SUPREME COURT OF THE STATE OF WASHINGTON

COURT OF APPEALS, DIVISION I

Case No. 85203-5

OMA CONSTRUCTION INC.

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

APPELLANT OMA. CONSTRUCTION INC'S PETITION FOR REVIEW OF THE COURT OF APPEALS' PUBLISHED DECISION FILED APRIL 29, 2024

Lindsay T. Watkins, WSBA No. 43012
Margarita Kutsin, WSBA No. 56092
1325 Fourth Avenue, Suite 1850
Seattle, WA 98101
Phone: (206) 287-9900
Fax: (206) 934-1139
Attorneys for Appellant OMA Construction Inc.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

I. IDENTITY OF PETITIONER/

Petitioner OMA. Construction, Inc. ("OMA"), is a heavy civil earthwork contractor, specializing in public works construction and specifically, earthwork. This Petition arises upon OMA's appeal from a Decision and Order entered by the Board of Industrial Insurance Appeals ("BIIA").

II. CITATION TO COURT OF APPEALS DECISION

OMA requests review of the Court of Appeal's decision in *OMA Construction Inc., v. Dep't of Lab. & Indus.*, No. 85203-5-I (Wash Ct. App. Apr. 29, 2024), https://www.courts.wa.gov/opinions/pdf/852035%20orderandopinion.pdf, published following the Court of Appeals' June 14, 2024 Order granting Respondent, Washington State Department of Labor and Industries' ("L&I") Motion to Publish.

III. INTRODUCTION

This Court recently acknowledged the "ongoing debate" regarding the extent of deference afforded to administrative

agency interpretations of statutes. *Alaska Airlines, Inc. v. Dep't of Labor & Indus.*, 1 Wn.3d 666, 683, 531 P.3d 252 (2023). This same debate and uncertainty exists with respect to other types of legal determinations, such as an agency's interpretation of regulations and its applications of law to fact, both of which are subject to de novo review under the Administrative Procedures Act ("APA") error of law standard.

In this instance, the Court of Appeals deferred to L&I's interpretation and application of unambiguous regulations, notwithstanding that this interpretation and application was contrary to the plain language of the regulations, other related regulations, and the governing statute.

As this Court observed in *Alaska Airlines*, "'[d]e novo' means de novo—starting from the beginning, anew." *Id.* at 674. However, the Court of Appeals here applied a deferential standard of review far closer to abuse of discretion than to a de novo standard. Without guidance as to which circumstances warrant deference to agency interpretations and determinations, the de novo standard applicable to issues of law under the APA rings hollow. OMA thus asks that this Court accept review to settle the "ongoing debate" regarding deference to agency

determinations and interpretations and to define the contours of when such deference is proper. Prior decisions from this Court and the Court of Appeals, to which the Decision runs counter, provide guidance.

Beyond the applicable standard of review, OMA's appeal presents two issues of first impression and of substantial public importance, including (1) how to determine which risk classification, between two potential risk classifications, is best suited for a particular business or occupation for the purpose of assessing industrial insurance premiums, and (2) whether a "knowing misrepresentation" penalty under RCW 51.48.020(1)(a) may be assessed based on constructive knowledge alone, or whether a knowing misrepresentation requires actual and subjective knowledge of falsity such that a good faith misunderstanding of unclear L&I communication can constitute a defense.

The published Decision has far-reaching impacts as to both questions, as it affects industrial insurance reporting procedures and potential exposure to penalties for all manner of employers. Further, because OMA respectfully believes the Court of Appeals reached its holdings in error, and because the

reasoning underlying the published Decision may create confusion downstream, the Decision merits review by this Court.

IV. ISSUES PRESENTED FOR REVIEW

1. Whether an agency's interpretation of regulations, as well as its application of those regulations to facts, is always entitled to considerable deference, including where the interpretation conflicts with the plain the language of the regulation and other, related regulations, and where there is no indication the interpretation is part of a consistently applied agency policy?

2. Whether, when determining which of two potential risk classifications is the best fit for an employer for the purpose of determining industrial insurance premiums, the enabling statute and implementing regulations require L&I to assign the risk classification that is more precise to the business, or whether L&I must classify individual occupations within a business/industry based on activities performed within that

occupation that fit in broader risk classes applicable to varied and distinct businesses and industries?

3. Whether the standard for assessment of a knowing misrepresentation penalty under RCW 51.48.020(1)(a) requires actual and subjective knowledge of falsity or whether an employer may be subject to a knowing misrepresentation penalty based on constructive or objective knowledge of falsity alone?

V. STATEMENT OF THE CASE

A. OMA Is A Heavy Civil Contractor That Primarily Performs Excavation and Related Earth Work.

OMA is heavy civil contractor specializing in public works construction and specifically, earthwork. Clerk's Papers (CP) at 812-13, 816, 818, 864, 960, 1500-01, 2041. OMA's primary activities include excavation of site materials, grading and embankment work, excavating, importing, moving, and incorporating materials, hauling materials, among others. *Id.* at 812-13, 816, 818, 864, 960, 1500-01. Materials are unloaded through direct placement, stockpiling, spreading gravel and borrow, and back-filling materials into trenches or holes. *Id.* at

816-17. OMA's dump truck drivers perform this unloading work, and materials are loaded through cooperation between dump truck operators and other equipment operators. *Id.* at 800, 816-17.

B. Audit 1: L&I Addressed Classification Issues Distinct From the Classification Issues involved in this Appeal.

L&I completed its first audit (Audit 1) of OMA on June 11, 2015, covering the period from the second quarter of 2012 through the fourth quarter of 2014. *Id.* at 127. Audit 1 contained seven distinct areas of focus, including "[d]etermining if all workers hours were reported under correct risk classifications." *Id.* at 1703. OMA initially appealed Audit 1 but subsequently settled the matter with L&I. *Id.* at 1094.

In Audit 1, L&I addressed classifications relating to the workers classified under Landscaping and Clerical classifications, WAC 296-17A-0301 and WAC 296-17A-4904. *Id.* at 1187-98; 1207-08. The fact that the first audit was limited to classification issues pertaining to landscaping and clerical is confirmed in the official summary and findings provided to

OMA following the audit, which discuss "trucking vs. clerical," and "excavation vs. clerical" designations. *Id.* at 336-54. Audit 1 did not include an "excavation vs. trucking" category. *Id.*

Moreover, and contrary to the Court of Appeals statement that OMA was instructed that "classifying its employees as anything but intrastate trucking was improper," *OMA*, Slip Op. at 20, the official Audit Summary for Audit 1 provided OMA was to classify workers whose duties required "operating earth moving equipment" such as "dump trucks" and who performed "earth moving and other related services" within the excavation risk class. *Id.* at 341-42.

Mr. Abdi Yussuf, the Audit 1 auditor, contemporaneously noted his discussion with OMA:

> I explained to Mr. O'Young that any project or work that involved excavating or digging of earth to form foundation or that involves excavation contract should be reported under 0101-02 [Excavation] risk class. I also told him that if the scope of the contract included the use of earth moving equipment such as backhoe, bulldozer, grader, scraper and dump truck, all hours associated with such projects should be reported under 0101-02 [Excavation] risk class.

> . . .
> I emphasized to Mr. O'Young that any works that pertains to grading, clearing or contouring of land should be reported in classification 0101-02 [Excavation]**.**

Id. at 1481-82.

These notes and discussion are consistent with the L&I's 2012 internal notes on the subject, also providing for classification under excavation:

> Class code 0101-02 is used to report hours worked doing excavation and land clearing work, usually related to foundations and utility installations, that is not covered by another class code. This class code covers all of the related activities including hauling the debris away in trucks.

Id. at 1729.

