposes a specific duty to "comply with the rules, regulations, and orders promulgated" by the Department. RCW

49.17.060(2); J.E. Dunn Nw., Inc. v. Dep't of Labor & Indus., 139 Wn. App. 35, 48, 156 P.3d 250 (2007).

In an appeal of the superior court order affirming the decision of the Board, we review the Board's decision directly, based on the record before the Board. J.E. Dunn Nw., 139 Wn. App. at 42; Potelco, Inc. v. Dep't of Labor & Indus., 194 Wn. App. 428, 434, 377 P.3d 251 (2016) (citing Mowat Constr. Co. v. Dep't of Labor & Indus., 148 Wn. App. 920, 925, 201 P.3d 407 (2009)). In a WISHA appeal, the Board's findings of fact are conclusive if supported by substantial evidence. RCW 49.17.150(1); Mowat, 148 Wn. App. at 925. Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the matter asserted. Potelco, 194 Wn. App. at 434 (citing Mowat, 148 Wn. App. at 925). We view the evidence and reasonable inferences in the light most favorable to the prevailing party—here, the Department. Coluccio Constr., 181 Wn. App. at 35. Unchallenged findings are verities on appeal. Coluccio Constr., 181 Wn. App. at 35. If substantial evidence supports the Board's findings, we review whether the findings support the Board's conclusions of law. Erection Co. v. Dep't of Labor & Indus., 160 Wn. App. 194, 202, 248 P.3d 1085 (2011).

Serious Violation of WAC 296-155-24615(3)(a)(ii)

The Department bears the initial burden of proving a WISHA violation. WAC 263-12-115(2)(b); SuperValu, Inc. v. Dep't of Labor & Indus., 158 Wn.2d 422, 433, 144 P.3d 1160 (2006). To establish a serious violation of a WISHA safety regulation, the Department must prove (1) the cited standard applies, (2) the requirements of the standard were not met, (3) employees were exposed to or had access to the violative condition, (4) the employer knew or through the exercise of reasonable diligence could

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have known of the violative condition, and (5) there is a substantial probability that death or serious physical harm could result from the violative condition. Coluccio Constr., 181 Wn. App. at 36-37; Wash. Cedar & Supply Co. v. Dep't of Labor & Indus., 119 Wn. App. 906, 914, 83 P.3d 1012 (2004).

To establish knowledge of a serious WISHA violation, the Department must show " 'the employer knew or, through the exercise of reasonable diligence, could have known of the violative condition.' " Potelco, Inc. v. Dep't of Labor & Indus., 191 Wn. App. 9, 34, 361 P.3d 767 (2015) (quoting Coluccio Constr., 181 Wn. App. at 37). "Reasonable diligence" includes the obligation of an employer to inspect the work site, anticipate hazards that employees may be exposed to, and take measures to prevent the occurrence of a violative condition. Erection Co., 160 Wn. App. at 206-07. The employer has constructive knowledge of a hazardous condition if it is readily observable or in a conspicuous work site location. BD Roofing, Inc. v. Dep't of Labor & Indus., 139 Wn. App. 98, 109-10, 161 P.3d 387 (2007).

Bayley contends insufficient evidence supports the Board finding it committed a serious violation of WAC 296-155-24615(3)(a)(ii). The findings of fact describe the work site hazard on July 21, 2014 when Merry fell to his death through the plywood cover over the hole in the roof:

3. On July 21, 2014, Bayley Construction was the general contractor for a project erecting a building at Bellevue College, with Evergreen Erectors being the structural steel subcontractor. The Evergreen Erectors crew at this project included Theodore (T.J.) Merry. The structural steel crew were on the roof of the building constructing a metal cage or wind wall that was at least 16 feet tall. The crew was welding angle iron, using clamps to help support the work. The crew had access to the interior of the cage by using a stepladder that straddled the cage. Construction of the cage required workers to be inside it periodically.

