Construction Law

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CHAIR'S REPORT

By Bart W. Reed – Stoel Rives LLP

On Nov. 16, 2023, members of the WSBA Construction Section met up on a chilly evening and toured the new Seattle Ferry Terminal at Colman Dock in downtown Seattle. Representatives from the Washington State Department of Transportation (WSDOT) and Washington State Ferries (WSF) kindly offered an informative and entertaining tour and "behind-the-scenes" look at the project, providing some interesting details about this project that recently completed—to the delight of ferry passengers (including me).

Along with a tour of the newly completed facility and surrounding streetscape, WSDOT and WSF representatives shared some background and data regarding the project:

Background

- Construction began in 2017 and continued into 2023
- $489 million in funding from state and federal resources
- More than 10,000,000 riders annually
- Key partners included the U.S. Department of Transportation (USDOT), Federal Transit Administration (FTA), King County, the City of Seattle, ferry riders, and waterfront partners and community groups

Terminal Building

- 20,026 square feet/ 1,900 person occupancy
- Lighter, brighter interior with 4,230 square feet of windows
- Four restrooms with 24 units

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Construction Law Section
2023 - 2024

EXECUTIVE COMMITTEE

COMMITTEE MEMBERS AT-LARGE

Washington State Bar Association
CONSTRUCTION LAW SECTION
1325 Fourth Avenue, Suite 600 | Seattle, WA 98101-2539

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Chair's Report

- 362 seats (3x more than old building)
- 24 turnstiles (12 per route and six for ADA passengers)
- 1,400 cubic yards of concrete poured for the new terminal building

Trestle

- 7,500 tons of creosote-treated wood removed from the water
- 611 vehicle holding spaces (185 more than old terminal)
- Installed 500 new steel support piles
- Placed 772 pre-cast concrete panels
- 12,000 cubic yards of concrete for trestle holding lanes

Entry Building

- 10,000 square feet of public space (three staircases/ two elevators from Alaskan Way)
- ADA features (tactile pavers, turnstiles, drop-off area (when Alaskan Way opens))
- Three restrooms facing holding lanes

Pedestrian Connector

- 20,500 square feet of public space
- 10 benches to enjoy the view
- Three ticket booths
- Two automatic ticket kiosks
- Seven digital displays with route information

Overall

- Four elevators (two on Alaskan Way and two at passenger only ferry)
- 10 food/retail spaces (opening soon)
- Two tribal-named plazas (from Muckleshoot and Suquamish Tribes)

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Chair's Report

After the tour of the new ferry terminal, Section members and attendees enjoyed a social gathering and delicious dinner adjacent to the project at Ivar's Acres of Clams restaurant. We appreciate all of those who attended the event and especially those who contributed to its success. A special thanks to and recognition of the engineering consulting firm, ESi (www.engsys.com), for their generous sponsorship of the event. It was a lovely evening on the Seattle waterfront and we're sincerely appreciative of the support from WSDOT, WSF, Ivar's, and ESi. ■

The WSBA Construction Law Section Executive Committee generaly conducts meetings on the second Wednesday of each month.

CONSTRUCTION LAW SECTION EXECUTIVE COMMITTEE MEETING

Date: May 8, 2024

Time: 12:00 PM - 1:00 PM

Location:
Video Conference Only

USE THIS LINK or **CALL IN**

Call-In: 253-215-8782
or 669-444-9171

Please contact committee members for more details on this and upcoming meetings.

Velazquez Framing, LLC v. Cascadia Homes, Inc.
540 P.3d 1170 (2024)

By Seth Millstein, Pillar Law PLLC

On Jan. 11, 2024, the Washington Supreme Court clarified an important issue relating to subcontractor liens in the matter of *Velazquez Framing, LLC v. Cascadia Homes, Inc.*, 101591-7 (Wash. Jan 11, 2024). In this newsletter, we have been following the case closely. Last year, we wrote about the Court of Appeals decision, in which Division II held that, absent a prelien notice, subcontractors could *not* record a claim of lien even for the labor portion of their work. This was a surprising decision to most construction attorneys, as labor has typically been treated as lienable, essentially due to constructive notice by the owner and their agents.

