IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA, DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT, DIVISION OF LABOR STANDARDS AND SAFETY, OCCUPATIONAL SAFETY AND HEALTH SECTION, Appellant, vs. RPR, INC., d/b/a RAIN PROOF ROOFING, Appellee.	)	Case No. 3AN-20-07916CI OAH No. 19-00061-OSH

DECISION AND ORDER

In this administrative appeal, the State as Appellant argues that the agency misconstrued federal regulations by not adopting the State's preferred interpretation. At issue is an inspection exception to the general requirement of fall protection at construction sites. The State asserts that the Occupational Safety and Health Review Board ("Board") erred when it rejected a narrow interpretation of the exception in favor of a more contextual approach. Relying on a U.S. Supreme Court decision examining the unique history and structure of the federal regulatory scheme, the State asks this court to rule that the Board must defer to the State's interpretation as a matter of law. Alternatively, the State argues that the Board's interpretation is unreasonable. Appellee responds that the Board's decision had a reasonable basis in law and fact, and therefore this court should follow its normal practice of deferring to the administrative agency's interpretation. As explained below, this court **AFFIRMS** the Board's decision and order.

I. FACTS AND PROCEEDINGS

On October 9, 2019, two officials from the Alaska Department of Labor and Workforce Development, Division of Labor Standards and Safety, Occupational Safety

and Health Section ("Division") responded to an anonymous tip that Rain Proof Roofing ("RPR") employees had been seen working on roofs without fall protection. At the time, RPR was in the midst of a multiweek retiling project on a site with multiple structures and roofs of various sizes and slopes. Upon arriving at the worksite, Division officials encountered one employee on a roof without fall protection. No retiling work had visibly commenced on that section of roof, although other roofs throughout the construction site were in various stages of completion. The officials ordered the employee off the roof, and the employee jumped onto the raised bed of a nearby truck equipped with mobile scaffolding. Division officials then conducted a partial inspection of the worksite with RPR supervisors. The Division later cited RPR for violations of three Occupational Health and Safety Administration ("OSHA") regulations, including lack of fall protection.[1] RPR contested the citations.

The Board held a telephonic hearing on July 7-8, 2020. The Board took testimony from the RPR employees and supervisors involved, as well as the Division officials who performed the site visit. RPR argued that its employee was not engaged in construction work at the time but was conducting a preliminary inspection "to assess fall protection" before beginning work on that roof.[2] RPR thus asserted that any violations were excused by an inspection exception in the federal regulations.[3] The Division countered that the inspection exception is unavailable as it only applies at "the very initial and very final inspection."[4] The Division cited federal case law to support this narrow interpretation.

The Board issued its decision and order on August 6, 2020. The Board credited the testimony of RPR's employees, which established that the RPR employee was on the roof without fall protection for at most 30 seconds.[5] The testimony also established that no retiling work had yet begun on that roof, and that the employee "was on the roof

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[1] *See* 29 C.F.R. § 1926.501(b)(10). The Division also cited RPR for not having a ladder to the roof and for inadequate safety training. Exc. 93.
[2] Exc. 60.
[3] *See* 29 C.F.R. § 1926.500(a)(1).
[4] Exc. 71.
[5] Exc. 96.

solely to determine where to install anchor points for the requisite fall protection."[6] Because the lengthy roofing project "involved multiple roofs of varying heights and slopes on different sides of the building," the Board found it was reasonable for RPR to "evaluate each work space individually."[7] The Board rejected the Division's narrow interpretation as unsupported by the regulatory text, reasoning that it did not provide for "any obvious safety benefits."[8] The Board vacated all three citations against RPR.

The State appeals only the citation for lack of fall protection.