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5. Inside the cage on the roof near the stepladder was a 32-inch high "stem" wall consisting of wood forms and 2x4s that had been set up in preparation of a concrete pour. One corner of the stem wall was located adjacent to the stepladder used by workers to enter and leave the cage. Inside the stem wall was a rectangular hole through the roof that was 62 inches long and 32 inches wide, in which HVAC equipment and duct work were to be installed. A fall through this hole would be approximately 42 feet onto concrete. The hole in the roof was covered by a sheet of 5/8-inch thick plywood that was 60 inches long and 48 inches wide. The plywood was placed on top of the hole so that on each long end a 1-inch gap was present through which electrical cords and other items could be positioned. The plywood sheet was affixed to wood surrounding the hole by two large nails driven into the wood within a few inches of each other. The word "HOLE" in large letters was spray painted onto the top of the plywood sheet using red spray paint.
 6. On July 21, 2014, T.J. Merry was working on the ladder inside the wind wall. He needed a clamp so he stepped from the ladder onto the stem wall and from there jumped onto the plywood sheet acting as the hole cover, which broke on impact. Mr. Merry fell through the hole and died.

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11. A substantial probability existed that a worker who was exposed to the hazard of falling through the hole in the roof, notwithstanding the placement of the plywood cover above it, would incur a serious bodily injury, including the possibility of fractures, paralysis, or death.
 12. The severity of the hazard in Item No. 1-1 of Citation and Notice No. 317401172 is rated as a 6 on a scale of 1 to 6 because the most serious injury that reasonably could be expected to occur was death.

The Board also rejected the argument that it was unforeseeable that a worker would "step or jump over" the stem wall onto the plywood floor-hole cover to "pick up

parts or angle iron, or for other job-related" tasks:

[W]hen access to the inside of the cage is by a stepladder placed in close proximity to the stem wall and the corridor between the cage and the stem wall is narrow and pinched to less than a foot at one point by a 2x4 [whaler] extending into that space, it is reasonably foreseeable that workers would step or jump over the 32-inch tall stem wall when traveling across the inside of the cage to weld in a different location, pick up parts or angle iron, or for other job-related duties.

Substantial evidence supports the Board finding workers were exposed to falling 42 feet through the plywood floor-hole cover and a substantial probability that serious physical harm or death could result, and Bayley knew or should have known of the work site hazard.

Department safety compliance officer Sarmiento investigated the accident and took measurements and photographs of the work site. Bayley safety director Chandler testified the photographs accurately depict the work site.

The photographs showed the path at the bottom of the ladder between the wind wall and the stem wall was very "narrow" and measured only 10 ½ inches wide.

Q How many inches did [Merry] have to walk through?

A Ten-and-a-half, I took a measurement.

Q So if hypothetically Mr. Merry had gotten all the way off the ladder and had walked around the stem wall, would he have to have walked past where your tape measurement was?

A Yes. He [would] have to walk through this area.

Q And it's how many inches?

A Ten-and-a-half.

....

A That was obvious to me that this person they have an area free to walk around it. The person, he was completely barricaded by this piece of lumber which is called a whaler. A whaler helps to reinforce the concrete forms. The concrete forms, they were ready to pour that day, so that was obvious to me that that form was complete.

Sarmiento said it was “[h]ard for me to work in-between the whaler and the wind — wind screen wall being so — it reduced the space. . . . [I]f that was hard for me to walk by, a person with tools, yes, it's going to be harder yet.”



Troxell also testified that the space to get around the stem wall was narrow and difficult to walk through. Troxell testified that if Merry did not “go over the stem wall,” he would have had to “turn sideways and shuffle through” the narrow path because “the other direction” was physically impossible to walk through:

- Q. And would it have been possible for him to go the other direction around the stem wall?
- A. . . . Right there at the base of the ladder, the distance there looks to be roughly — I was looking at all these photos again yesterday, and it looks like it's about maybe just slightly more than the thickness of two two-by-fours because there was a couple of two-by-fours jammed in there, and so I can't imagine it more than about four inches in width.
- Q. If he had gone the other direction not —
- A. Yes. If he gone along the tube framework of the wind wall for the wind wall itself.
- Q. It would be how many inches?