In the recent decision, the Washington Supreme Court disagreed with Division II's reasoning. Our highest court clarified that labor, even without a prelien notice under RCW 60.04.031, *is lienable*. The Supreme Court's ruling was simple, even after somewhat circuitous oral argument before the court on Oct. 10, 2023.

In its *en banc* opinion, our Supreme Court held that there are two reasons a second-tier subcontractor such as Velazquez Framing could lien for its labor. First, the prelien notice itself does not say such a notice is required for labor. The court wrote: "Our analysis begins with the statutory language and frequently ends there when its meaning is plain." *Id.* at 2; *see also* RCW 60.04.031(1). The court next stated: "Unlike the sample prelien *notice* form, the lien *claim* form includes language concerning labor [in RCW 60.04.091] which is 'noticeably absent in the prelien notice requirement statute.'" *Id.* at 506. The court then examined the legislative history and overall guiding principles behind Ch. 60.4 RCW, as well as the balance between protecting those who improve properties and protecting owners who may be forced to pay twice for "duplicative liens." *Id.* at 1. Specifically, the court looked to the 1992 revisions to Ch. 60.04 RCW and the legislative intent to protect those who supply labor, which Division II's ruling would have stripped. *Id.* at 8.

The final issue addressed by the court was what to do about segregating Velazquez's labor from its materials (*e.g.*, nails and a generator). The court remanded to the trial court to determine the dollar value of Velazquez's labor stating: "Although Velazquez Framing will not be able to lien for its material and equipment, its labor lien is still enforceable." *Id.* at 8. The only time a contractor such as Velazquez must provide a notice is when it would be otherwise "impossible to fix or award any amount for which [the subcontractor could] maintain labor liens." *Id.* citing to *Hallett v. Phillips*, 73 Wash. 457, 464 (1913).

Valezquez Framing is an important case. It finally clarifies what most attorneys in this field of practice have long assumed. For practitioners, it highlights two rules. First, it is *always* better for all parties (other than the prime contractor) to send the prelien notice. Second, if your client does not do so, and it hopes to lien for its labor, in order to avoid protracted litigation, it should be clarified on the face of the lien that the lien is for labor. ■

King County v. Walsh Construction Company II, LLC, *27 Wn. App. 2d 156, 532 P.3d 182 (2023)*

By: Margarita Kutsin, Ahlers, Cressman & Sleight PLLC

King County v. Walsh Construction Company, a published decision from Division I of the Court of Appeals, concerned the tension between the *Spearin* doctrine and contract provisions pertaining to the contractor's obligation to perform repairs and corrections to its work at no cost if "material, equipment, workmanship, or Work…failed to perform satisfactorily." The Superior Court ruled on summary judgment that contract provisions supplanted the implied warranty of design adequacy, concluding that Walsh guaranteed not only that its work would conform to the contract but also that the completed work would perform satisfactorily regardless of design adequacy. On discretionary review in an interlocutory appeal, Division I relied on contract interpretation principles to reach the opposite conclusion.

Derived from the seminal U.S. Supreme Court construction case *United States v. Spearin*, 248 U.S. 132, 54 Ct.Cl. 187, 39 S. Ct. 59, 63 L.Ed. 166 (1918), the *Spearin* doctrine provides that while "'a contractor is required to build in accordance with plans and specifications furnished by the owner, the [owner] impliedly guarantees that the plans are workable and sufficient.'" *Id.* at 160 (internal quotation marks omitted) (quoting *Lake Hills Investments, LLC v. Rushforth Construction Co.*, Inc. 198 Wn.2d 209, 218, 494 P.3d 410 (2021)). This doctrine has been adopted in Washington and repeatedly reaffirmed, most recently in the *Lake Hills* decision from the Washington Supreme Court.

In April 2014, Walsh Construction Company (Walsh) was awarded a contract by King County to construct an underground conveyance pipeline. Work began the following September, and in January 2016, the county issued a Certificate of Substantial Completion. Several months later, the county discovered that the pipeline had fractured, and soil and debris was infiltrating the pipeline.

