NO. 103258-7

SUPREME COURT OF THE STATE OF WASHINGTON

OMA CONSTRUCTION, INC.,

Petitioner,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

DEPARTMENT OF LABOR AND INDUSTRIES ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

This case involves routine statutory interpretation and largely undisputed facts. The Court of Appeals discussed at length the relevant regulations, applied those regulations to the undisputed facts without resort to agency deference, and applied the appropriate standard of review to factual findings made below it. If this Court is inclined to consider a case about the appropriate level of agency deference given to interpreting statutes, the lower court's scant discussion on agency deference does not involve any issue of conflict or invoke a substantial interest here.

Instead, the issues presented by OMA Construction's petition provide no reason for the Court to review. It is undisputed that OMA's truck drivers generally hauled dirt from one site to another on roads within Washington without leaving their vehicles, and so performed intrastate trucking work. OMA incorrectly classified its workers by the level of hazard for purposes of setting premiums for workers' compensation

insurance by classifying its truck drivers as performing a lower risk classification. And, although L&I specifically advised OMA that it should classify its truck drivers using the "intrastate trucking" risk classification in an earlier final order, OMA knowingly failed to follow that order. Thus, the Court of Appeals correctly affirmed the penalty for knowing misrepresentation.

This Court should deny review.

II. STATEMENT OF THE ISSUES

1. Does substantial evidence support finding that OMA performed intrastate trucking work under the plain language of the applicable statutes and rules when the workers drove within Washington and hauled, loaded, and unloaded goods?

2. Does substantial evidence support finding that OMA had actual knowledge that it should report in intrastate trucking when a prior L&I order specifically directed it to pay workers' compensation premiums in that classification?

III. STATEMENT OF THE CASE

A. Industrial Insurance Act Background

The Industrial Insurance Act's fundamental policy is to protect workers against the hazards of employment and the suffering and economic loss arising from work injuries. RCW 51.12.010. In 1911, the Legislature adopted the Act to provide "sure and certain relief" to injured workers. RCW 51.04.010. All employers must either self-insure or pay premiums into the workers' compensation state fund. RCW 51.14.010; RCW 51.08.175. This responsibility reflects that the Act was founded on the "basic principle" that industry is responsible for payment of injuries. *State v. Clausen*, 65 Wash. 156, 175, 117 P. 1101 (1911). "A core purpose of the [Act] is to allocate the cost of workplace injuries to the industry that produces them, thereby motivating employers to make workplaces safer." *Harry v. Buse Timber & Sales, Inc.*, 166 Wn.2d 1, 19, 201 P.3d 1011 (2009). This policy applies to the collection of premiums—the more a "statute facilitates full collection of premiums, the better

it serves" the State fund from which L&I aids workers. *Littlejohn Constr. Co. v. Dep't of Lab. & Indus.*, 74 Wn. App. 420, 426, 873 P.2d 583 (1994).

Under RCW 51.16.035, L&I adopts rules to classify occupations to reflect the degree of hazard. RCW 51.16.035; *WR Enters., Inc. v. Dep't of Lab. & Indus.,* 147 Wn.2d 213, 227, 53 P.3d 504 (2002) (explaining rules about "rates must reflect risk and those with a higher risk should pay higher premiums"); WAC 296-17-31011.

In drafting classification rules, perfection in classifications has never been the standard: "It is recognized that classifications must be made and that in making them, dividing lines must be drawn some place." *Wash. State Sch. Dir.'s Ass'n. v. Dep't of Lab. & Indus.*, 82 Wn.2d 367, 376, 510 P.2d 818 (1973) (quoting *State v. Persinger*, 62 Wn.2d 362, 368, 382 P.2d 497 (1963)). When drafting and applying the rules, it is the best fit that applies. CP 1155; *cf. D.W. Close Co. v. Dep't of Lab. & Indus.*, 143 Wn. App. 118, 128-29, 132, 177

P.3d 143 (2008) (looking at "best estimation" for adopting prevailing wage classification rule).

L&I has created over 300 primary risk classifications and around 1,000 sub-classifications. CP 1155; *see* WAC 296-17-31029(2); *see also* WAC 296-17A-0101 to -7400. While the rules overall focus on the level of hazard involved (WAC 296-17-31010, -31011), in determining the correct risk class for a particular company's employees, L&I looks to the "nature of [the] business," which is based on the business operations, products, and services within the overall business. WAC 296-17-31012(1).