- A. About four. I'm guessing three to four inches.
Q. So it wouldn't be physically possible [to do that?]
A. No.

Troxell testified that Wahl and Johnson told him that they frequently "straddl[ed] over the stem wall form" to enter and exit the stem wall area while working on the wind wall. The Board found the testimony of Johnson and Wahl credible:

[T]he very act of erecting the cage and the stem wall inside of it required that some workers be working immediately adjacent to the hole. It is clear from the photographic exhibits that on July 21, 2014, the crew could not have completed welding the cage without being inside it on occasion. Thus, the admissions of both Mr. Wahl and Mr. Johnson to the Department's safety officers that they had repeatedly worked inside the stem wall are believable.

Bayley contends it did not know that work on the wind wall exposed the workers to the hazard of falling through the floor hole cover. Bayley also points to the testimony that safety director Chandler specifically instructed the Evergreen Erectors workers to stay out of the stem wall area on July 21, 2014. The Board rejected the argument that Bayley did not know about the work site 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."

Bayley insists that the iron workers had no work-related reason to be inside the stem wall. Mr. Wahl and Mr. Johnson testified that they were instructed not to venture inside the stem wall. Their testimony that they followed this instruction was contradicted by statements they gave to the Department's safety inspectors, to whom they admitted having worked inside the stem wall and also straddling it while working.

The uncontroverted testimony of DOSH construction industry standards expert Conley also established "falls from ladders" are "very common" and "one of the top two" sources of injuries at construction sites.

Substantial evidence supports finding a work site hazard and that Bayley knew or should have known the Evergreen Erectors workers were exposed to the hazard of falling through the plywood floor-hole cover. Evergreen workers were obviously working on the construction of the wind wall and using a stepladder positioned next to the stem wall and the large floor-hole cover.

Interpretation of WAC 296-155-24615(3)(a)(ii)

Bayley contends the Board erred in interpreting "maximum potential load" in concluding Bayley violated WAC 296-155-24615(3)(a)(ii). The findings of fact state, in pertinent part:

7. On July 21, 2014, when he jumped onto the hole cover, Mr. Merry weighed 257 pounds and wore a tool belt weighing approximately 20 pounds.
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.
10. 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.

The Board rejected Bayley's argument that "maximum potential load" means "maximum intended load." The conclusions of law state, in pertinent part:

2. The phrase "maximum potential loads" in WAC 296-155-24615(3)(a) encompasses all potential loads, not just intended loads.

3. The phrase "maximum potential loads" in WAC 296-155-4615(3)(a) includes dynamic loads or force as well as static loads or force.

We review the Board's interpretation of regulations de novo. Erection Co., 160 Wn. App. at 201. Our objective is to ascertain and give effect to the intent of the regulation. Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 9, 43 P.3d 4 (2002).

Our interpretation begins with the plain meaning of the regulation. Lake v. Woodcreek Homeowners Ass'n, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010). We look first to the text of the regulation to determine its meaning. Griffin v. Thurston County Bd. of Health, 165 Wn.2d 50, 55, 196 P.3d 141 (2008). "If an administrative rule or regulation is clear on its face, its meaning is to be derived from the plain language of the provision." Cannon v. Dep't of Licensing, 147 Wn.2d 41, 55, 50 P.3d 627 (2002).