II. STANDARD OF REVIEW

The Standard of review for administrative appeals to the superior court has been explained by the Alaska Supreme Court:

> We recognize four standards to review administrative decisions. We apply a substantial evidence standard to questions of fact, a reasonable basis standard to questions of law involving agency expertise, a substitution of judgment standard to questions of law not involving agency expertise, and a reasonable and not arbitrary standard to an agency's interpretation of its own regulations. We will affirm an agency's factual findings if supported by substantial evidence, but what constitutes substantial evidence presents a question of law requiring de novo review.[9]

Further, the superior court, acting as an intermediate appellate court, "review[s] whether an agency's interpretation of its regulation is 'plainly erroneous and inconsistent with the regulation'—*i.e.*, whether it has a reasonable basis."[10] This is because courts presume "that the agency is best able to discern its intent in promulgating the regulation at issue."[11] Questions of law not involving agency expertise are reviewed de novo.[12]

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[6] Exc. 95.
[7] Exc. 97.
[8] Exc. 97. The Board did not discuss federal case law in its decision and order, although it did cite published federal interpretive documents. *See* Exc. 96-97.
[9] Gottstein v State, Dept. of Natural Resources, 223 P.3d 609, 620 (Alaska 2010);
[10] *Davis Wright Tremaine LLP v. State, Dep't of Admin.*, 324 P.3d 293, 301 (Alaska 2014) (internal quotation marks omitted) (quoting *Kuzmin v. State, Commercial Fisheries Entry Comm'n*, 223 P.3d 86, 89 (Alaska 2009)).
[11] *Kuzmin*, 223 P.3d at 89 (quoting *Rose v. Commercial Fisheries Entry Comm'n*, 647 P.2d 154, 161 (Alaska 1982)).
[12] *N. Slope Borough v. State*, 484 P.3d 106, 113 (Alaska 2021).

III. ANALYSIS

On appeal, the State raises two issues: whether the Board must defer to the Division's reasonable interpretation of federal OSHA regulations, and whether the Board's interpretation was reasonable. The State does not challenge the Board's factual findings or its application of the law to the facts.[13]

A. Applicable Law

The regulation at issue here is actually a federal regulation promulgated by the U.S. Secretary of Labor ("Secretary"). Under OSHA guidelines, employers are generally required provide fall protection systems for construction employees.[14] But the regulations set out a narrow exception to this general rule: "The provisions of this subpart do not apply when employees are making an inspection, investigation, or assessment of workplace conditions prior to the actual start of construction work or after all construction work has been completed."[15] The Alaska Department of Labor and Workforce Development ("Department") subsequently adopted these federal regulations as the standard for Alaska.[16]

The preamble for the OSHA regulations also supplies relevant guidance for interpreting the inspection exemption. As both parties rely heavily on different portions of the preamble, this court will reproduce it in full for reference:

> Paragraph (a)(1) [of 29 C.F.R. § 1926.500] . . . also states that the provisions of subpart M [requiring fall protection] do not apply when the employer establishes that employees are only inspecting, investigating, or assessing workplace conditions prior to the actual start of the work or after work has been completed. OSHA has set this exception because employees engaged in inspecting, investigating and assessing workplace conditions before the actual work begins or after work has been completed are exposed to fall hazards for very short durations, if at all, since they most likely would be able to accomplish their work without going near the

[13] Although the State belatedly attempts to raise factual disputes and other claims in its reply brief, arguments raised for the first time in a reply brief are considered waived. *See Barnett v. Barnett*, 238 P.3d 594, 603 (Alaska 2010).
[14] *See* 29 C.F.R. § 1926.501(a).
[15] 29 C.F.R. § 1926.500(a)(1).
[16] 8 AAC 61.1010(c).

danger zone. Also, the Agency's experience is that such individuals who are not continually or routinely exposed to fall hazards tend to be very focused on their footing, ever alert and aware of the hazards associated with falling. These practical considerations would make it unreasonable, the Agency believes, to require the installation of fall protection systems either prior to the start of construction work or after such work has been completed. Such requirements would impose an unreasonable burden on employers without demonstrable benefits.

OSHA notes that the operations covered by paragraph (a)(1) are normally conducted in good weather, that the nature of such work normally exposes the employee to the fall hazard only for a short time, if at all, and that requiring the installation of fall protection systems under such circumstances would expose the employee who installs those systems to falling hazards for a longer time than the person performing an inspection or similar work. In addition, OSHA anticipates that employees who inspect, investigate or assess workplace conditions will be more aware of their proximity to an unprotected edge than, for example, a roofer who is moving backwards while operating a felt laying machine, or a plumber whose attention is on overhead pipe and not on the floor edge.