None of L&I's notes specify which circumstances require OMA to report dump truck drivers in trucking versus excavation, and certainly not in the way as clarified for clerical and landscaping risk classes. *See id.* at 339. As L&I's Litigation Specialist for Audit 1 testified, the distinction between excavation versus trucking "was not a topic that was part of what we discussed at that time frame." *Id.* at 1207-08.

Instead, OMA was informed that if excavation was

involved in the work in general, or if its workers operated dump trucks and performed earth moving or related services, the excavation risk class should be used. *Id.* at 341-31, 1481-82. Because OMA's employees operate dump trucks to, quite literally, move excavated earth in dump trucks within and to and from construction sites and also incorporate earth through unloading processes such as backfilling and spreading, for excavation projects, OMA reasonably followed Mr. Yussuf's Audit 1 instructions and the Audit 1 Summary and reported its dump truck drivers' hours under the excavation risk class. *Id*. at 812-13, 816, 818, 864, 960, 1481-82, 1500-01.

C. OMA Requests Adjustment of Its Experience Modifier Rate (EMF).

After Audit 1, OMA recognized that though L&I re-classified portions of OMA's work, L&I did not update OMA's Experience Modification Factor ("EMF") to reflect the adjustments made through Audit 1. *Id* at 922-23. An EMF is calculated "by comparing the past costs or losses incurred by an employer to the expected losses *within that classification*." *WR*

Enters., Inc. v. Dep't of Lab. & Indus., 147 Wn.2d 213, 219, 53 P.3d 504 (2002) (emphasis added).

Following the Audit 1 adjustments, OMA was imputed with additional hours in excavation and trucking and paid higher premiums associated those classes, but L&I did not adjust OMA's EMF to account for the higher *expected* losses. *Id.* at 1339-45. As a result, OMA paid inflated premiums. *Id.*

After numerous calls and no direction from L&I, in a November 29, 2017 letter, OMA formally requested its EMF be adjusted to accurately reflect the audit changes. *Id.* at 880, 1339-45, 1508-09. OMA followed up with numerous calls and emails, but after receiving no response, adjusted its hours to adequately account for the EMF following L&I's corrections. *Id.* at 881-82. Based on L&I's failure to respond despite knowledge of the issue, OMA believed that adjusting its hours was accurate, as OMA "exhausted all of the other options." *Id.* at 919, 922-23.

One year later, on November 28, 2018, when OMA met with LnI, it again requested its EMF be corrected. *Id.* at 1518.

Over a year after OMA sent its letter, Ms. Sur responded by summarily declining to correct the EMF. *Id.* at 1515-17. Ms. Sur, however, did not deny that OMA was paying an inflated EMF, but instead claimed that an adjustment could not be made retroactively. *Id.*

D. Audit 2: After Nearly All Audit 3 Hours Were Reported, L&I First Internal Determination Regarding Distinction Between Trucking and Excavation.

L&I initiated its second audit of OMA (Audit 2) and completed its report on May 3, 2018. *Id.* at 1520-21, 51. Audit 2 addressed, in part, re-classification of hours between trucking and excavation. *Id.* at 1520-21. OMA appealed. *Id.* at 1336. OMA and L&I agreed to mediate the dispute and ultimately reached a settlement. *Id.* at 1336-38. The Settlement Agreement contained a "no admissions clause," which provided the settlement agreement should not be construed as acceptance of either party's positions. *Id.* at 1337-38.

During the reconsideration proceedings, on November 28, 2018, L&I made its first internal written determination of the

scope distinction between the trucking and excavation risk classifications. *Id.* at 1179, 1315, 1318. On the same date, Ms Wu asked Ms. Sur whether a firm that "performs excavation work and [has] dump truck drivers" must report their drivers in excavation. *Id.* at 1318. In response, Ms. Sur stated OMA must report its drivers under trucking if the contract requires OMA to haul materials for another contractor, but if the hauling is for OMA's "own project," excavation is the proper risk class. *Id*. This was not communicated to OMA. *See id.*

For Audit 2, Ms. Wu testified she reviewed "the whole audit file," which included the prior information provided to OMA regarding classification of its workers. *Id.* at 1302, 1307. Ms. Wu testified that the first time she learned about L&I's position regarding classification in trucking versus excavation was on November 28, 2018, with Ms. Sur's response to her email question. *Id.* at 1315, 1318.

Ms. Sur also testified that the first time she made a determination in writing about whether OMA should be

reporting under trucking as opposed to excavation was in her email response to Ms. Wu's question, on November 28, 2018, more than a year after she became OMA's account manager. *Id.* at 1179.

E. While OMA was Appealing Audit 2, the Department Commenced Audit 3 and Assessed a Misrepresentation Penalty Based on the Same Issues OMA was Actively Disputing.

While OMA was appealing Audit 2 (i.e., L&I was aware of OMA's dispute over classification), L&I began a third audit. *Id.* at 1037. Audit 3 covered the fourth quarter of 2017 through the fourth quarter of 2018. *Id.* at 114. Therefore, by the time L&I made its first written determination regarding classification in the trucking versus excavation risk class and OMA's EMF rating, most of the hours under review in Audit 3 had already been reported. *Id.* at 1319-20, 1518, 1521.

Further, it was not until after OMA and L&I settled Audit 2, on August 7, 2020, L&I issued its determination in Audit 3 and assessed a total penalty against OMA of $1,756,756.62

again, mainly for hours that were reported prior to OMA's Audit 2 appeal and before the Department's November 28, 2018 determination regarding classification. *Id.* at 113-14, 689-91, 1315, 1318, 1170. Of that total, $1,159,039.38 was assessed under RCW 51.48.020(1) for a "knowing misrepresentation" based on both the classification and EMF issues. *Id.* at 128, 689.

VI. ARGUMENT

A. Review of the Judicial Deference Issue is Warranted Under RAP 13.4(b)(1),(2), and(4).

Before the Court of Appeals, OMA argued the BIIA erred in interpreting the excavation and trucking risk classifications and in applying those interpretations to the facts. Both claims of error involve legal issues that require de novo review. *See Dep't of Labor and Indus. v. Tyson Foods, Inc*., 143 Wn. App. 576, 582, 178 P.3d 1070 (2008); *see also Tapper v. Employment Sec. Dep't*, 122 Wn.2d 397, 403, 858 P.2d 494 (1993). Rather than review these legal claims of error "anew," the Court of Appeals

repeatedly deferred to L&I's interpretations and applications of law to fact. *See e.g., OMA,* Slip Op. at 5, 11, 17.

For example, while the Court of Appeals acknowledged the plain language of a regulation controls, it also held an agency's interpretation of its own regulations is entitled to "considerable deference." *OMA*, Slip Op. at 5 (quoting *D.W. Close Co., Inc. v. Dep't of Labor & Indus*., 143 Wn. App. 118, 129, 177 P.3d 143 (2008). As will be explained below, in defining the contours of the excavation risk class in WAC 296-17A-0101-02, the Court narrowed its scope by imposing limitations that are found nowhere in the plain language. *Id.* at 10-11. In fact, the interpretation the Court applied contradicted express terms, rendering them superfluous. *Id.* The Court's construction of WAC 296-17A-0101-02 likewise cannot be reconciled with other risk classification WACs and the broader regulatory scheme. With no indication the language of the applicable regulations was ambiguous, the Court concluded its

analysis by again stating L&I is entitled to "significant discretion" in interpretation of its own rules. *Id.* at 11.