We also employ traditional rules of grammar in discerning the plain language of a regulation. In re Forfeiture of One 1970 Chevrolet Chevelle, 166 Wn.2d 834, 838-39, 215 P.3d 166 (2009). We construe all of the language to give effect to the regulation. Lake, 169 Wn.2d at 526. A construction that would render a portion of the regulation meaningless or superfluous should be avoided. Ford Motor Co. v. City of Seattle, 160 Wn.2d 32, 41, 156 P.3d 185 (2007). "[W]e avoid interpretations 'that yield unlikely, absurd or strained consequences.'" Broughton Lumber Co. v. BNSF Ry., 174 Wn.2d 619, 635, 278 P.3d 173 (2012) (quoting Kilian v. Atkinson, 147 Wn.2d 16, 21, 50 P.3d 638 (2002)). Where the language of a regulation is clear, intent is derived from the language of the regulation alone. City of Spokane v. Rothwell, 166 Wn.2d 872, 876, 215 P.3d 162 (2009). If the plain language is subject to only one interpretation, our inquiry is at an end. Lake, 169 Wn.2d at 526.

WAC 296-155-24603 defines a "fall restraint system" as "[a] system in which all necessary components function together to restrain/prevent an employee from falling to a lower level." WAC 296-155-24609(1) requires employers to provide and implement an "appropriate fall protection system" when employees are working at "four feet or more" off the ground. WAC 296-155-24609(4)(a)(ii) states, "Floor openings shall be guarded by one of the following fall restraint systems. . . . A cover, as specified in WAC 296-155-24615(3)." WAC 296-155-24615(3) states, "Fall restraint protection shall conform to the following provisions":

Cover specifications.

(a) Floor opening or floor hole covers shall be of any material that meets the following strength requirements:

(i) Conduits, trenches, and manhole covers and their supports, when located in roadways, and vehicular aisles shall be designed to carry a truck rear axle load of at least two times the maximum intended load;

(ii) All floor opening and floor hole covers shall be capable of supporting the maximum potential load but never less than two hundred pounds (with a safety factor of four).

(A) All covers shall be secured when installed so as to prevent accidental displacement by the wind, equipment, or employees.

(B) All covers shall be color coded or they shall be marked with the word "hole" or "cover" to provide warning of the hazard.^[7]

The WAC does not define the phrase "maximum potential load." Bayley asserts "maximum potential load" means "maximum intended load." Bayley also argues the "maximum potential load" regulation contemplates the calculation of only a static load. We disagree.

We give undefined terms their ordinary meaning as defined in the dictionary. Habitat Watch v. Skagit County, 155 Wn.2d 397, 423, 120 P.3d 56 (2005). The dictionary definition of "maximum" is "the greatest quantity or value attainable in a given case." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1396 (2002).

⁷ Emphasis added.

Contrary to Bayley's assertion, the word "potential" does not have the same meaning as "intended." "Potential" means "existing in possibility : having the capacity or a strong possibility for development into a state of actuality." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, at 1775. By contrast, "intended" is defined as "intentional," "to design for . . . a specified purpose," and "to have in mind as a design or purpose : plan." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, at 1175.

The dictionary definition of "load" does not support the argument that the regulation contemplates only a static load. "Load" means "a mass or weight supported by something" and "the forces to which a structure is subjected because of weights carried on the supports." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, at 1325.

Where an administrative agency uses two different terms in the same regulation, we presume the agency intends the terms to have different meanings. City of Kent v. Beigh, 145 Wn.2d 33, 45, 32 P.3d 258 (2001). Here, the Department deliberately used the term "potential" instead of the word "intended" when enacting WAC 296-155-24615(3)(a)(ii). WAC 296-155-24615(3)(a)(i) governs the requirements for conduits, trenches, and manhole covers. WAC 296-155-24615(3)(a)(i) states, "Conduits, trenches, and manhole covers and their supports, when located in roadways, and vehicular aisles shall be designed to carry a truck rear axle load of at least two times the maximum intended load."⁸ But by contrast, WAC 296-155-24615(3)(a)(ii) states, "All floor opening and floor hole covers shall be capable of supporting the maximum potential load but never less than two hundred pounds (with a safety factor of four)."