Some commenters expressed concern regarding the proposed exception. In particular, one commenter said "the exception . . . will create havoc for enforcement agencies." The commenter further stated that "superintendents, foremen, and other company officials will never have to be protected during the entire job, because they will say that they are only inspecting." Another commenter suggested that OSHA grant only a conditional exception. It would then allow the exception only where exposures to falling are minimal at most or nonexistent. In addition, only experienced, responsible persons trained in the hazards associated with inspections, investigations, etc., would be allowed to work without fall protection. One commenter disagreed with the proposed exclusion, saying:

These employees are exposed to unique hazards since their functions are to determine if protection systems are adequate, deteriorated, etc. To allow such employees to work unprotected will promote the not wearing or using such protection by others.

Based on the comments received, OSHA recognizes that proposed § 1926.500(a)(1) requires clarification. Therefore, OSHA has decided to reword the provision to make it clear that the exclusion only applies when the employer establishes that employees are inspecting, investigating, or assessing workplace conditions prior to the actual start of work or after the work has been completed. It was OSHA's intent when it proposed this provision that the exclusion would only apply at the two times stated above, not during the period when construction work is being performed.

> As explained in the preamble to the proposed rule, the exception would apply where an employee goes onto a roof in need of repair to inspect the roof and to estimate what work is needed. During such an inspection, guardrails, body belts, body harnesses, safety nets, or other safety systems would not be required. However, if inspections are made while construction operations are underway, all employees who are exposed to fall hazards while performing these inspections must be protected as required by subpart M. The intent of the provision is also to recognize that after all work has been completed, and workers have left the area, there may be a need for building inspectors, owners, etc. to inspect the work. OSHA recognizes that in these situations, all fall protection equipment, such as perimeter guardrail systems, may have been removed. OSHA is not requiring the installation of the systems for a second time for inspectors, because the Agency recognizes it would be unreasonably burdensome to require the reinstallation of fall protection equipment after all the work has been completed.[17]

OSHA also offered additional clarification of the inspection exemption through official letters. First, OSHA explained that the amount of time spent on any inspection is less important than the context:

> [T]he Agency found in the rulemaking that the short duration of hazard exposure was part of the basis for creating the exception for the inspection-only activity. But another basis for the exception was the concept that in inspections before and after the work is done, there is no on-going construction work to divert the inspector's attention from the fall hazard. Once there is construction activity, the risk goes up by virtue of that diversion of attention.[18]

The inspection exception is therefore inapplicable "if the inspection activity takes place at the same time the construction work is on-going."[19]

In a second letter, OSHA paraphrased the regulation as "allow[ing] inspectors to be exempted from the fall protection requirements of Subpart M when performing an inspection before or after the performance of work."[20] OSHA explained that the test for this exemption requires a consideration of multiple factors, including total "exposure

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[17] Safety Standards for Fall Protection in the Construction Industry, Final Rule Preamble, 59 FR 40672 (Aug. 9, 1994) (citations omitted).

[18] U.S. Dep't of Labor, OSHA, Standard Interpretations, Letter to Randy Stahl (Mar. 12, 2004), https://www.osha.gov/laws-regs/standardinterpretations/2004-03-12.

[19] *Id.*

[20] U.S. Dep't of Labor, OSHA, Standard Interpretations, Letter #20091112-9340, https://www.osha.gov/laws-regs/standardinterpretations/2010-03-02-1.

time" without fall protection and "the necessity for the inspector to go near the danger zone."[21] Focusing on the purpose of the exemption, OSHA reasoned that "work activities during which tools are used in a potentially distracting manner in close proximity to fall hazards would not fall under the exemption."[22]

The parties also rely on a 2018 federal case interpreting the inspection exemption. In the OSH Review Commission case of *Ovation Plumbing, Inc.*, two employees crossed through a guardrail to take measurements for water heater installation.[23] The employees were without fall protection for at least 45 seconds while various construction work was ongoing throughout the building.[24] The employer argued that the inspection exemption applied, but the Administrative Law Judge ("ALJ") rejected that argument, noting that the agency consistently interpreted the exemption as applying only when construction work was not ongoing.[25] The ALJ contrasted the language of 29 C.F.R. § 1926.500(a)(1) with the prior regulatory exemption, which applied "where employees are on the roof only to inspect, investigate, or estimate roof level conditions," regardless of the timing.[26] Relying on the plain language of the regulation and OSHA's preamble, the ALJ reasoned:

> There are only two times when an employer is excused from complying with subpart M: (1) inspections occurring "prior to the *actual start* of construction work", and (2) inspections occurring "after *all* construction work has been completed." The time-related restrictions on the exception are framed in absolute terms, not as a series of interim "starts" and "finishes" that may occur during the course of a construction project.[27]

The ALJ also reasoned that the preamble's language specifically referring to "the two times" when the exemption applies as "further buttress[ing] [its] conclusion the limitation is absolute."[28] The ALJ thus concluded that the exemption was unavailable "because

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[21] *Id.*
[22] *Id.*
[23] 2018 O.S.H. Dec. (CCH) ¶ 33665, 2018 WL 2407438, at *1 (CMPAU Apr. 17, 2018).
[24] *Id.* at *2-3.
[25] *Id.* at *6.
[26] *Id.* at *7 (quoting former 29 C.F.R. § 1926.500(g)(2) (amended Feb. 6, 1995)).
[27] *Id.* at *8 (emphasis in original).
[28] *Id.* at *9.

the inspection did not occur prior to the actual start of construction."[29] But the ALJ additionally noted that, regardless of timing, the activity involved did not qualify:

> Nor does this situation fit into the underlying rationale for the exception in the first place—the exposure was entirely unnecessary. Unlike a roof repair, wherein an on-site assessment is necessary to ascertain required materials and anchor point locations at the outset, fall protection was already installed on the balcony, just incorrectly for the purposes of Respondent's necessary work on the balcony. In other words, we are not talking about employees that did not use fall protection because it was more hazardous or unduly burdensome to install; rather, we are talking about employees circumventing existing fall protection because it was incorrectly placed and inconvenient. It was not more hazardous nor unduly burdensome to properly re-install the guardrails because many construction projects were still scheduled to occur on or about the balcony. The installation of the regulator vent, the water heater, and the door to the balcony would all eventually require fall protection.[30]

Thus, the employer failed to establish that it was entitled to the inspection exemption.[31]

B. Agency Deference in Split-Enforcement Regimes

First, the State argues that the Board erred when it failed to defer to the Division when interpreting a federal regulation. The State relies on *Martin v. Occupational Safety & Health Review Commission*.[32] In that case, the U.S. Supreme Court reviewed the structure and history of Occupational Safety and Health Act of 1970 ("OSH Act") to determine whose interpretation is owed deference when the Secretary and the OSH Review Commission supply conflicting interpretations.[33] Based on the unusual "split enforcement" scheme, the Court concluded "that the power to render authoritative interpretations of OSH Act regulations is a "necessary adjunct" of the Secretary's powers."[34] Legislative history also supported this conclusion.[35] But the Court explicitly

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[29] *Id.*
[30] *Id.*
[31] *Id.* at *10.
[32] 499 U.S. 144 (1991).
[33] *Id.* at 146-48.
[34] *Id.* at 151-52.
[35] *Id.* at 153-54.

narrowed its holding as limited solely to the OSH Act and inapplicable to "other regulatory schemes that conform to the split-enforcement structure."[36]

The State observes that Alaska adopted its own version of enforcing workplace safety standards, modeled on the OSH Act, and employs a similar split-enforcement structure.[37] The State thus asserts that the same conclusion is mandated here, and that this court should adopt the holding of *Martin*.[38] RPR responds that *Martin* is inapposite, because Alaska's safety regime predates the OSH Act, and the legislature sought to update and expand Alaska's existing laws rather than import the OSH Act wholesale.[39] But even assuming *Martin* applied, RPR argues that the Division's interpretation is unreasonable and thus should be afforded no deference.[40] In reply, the State urges this court to resolve the *Martin* issue to avoid future disputes.[41]

Although there are many similarities between the Alaska and federal regimes, the State glosses over the import of key differences. For instance, the Secretary has the sole power to promulgate standards under the federal OSH Act.[42] But under Alaska law, the power to adopt regulations is vested in the Department *as a whole*.[43] This difference alone is enough to distinguish *Martin*, particularly where *Martin* explicitly limited its holding to the federal OSH Act. Moreover, the regulation at issue here is a federal one—the entire premise of *Martin* is that the Secretary is in the best position to definitively interpret regulations that the Secretary promulgated. This logic may extend to situations where the Department promulgates Alaska-specific standards, but that is not what occurred here. Finally, the State offers no legislative history to support its arguments, nor does the State direct this court to any other jurisdiction that has "adopted" *Martin*.

