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Supreme Court of the State of Washington

Opinion Information Sheet

Docket Number: 76695-9
Title of Case: Silverstreak, Inc. v. Dep't of Labor & Indus.
File Date: 03/29/2007
Oral Argument Date:

SOURCE OF APPEAL

Appeal from King County Superior Court
02-2-24541-2
Honorable Mary Yu

JUSTICES

See the end of the opinion for the names of the signing Justices.

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

SILVERSTREAK, INC.; T-MAX)	
CONSTRUCTION; STOWE CONSTRUCTION;))	No. 76695-9
GARY McCANN TRUCKING; and BUCKLEY)	
RECYCLING,)	
)	En Banc
Respondents,)	
)	
v.)	
)	
WASHINGTON STATE DEPARTMENT OF)	
LABOR AND INDUSTRIES,)	
)	
Petitioner.)	
)	Filed March 29, 2007

ALEXANDER, C.J. -- In this case, we are asked to determine whether a group of workers who drove end-dump trucks for the respondents, five suppliers of fill materials (Suppliers), on the first phase of construction of a runway at Sea-Tac Airport is entitled to be paid prevailing wages.¹ Division One of the Court of Appeals concluded that the end-dump truck drivers' activities at the work site did not involve participation in the

The prevailing wage act, chapter 39.12 RCW, provides that hourly wages paid to workers "upon all public works" (the "prevailing wage") must be at least the prevailing rate paid for an hour's work in the same trade or occupation in the largest city within the county where the work is performed. RCW 39.12.020. It is often significantly higher than the rate otherwise paid where the work is actually performed (the "market wage") because many projects are constructed outside the largest city of a county.

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incorporation of the delivered materials into the project under construction. Thus, the Court of Appeals held that the workers did not qualify to be paid prevailing wages under Washington's prevailing wage act and the governing regulation, WAC 296-127-018.

We hold that the Court of Appeals erred in applying the canon of *ejusdem generis* to limit the scope of the prevailing wage act's coverage to only those activities similar to spreading, leveling, or rolling. Consequently, we uphold the Department of Labor and Industries' (the Department) broader construction of the governing regulation and conclude that the end-dump truck drivers did participate in the incorporation of fill material into the project. However, because the Department's present position on the applicability of the prevailing wage act to the end-dump truck drivers' activities is inconsistent with the position it adopted in its 1992 memorandum and with subsequent representations it made to the Suppliers, we conclude that the Department is estopped from enforcing its order. Therefore, we affirm, though on different grounds, the Court of Appeals' determination that the end-dump truck drivers employed by the Suppliers are not entitled to prevailing wages.

Facts and Procedural History

This case stems from work performed between May and December 1998 at the Sea-Tac third runway embankment (the Third Runway Project). The project involved construction of an embankment, using roughly 800,000 cubic yards of delivered fill material. City Transfer of Kent, Inc. (CTI) bid on the project, assuming payment of market wages for end-dump truck drivers.² After being awarded the contract, CTI

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contracted with Suppliers to supply and deliver fill materials for the embankment. Suppliers paid all of their end-dump truck drivers market wages for delivering the fill.

In preparing their bid, Suppliers relied upon a 1992 department memorandum on "Delivery of Materials Under WAC 296-127-018," which explains which dumping activities trigger the requirements of the prevailing wage act. Administrative Record (AR) at 2372. Suppliers also insist they relied upon oral

representations made by the head of the prevailing wage section of the Department concerning which dumping activities trigger prevailing wage requirements. Subsection (4) of the department policy memorandum provides, in pertinent part: "Delivery of materials using a method in which the truck does not roll while the material is placed, or rolls only enough distance to allow the materials to exit the truck, does not include incorporation of the materials into the job site." Id.

Roughly one year after completion of the project and after Suppliers had been paid, the Department issued a notice of violation under RCW 39.12.020, part of Washington's prevailing wage act, along with a letter stating that prevailing wages were owed to the end-dump truck drivers.