The classification at issue in this case is under WAC 296-17A-1102-03 for "[b]usinesses that hire drivers . . . engaged in intrastate trucking." "Intrastate truck driving is operating a vehicle hauling goods within the boundaries of Washington state." *Id.* Its "[d]uties include, but are not limited to: deadhead trips, driving without a load . . . ; [l]oading and unloading vehicles." *Id.* The "[t]ypes of goods hauled include,

but are not limited to: . . . [b]ulk freight, merchandise, or commodities; . . . [g]ravel or . . . [s]oils." *Id.*

If an employer does not pay premiums or misclassifies premiums, L&I may issue a notice of assessment. RCW 51.48.120. If an employer has knowingly misrepresented any aspect of its reporting, L&I may issue a penalty. RCW 51.48.020(1)(a). An employer may appeal a notice of assessment and any penalty. RCW 51.48.131. It carries the burden of proof at the Board. *Id.* If it loses at the Board, it carries the burden on any appeal. RCW 34.05.570(1)(a).

B. OMA Used Its Dump Truck Drivers to Haul Dirt and Other Materials to, from, and Within Construction Sites, Not to Perform Excavation or Land Clearing

OMA is a public works contractor whose "primary business involves using dump truck drivers to haul dirt, debris, or other materials" for other contractors. CP 127; *see* CP 805, 808, 864, 1024, 1038, 1053, 1166, 1209, 1213, 1230, 1950. It sometimes performs its own excavation work, but the company's "primary contracts are limited to hauling materials"

that other contractors have removed. CP 127; *see* CP 908, 1038, 1060, 1117, 1142, 1166, 1209, 1213-14, 1230, 1672-96.

OMA owns between 70-80 dump trucks. CP 822-23. The dump trucks travel on Washington public roads and highways and on construction sites. CP 776-77, 784, 807-08, 1139-40, On average, OMA's dump truck drivers can drive between 200 to 300 miles a day. CP 778-79.

Drivers do not participate in the earth work activities like digging into the earth or clearing land, and because they rarely leave their trucks, even on construction sites, they face the risks associated with the work of other Washington drivers with commercial drivers' licenses. *See* CP 784-85, 806-08, 1139-40. The vast majority of OMA's contracts are limited to "hauling away dirt and debris from a job site." CP 1303.

C. L&I Repeatedly Told OMA That It Must Report Its Dump Truck Drivers in the Intrastate Trucking Classification

In 2015, L&I audited OMA to determine its compliance with the Industrial Insurance Act's reporting requirements. CP

1702-20. OMA had classified its driver hours in the landscape or clerical category, but the audit determined that all OMA's dump truck driver hours needed to be reclassified into the intrastate trucking risk classification. CP 994-98, 1705-06 (Ex. 69). The auditor instructed OMA about the need to report in the proper risk classification for its dump truck drivers. CP 994.

L&I issued a notice of assessment at the end of the audit in June 2015. *See* CP 1520. The audit report stated that OMA's truck drivers "performed hauling services for various public and non-public projects" and that these services "precisely meet the definition 1102-03 intrastate trucking risk classification." CP 1705. The report explained that the drivers "should have been reported" in this classification. *Id.*

And the auditor told the company's founder and president, Barry O'Young, that OMA must report its dump truck drivers in the intrastate trucking risk classification. CP 942-43, 994, 1001-02. O'Young told the auditor that he

understood the reporting requirements moving forward. CP 1002.

In mid-2018, L&I began a second audit of OMA. CP 1520 (Ex. 30). L&I again determined that OMA had failed to correctly classify its workers or properly report its hours. CP 1067, 1520.

In late 2018, L&I discovered that OMA was again misreporting worker hours by reporting them to the lower cost and lower risk classifications. *See* CP 1038, 1705, 1721. OMA's dump truck drivers continued to haul dirt, debris, and other material to and from construction sites—the same work they were performing during the first audit. CP 1060. So the auditor found that OMA had misclassified its dump truck drivers in a risk classification other than the intrastate trucking risk class. CP 1052-53.

Because of OMA's significant underreporting of worker hours and the company's continued misclassification of its dump truck drivers, L&I issued a knowing misrepresentation

penalty under RCW 51.48.020. CP 112, 1883-85, 1901-02. OMA appealed L&I's assessment to the Board. CP 680-81. At the hearing, OMA stipulated to intentionally underreporting worker hours for the fourth quarter of 2017 and the first and second quarters of 2018. CP 1130-33.