The undisputed record establishes WAC 296-155-24615(3)(a)(ii) is a performance standard, not a specification standard. The language "maximum potential

⁸ Emphasis added.

load” means the employer must take into account dynamic forces and the potential or possible hazard of falling onto the floor hole cover at the work site. The language that a floor hole cover shall not only be capable of “supporting the maximum potential load,” but “never less than two hundred pounds (with a safety factor of four),” is the minimum weight the cover shall support. WAC 296-155-24615(3)(a)(ii). We conclude the phrase “maximum potential load” includes possible dynamic loads and not only an intended or static load.

Bayley contends all the witnesses at the hearing agreed that WAC 296-155-24615(3)(a)(ii) only requires the employer to multiply the weight of the heaviest worker times a safety factor of four. Neither the intent of WISHA, the plain language of WAC 296-155-24615(3)(a)(ii), nor the record support this argument. The plain language of the regulation identifies a minimum strength requirement. As Troxell testified, that calculation is only a starting point and does not take into account the work site conditions. DOSH expert Conley testified that “in calculating the maximum potential load, you would be taking into account the greatest amount of force that could be placed on that cover” at the work site. When Bayley’s attorney specifically asked Conley if he agreed that the proper compliance method is to only take the heaviest worker and multiply by four, Conley said, “I do not.” Bayley’s expert Heist testified that a qualified person would need to determine if the floor hole cover is “sufficient for it to be able to take the static or potentially any other loads that might be on it working in that area.”

We also reject Bayley’s argument that “fall restraint” regulations govern only a static load and “fall arrest” regulations govern only a dynamic load. WAC 296-155-24603 defines a “fall arrest system” as “a fall protection system that will arrest a fall from

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elevation. Fall arrest systems include personal fall arrest systems that are worn by the user, catch platforms, and safety nets." "Fall arrest" means "[s]topped after the fall with a 6 [foot] maximum free fall distance." WAC 296-155-24605.

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." See also WAC 296-155-24603. The purpose of a floor opening cover is to restrain or prevent an employee from falling to a lower level. WAC 296-155-24603.

We conclude the Board did not err in concluding WAC 296-155-24615(3)(a)(ii) "encompasses all potential loads, not just intended loads," and "includes dynamic loads."⁹ Further, even if ambiguous, we accord substantial weight to an agency's interpretation within its area of expertise and uphold that interpretation if it reflects a plausible construction of the regulation and is not contrary to legislative intent. Roller v. Dep't of Labor & Indus., 128 Wn. App. 922, 926-27, 117 P.3d 385 (2005).

Fair Notice and Due Process

Bayley argues the Department's interpretation of WAC 296-155-24615(3)(a)(ii) and "maximum potential load" violated Bayley's right to "fair notice" and due process. The record does not support the premise of Bayley's argument that the Department "changed" its interpretation of WAC 296-155-24615(3)(a)(ii).¹⁰

⁹ The Associated General Contractors of Washington (AGC) filed an amicus curiae brief. AGC contends this interpretation imposes an impossible burden on an employer. But where, as here, "a specific standard exists, the standard is presumed feasible and the burden is on the employer to prove that it is not." SuperValu, 158 Wn.2d at 434 (emphasis in original). Below, Bayley did not assert unfeasibility as an affirmative defense.

¹⁰ AGC also argues the Board erred by using a "new and different" interpretation of "maximum potential load." AGC also cites a sentence in the Board Decision and Order that states, "Bayley insists that the phrase actually means 'maximum intended load,' an interpretation that all of the experts acknowledge had been used by the Department in the past." (Emphasis in original.) But as noted, the uncontroverted record establishes the Department had not previously interpreted "maximum potential load."

Conley and Bayley's expert Heist, a former technical specialist for DOSH, testified they were unaware of any previous investigation where an improper floor covering resulted in injury or death. Conley testified:

A I — we have what we call the wind system, which is the WISHA information network that houses all of our data on consultations and compliance activity. So I searched through those related to this code, and — to look to see if I could come up with any other inspections that referenced this type of incident or. . .