The prevailing wage act requires payment of prevailing wages for work "upon all

End-dump trucks deliver and dump the fill load by stopping the truck and then raising the truck bed hydraulically, allowing the fill to exit by force of gravity into a pile below the bed. By contrast, belly-dump trucks dump and spread the fill materials by opening a gate in the bottom, or the "belly," of the trucks as they drive over the project. Because belly-dump truck drivers spread the fill as they deliver it, they clearly fall within the regulation at issue here and are paid prevailing wages.

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public works." RCW 39.12.020. Prevailing wages are not based upon competitive prices of the marketplace, but are instead calculated by the Department as equal to the (higher) wages paid in the largest city of the county -- here, Seattle. 39.12.010(2). In this case, the difference between "prevailing wage" and wages actually paid to the end-dump truck drivers was approximately \$500,000. Supplier appealed the Department's violation notice administratively.

The administrative law judge held that the end-dump truck drivers were not entitled to prevailing wages because their method of delivery did not amount to "incorporation" as that term is used in WAC 296-127-018. The administrative law judge found that the end-dump truck drivers' activity was carefully orchestrated by CTI's employees to minimize their time on the site, and "amounted to nothing more than a method of delivery." AR at 3335. The Department appealed to the Department Director (Director).

The Director reversed, holding that the end-dump truck drivers were entitled to prevailing wages. The Director concluded that the end-dump truck drivers participated in incorporation of the fill materials into the project when they deposited the fill material directly onto the project site, rather than to a stockpile, at the direction of (

employees who were blading and spreading the deposited fill materials. The Director also concluded that the drivers compacted fill materials by driving over the project site as they entered and exited. Each of these conclusions qualified the drivers for prevailing wages. Suppliers appealed to King County Superior Court.

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The superior court reversed the Director's conclusion that the drivers compacted the fill materials by merely driving over them.³ The superior court did, however, sustain the Director's determination that the end-dump truck drivers required prevailing wages because they participated in the incorporation of fill materials into the project by dumping the fill directly onto the embankment, "resulting in greater efficiencies and cost savings." Clerk's Papers (CP) at 2. Suppliers appealed the superior court's latter ruling to the Court of Appeals.

Division One of that court reversed, holding that delivering fill materials directly onto the work under construction does not amount to "participat[ion] in a incorporation" as that phrase is used in WAC 296-127-018(2)(a). See *Silverstreak, Inc. v. Dep't of Labor & Indus.*, 125 Wn. App. 202, 211-14, 104 P.3d 699, review granted, 155 Wn.2d 1001 (2005). It reasoned that "proper interpretation of the governing regulation requires that the participation of end-dump truck drivers in the incorporation of fill must be similar to one or more of the[] three limiting terms [in WAC 296-127-018(2)(a)]: spreading, leveling, or rolling. *Id.* at 213. The Court of Appeals noted there was no dispute that the end-dump truck drivers' activities consisted solely of dumping fill while remaining inside their trucks, they were on-site for approximately 5 to 15 minutes per delivery, and the fill was delivered directly onto the embankment.

³The Department did not cross-appeal this holding, and the question of whether the drivers participated in "compaction" of the delivered fill materials is not before this court. Unchallenged findings become verities on appeal. *State v. Rankin*, 151 Wn.2d 689, 709, 92 P.3d 202 (2004) (citing *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994)).

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These actions, it ruled, did not constitute participation in the incorporation of the materials by means of spreading, leveling, rolling, or any similar activity. *Id.* at 217 ("We conclude that the activities here do not exceed the 'mere delivery' limitation defined by case authority and plainly indicated by the text of the regulation at issue here.").

As a result of that holding, the Court of Appeals declined to reach Suppliers' claim that the Department should be estopped from requiring payment of the higher "prevailing wage" due to its 1992 policy memorandum and representations made by the wage division head prior to the Suppliers' bid. That court also denied Suppliers' request for attorney fees, finding the Department's actions reasonable and substantially justified. Suppliers were, however, awarded costs, to which the Department conceded they were entitled.

The Department sought review by this court. We granted its petition and also agreed to hear Suppliers' equitable estoppel claim and its request for fees on appeal.