Following a six-day evidentiary hearing, the industrial appeals judge issued a proposed decision, affirming L&I's assessment. CP 112, 664. This decision was adopted by the Board. CP 77. As for the proper risk classification of OMA's dump truck drivers, because the drivers hauled excavation material and debris (and were not "digging into the earth" or clearing land, CP 118), the Board found that the primary nature of the business was "using dump truck drivers to haul dirt, debris, or other materials to, from, or within construction sites," so the appropriate risk class for these workers was intrastate trucking. CP 127 (FF 2), 129 (CL 2).

The Board determined that a knowing misrepresentation penalty was proper, especially considering that, at hearing,

OMA had stipulated to intentionally underreporting hours. CP 120-23. The Board found that OMA knew about its reporting requirements and had deliberately misclassified its workers even though L&I had educated OMA during and following the first audit about the proper classification and OMA's president told L&I that he understood OMA must classify its dump truck drivers within the intrastate trucking risk classification. CP 122-23.

The Board affirmed the notice of assessment. CP 77, 112-32. The superior court and Court of Appeals affirmed. CP 1-5, 2178-86; *OMA Constr., Inc. v. Dep't of Lab. & Indus.*, 30 Wn. App. 2d 893, 550 P.3d 509 (hereinafter "slip op."), slip op. at 1, 22 (2024).

The Court of Appeals recognized that the undisputed facts were that "OMA owned and operated trucks. OMA's trucks loaded and moved dirt and other excavated materials. The same trucks unloaded these materials." *Id.*, slip op. at 8. So the Court of Appeals held that "[o]n its face, the work of

OMA's truck drivers satisfies each of the essential characteristics of the intrastate trucking risk classification: operating a vehicle, which loads, hauls, and unloads goods on Washington roads." *Id.*, slip. op at 8. The Court of Appeals held that the dump truck drivers were not "engaged in the same work as excavators because . . . the drivers simply are not digging into the earth or turning earth in any way." *Id.*, slip op. at 10 (citing WAC 296-17A-0101-02).

As to the knowing misrepresentation penalty, the Court of Appeals held that substantial evidence supported the penalty. *OMA Const. Inc.*, slip op. at 14. The Court of Appeals held that "[i]t is undisputed and, indeed acknowledged in its own briefing, that OMA intentionally designated its dump truck drivers in a risk classification different than the one that the Department instructed OMA to use." *Id.*, slip op. at 15. "The simple fact is that it had information its hours were considered false, and took unilateral action contrary to that information." *Id.*

OMA petitions for review.

IV. ARGUMENT

A. Review Is Not Warranted for the Court of Appeals' Routine Interpretation of the Relevant Regulations and Application to Undisputed Facts

The Court of Appeals analyzed two regulations to determine what classification OMA's driving work fell into: WAC 296-17A-1102-03 (intrastate trucking) and WAC 296-17-01101-02 (excavation). Classification 1102-03 applies to "[b]usinesses that hire drivers . . . engaged in intrastate trucking." WAC 296-17A-1102-03. "Intrastate truck driving is *operating* a *vehicle hauling goods* within the boundaries of *Washington* state." *Id.* (emphasis added). Its "[d]uties include, but are not limited to: [d]eadhead trips, driving without a load . . . ; [*l]oading and unloading* vehicles." *Id.* (emphasis added). Furthermore, the "[t]ypes of goods hauled include, but are not limited to: . . . [b]ulk freight, merchandise, or commodities; . . . *[g]ravel* or . . . *[s]oils*." *Id.* (emphasis added). Substantial

evidence supported that OMA's truck drivers operated vehicles and loaded, hauled, and unloaded goods on Washington roads.

OMA claimed its drivers engaged in excavation work under WAC 296-17-01001-02. Br. of Appellant 2, 7, 19-25. But the drivers did not engage in the same work as excavators because the drivers did not dig into the earth, turn, or manipulate earth in any way. The "work activities" in the excavation classification include (but are not limited to):

- Backfilling;
- Bringing the roadbed or project site to grade;
- Clearing or scraping land of vegetation;
- Cut and fill work;
- Earth excavation;
- Excavation or digging of earth to form the hole for pools, ponds, building
- foundations, and side sewer hookups (street to house) when performed
- as part of the excavation contract;
- Excavation of rocks and boulders;
- Grubbing;
- Piling or pushing of earth;
- Placement of plastic pool and pond liners not in connection with concrete
- work;
- Removal of tree stumps; and
- Slope grooming.