> **…the Spearin doctrine provides that while "a contractor is required to build in accordance with plans and specifications furnished by the owner, the [owner] impliedly guarantees that the plans are workable and sufficient."**

The county notified Walsh that Walsh was obligated to develop a corrective action plan and to perform repairs to the non-functioning pipeline. Walsh disagreed with the county, asserting its work was conforming and that the fracture was caused by a design error. Despite their disagreement, to expedite repairs, the county advanced funds to Walsh, subject to a reservation that the county could later seek reimbursement, and Walsh performed corrective work.

The county later sued Walsh to recover $20 million in repair costs. In particular, the county claimed Walsh was in breach of its obligation to repair the pipeline at no cost to the county pursuant to the "Correction of Work or Damaged Property" provision, which provided as follows:

> If material, equipment, workmanship, or Work proposed for, or incorporated into the Work, does not meet the Contract requirements or fails to perform satisfactorily, the County shall have the right to reject such Work by giving the Contractor written Notice that such Work is either defective or non-conforming.
>
> 1. The County, at its option, shall require the Contractor, within a designated time period as set forth by the county, to either
>
>   a. Promptly repair, replace or correct all Work not performed in accordance with the Contract at no cost to the county; or
>
>   b. Provide a suitable corrective action plan at no cost to the County.

27 Wn. App. 2d at 158.

Walsh maintained that its obligations under that provision were limited to correcting work that did not conform to the contract if the materials, equipment, workmanship, or Work failed to perform satisfactorily, but it was

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not responsible for issues with the pipeline's design. Indeed, elsewhere, the contract specified that "Contractor will not be required to provide professional services which constitute the practice of architecture and engineering except to the extent provided for in the technical specifications and drawings." Accordingly, among other affirmative defenses, Walsh asserted the county's claims were barred under the *Spearin* doctrine.

The county moved to dismiss Walsh's *Spearin* affirmative defense on summary judgment, arguing that Walsh assumed an obligation to ensure the pipeline performed satisfactorily regardless of design adequacy under the Correction of Work or Damaged Property provision, displacing the county's implied warranty. The trial court granted the county's motion.

The Court of Appeals summarized the issue before it as follows: "The question presented here is whether the Correction of Work or Damaged Property provision in the Contract (quoted above) displaces '[a]ny defense based on alleged defective design,' including Walsh's Spearin defense, as the trial court ruled." 27 Wn. App. 2d at 161. Both the county and the trial court relied heavily on *Shopping Center Management Company v. Rupp*, 54 Wn.2d 624, 343 P.2d 877 (1959) in dismissing Walsh's *Spearin* defense, but the Court of Appeals held that this case is distinguishable.

In *Rupp,* the court acknowledged that a contractor is not liable for loss or damage stemming from defective design "in the absence of an express warranty." However, if a contract contains an express warranty that warrants the materials and equipment installed by the contractor will "operate satisfactorily under the plans and specifications of the owner," that express warranty of "satisfactory operation" displaces the owner's implied warranty of design adequacy. The *Rupp* court construed such language as amounting to a guarantee of satisfactory operation of all materials and equipment installed under the contract, and not just a guarantee that the contractor would repair defects that stemmed from the contractor's error.

Considering the analysis in *Rupp,* the *Walsh* court held the Correction of Work or Damaged Property provision did not amount to a broad, potentially limitless guarantee that the pipeline itself would perform satisfactorily. The court's conclusion was predicated on principals of contract interpretation, including the principals that (1) contracts should be construed to give effect to all provisions, with any potential conflicts harmonized where possible; (2) courts should avoid construing contracts in a way that would lead to absurd results; and (3) if the contract is susceptible to more than one interpretation, it must be construed against the drafter.

First, the court reasoned that the Correction of Work or Damaged Property provision allowed the county to require repair, replacement, and correction of *nonconforming* work. This interpretation was harmonized with the separate provision that specified Walsh was not obligated to verify adequacy of the design as an architect or engineer to mean Walsh's obligations did not extend to cover repair costs for design issues such that Walsh guaranteed the satisfactory performance of the pipeline itself.