Standard of Review

The Washington Administrative Procedure Act (WAPA), chapter 34.05 RCW, governs review of a final decision by the director of a department. RCW 34.05.510. A party will be afforded relief from an adverse administrative decision when the law is erroneously interpreted or applied by the agency or when the order is not supported by substantial evidence on the record. RCW 34.05.570(3)(d)-(e). In reviewing an administrative decision, this court sits in the same position as the Court of Appeals and

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the superior court, applying the WAPA standards directly to the record considered by the agency. *Tapper v. Employment Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993). An agency's findings of fact and its regulatory interpretations are granted deference. *Everett Concrete Prods., Inc. v. Dep't of Labor & Indus.*, 109 Wn.2d 819, 823, 748 P.2d 1112 (1988). However, questions of law are reviewed de novo. Whether the law was correctly applied to the facts as found by the agency is also a question of law that we review de novo. *Tapper*, 122 Wn.2d at 403.

Analysis

A. Prevailing Wages and WAC 296-127-018

The prevailing wage act provides that "[t]he hourly wages to be paid to laborers, workers, or mechanics, upon all public works . . . of the state or any . . . political subdivision . . . shall be not less than the prevailing rate of wage for an hour's work in the same trade or occupation in the locality within the state where such labor is performed." RCW 39.12.020.4 The prevailing wage act was designed to protect employees on public works projects and preserve local wages. *Heller v. McClure & Sons, Inc.*, 92 Wn. App. 333, 338, 963 P.2d 923 (1998) (citing *Everett Concrete*, 109

Wn.2d at 823). Thus, "it is the worker, not the contractor, who is the intended beneficiary of the" act. Id.

The Department has adopted regulations to further define the applicability of the

4Under RCW 39.12.010, the Department calculates prevailing wages as the rate paid in the largest city in the county.

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prevailing wage act to delivery of materials to public projects. These regulations provide, in pertinent part:

All workers . . . are subject to the provisions of [the prevailing wage act] when:

(a) They deliver . . . materials to a public works project site and perform any spreading, leveling, rolling, or otherwise participate in any incorporation of the materials into the project.

WAC 296-127-018(2)(a).

Workers are not subject to the provisions of [the act] when:

(b) . . . the employees' duties do not include spreading, leveling, rolling, or otherwise participating in the incorporation of the delivered materials into a public works project

WAC 296-127-018(3)(b).

1. Interpreting WAC 296-127-018

As in statutory interpretation, where a regulation is clear and unambiguous, words in a regulation are given their plain and ordinary meaning unless a contrary intent appears. In re Estate of Little, 106 Wn.2d 269, 283, 721 P.2d 950 (1986); Hewson Constr., Inc. v. Reintree Corp., 101 Wn.2d 819, 826, 685 P.2d 1062 (1984). The plain language of WAC 296-127-018 requires that two conditions be satisfied before prevailing wages must be paid. First, the drivers must deliver fill materials to a public works site. Second, the drivers must perform an additional task that involves incorporation of the materials into the project. The WAC gives examples of such "incorporation": "spreading, leveling, rolling, or otherwise participating in the incorporation of the delivered materials." WAC 296-127-018(3)(a). Mere delivery by

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drivers of fill materials to a public works project does not trigger the prevailing wage requirements. Superior Asphalt & Concrete Co. v. Dep't of Labor & Indus., 112 Wn. App. 291, 299-300, 49 P.3d 135 (2002) (Superior II); Superior Asphalt & Concrete Co. v. Dep't of Labor & Indus., 84 Wn. App. 401, 405-06, 410, 929 P.2d 1120 (1996)

(Superior I).

It is undisputed that the Third Runway Project is a public works project. In addition, both parties agree that a plain reading of WAC 296-127-018 requires payment of prevailing wages to delivery drivers who perform an additional task involving incorporation of the delivered fill into the project. Neither party claims that the end-dump truck drivers in this case engaged in spreading, leveling, or rolling. However, the Department and Suppliers disagree on how the phrase "or otherwise participate in any incorporation of the materials into the project" is to be read.