Consequently, the Decision conflicts with multiple decisions from this Court and published decisions from the Court of Appeals that hold the plain language of an unambiguous regulation controls, and the Court must not look beyond plain meaning of the words used, including by deferring to an agency's contrary interpretation. *See e.g., Mader v. Health Care Auth.*, 149 Wn.2d 458, 472, 70 P.3d 931 (2003) ("If a regulation is unambiguous, intent can be determined from the language alone...")*; Children's Hosp. and Med. Ctr. v. Washington State Dep't of Health*, 95 Wn. App. 858, 868, 975 P.2d 567 (1999); *Conway v. Dep't of Soc. & Health Servs.*, 131 Wn. App. 406, 414, 120 P.3d 130 (2005) (same)*; Dep't of Labor and Indus. v. Tyson Foods, Inc.*, 143 Wn. App. 576, 582, 178 P.3d 1070 (2008) (holding that if the agency's interpretation of a regulation is "in conflict with the regulatory language," it is not entitled to the "great weight" typically afforded); *Durant v. State Farm Mut.*

Auto. Ins. Co., 191 Wn.2d 1, 8, 419 P.3d 400 (2018) ("If a regulation is unambiguous, … the court will not look beyond the plain meaning of the words of the regulation.").

Similarly, this Court has held that in applying law to fact, the Court must determine the propriety of such an application without deference to the agency's decision. *See e.g., Port of Seattle v. Pollution Control Hearings Board,* 151 Wn.2d 568, 588, 90 P.3d 659 (2004) (explaining "that mixed questions of law and fact, also known as problems of application of law to facts, are subject to de novo review, meaning the court must determine the correct law independent of the agency's decision and then apply the law to established facts de novo")*; see also Franklin County Sheriff's Office v. Sellers,* 97 Wn.2d 317, 329–30, 646 P.2d 113 (1982) (same).

This Court has also held that deference is particularly inappropriate where there is no indication an agency's interpretation or application of law is a uniformly applied policy. *See e.g., Alaska Airlines,* 1 Wn. 3d at 683-84; *see also Cowiche*

Canyon Conservancy v. Bosley, 118 Wash.2d 801, 815, 828 P.2d 549 (1992) (declining to defer to an agency determination where "[t]he evidence establishes that the application and "interpretation" here was nothing more than an isolated action by the Department.").

The Decision's repeat emphasis on L&I's discretion to interpret regulations underscores the fact that the Court did not determine the scope of classifications independent of the agency's decision. OMA, Slip Op. at 11. OMA identified contrary regulations and also identified internal 2012 L&I notes regarding classification of OMA's dump truck drivers consistent with the policy of including all related activities, such as hauling within the excavation risk class. CP at 1729. The Court did not address those points, and instead deferred to L&I's interpretation that is inconsistent with the approach applied to drivers in other businesses and to its own prior interpretation of the regulations.

OMA thus asks that, with respect to interpretation and application of regulations, this Court resolve the ongoing debate

as to when an agency's determination is entitled to deference. Without contours for deference, as here, review of these legal errors is de novo in name only. Further, there is significant public interest in predictability and guidance as to how courts will approach interpretation and application of regulations in appeals proceeding.

B. Review of the Classification Issue is Warranted Under Rap 13.4(b)(1), (2) and (4).

While the Decision references the proper requirements for review of regulations, the Court's analysis of WAC 296-17A-0101 N.O.C does not actually follow these rules. *OMA* Slip Op. at 5, 11. The Decision thus conflicts with opinions from this Court and the Court of Appeals that prescribe the analysis a Court must undertake when interpreting a regulation.

As the Decision recognized, regulations are interpreted according to the same "plain meaning" rule used to interpret statutes. *Sampson v. Knight Transp., Inc*., 193 Wn.2d 878, 886, 448 P.3d 9 (2019). In examining plain language, "'[a] term in a

regulation should not be read in isolation but rather within the context of the regulatory and statutory scheme as a whole.'" *Overlake Hosp. Ass'n v. Dep't of Health*, 170 Wn.2d 43, 52, 239 P.3d 1095 (2010) (quoting *City of Seattle v. Allison*, 148 Wn. 2d 75, 81, 59 P.3d 85 (2002)). Further, Regulations are construed to give effect to all language, and "[a] construction that would render a portion of the regulation meaningless or superfluous should be avoided." *Bayley Constr. v. Dep't of Labor & Indus*., 10 Wn. App. 2d 768, 781, 450 P.3d 647 (2019).

i. The Decision Contradicts Applicable Regulation N.O.C. Language.

The Court held that the excavation risk classification as enumerated in WAC 296-17A-0101 N.O.C does not apply to drivers who "are not digging into the earth or turning the earth in any way." *OMA*, Slip Op. at 10. The Court further held activities in the excavation risk class are limited to those that involve "the physical removal or placement onto or into the earth of material from its original resting place." *Id.* Finally, the Court held dump

truck drivers are excluded because they "are not using equipment that could excavate or dig because, again, they are driving dump trucks, as opposed to diggers or backhoes." *Id.* This interpretation reads into the regulation limitations that do not exist within the plain terms, ignores the directive to OMA that, in some cases, it should classify its drivers under excavation, extracts multiple activities that are expressly incorporated, and conflicts with the N.O.C. designation and the regulatory scheme as a whole.

Primarily, WAC 296-17A-0101 N.O.C goes beyond digging and includes (but is "not limited to") a number of activities, including backfilling, piling, pushing of earth, placement of plastic pool and pond liners, and removal of tree stumps, all of which do not necessarily involve "digging or turning the earth." *Id.* Nothing within these enumerated activities, or elsewhere, specifies the material must be "from its original resting place." The inclusion of N.O.C. necessarily means that the risk classification is not narrowly confined to

digging or turning of earth. This is not addressed by the Court.

Further, not only are dump trucks not excluded, but "[D]ump trucks" are also included in WAC 296-17A-0101 N.O.C as equipment used within that risk class, contradicting the Court's holding that use of dump trucks does not fit within excavation because dump trucks do not excavate or dig. *OMA*, Slip Op. at 10; CP at 341-42.

ii. The Decision Contradicts The Regulatory Scheme To Classify By Risk and Nature of the Business.

Not only does the Decision contravene the plain language, but the Court's interpretation is also contrary to the regulatory scheme as a whole—again, a factor that implicates the public interest as it is the first decision of its kind.

Risk classifications are based on exposure to loss or the "nature of their business" rather than individual jobs or occupations. *See* WAC 296-17-31002; WAC 296-17-31011. The Court held, however, that because OMA's dump truck drivers operate a vehicle hauling goods within Washington, that

alone renders trucking under WAC 296-17A-1102-03 the correct risk classification. *OMA*, Slip Op. at 9. Nevertheless, the Court also recognized, "The following facts are undisputed: OMA is a contractor and subcontractor for, among other things, public works construction projects." *OMA*, Slip Op. at 2.

The BIIA's Decision and Order likewise explains, "an excavation job cannot be completed until someone hauls the removed dirt or debris away, or deposits the necessary materials for a foundation or grading." CP at 118. The industry or business applicable to OMA and its dump truck drivers is construction generally, and excavation, specifically. Rather than assign a risk class based on that business/industry, the Court affirmed a classification based on an individual occupation contrary to WAC 296-17-31011. The result is OMA's dump truck drivers are displaced within a risk class that includes business and industries unlike construction or excavation.

With respect to construction, the classification regulations provide that "construction site cleanup and debris removal are

included in the phase of construction describing the work." WAC 296-17-31013 (8). For example, "[a] roofing contractor with an employee picking up roofing debris off the ground reports the cleanup work in the roofing classification." *Id.* Insofar as OMA's dump truck drivers remove excavation debris, WAC 296-17-31013 (8) directs classification within excavation, not trucking.