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[36] *Id.* at 157-58.
[37] Appellant's Brief at 10-13; *see generally* AS 18.60.010-105.
[38] Appellant's Brief at 17.
[39] Appellee's Brief at 14.
[40] Appellee's Brief at 21-24.
[41] Appellant's Reply Brief at 20.
[42] 29 U.S.C. § 655(a)-(b).
[43] AS 18.60.020(a) ("The Department of Labor and Workforce Development shall issue the orders and adopt the regulations necessary to carry out the purposes of [this chapter]."). The Board is also part of the Department. *See* AS 18.60.057(a). Although the State's briefing attempts to skew this distinction by referring to the Division as the "Commissioner," this court observes that these terms all have separate definitions under the relevant statutes and regulations. *See* AS 18.60.105; 8 AAC 61.1960.

While cognizant of the State's desire for resolution of this peculiar question of law, this court is hesitant to wade into this sensitive intra-agency dispute. More importantly, on this limited briefing, the State has not convinced this court that it should defer to the Division's interpretation over the Board's—especially where neither is longstanding or published outside of the parties' litigating positions below.[44] Instead, this court will follow established case law and defer to the *agency's* reasonable interpretation of its own regulations as evidenced in the Board's decision. Before considering the Division's preferred interpretation, this court must first determine whether the Board's interpretation is "plainly erroneous and inconsistent with the regulation."

C. Whether The Board's Interpretation Is Reasonable

The State argues that, even without adopting *Martin*, this court should not defer to the Board's interpretation because it is unreasonable. An agency's interpretation of its own regulation is afforded heightened deference under the reasonable basis test, particularly when the interpretation is "longstanding and continuous."[45] This means that courts "will defer to the agency unless its 'interpretation is plainly erroneous and inconsistent with the regulation.'"[46] In practice, courts applying the reasonable basis test will only find an interpretation "unreasonable" if it effectively rewrites the regulation.[47] Thus, where an agency's interpretation ignores the plain text of a regulation by adding or subtracting words, courts will afford no deference.[48]

The plain text of 29 C.F.R. § 1926.500(a)(1) limits the inspection exemption by timing: the exemption is available only "prior to the *actual start* of construction work or

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[44] *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2417 (2019) ("[A] court should decline to defer to a merely 'convenient litigating position' or 'post hoc rationalizatio[n] advanced' to 'defend past agency action against attack.'"). Indeed, federal case law on the degree of deference afforded to an agency's interpretations of its own regulations has changed dramatically in the 30 years since *Martin* was decided.
[45] *Davis Wright Tremaine LLP v. State, Dep't of Admin.*, 324 P.3d 293, 299 (Alaska 2014) (quoting *Marathon Oil Co. v. State, Dep't of Natural Res.*, 254 P.3d 1078, 1082 (Alaska 2011)).
[46] *Id.* (quoting *Kuzmin v. State, Commercial Fisheries Entry Comm'n*, 223 P.3d 86, 89 (Alaska 2009)).
[47] *See* 1A SUTHERLAND STATUTORY CONSTRUCTION § 31:6 (7th ed.) ("A statute or administrative rule may not, under the guise of 'interpretation,' be modified, revised, amended or rewritten.").
[48] *See, e.g., Bd. of Trade, Inc. v. State, Dep't of Lab., Wage & Hour Admin.*, 968 P.2d 86, 92 (Alaska 1998) (holding that interpretation was inconsistent with the language of the regulation, where the hearing officer interpreted "adjacent or nearby" as imposing "no geographical restriction with regard to distance").

after *all* construction work has been completed." The language is unambiguous that while construction work is ongoing, the exemption is unavailable. But precisely when the exemption ceases to be available is less obvious. The regulation could just as easily have said "prior to the start of *all* construction work," but the use of different modifying terms connotes an intent to treat these exemptions differently.[49] What is meant by "actual start of construction work" is thus ambiguous as it is susceptible to different interpretations.