When we apply basic statutory construction principles, our primary task is to determine which interpretation best reflects the intent of the legislature in enacting the prevailing wage act and to give effect to that interpretation. *Scoccolo Constr., Inc. v. City of Renton*, 158 Wn.2d 506, 515, 145 P.3d 371 (2006) (citing *Nat'l Elec. Contractors Ass'n v. Riveland*, 138 Wn.2d 9, 19, 978 P.2d 481 (1999)); see also *Campbell v. Dep't of Soc. & Health Servs.*, 150 Wn.2d 881, 83 P.3d 999 (2004). As noted above, the prevailing wage act is remedial legislation designed to protect the employees of government contractors in this state from substandard earnings and to preserve local wage standards. See *Everett Concrete*, 109 Wn.2d at 823. As such, the act and

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regulations promulgated thereunder are to be liberally construed in favor of the beneficiary the act, the worker. See *id.* at 823-24; see also *Superior II*, 112 Wn. App. at 297. Exemptions from remedial legislation are to be narrowly construed in a manner that is consistent with the terms and spirit of that legislation. *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 301, 996 P.2d 582 (2000) (citing *Knecht v. City of Redwood City*, 683 F. Supp. 1307, 1310 (N.D. Cal. 1987)).

The Court of Appeals applied the canon of *eiusdem generis* in limiting the scope of prevailing wage coverage here. The rule of *eiusdem generis* requires that general terms appearing in a statute in connection with specific terms are to be given meaning and effect only to the extent that the general terms suggest similar items to those designated by the specific terms. *Davis v. Dep't of Licensing*, 137 Wn.2d 957, 970, 977 P.2d 554 (1999); *Dean v. McFarland*, 81 Wn.2d 215, 221, 500 P.2d 1244 (1972).

"[S]pecific terms modify or restrict the application of general terms, where both are used in sequence." *Davis*, 137 Wn.2d at 970 (quoting *McFarland*, 81 Wn.2d at 221); see also *In re Estate of Jones*, 152 Wn.2d 1, 11, 93 P.3d 147 (2004). Thus, the Court

of Appeals concluded that the specific terms "spreading," "leveling," and "rolling" limited the meaning of the phrase "or otherwise participate in any incorporation of the materials into the project" to only activities similar to spreading, leveling, or rolling.

However, the ejusdem generis rule is to be employed to support the "'legislative intent in the context of the whole statute and its general purpose.'" City of Seattle State, 136 Wn.2d 693, 701, 965 P.2d 619 (1998) (quoting Cherry v. Mun. of Metro.

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Seattle, 116 Wn.2d 794, 800, 808 P.2d 746 (1991)). The Court of Appeals' use of the rule in this case does not, in our view, advance the intent of the legislature in passing RCW 39.12.020. We say that because application of the canon here would serve to exclude a number of workers from the protection of the prevailing wage act. It would allow some dump truck drivers to be paid significantly lower wages, even though they participate to the same extent as others in the public works project, so long as that participation is not similar to spreading, leveling, or rolling. This works to undermine the legislature's intent to protect workers.⁵

Furthermore, application of the ejusdem generis rule in this case could produce exactly the sort of decrease in local wages that the prevailing wage act was designed to prevent. Since government contracts are awarded to the lowest bidder, allowing some drivers to be paid less for an equivalent amount of work provides a tempting opportunity for general contractors to cut costs in order to underbid competitors. See Heller, 92 Wn. App. at 338. The careful dictation of drivers' activities in this case, designed to use them as much as possible without having to pay prevailing wages, suggests that contractors might be willing to take advantage of such a loophole. This would force local dump truck drivers to accept lower wages or forgo working on government contracts. Thus, the Court of Appeals' use of the ejusdem generis rule

⁵The dissent points out that denying prevailing wages to drivers who are not actually working on a public works project would not be inconsistent with this legislative purpose. However, the drivers here were working on a public works project, as we conclude below.

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supports neither of the legislative purposes behind the prevailing wage act.

This inequitable result arises because the appeals court reads the word "otherwise" out of WAC 296-127-018. "Otherwise" is defined as "in another way;

differently; in another respect." Scribner-Bantam English Dictionary 641 (1977). The Court of Appeals' reading violates the principle that a reviewing court has a duty to give meaning to every word in a regulation. Accord *City of Seattle v. Williams*, 128 Wn.2d 341, 349, 908 P.2d 359 (1995) (analyzing the words of statutes).