Further, the general classification system also recognizes certain workers are often categorized based on their employer's type of business. WAC 296-17-31015, Example 2. Drivers, in particular, may fall within multiple classifications, as illustrated in WAC 296-17-31015, Example 2:

> • Drivers for a retail grocery store are included in the retail grocery classification 6402 since the classification does not exclude delivery.
> • Drivers working for a drug store are included in the delivery classification 1101, because the drug store classification 6406 excludes delivery.
> • Drivers for household moving businesses are included in the moving and storage classification 6907, since the classification does not exclude delivery…

A litany of classifications across varied industries

explicitly exclude trucking from their scope and provide that drivers for those occupations must be reported under trucking. *See e.g.*, WAC 296-17A-0517; WAC 296-17A-1004; WAC 296-17A-1101-04; WAC 296-17A-1101-06; WAC 296-17A-1101-09; WAC 296-17A-1103-06; WAC 296-17A-1404-11. Unlike the forgoing examples, the excavation risk class does not exclude driving. *See* WAC 296-17-31015, Example 2; *see also* WAC 296-17A-0101 (N.O.C).

Finally, when assigning classifications where one of the risk classes is designated N.O.C., like excavation, the Department reviews whether a different risk classification is a more "precise" fit if the risk classification "contains language in the description" that matches employer's particular business. WAC 296-17-31002 (defining N.O.C.). But while WAC 296-17A-1102-02 lists various equipment types (forklifts, hand trucks, pallet jacks, tractors, and trailers) used in the work, it does **not** include dump trucks. Importantly, dump trucks *are* specified as a type of equipment in WAC 296-17A-0101 (Excavation).

Backfilling and piling are not listed methods of "unloading" but these activities *are* listed in WAC 296-17A-0101 (Excavation), and the trucking classification makes no reference to construction sites, although the Court noted OMA's dump truck drivers spend nearly all of their time on construction sites as opposed to on public roads. CP at 117; 700-01.

Thus, the Decision merits this Court's review because, otherwise, the only published decision that analyzes risk classifications between two potential classes is inconsistent with multiple regulations and the underlying policy of the governing statute (RCW 51.16.035(1)). An agency determination that is "inconsistent with the policy of the act and promotes form over substance," must be rejected. *Safeco Ins. Cos. v. Meyering*, 102 Wn.2d 385, 392, 687 P.2d 195 (1984).

C. Review of the Knowing Misrepresentation Issue is Warranted Under RAP 13.4(b)(1) and (4).

Finally, this Court should accept review to clarify whether RCW 51.48.020(1)(a) permits assessment of a knowing

misrepresentation penalty based on constructive knowledge, as opposed to actual knowledge. The Decision is unclear on this point, suggesting at times that actual knowledge is required and at others, implying that constructive knowledge will suffice. Insofar as the Court holds or suggests constructive knowledge is sufficient to impose a penalty, the Decision conflicts with opinions of this Court construing the term "knowledge" as used in a statute. Further, because this Decision is the only one construing RCW 51.48.020(1)(a), and because the Decision may support imposition of misrepresentation penalties for good faith misunderstandings, the Decision affects the public interest.

RCW 51.48.020(1)(a) provides for a misrepresentation penalty when an employer "**knowingly misrepresents**." This Court has held that if constructive or objective knowledge is intended in a statute, the legislature will state so explicitly by using precise terminology, such as "should have known." *In re Forfeiture of One 1970 Chevrolet Chevelle*, 166 Wn.2d 834, 842, 215 P.3d 166 (2009) (noting the legislature "could have defined

knowledge with an objective definition by using phrases like 'knows or has reason to know,'" but because the legislature did not, actual, not constructive, knowledge was contemplated.).

Nothing in the plain language of RCW 51.48.020(1)(a) indicates the legislature intended to include *both* actual and constructive knowledge for a misrepresentation penalty. Had the legislature intended otherwise, it could have omitted the word "knowingly," from the statute,[1] or made that intent plain. It did not. Consequently, assessment of a penalty based strictly on constructive knowledge of a falsity is not authorized under the plain language of RCW 51.48.020(1)(a).

The Court's Decision is not consistent with an "actual knowledge" analysis. For example, it states OMA "knew or at least had information" regarding classification. *See OMA*, Slip Op. at 15. It further provides:

[1] To the contrary, the Legislature amended the statute to add the word "knowingly," where the prior version did not include it. Laws of 1997, ch. 324, §1.

> OMA knew **or should have known** it was the Department's responsibility to begin by assigning a basic classification to OMA based on the nature of its business per WAC 296-17-31012.

Id. at 17 (Emphasis added). The Court recognizes the "arguably lack of clarity" of L&I's instruction at times, but nevertheless holds OMA knew "or should have known" when the only pertinent analysis is what OMA in fact knew. *Id.* at 20.

Moreover, contrary to the Decision, OMA was not instructed at any point that reporting workers under a classification other than trucking was improper. In fact, both the Audit 1 Summary and BIIA decision direct OMA to in certain cases classify dump truck drivers under excavation. CP at 120, 341-42. Rather, the distinction between trucking and excavation (based on the scope of OMA's contract on a given project) was not made explicit during Audit 1 or prior to Ms. Sur's November 28, 2018 determination, after reporting the bulk of OMA's Audit 3 hours. *See* CP at 114, 341-42, 1481-82. 1207-08. 1315, 1318,

1179.[2] The Decision imputes knowledge by requiring OMA to effectively extrapolate from instructions pertaining to distinct classifications (clerical and landscaping). *OMA*, Slip Op. at 19.

Therefore, while the Decision states, in a footnote, that the Court "declines to reach the arguments that we should construe OMA's actions as a 'constructive knowledge' of the proper penalty," because, it asserts, the claim "is of actual knowing misrepresentation, not whether OMA constructively knew," the reasoning underlying the Court's holding is consistent with constructive—not actual knowledge. Further, the Court does not refer to any portion of the record where L&I specified when OMA is to report under trucking versus excavation. At minimum, reference to what OMA "should have known," and the statements that OMA "had information," evoke constructive knowledge contrary to the regulation.

[2] The Decision also appears to conflate OMA's stipulation related to the EMF rate issue with an admission regarding classification, which was separate. *See e.g., OMA,* Slip Op. at 15.

The lack of clarity of the decision could be construed as permitting a misrepresentation penalty when there is a good faith misunderstanding or error. This could have business-ending consequences for all types of employers if L&I is permitted to assess a penalty when the employer does not actually know it has done anything wrong. The Court's intervention is critical because such interpretation is contrary to the plain language of the statute.

I certify that this brief contains less than 5,000 words, in compliance with RAP 18.17.

RESPECTFULLY SUBMITTED this 15th day of July, 2024.

AHLERS CRESSMAN & SLEIGHT PLLC

By: */s/ Lindsay T. Watkins*

Lindsay T. Watkins, WSBA No. 43012
Margarita Kutsin, WSBA No. 56092
1325 Fourth Avenue, Suite 1850
Seattle, WA 98101
Phone: (206) 287-9900
Fax: (206) 934-1139
Lindsay.Watkins@acslawyers.comm
margarita.kutsin@acslawyers.com
Attorneys for OMA Construction Inc.

VII. INDEX OF APPENDIX

DECLARATION OF SERVICE

On July 15, 2024, I caused to be served a true and correct copy of the foregoing document to be served on counsel of record stated below, via the Washington Courts E-Portal:

Nathan Riordan
Faye C. Rasch
Catherina J. Reny
Wenokur Riordan PLLC
600 Stewart Street, Ste 1300
Seattle, WA 98101
Ph: (206) 492-7083
nate@wrlawgroup.com
faye@wrlawgroup.com
cat@wrlawgroup.com
Attorneys for Receiver Revitalization Partners, LLC

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 15th day of July, 2024, at Seattle, Washington.

By: */s/Carolyn McCutchan*
Carolyn McCutchan, *Legal Assistant*

FILED
4/29/2024
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

O.M.A. CONSTRUCTION, INC., Appellant, v. WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES, Respondent.	No. 85203-5-I DIVISION ONE UNPUBLISHED OPINION

DÍAZ, J. — OMA Construction, Inc. (OMA) is a civil contractor which employs dump truck drivers to transport various materials to, from, and within construction sites of large public works projects. Under the Industrial Insurance Act (IIA), Washington classifies occupations or industries by their level of hazard for purposes of setting premiums for workers' compensation insurance. OMA appeals the superior court's order affirming the decision of the Board of Industrial Insurance Appeals (Board), which found that OMA (1) misclassified its business as performing excavation rather than truck driving, and (2) did so knowingly, subjecting it to significant penalties. OMA also brings a due process challenge against the Board's processes. We affirm.