The Board's interpretation, based on the facts of this case, was that in a lengthy roofing project with different workspaces, each roof may be evaluated separately in progression, so long as no actual construction work has begun at that workspace.[50] In contrast, the Division's interpretation would require that any inspection occur "before work commences *on an entire project*."[51] Relying on OSHA's letters clarifying the inspection exemption, the Board noted that OSHA has rejected using duration of the inspection as the sole factor.[52] Instead, the Board focused on OSHA guidance that one reason for the exemption "is that there is a lower risk of hazards in part because no work tools or materials are in the workspace."[53] The Board thus rejected the Division's strict interpretation as providing no "obvious safety benefits" as opposed to allowing "piecemeal evaluations."[54]

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[49] *See Alaska Spine Ctr., LLC v. Mat-Su Valley Med. Ctr., LLC*, 440 P.3d 176, 182 (Alaska 2019) ("[W]e assume the legislature meant to differentiate between two concepts when it used two different terms."). The State's argument that the Board's interpretation disregards the "absolute terms" in the regulation's text is thus unconvincing. Appellant's Brief at 30. Rather, it is the Division's interpretation that inserts words into the text.

[50] *See* Exc. 96-97.

[51] Exc. 97 (emphasis in original).

[52] Exc. 96. The Board also credited testimony that the workers were only on the roof momentarily and for the purposes of evaluating where to place anchor points for the fall protection. Exc. 96. The State does not challenge the Board's factual findings.

[53] Exc. 97. Again, the Board credited the workers' testimony, finding that no actual construction work was occurring at the time of the inspection. Exc. 97.

[54] Exc. 97. The State argues that this interpretation violates the rule that exceptions to remedial legislation should be construed narrowly. Appellant's Brief at 30 (*citing Whitesides v. U-Haul Co. of Alaska*, 16 P.3d 729, 732 (Alaska 2001)). But construing exemptions narrowly does not mean eliminating them altogether. This court does not view the Board's context-specific interpretation as violating any such rule.

As RPR argues in its briefing, this interpretation is also supported by the OSHA regulations' preamble.[55] The preamble reasons "that employees who inspect, investigate or assess workplace conditions will be more aware of their proximity to an unprotected edge" as opposed to employees engaged in actual construction work.[56] The preamble clarifies that the exemption is unavailable "during the period when construction work is being performed" or "while construction operations are underway."[57] This is because those conducting inspections "are not continually or routinely exposed to fall hazards" and thus "tend to be very focused on their footing, ever alert and aware of the hazards associated with falling."[58] The exemption is therefore grounded on "practical considerations," acknowledging that requiring fall protection at all times may create "an unreasonable burden on employers without demonstrable benefits."[59] These are the same factors that the Board considered when interpreting the inspection exemption here. The Board's view is thus consistent with the text of the regulation and with OSHA guidance.

But the State argues that the Board's interpretation is unreasonable, primarily because it is unsupported by subsequent case law.[60] The State relies on one particular sentence from *Ovation Plumbing* in support: "The time-related restrictions on the exception are framed in absolute terms, not as a series of interim 'starts' and 'finishes' that may occur during the course of a construction project."[61] The State then points to earlier language in the opinion indicating that "ALJs have consistently applied" this interpretation.[62] But this argument is misleading, as what the ALJ referred to as a

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[55] Appellee's Brief at 15-17.
[56] Safety Standards for Fall Protection in the Construction Industry, Final Rule Preamble, 59 FR 40672 (Aug. 9, 1994).
[57] *Id.*
[58] *Id.* This point is echoed in OSHA's second letter, which tied the inspection exemption to the concurrent use of construction tools "in a potentially distracting manner." U.S. Dep't of Labor, OSHA, Standard Interpretations, Letter #20091112-9340, https://www.osha.gov/laws-regs/standardinterpretations/2010-03-02-1.
[59] Safety Standards for Fall Protection in the Construction Industry, Final Rule Preamble, 59 FR 40672 (Aug. 9, 1994). In contrast, the State focuses on the preamble's statement "that the exclusion would only apply at the two times stated above," *i.e.*, before and after construction work. Appellant's Brief at 31. But the State misreads this language. That there are only "two times" when the exemption is available does not mean that for an entire construction project, inspections without fall protection can only occur *twice*.
[60] Appellant's Brief at 33-34.
[61] *Ovation Plumbing, Inc.*, 2018 O.S.H. Dec. (CCH) ¶ 33665, at *8 (CMPAU Apr. 17, 2018).
[62] *Id.* *6