To avoid such a construction, we have previously ruled *ejusdem generis* inapplicable to statutes where general words, such as "or otherwise," clearly "'were intended to include something more than specific descriptive words preceding.'" *McMurray v. Sec. Bank of Lynnwood*, 64 Wn.2d 708, 714, 393 P.2d 960 (1964) (construing the phrase "'through transfer of stock ownership, sale of assets' . . . 'or otherwise'" in a statute (quoting *Republic Inv. Co. v. Naches Hotel Co.*, 190 Wash. 176, 182, 67 P.2d 858 (1937))). WAC 296-127-018(2)(a) contains a phrase similar to the general words examined in *McMurray*: "or otherwise participat[ing]." Just as we recognized in *McMurray* that the words "or otherwise" expanded the reach of the statute to any other form of sale or conversion besides those enumerated, 64 Wn.2d at 714, the words "or otherwise participated" expand the coverage of the prevailing wage act to workers who participate in incorporating materials into the project in any way besides the three enumerated. The Court of Appeals erred in applying *ejusdem generis* to this case to find otherwise.

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The Court of Appeals also failed to accord the proper weight to the Department's interpretation of its own properly promulgated regulation. This court has made clear that we will give great deference to an agency's interpretation of its own properly promulgated regulations, "absent a compelling indication" that the agency's regulatory interpretation conflicts with legislative intent or is in excess of the agency's authority. *Marquis v. City of Spokane*, 130 Wn.2d 97, 111, 922 P.2d 43 (1996); see also *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 593, 90 P.3d 659 (2004); *Everett Concrete*, 109 Wn.2d at 823. We give this high level of deference to an agency's interpretation of its regulations because the agency has expertise and insight gained from administering the regulation that we, as the reviewing court, do not possess. *Port of Seattle*, 151 Wn.2d at 593; *Lockheed Shipbuilding Co. v. Dep't of Labor & Indus.*, 56 Wn. App. 421, 429-30, 783 P.2d 1119 (1989). Because the Department's interpretation of WAC 296-127-018 neither conflicts with legislative intent nor exceeds the scope of its authority, it should be given proper deference here.

The Department Director broadly interpreted the phrase "or otherwise participate in any incorporation of the materials" to encompass a worker whose participation is "'directly related to the prosecution of the work'" and who is "'necessary for the completion of that work.'" AR at 3347 (quoting Heller, 92 Wn. App. at 337). In order to determine whether the drivers in this case met that standard, the Department Director applied factors identified by the courts in Heller and Superior II as material to evaluating the scope of prevailing wage coverage.⁶

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The Court of Appeals rejected this interpretation because the factors used are not expressly laid out in the regulation. The Court of Appeals pointed out that "L&I could have written a more expansive regulation" that instructed courts to look at factors such as those in Heller and Superior II or that clearly required payment of prevailing wages in this situation. Silverstreak, 125 Wn. App. at 217. We hold that the Court of Appeals' conclusion in this regard is untenable. We do so because it represents a substitution of a reviewing court's judgment for that of the agency tasked with administering the prevailing wage act. Courts have adopted many tests over time that are not laid out in the applicable statute or regulations; instead, those tests are useful tools for determining whether the standard set out in the statute or regulation has been met in a given situation. The Department Director used factors previously identified by the courts in similar cases to help define the boundaries of the prevailing wage requirements under WAC 296-127-018. We defer to the Department's expertise.

With the foregoing in mind, we conclude that the Department's more expansive reading of the phrase "or otherwise participate in any incorporation of the materials into the project" should control our analysis in this case. Activities by the end-dump truck drivers not akin to spreading, rolling, and leveling can represent an additional task on the project and, thus, may constitute "participat[ion] in . . . incorporation of the materials" as that general phrase is used in WAC 296-127-018(2)(a).

⁶These factors include whether the impacted worker (i) improved the efficiency of the operation, (ii) was necessary to the completion of the public works project, and (iii) displaced workers who would otherwise be entitled to prevailing wages.