I. BACKGROUND

The following facts are undisputed: OMA is a contractor and subcontractor for, among other things, public works construction projects. OMA's employees drive dump trucks, which carry various materials to, from and within construction or reclamation sites. Approximately 70-75% of its employees' driving is on or within construction sites. Its drivers may drive 100-200 miles in one day within the boundaries of a single large construction site. For example, OMA's truck drivers hauled dirt away from the SR-99 tunnel in Seattle; hauled material within and around various highway and light rail tunnel construction sites; and hauled material to and from a reclamation site in Maple Valley. Its truck drivers primarily stay in the cab of the truck, and do not run excavation equipment.

In June 2015, the Department of Labor and Industries (Department) audited OMA and found it had improperly classified its dump truck drivers as performing "clerical" and "landscaping" work under the rating system for Washington workers' compensation insurance. OMA asked the Department to reconsider, and OMA's president met with Department specialists. In various meetings, the Department instructed OMA to select the "intrastate trucking" risk classification if its dump truck drivers were driving, and to select the "excavation" risk classification *if* they were excavating.

The Department audited OMA two more times. After the next (second) audit, OMA unilaterally adjusted the industrial insurance premium it paid because it believed it was overpaying its premium. Specifically, OMA believed it had fewer actual losses than the Department calculated, and OMA could address the

discrepancy by selecting a different (less expensive) risk classification.

In 2020, pursuant to its third audit, the Department found OMA underreported the hours its employees worked and misclassified its business as excavation rather than truck driving, ordering OMA to pay $380,000 in additional premiums, $1.1 million in trebled penalties, and other fines, totaling approximately $1.7 million (hereinafter, Order).

OMA appealed to the Board, which affirmed the Order after several days of evidentiary hearings consisting of testimony from 14 witnesses. The Industrial Appeals Judge (IAJ) found: (1) the "Department correctly classified OMA's dump truck drivers" under the intrastate trucking classification; (2) "OMA knowingly underreported and misrepresented its hours, knowingly misclassified and misrepresented their dump truck drivers as excavation workers to the Department"; and (3) "failed to maintain and provide records for inspection as required."[1] The IAJ concluded OMA failed to prove by a preponderance of the evidence the Order was incorrect.

OMA filed a petition for judicial review in the King County Superior Court, which also affirmed the Board. OMA sought reconsideration of the court's judgment and order, which the court denied. OMA now timely appeals.

II. ANALYSIS

A. Overview of the IIA and Standard of Review

"The Industrial Insurance Act . . . was a 'grand compromise' that granted

[1] OMA does not dispute in this appeal that it knowingly underreported its hours and failed to maintain and provide records for inspection. Those facts are taken as verities. Matter of Estate of Lint, 135 Wn.2d 518, 532-33, 957 P.2d 755 (1998).

immunity to employers from civil suits initiated by their workers and provided workers with 'a swift, no-fault compensation system for injuries on the job.'" Dep't of Labor & Indus. v. Simmons, 28 Wn. App. 2d 609, 613, 537 P.3d 701 (2023) (quoting Dep't of Lab. and Indus. v. Lyons Enters., Inc., 185 Wn.2d 721, 733, 374 P.3d 1097 (2016)). "As part of this compromise, employers must maintain workers' compensation coverage through the Department." Id. (quoting RCW 51.16.060). "The Department can audit employers and issue assessments for any past-due premiums." Id. (quoting RCW 51.16.035; RCW 51.48.030).

The IIA granted the Department broad discretion to create a "rating system" for classifying occupations and industries based on their degrees of hazard and to fix corresponding industrial insurance premium rates. Di Pietro Trucking Co. v. Dep't of Labor and Indus., 135 Wn. App. 693, 704, 145 P.3d 419 (2006) (citing LAWS OF 1971, 1st Ex. Sess., ch. 289, § 16; RCW 51.16.035). The legislature delegated further authority to the Department to "adopt rules governing the method of premium calculation and . . . to encourage accident prevention and to facilitate collection." RCW 51.16.035(2). If an employer fails to pay the proper premium, the Department may "issue a notice of assessment certifying the amount due." RCW 51.48.120.

"Under the APA, a plaintiff has the burden to show that an agency acted outside statutorily-granted authority or that an agency erroneously interpreted or applied the law." Di Pietro Trucking Co., 135 Wn. App. at 700-701 (citing RCW 34.05.570). "We review the Board's conclusions of law de novo to determine whether the Board correctly applied the law and whether the Board's findings of

fact support its conclusions of law." Pro-Active Home Builders, Inc. v. Dep't of Labor & Indus., 7 Wn. App. 2d 10, 16, 465 P.3d 375 (2018).

As to conclusions of law, we review interpretation of a statute de novo. Di Pietro Trucking Co., 135 Wn. App. at 701. "We interpret statutes to carry out the Legislature's intent." Id. "If a statute is clear on its face, we derive its meaning from the language of the statute." Id. "'The appellate court may substitute its interpretation for that of the agency . . . [b]ut, we must 'accord substantial weight to the agency interpretation.'" D.W. Close Co., Inc. v. Dep't of Labor & Indus., 143 Wn. App. 118, 129, 177 P.3d 143 (2008) (quoting Everett Concrete Prods. v. Dep't of Labor & Indus., 109 Wn.2d 819, 823, 748 P.2d 1112 (1988)).

These "'[r]ules of statutory construction apply to administrative . . . regulations.'" D.W. Close, 143 Wn. App at 126 (quoting State v. Burke, 92 Wn.2d 474, 478, 598 P.2d 395 (1979)) (alteration in original). "The initial examination focuses on the plain language of the regulation. 'If an administrative rule or regulation is clear on its face, its meaning is to be derived from the plain language of the provision alone.'" Id. (quoting Cannon v. Dep't of Licensing, 147 Wn.2d 41, 56, 50 P.3d 627 (2002)). "[R]egulations are interpreted as a whole, giving effect to all the language and harmonizing all provisions." Id. (quoting Cannon, 147 Wn.2d at 57) (alteration in original). And, we have held the Department, "acting within the ambit of its administrative functions normally is best qualified to interpret its own rules, and its interpretation is entitled to considerable deference by the courts." Id. at 129 (quoting Pacific Wire Works v. Dep't of Labor & Indus., 49 Wn. App. 229, 236, 742 P.2d 168 (1987)).

As to factual determinations, "[w]e review the Board's findings of fact for substantial evidence." Pro-Active Home Builders, 7 Wn. App. 2d at 16. "Evidence is substantial where it is sufficient to persuade a fair-minded, rational person of the finding's truth." Id. "The [Board's] conclusions of law must also flow from its findings." Henry Indus., Inc. v. Dep't of Labor & Indus., 195 Wn. App. 593, 599-600, 381 P.3d 172 (2016). "We view the evidence and reasonable inferences in the light most favorable to the prevailing party—here, the Department." Frank Coluccio Constr. Co. v. Dep't of Labor & Indus., 181 Wn. App. 25, 35, 329 P.3d 91 (2014).

"On appeal from the superior court, this court 'sit[s] in the same position as the superior court and review[s] the agency's order based on the administrative record rather than the superior court's decision.'" Henry Indus., 195 Wn. App. at 599-600 (quoting B & R Sales, Inc. v. Dep't of Labor & Indus., 186 Wn. App. 367, 374, 344 P.3d 741 (2015)) (alteration in original).