longstanding interpretation was that the inspection exception does not apply "while construction work [is] ongoing."[63] Indeed, almost every case cited by the ALJ addressed the latter time restriction, *i.e.*, whether "all construction work has been completed."[64] Moreover, as RPR points out, the language the State relies on is dicta, as the ALJ in *Ovation Plumbing* observed that the factual scenario did not "fit into the underlying rationale for the exception in the first place."[65] The ALJ noted that the workers were "in the process of installing regulator vents on the first floor" of the building, and that any "measurements were simply a part of the ongoing project to install regulator vents throughout the building."[66] In other words, the State identifies no cases—*Ovation Plumbing* included—that have actually adopted or applied the Division's preferred narrow interpretation.

The State also negatively compares the Board's interpretation with an earlier case, *Seyforth Roofing Co.*, which predates the exception's timing restrictions.[67] But this is a strawman argument—the Board never relied on that case, nor does RPR cite it on appeal. And it was actually the State who first brought up that case.[68] Moreover, whether an interpretation is "unreasonable" is not the same as whether it is "unwise."

As explained above, the Board's interpretation here is reasonable and this court affords it deference. Accordingly, the Board committed no error. Although this court does not actually reach the question of whether the Division's competing interpretation is also reasonable, this court will merely observe that if the State disagrees with the

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[63] *See id.*

[64] *See Kirtley Roofing & Sheet Metal, LLC, & Its Successors*, 25 O.S.H. Cas. (BNA) ¶ 2250, at *7 (O.S.H.R.C.A.L.J. Apr. 5, 2015) ("The application of the sealant was 'the roofing work' and clearly was not part of an 'inspection, investigation, or assessment of workplace conditions . . . after all construction work has been completed.'"); *R&S Roofing, LLC*, 24 O.S.H. Cas. (BNA) ¶ 2151, at *12 (O.S.H.R.C.A.L.J. Jan. 28, 2014) (finding no exception available when workers "did not finish the roofing job on the day of inspection, but rather had to return on another day to do so"); *Mod. Bldg. Sols., LLC*, 23 O.S.H. Cas. (BNA) ¶ 1787, at *6 (O.S.H.R.C.A.L.J. Apr. 25, 2011) ("The worker's additional inspecting activities were not performed after construction work was complete."); *cf. Cleveland Constr., Inc.*, 18 O.S.H. Cas. (BNA) ¶ 1648, at *7 (O.S.H.R.C.A.L.J. Nov. 12, 1998) (finding exception inapplicable when not first raised as affirmative defense).

[65] *Ovation Plumbing*, 2018 O.S.H. Dec. (CCH) ¶ 33665, at *9.

[66] *Id.* As RPR explains, this observation is also pertinent because the entire project in *Ovation Plumbing* involved 12 buildings, and yet the ALJ emphasized ongoing activities at this particular building, rather than specifying the beginning of the whole project. Appellee's Brief at 20.

[67] *Seyforth Roofing Co.*, 16 O.S.H. Cas. (BNA) ¶ 2031 (O.S.H.R.C. Sept. 26, 1994).

[68] *See* Exc. 74.

Board's decisions in the future, the Department may promulgate a new, unambiguous regulation. The Division may also preemptively publish its regulatory interpretations *before* asserting them as litigating positions. Even without adopting *Martin*, the Division's enforcement power is not usurped by deferring to the Board's reasonable interpretation of ambiguous federal regulations.

IV. CONCLUSION

For the reasons stated above, this court **AFFIRMS** the Board's August 6, 2020 Decision and Order vacating the citations against RPR.

IT IS SO ORDERED.

DATED at Anchorage, Alaska this 20th day of March, 2023.

Thomas Matthews
Superior Court Judge

I certify that on 3/20/23 (JW) a copy of the following was mailed/faxed/hand-delivered to each of the following at their addresses of record.
Brasington
Robinson
Gardner