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2. Application of WAC 296-127-018

The record in this case contains substantial evidence for holding that the drivers'

activities amounted to more than "mere delivery." Under Superior II and Heller, the drivers' acts of delivering the fill directly onto the runway embankment, rather than to a central stockpile, when combined with the drivers' coordinated work with those who were blading and spreading the material as it was deposited along various points of the embankment, constitute participation in incorporation of the fill into the work site. Accordingly, we affirm the Department Director's determination that the end-dump truck drivers on the Third Runway Project participated in incorporation of the fill materials into the project.

B. Estoppel

Although we uphold the Department Director's broad reading of WAC 296-127-018 and the finding that the drivers participated in incorporation of the fill materials, the interests of justice prevent us from upholding the Department's order applying these determinations retroactively to Suppliers. We hold that all elements of equitable estoppel are met and that, therefore, the Department is estopped in this case from claims contrary to its policy memorandum position.

Equitable estoppel prevents a party from taking a position inconsistent with a previous one where inequitable consequences would result to a party who has justifiably and in good faith relied. *Kramarevcky v. Dep't of Soc. & Health Servs.*, 122 Wn.2d 738, 743, 863 P.2d 535 (1993); *Wilson v. Westinghouse Elec. Corp.*, 85 Wn.2d

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78, 81, 530 P.2d 298 (1975). When equitable estoppel is asserted against the government, the party asserting estoppel must establish five elements by clear, cogent, and convincing evidence: (1) a statement, admission, or act by the party to be estopped, which is inconsistent with its later claims, (2) the asserting party acted in reliance upon the statement or action, (3) injury would result to the asserting party if the other party were allowed to repudiate its prior statement or action, (4) estoppel is "necessary to prevent a manifest injustice," and (5) estoppel will not impede governmental functions. *Kramarevcky*, 122 Wn.2d at 743.

Central to respondents' estoppel claim is the Department's 1992 policy memorandum. Subsection (4) of the policy memorandum reads: "Delivery of materials using a method in which the truck does not roll while the material is placed, or rolls only enough distance to allow the materials to exit the truck, does not include incorporation

of the materials into the job site." AR at 2372. The record shows that before CTI and the Suppliers bid on the Third Runway Project, CTI's vice-president contacted the Department and spoke with the head of its prevailing wage section, Jim Christenson.⁷ Christenson sent CTI the department policy memorandum. Suppliers claim that Christenson also made verbal representations similar to those in the memorandum. CTI provided the policy memorandum to Suppliers before bids were submitted. It is not disputed by the Department that its new litigating position is contrary to the 1992 policy memorandum.

⁷Christenson does not recall speaking by phone with CTI's vice-president.

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The administrative law judge rejected the estoppel argument essentially for what he concluded was a lack of reasonable reliance. The administrative law judge noted that Suppliers did not contact the Department directly and concluded the contact between CTI and Christenson was "insufficient to create a duty of the Department" upon which Suppliers could rely regarding the Department's interpretations of "the activities occurring in connection with the Third Runway Project." AR at 3337.

We reject the administrative law judge's determination. Although the Department did not provide the memorandum directly to Suppliers, this is not dispositive. The 1992 department policy memorandum was a publicly available statement of department policy implementing WAC 296-127-018 and interpreting which activities the Department held covered by the terms "or otherwise participate in any incorporation of the materials." Significantly, the Department sent the policy memorandum to bidders on the Third Runway Project, a group that included Suppliers, expressly holding out the memorandum as its position on whether the method of delivery employed in this case would entitle the end-dump truck drivers to prevailing wages. Furthermore, the Department policy memorandum was adopted nearly contemporaneously with the promulgation of WAC 296-127-018 (and by the same Director), rendering it more authoritative. The Department never repudiated this memorandum until the claims that are the subject of the instant action were made. Thus, it was entirely reasonable for Suppliers to rely upon the department policy memorandum.