WAC 296-17A-0101-02.

Despite the lengthy analysis by the Court of Appeals of the meaning of each regulation in view of the undisputed facts, OMA argues that the Court of Appeals reviewed the issues about excavations and trucking risks classifications by deferring to L&I's interpretation of the regulations. Pet. 14-16. OMA claims this conflicts with Supreme Court precedent. Pet. 16.

OMA mistakes the Court of Appeals' analysis. The Court looked at the elements of the regulations in view of the undisputed facts and found that "[o]n its face, the work of OMA's truck drivers satisfies each of the essential characteristics of the intrastate trucking risk classification: operating a vehicle, which loads, hauls, and unloads goods on Washington roads." *OMA Constr. Inc.*, slip op. at 8 (citing WAC 296-17A-1102-03). It discussed the regulations and the undisputed facts at length between pages 8 and 11 of the decision. It engaged in a lengthy substantial evidence analysis

on pages 11 to 13. It did in passing note that deference is given to agencies. *Id.*, slip op. at 11. But its decision by no means rested on this brief reference, as the Court of Appeals focused on whether OMA met its burden to show that L&I incorrectly determined the risk classification. *Id.*

Perhaps this Court will one day want to "resolve the ongoing debate as to when an agency's determination is entitled to deference," Pet. 18-19, but this factually laden case is not one that turns on that issue, so it is not the proper vehicle for any such inquiry.

And the Court of Appeals' decision on the merits warrants no review. OMA quibbles over the Court's description of the elements of the regulations, Pet. 18-19, but it cannot deny that the excavation classification involves the manipulation of dirt, and OMA's drivers did not perform such work. WAC 296-17A-0101; CP 1303.

OMA argues that the nature of the business was not considered. Am. Pet. 23. But the Board made a finding about

the nature of the business that OMA's primary business involved using dump trucks "to haul dirt, debris, or other materials to, from, or within construction sites." CP 127 (FF 2). This finding is supported by substantial evidence that in turns supports the intrastate trucking classification. Nothing about the interpretation of the regulations and the undisputed facts warrant review.

B. Review Is Not Warranted when the Court of Appeals Applied an Actual Knowledge Test to OMA's Confessed Actions

OMA was subject to a penalty for knowingly misrepresenting its classification status to L&I. The heart of OMA's arguments is that it asserts that the Court of Appeals was unclear as to whether actual or constructive knowledge is required. Pet. 27. But it admits that the Court of Appeals said it "declines to reach the arguments that we should construe OMA's actions as a 'constructive knowledge' of the proper penalty," because, it emphasized that the claim "is of actual knowing misrepresentation, not whether OMA constructively

knew." Pet. 30 (quoting *OMA Constr. Inc.*, slip op. at 18, n.7). Thus, any concern over the applicable standard is misplaced.

And on the facts, actual knowledge was proven on substantial evidence review, as shown by OMA's confessed knowledge. L&I issued a notice of assessment at the end of its initial audit on June 11, 2015. *See* CP 1520. The notice of assessment stated that OMA's truck drivers "performed hauling services for various public and non-public projects" and that these services "precisely meet the definition 1102-03 intrastate trucking risk classification." CP 1705. The assessment explained that the drivers "should have been reported" in this classification. *Id.* OMA appealed this notice of assessment—thus confessing it received the notice and read it. CP 1668-69; Pet. 29. It acknowledged its correctness by then dismissing its appeal. CP 1203-04, 1668-69.[1] Thus, OMA is just plain wrong

[1] Also supporting the penalty is that at hearing, OMA stipulated to intentionally underreporting worker hours for the fourth quarter of 2017 and the first and second quarters of 2018. CP 1130-33.

when it claims no one told it the proper classification. *See* Am. Pet. 29. Nothing about this issue warrants review.

V. CONCLUSION

L&I asks this Court to deny review.

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RESPECTFULLY SUBMITTED this 11th day of September, 2024.

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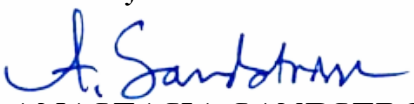

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SUPREME COURT
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OMA CONSTRUCTION INC., Petitioner, v. DEPARTMENT OF LABOR AND INDUSTRIES, Respondent.	CERTIFICATE OF SERVICE

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September 11, 2024 - 10:33 AM

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