B. Whether the Risk Classification Was Properly Assigned and Supported

1. Further Regulatory Background on the Rating System for Classifications

Again, the Department classifies "occupations or industries by their level of hazard." WAC 296-17-31011. "Classification descriptions contained in WAC 296-17*A*-0101 through 296-17*A*-7400 establish the intended purpose or scope of each classification." WAC 296-17-31002 (emphasis added).

At its most general level, a "basic classification" is a "grouping of businesses or industries having common or similar exposure to loss without regard to the separate employments, occupations or operations which are normally associated

with the business or industry." Id. "Since a basic classification reflects the liability (*exposure to hazard*) of a given business or industry, all the operations and occupations that are common to an industry are blended together and included in the classification. The rate for a basic classification represents the average of the hazards within the classification." Id. (emphasis in original).

Specific workers' compensation classifications are enumerated in chapter 296-17A WAC. WAC 296-17-31011(1). "[T]hese rules group employers into risk classifications based on the *nature of a business* . . . each classification describes the types of businesses and operations it includes, and the classification is a blend of exposures and risks." WAC 296-17-31011(2) (emphasis added). The Department does not "classify and rate individual jobs or occupations . . . [i]nstead, each classification describes the types of business and operations it includes." Id. "Sometimes, a classification may also reference certain operations (tasks, processes, activities, etc.) excluded from the classification." Id. The Department characterizes the boundary between what is included in and what is excluded from a classification as the "scope" of the classification. Id.

With respect to the relevant classifications at issue here, the Department designates and applies several classifications related to "trucking." WAC 296-17A-1102. Relevantly, classification 1102-03 applies to "businesses 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). "Duties include, but are not limited to: deadhead trips, driving without a load . . . *loading and unloading* vehicles." Id. (emphasis added).

Furthermore, "Types of goods hauled include, but are not limited to: . . . Bulk freight, merchandise, or commodities, . . . *gravel* or . . . *soils* . . ." Id. (emphasis added).

2. Discussion

On 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. WAC 296-17A-1102-03. The following facts are undisputed: OMA owned and operated trucks. OMA's trucks loaded and moved dirt and other excavated materials. The same trucks unloaded these materials. These actions occurred within Washington. OMA offers three initial arguments to the contrary, each of which we find unpersuasive.

First, OMA contends that the various materials its drivers transported in the trucks were not "goods," which it avers means something like tradeable commodities. As an initial matter, in this classification, "types of goods hauled [expressly] include[s]: . . . [g]ravel or aggregate . . . or soils," which OMA admits it transports. WAC 296-17A-1102-03. Even if OMA transports more than just soils, the "types of goods" may "*include but are not limited to*" an array of materials, which may have been, e.g., excavated along with the gravel, aggregate or soil. WAC 296-17A-1102-03. Nothing in the definition indicates that its scope is limited to "commodities." Id. Thus, this argument fails.

Second, OMA argues the Department should not have classified its employees as intrastate trucking drivers because they drove mostly within

construction sites rather than on "public roads." There simply is no requirement in the relevant regulations or other authority that a driver must drive on public roads to be classified in the intrastate trucking risk category. It is sufficient that OMA's driving was entirely contained within Washington, including construction sites. Thus, this argument is also unavailing.

Third, OMA argues that, because the intrastate trucking regulation enumerates equipment its dump truck drivers do not use (e.g., forklifts, hand trucks, and pallet jacks), the drivers' duties are not intrastate trucking. Similar to the argument above, the regulation specifically states "equipment *may* include, but *is not limited to*" in its preface. WAC 296-17A-1102-03 (emphasis added). Thus, the fact that OMA's drivers may not use, e.g., forklifts, is not dispositive of the question at issue: do they operate a vehicle hauling goods within the boundaries of Washington. We hold they do.

OMA next argues that, even if there is some match with intrastate trucking, the specific tasks in the excavation classification of WAC 296-17A-0101 are a *closer* match to the tasks of OMA's drivers. Specifically, OMA claims its dump truck drivers are engaged in (a) the same work (back-filling), with (b) the same equipment (dump trucks), and (c) face the same hazards (navigating the construction site) as excavators.[2]

[2] OMA relatedly argues our Supreme Court considered "a near identical issue" in Silverstreak, Inc. v. Dep't of Labor & Indus., 159 Wn.2d 868, 886, 154 P.3d 891 (2007), distinguishing between "mere delivery" of fill to a construction site and actual excavating. Silverstreak's analysis is inapposite because the regulations (WAC 296-127-018), the legal issue at question (whether the prevailing wage act applies), and the procedural posture (where the Department, who was entitled to "great deference," supported such a distinction) there were vastly different than

OMA's drivers, however, are not engaged in the same work as excavators because, first, the drivers simply are not digging into the earth or turning earth in any way. See, e.g., WAC 296-17A-0101-02. 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. These activities inherently involve the physical removal or placement onto or into the earth of material from its original resting place, not simply the transference of the same from one location to another.

Additionally, OMA's drivers are not using equipment that could excavate or dig because, again, they are driving dump trucks, as opposed to diggers or backhoes.

And, OMA's drivers do not face the same hazards as excavators because, for the most part, they remain in the cab of their truck while on the construction site. Stated otherwise, excavators do not face road or traffic hazards when driving

---

here. Id. at 878 & 884. There was simply no analysis of the competing regulations as here.

to or from construction sites.[3]

Moreover, OMA bears the burden of proof to show the Department improperly applied its regulation. B & R Sales, 186 Wn. App. at 375. And, we accord the Department significant discretion when it interprets its rules and "when the subject area falls within the agency's area of expertise." Id. (quoting Dep't of Labor & Indus. v. Mitchell Bros. Truck Line, Inc., 113 Wn. App. 700, 704, 54 P.3d 711 (2002)). Here, the Department, in its expertise, examined the nature of OMA's business and classified the duties of OMA's dump truck drivers pursuant to a blend of their exposures and risks. WAC 296-17-31011(2).

In short, on the uncontested facts, OMA did not carry its burden to show the Department, as a matter of law, should have classified its dump truck drivers' risk in the excavation classification. Pro-Active Home Builders, 7 Wn. App. 2d at 16. The Department was within its discretion to classify OMA's business as it did because of the work the drivers indisputably do engage in (operating a vehicle hauling goods in Washington) and because OMA does not allege that its employees actually excavate the earth per WAC 296-17A-0101-02.

Finally, OMA argues that the Board's conclusions, nonetheless, do not follow from its findings of fact. We conclude the Department supported its application of WAC 296-17A-1102-03 with substantial evidence.

At the hearing before the Board, the Department offered an expert witness, George Mattison, who drove dump trucks for OMA. Mattison described that on a

[3] OMA also argues the Department classified its work solely based on OMA's public works contracts and not the hazards actually faced by its dump truck drivers, which is an assertion not supported by the record.

typical day, he drove his dump truck to the construction site, another employee loaded his truck, and he drove the load back and forth between the job site and the "dump site." As part of his duties, he only exited the dump truck to lock or unlock part if it before loading or unloading.

John Pettey, another truck driver for OMA, also testified. On direct examination by OMA, Pettey testified to spending 70 to 75 percent of his time within OMA's construction sites. He explained:

> Typically, you will be working with an excavation team . . . they'll be digging out, loading it into [the dump truck], and *you are moving it to some other area on site*. If you are hauling to another site, typically, that will be a stockpile of *dirt*, or whatever it may be that you are *taking to another site*, and dropping off . . . some of it, will be taking to a reclamation site.

(emphasis added).

When viewing this "evidence in the light most favorable to the prevailing party—here, the Department," we conclude it provides evidence "sufficient to persuade a fair-minded, rational person of the finding's truth." Frank Coluccio Constr. Co., 181 Wn. App. at 35; Henry Indus., Inc., 195 Wn. App. at 599-600.