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The record amply demonstrates such reliance, made in good faith. Suppliers k hundreds of thousands of dollars less on their subcontracts than they would have had they believed higher "prevailing wages" were required. They accepted payment in the amount of their bid, before the Department attempted to redefine the coverage of WAC 296-127-018. The public would have paid more for this work if Suppliers had not believed the Department's interpretation of WAC 296-127-018 excluded their end-dump truck drivers from prevailing wage requirements.

In Washington, the "injury" element requires the party asserting equitable estoppel to show a detrimental change of position based upon the government's representation. See *State ex rel. Shannon v. Sponburgh*, 66 Wn.2d 135, 143-44, 401 P.2d 635 (1965). Here, Suppliers premised their bid upon the expectation they would be paying market wages to end-dump truck drivers for delivery of fill materials. They agreed to pay and did pay that amount. If the Department is allowed to change its interpretation of the rule, Suppliers will be penalized and required to pay the \$500,000 difference between the applicable prevailing wage and the market rate actually paid to end-dump truck drivers, seven years after the job's completion. This would result in the public, as owner of the airport, being subsidized to that extent at the expense of these small businesses.

A manifest injustice is involved. It is self-evidently unfair to permit the Department to adopt and publicly distribute an interpretive policy memorandum and later deny the memorandum's plain reading after contractors have relied upon it to their

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detriment.⁸ It is the public policy of our bidding system that public works contractors and subcontractors strive to submit the lowest bid, to the taxpayers' benefit. Requiring contractors to pay prevailing wages for work "upon public projects" theoretically puts all bidders on a level playing field, by preventing contractors from paying lower wages in order to underbid others. However, such a level playing field exists only if wage rates are certain and known to all bidders. Bidders must be able to rely on the plain meaning of regulations and Department interpretations, without fear that a state agency will later penalize them by adopting a different interpretation after they have performed and accepted payment.

If the Department were allowed to change its interpretation of a regulation after contractors had performed, it would have the effect of impairing the obligations of those

contracts -- an effect forbidden by article I, section 23 of our state constitution. See also U.S. Const. art I, § 10. It is presumed that any contract "is made in contemplation of existing law." *Shoreline Cmty. Coll. Dist. No. 7 v. Employment Sec. Dep't*, 120 Wn.2d 394, 410, 842 P.2d 938 (1992). The department policy memorandum, while not a statute or a regulation, nonetheless carried the imprimatur of Department policy determination. Requiring Suppliers to retroactively pay higher salaries based on a change of policy, while still receiving only the previously negotiated payment from the

8Even the trial court noted "an element of unfairness in [upholding the Department's position] due to the confusing memoranda and regulations promulgated by the Department." CP at 3. In its order upholding the Director's order, the superior court urged the Department to reconsider its memorandum and regulations in light of a contractor's reliance upon them.

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State through CTI, would deprive Suppliers of a large portion of the benefit of their bargain. This court cannot countenance such an inequitable result.

Allowing the Department to adopt new and changing interpretations would also result in finding WAC 296-127-018 unconstitutionally vague. Regulations are unconstitutionally vague if they allow an administrative agency to make arbitrary discretionary decisions. *Anderson v. City of Issaquah*, 70 Wn. App. 64, 77-78, 851 P.2d 744 (1993). A statute or regulation that forbids or requires the doing of an act in terms so vague that people of common sense must guess as to its meaning and differ as to its application violates the first essential of due process. *Id.* at 75 (citing *Connall v. General Constr. Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926)); see also *Haley v. Med. Disciplinary Bd.*, 117 Wn.2d 720, 739, 818 P.2d 1062 (1991). contractors and subcontractors cannot rely on the consistency of clear department interpretations in effect at the time they enter into a contract, they are left to guess at the meaning of regulations. Thus, the result the Department urges us to reach would be not only manifestly unjust, but unconstitutional.

Precluding the Department from applying its new policy position, on the other hand, does not impair any legitimate department functions. Suppliers simply seek to hold the Department to its previously expressed policy as plainly read and not subject them to post hoc policy.