Q What did you find?

A I did not find anything related to that.^[11]

Heist said that while he was working for the Department, "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."

The uncontroverted testimony of Conley established the Department had not previously interpreted the phrase "maximum potential load" in WAC 296-155-24615(3)(a)(ii).

Q Before this case, has the Department ever had any reason to express its interpretation of the phrase "maximum potential load" in this floor covering rule?

A Not to my knowledge.

Q And before this case, is the Department aware of anyone ever raising any questions as to the meaning of the phrase, "maximum potential load," in the floor covering rule?

A Not to my knowledge.

Q And are you aware of any previous inspections where the Department had to determine the meaning of the phrase "maximum potential load"?

A I am not aware of any.

Q Have you determined when the phrase "maximum potential load" was first included in the floor covering rule?

A That question was posed to our standards group, and the response that we got from the folks in our standards department said that that language came into effect in January of 1986.

¹¹ Ellipsis in original.

The case Bayley cites, Perez v. Loren Cook Co., 803 F.3d 935 (8th Cir. 2015), is distinguishable. In Perez, the Eight Circuit concluded the United States Secretary of Labor changed a regulation from an old interpretation to a new one. Perez, 803 F.3d at 943.

Excluded Evidence

Bayley contends the Board erred in not considering testimony that "maximum potential load" is the same as "maximum intended load."

We review evidentiary rulings for abuse of discretion. State v. Myers, 133 Wn.2d 26, 34, 941 P.2d 1102 (1997). "The trial court's decision 'will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" Wilson v. Horsley, 137 Wn.2d 500, 505, 974 P.2d 316 (1999) (quoting State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

The Board ruled:

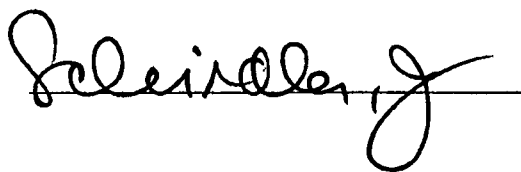
[W]e affirm the denial of additional witness testimony requested by the employer and the publication of deposition excerpts as Exhibit No. 58 pursuant to ER 402 & [ER] 403. As for the employer's complaint about not being allowed to present the testimony of a person designated as a CR 30(b)(6) witness designated to speak on behalf of the Department, we note that David Conley was designated by the Department to testify on its behalf and did so.

The record reflects the testimony of additional witnesses about the interpretation of WAC 296-155-24615(3)(a)(ii) was cumulative. The record also shows that the Department did not designate Scott Reiquam as the CR 30(b)(6) Department witness on the interpretation of WAC 296-155-24615(3)(a)(ii). The Board did not abuse its

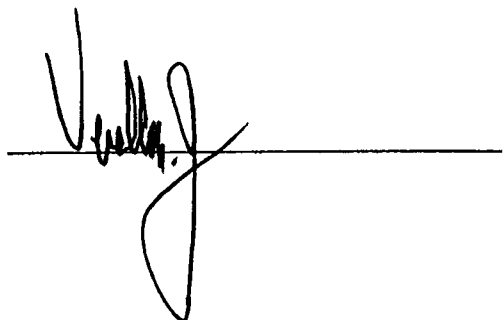
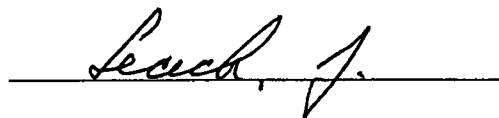
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discretion in affirming the decision of the hearing examiner denying the request to consider the testimony of additional witnesses and Reiquam.

We conclude the Department established that Bayley committed a serious violation of WAC 296-155-24615(3)(a)(ii). We affirm the superior court order affirming the Board.

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WE CONCUR:

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OWADA LAW PC

November 18, 2019 - 12:30 PM

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