In response, OMA argues there is (a) nothing in the findings of fact specifically regarding the hazard faced by *its* drivers, (b) no express comparison between the hazards of dump truck driving and excavation on the projects it works on besides vague allusions to "driving conditions," and (c) nothing about what percentage of risk would be acceptable under this regulation.

As to the first argument, we can imply conclusions of law from the findings of fact the Board makes because "[t]he legislature has recognized that there is an inherent hazard in all industry." Wash. State Sch. Directors Ass'n v. Dep't of Labor

& Indus., 82 Wn.2d 367, 373, 510 P.2d 818 (1973). Here, OMA's dump truck drivers operated a truck, the truck was loaded, the driver hauled it, then the truck was unloaded. Thus, the facts have been adduced that OMA's drivers are engaged in driving, which is an inherently dangerous activity.

As to OMA's second two arguments, OMA offers no authority in support of its argument that the fact finder must compare two possible risk classifications with each other in order to reach a reasoned decision, let alone develop percentage matrices of risk. We do not impose such obligations here.[4]

For these reasons, we hold that the Board's conclusions "flow from its findings." Henry Indus., Inc., 195 Wn. App. at 599-600.

C. Knowing Misrepresentation Under RCW 51.48.020(1)(a)

1. Law

The Department may issue a penalty to an employer if the employer "knowingly misrepresents . . . the amount of . . . employee hours" underlying the premium it pays the Department, in which case the employer

> shall be liable to the state for up to ten times the amount of the difference in premiums paid and the amount the employer should have paid and for the reasonable expenses of auditing his or her books and collecting such sums.

RCW 51.48.020(1)(a).

2. Discussion

[4] OMA also argues that the Board's findings were insufficient because it did not expressly find that OMA hauled "goods" for the purposes of the intrastate trucking risk classification because "the findings state only that OMA hauls "dirt, debris, and other materials." Again, we may imply conclusions of law from the findings of fact about the materials it does haul, and do so here. Wash. State Sch. Directors Ass'n, 82 Wn.2d at 373.

OMA argues the Department improperly imposed its $1.7 million penalty. Specifically, OMA argues that it (a) was in a bona fide dispute with the Department about how to categorize its dump truck drivers' activities, (b) "repeatedly attempted to raise" the issue with the Department to no avail, and (c) "manually adjust[ed] its hours . . . in good faith."[5] We conclude that, as a matter of law, the Department did not err by penalizing OMA, and that the Department supported its conclusions with substantial evidence.

We interpret statutes, such as RCW 51.48.020(1)(a), to carry out the legislature's intent, and, if a statute is clear on its face, we derive the meaning from its language. Di Pietro Trucking Co., 135 Wn. App. at 701. Merriam-Webster defines "knowing" as "having or reflecting knowledge, *information*, or intelligence." MERRIAM-WEBSTER ONLINE DICTIONARY (last visited Mar. 12, 2024) (emphasis added), https://www.merriam-webster.com/dictionary/knowing. And, it defines "misrepresent" as "to give a false or misleading representation of *usually* with an intent to deceive or be unfair." MERRIAM-WEBSTER ONLINE DICTIONARY (last visited Mar. 12, 2024) (emphasis added), https://www.merriam-webster.com/dictionary/misrepresent. "When a statutory term is undefined, the court may look to a dictionary for its ordinary meaning." In re Estate of Blessing,

[5] OMA challenges the superior court's finding of fact that the Department's first audit of OMA showed, among other things, that OMA underreported hours, misclassified its dump truck drivers as in the landscape or clerical category, and that the Department instructed OMA to report its dump truck drivers under intrastate trucking. Although OMA challenges the superior court's *characterization and use* of the first audit, and not the audit itself, its challenge on appeal is the *result of* the third audit. Thus, because the facts are unchallenged, we treat the court's finding of fact as a verity on review. Lint, 135 Wn.2d at 532-33.

174 Wn.2d 228, 231, 273 P.3d 975 (2012).

It 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. In other words, OMA knew, or at least had information, that the Department considered the proper classification to be "intrastate trucking" and still provided what the Department would consider to be false information. Whether it "intended" to "deceive" the Department is not required under the plain language definition of the terms above. The simple fact is that it had information its hours were considered false, and took unilateral action contrary to that information.

Although no court has yet examined this provision of the statute, the Board has considered the term "knowing misrepresentation" in two separate cases, cited by the parties.[6]

First, in In Re: Eric T. Ash et Ux DBA Par Oneri Concrete, the Board concluded that a business owner "knowingly misrepresented" information it reported to the Department because the owner intentionally omitted that his father worked at the business, after the Department told him to report the father. 10 12372, 2011 WL 1903461, at *2 (Wash. Bd. of Indus. Ins. Appeals Mar. 17, 2011). The Board concluded "[m]isrepresentation can occur by omission, by failing to state what should be stated. 'Concealment or even non-disclosure may have the effect of a misrepresentation.'" Id. (citing BLACK'S LAW DICTIONARY, 7th ed. (1981)).

[6] We may consider BIIA decisions persuasive but not binding authority. Stone v. State, Dep't of Labor & Indus., 172 Wn. App. 256, 268, 289 P.3d 720 (2012).

"*Having previously been informed that his father was an employee*, Mr. Ash's failure to report hours and pay premiums amounts to a misrepresentation for purposes of RCW 51.48.020(1)(a)." Id. (emphasis added).

Second, in In Re: Yellow Cab Exp LLC, & in Re Yellow Broadway Transp., LLC, the Board reviewed knowing misrepresentation penalties against two different companies. 16 10201, 16 10202, 16 10203 & 16 10587, 2018 WL 3816941, at *1 (Wash. Bd. Of Indus. Ins. Appeals July 17, 2018). For its part, Yellow Cab reported *estimated* hours for its drivers because, allegedly, the Department declined to assist Yellow Cab with proper reporting. Id. at *8. The Board held "the essence of knowing misrepresentation is communication of an existing fact while *knowing that fact to be false.*" Id. (emphasis added). And, it found that Yellow Cab's estimates were not a knowing communication of false information under the statute. Id. However, the Board held that Yellow Broadway's refusal to report its employees' hours at all *did* count as a knowing misrepresentation. Id. at *10. The Board found that "communication of a false statement of fact, may be satisfied by failing to communicate a fact when there is a duty to do so." Id.

We agree with the Board's conclusion and adopt its analyses in both cases. Moreover, we hold that each further supports the Department's conclusion that OMA knowingly misrepresented the amount it was supposed to pay to the Department (a) based on its prior instructions for OMA's risk premiums (which was absent in Yellow Cab's case), and (b) regardless of any alleged failing of the

Department.

We so hold, first, because OMA offers no other authority that would permit it to unilaterally choose to designate the risk classifications it believed best, contrary to the Department's instructions. Stated otherwise, there is no authority, and we decline to create any, that the Department must show that an employer acted *in bad faith* to establish a claim of knowing misstatement. "'Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.'" City of Seattle v. Levesque, 12 Wn. App. 2d 687, 697, 460 P.3d 205 (2020) (quoting DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962)).

Next, as in Ash and Yellow Cab, this matter does not present an issue of mere constructive knowledge. OMA knew or should have known it was the Department's responsibility to begin by assigning a basic classification to OMA based on the nature of its business per WAC 296-17-31012. And, if OMA disagreed with the assignment after its first audit, it had the right to bring a claim under the Administrative Procedure Act, not to act unilaterally in what-can-only-be-described as "self-help." It would be certainly inconsistent with the "considerable deference" accorded to the Department to permit such measures. D.W. Close, 143 Wn. App. at 129.

Thus, we conclude, on the undisputed facts and as a matter of law, that the

Board did not err by imposing the penalty it did for knowing misrepresentation.[7]

OMA next argues that, even if the above is the correct legal standard, the Board failed to support its finding that OMA knowingly misrepresented its premium rates with substantial evidence. This argument too fails.