In sum, we find all the elements of equitable estoppel met. This court will not sanction a government agency's arbitrary decision to change its interpretation of rules

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and enforce such change against small businesses that have performed under their contract. Relying on existing law and policy, Suppliers made good faith payment of market wages based upon competitive prices of the marketplace, rather than higher "prevailing" wages. The Department is equitably estopped from enforcing a new changed interpretation of regulations, which was not communicated to Suppliers until after all payment had changed hands. Although the Department may prospectively apply its new, broader interpretation of what wages must be paid for delivery of fill material under WAC 296-127-018, it may not apply this interpretation retroactively.

C. Attorney Fees (Equal Access to Justice Act)

Suppliers request attorney fees up to \$25,000 on appeal. Under the equal access to justice act (EAJA) "a court shall award a qualified party that prevails in a judicial review of an agency action fees and other expenses, including reasonable attorneys' fees, unless the court finds that the agency action was substantially justified or that circumstances make an award unjust." RCW 4.84.350(1). While we typically review an award of fees under the EAJA for abuse of discretion, *Moen v. Spokane City Police Dep't*, 110 Wn. App. 714, 717, 42 P.3d 456 (2002); *Alpine Lakes Prot. Soc'y v. Dep't of Natural Res.*, 102 Wn. App. 1, 19, 979 P.2d 929 (1999), here we have considered estoppel issues not previously reviewed. Therefore, to the extent our independent determination of fees and costs under EAJA is interrelated with our judicial review, the review must be de novo.

Although we have upheld the Department's broader interpretation of its

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regulation, we concluded that the Department is equitably estopped from enforcing its order in this case. Therefore, Suppliers are the prevailing party in this appeal. The question is whether the Department's actions here were "substantially justified" under RCW 4.84.350(1).9

The Court of Appeals declined to award fees, holding the Department's reliance on Superior II was "substantially justified." *Silverstreak*, 125 Wn. App. at 219.10 We agree.

"Substantially justified means justified to a degree that would satisfy a reasonable person." *Moen*, 110 Wn. App. at 721 (citing *Plum Creek Timber Co. v. Forest Practices Appeals Bd.*, 99 Wn. App. 579, 595, 993 P.2d 287 (2000)). It

"requires the State to show that its position has a reasonable basis in law and fact."

Cobra Roofing Serv., Inc. v. Dep't of Labor & Indus., 122 Wn. App. 402, 420, 97 P.3d 17 (2004) (quoting Constr. Indus. Training Council v. Wash. State Apprenticeship & Training Council, 96 Wn. App. 59, 977 P.2d 655 (1999) (citing Aponte v. Dep't of Soc. & Health Servs., 92 Wn. App. 604, 623, 965 P.2d 626 (1998))). The relevant factors in determining whether the Department was substantially justified are, therefore, strength of the factual and legal basis for the action, not the manner of the investigation and the underlying legal decisions.

Here, the Department's actions would satisfy a reasonable person, given that the Department (1) received a wage complaint while the Third Runway Project was still

9It is unchallenged that Suppliers' claim is within EAJA. See RCW 4.84.340(5).

10The superior court did not award fees because it determined the Department was the prevailing party.

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ongoing, (2) has a statutory duty to investigate all possible wage violations, (3) has a duty to construe the prevailing wage act liberally in favor of the workers, and (4) relied heavily on existing and favorable Washington case precedent. Thus, even though the Department changed its interpretation of the regulation, the Department was "substantially justified," as that term is used in RCW 4.84.350(1), in bringing and prosecuting this action. Accordingly, we deny Suppliers' request for attorney fees.

Conclusion

The remedial nature of the prevailing wage act, the liberal construction that the provisions of the act are to be given to protect workers, and the high level of deference accorded to the Department Director's interpretations and findings lead us to uphold the Director's determination that the drivers in this case "otherwise participated in the incorporation of the materials into the project." However, we hold that the Department is equitably estopped from retroactively enforcing the new interpretation of its regulations. Thus, we affirm, albeit on different grounds, the Court of Appeals' holding that the drivers are not entitled to prevailing wage. Finally, because the Department was substantially justified in its actions, we affirm the Court of Appeals' denial of attorney fees to Suppliers.

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AUTHOR:

Chief Justice Gerry L. Alexander

WE CONCUR:

Justice Tom Chambers

Justice Charles W. Johnson

Justice Bobbe J. Bridge

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