The Board relied upon several facts in determining OMA knowingly misrepresented its premiums. First, the Department offered several admissions from OMA's employees who drove dump trucks, who admitted their work primarily involved driving instead of excavation, and that they were told as much by the Department.[8] In other words, there is little doubt that OMA's employees "knew" the activity they were engaged in was trucking and, at a minimum, what the position of the Department was.

Second, the Department offered the testimony of the person who performed the first audit in 2013, Yussuf Abdi, who stated:

> In reviewing the records provided for audit and audit investigation, I found that nearly all of the firm's dump truck drivers were reported incorrectly in risk classification 4904-00 Clerical and 0301-08 Landscape Construction . . . The audit determined that, *almost all of the firm's construction field workers (truck drivers) performed hauling services for various public and non-public projects which precisely*

[7] We decline to reach the arguments from OMA and Amicus Associated General Contractors that we should construe OMA's actions as a "constructive knowledge" of the proper penalty because, again, the claim at issue here is of actual *knowing* misrepresentation, not whether OMA constructively knew.

[8] One of OMA's drivers, John Pettey, testified that on a typical day, a "trench team" dug in the ground, loaded it into the truck, and he moved it to another area of the site. And, he hauled dirt between jobsites. Additionally, Julie Sur, an account manager for the Department, testified that she told OMA's president, Barry O'Young, that if the dump truck drivers were engaged with "hauling for hire," OMA should classify their risk as that for intrastate trucking (the "1102" risk classification).

meet the definition 1102-03 intrastate trucking risk classification . . .

(emphasis added). In other words, the position of the Department was long held and long communicated to OMA.

In response, OMA argues that, even if the Department had internally so concluded, its employees did not explicitly instruct OMA to classify its dump truck drivers in a classification other than excavation. That is inconsistent with the record. Again, Abdi testified that he explained to OMA's president

> that going forward the correct classification for his business operation should be 1102, [referring to the intrastate trucking classification] not 0101 or 0308 in the first audit.
>
> . . .
>
> Q. Effective the first audit, did you educate the firm about those two classifications 0308 and the proper classification into 1102?
>
> A. Yes, ma'am.

Similarly, another Department auditor, Jerold Billings, testified that in a conference with OMA's president, Barry O'Young:

> Mr. O'Young admitted that he had misclassified his drivers under the landscaping classification *when they should have been reported in truck driving.*

(emphasis added). Moreover, Billings later testified that:

> A. We exchanged emails about the reconsideration process.
>
> Q. And in those emails did you discuss to the best of your recollection the classification requirements appurtenant to landscaping and dump truck driving?
>
> A. As I recall, it was clear that we discussed that the correct classification for the drivers was driving and not landscape.

In short, while there may have been at times some arguable lack of clarity, there was sufficient evidence in the record to persuade a reasonable fact finder that OMA, for years, knew it was improperly categorizing its dump truck drivers because it was instructed multiple times *and admitted* that classifying its employees as anything but intrastate trucking was improper. Henry Indus., 195 Wn. App. at 600 (quoting B & R Sales, 186 Wn. App. at 375). And OMA did not carry its "burden of showing that the premiums were assessed incorrectly." Id. Thus, the Department supported its findings with substantial evidence.

D. Due Process

To determine whether the legislative standards for an adjudicative proceeding satisfy constitutional due process requirements, we consider three factors. Hardee v. Dep't of Soc. & Health Servs., 172 Wn.2d 1, 10, 256 P.3d 339 (2011):

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

Post v. City of Tacoma, 167 Wn.2d 300, 313, 217 P.3d 1179 (2009) (quoting Mathews v. Eldridge, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976))).

OMA argues that the Department's penalties violate its due process under article 1, section 3 of the Washington Constitution. OMA did not analyze this assignment of error under the three-part Mathews v. Eldridge rubric. Instead, OMA

simply asserts that the Department violated its due process rights by "stacking" the three audits without giving OMA a chance to respond. In other words, OMA argues the Department made its risk classifications only after OMA already had reported hours for the drivers in the wrong classification, and while OMA was trying to challenge the findings of the second audit.

As a preliminary matter, nowhere does OMA offer authority that bringing successive audits per se violates a person or organization's rights. "'[N]aked castings into the constitutional seas are not sufficient to command judicial consideration and discussion.'" Pub. Hosp. Dist. No. 1 of King County v. Univ. of Washington, 182 Wn. App. 34, 49, 327 P.3d 1281 (2014) (quoting State v. Johnson, 179 Wn.2d 534, 558, 315 P.3d 1090 (2014)) (alteration in original).

Moreover, we analyze this claim, as we must, through the Mathews factors here. First, there is no dispute that the private interest that would be affected by the Department's official action is OMA's economic interest, namely the $1.7 million fine. This interest will be affected by the outcome of the proceeding. This factor compels us to proceed with caution as to a potential due process violation.

As to the second factor of the Mathews test—the degree of the risk of erroneous deprivation of OMA's interest through the procedures used and whether additional safeguards are necessary—OMA did not argue how additional procedural safeguards would have more effectively preserved its rights. It instead focuses its complaints on the timing and sequencing of the underlying investigation.

In fact, in the adjudicative process, OMA had multiple opportunities to

present evidence supporting its case throughout its multiple audits, and participated in multiple hearings before three layers of administrative appeals. Therefore, this factor disfavors a potential due process violation.

As to the third factor of the Matthews test, OMA does not contest that the Department has a strong interest in enforcing the Industrial Insurance Act, and its "'purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker.'" Littlejohn Const. Co. v. Dep't of Labor & Indus., 74 Wn. App. 420, 425, 873 P.2d 583 (1994) (quoting Dennis v. Department of Labor & Indus., 109 Wn.2d 467, 470, 745 P.2d 1295 (1987)).

Weighing the factors from Mathews, we conclude that OMA does not carry its burden of showing a due process violation.

III. CONCLUSION

We affirm the Board.

Díaz, J.

WE CONCUR:

FILED
6/14/2024
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

O.M.A. CONSTRUCTION, INC., Appellant, v. WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES, Respondent.	No. 85203-5-I DIVISION ONE ORDER GRANTING MOTION TO PUBLISH

Respondent, Washington State Department of Labor and Industries, moved for publication of the opinion filed on April 29, 2024. Respondent, O.M.A. Construction, Inc., filed an answer to the motion, stating that the respondent takes no position on the motion to publish. A panel of the court has considered the motion and has determined that the motion to publish should be granted.

Now, therefore, it is hereby

ORDERED that the motion to publish is granted.

Díaz, J.

Brennan, J.

Mann, J.

AHLERS CRESSMAN & SLEIGHT PLLC

July 15, 2024 - 4:59 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	85203-5
Appellate Court Case Title:	OMA Construction, Inc., Appellant v. Department of Labor and Industries, Respondent

The following documents have been uploaded:

- 852035_Petition_for_Review_20240715165749D1586665_3079.pdf
  This File Contains:
  Petition for Review
  The Original File Name was 2024-07-15 FINAL OMA Petition Final .pdf

A copy of the uploaded files will be sent to:

- auzree.hightower@acslawyers.com
- daniel.hsieh@atg.wa.gov
- diane.cornell@atg.wa.gov
- margarita.kutsin@acslawyers.com
- mdouris@seyfarth.com
- nicholas.korst@acslawyers.com
- ryanne.mathisen@acslawyers.com

Comments:

Sender Name: Simone Torres - Email: sarah.king@acslawyers.com
Filing on Behalf of: Lindsay Taft Watkins - Email: lindsay.watkins@acslawyers.com (Alternate Email: carolyn.mccutchan@acslawyers.com)

Address:
1325 4th Ave Suite 1850
SEATTLE, WA, 98101
Phone: (206) 287-9900

Note: The Filing Id is 20240715165749D1586665