Second, the court reasoned that applying the interpretation advanced by the county would lead to absurd results where the contract included a separate express warranty provision, limited to a period of one year, in which Walsh warranted its work conformed to the contract requirements and was "free from any defect in equipment, material, design, or workmanship *performed by Contractor*." *Id.* at 163. If the county's interpretation

> **The Court of Appeals summarized the issue before it as follows: "The question presented here is whether the Correction of Work or Damaged Property provision in the Contract … displaces '[a]ny defense based on alleged defective design,' including Walsh's Spearin defense, as the trial court ruled."**

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was accepted, the express warranty would be meaningless because Walsh would have effectively guaranteed satisfactory operation of the pipeline forever, and without regard to what or who caused the pipeline to fail. The court listed several examples of events that would ostensibly trigger Walsh's obligations to perform repairs at no cost under the county's interpretation (*i.e.*, "if the county's construction activities above the pipeline caused the pipeline to fail, if the equipment was improperly maintained by the county, or if the county's design was inadequate or defective.") to illustrate the absurd results.

Third, to the extent the Correction of Work and Damaged Property provision could be construed as having two reasonable meanings, it must be construed against the drafter. The county was the drafter; therefore, the court interpreted the provision as obligating Walsh to conform its work to the contract, and ensure that the items incorporated into the work perform satisfactorily ("in other words, that a fusible polyvinyl chloride pipe installed under the contract will perform as a fusible polyvinyl chloride pipe reasonably should"). Given these interpretive aids, the court determined that the Correction of Work and Damaged Property provision was not a broad guarantee of satisfactory performance like the provision discussed in *Rupp*.

Relying further on *Lake Hills,* the court noted its interpretation was entirely consistent with that decision, wherein the Supreme Court reiterated that "'[i]f the owner provides a defective design, then the contractor should not be responsible for the damage caused by following the design because [they were] not the source of the defects.'" *Id.* (quoting 198 Wn.2d at 224).

This decision highlights the distinction between a warranty provision that guarantees the work will operate satisfactorily, and a warranty that the work, materials, and equipment will conform to the design. Careful attention must be paid to any such provisions, as well as other provisions in the contract that define the contracting parties' roles with respect to a project. As evidenced by this decision, the impacts of this distinction could be profound. ■

Washington Court of Appeals Upholds Assessment of Tax Liability Against Prime Contractor in *Lanzce G. Douglass, Inc. v. Department of Revenue*, *25 Wn. App. 2d 893, 525 P.3d 999 (2023)*

By: Jay Jetter and Amanda Haley, Stoel Rive LLP

Prime contractors perform construction *for consumers*, while speculative builders construct on property *they own*. The differentiation between these classifications is important because prime contractors are subject to Washington's business and occupation ("B&O") tax and retail sales tax, while speculative builders are not. In a recent Washington case, Lanzce G. Douglass, Inc. ("Douglass"), a Washington corporation, improperly classified itself as a speculative builder. After an audit, the Washington Department of Revenue (the "Department") determined that Douglass was a prime contractor (not a speculative builder), and issued an assessment of $254,491, consisting of tax, penalties, and interest. Douglass appealed, but the courts agreed with the prime contractor designation because Douglass "was not the owner of the property during construction." *Lanzce G. Douglass, Inc. v. Dep't of Revenue*, 25 Wn. App. 2d 893, 913, 525 P.3d 999 (2023).

In 2003, Douglass bought real property in Spokane, Washington. A year later, the property was deeded to Summerhill, LLC ("Summerhill"). Douglass was Summerhill's sole member. When the property was conveyed, Summerhill and Douglass executed a purchase and sale agreement. Under the agreement, Douglass could "possess the land in the meantime" and later "repurchase lots on the property." *Douglass*, 25 Wn. App. 2d at 896. Douglass then built homes on the property owned by Summerhill. Between 2014 and 2017, Douglass classified itself as a speculative builder for purposes of the construction and home sales.

A speculative builder is "one who constructs buildings for sale or rental upon real estate" they own. WAC 458-20-170(2)(a). In contrast, a prime contractor constructs buildings "for consumers." WAC 458-20-170(1)(a). Prime contractors are responsible for Washington's retailing B&O tax and must charge consumers the retail sales tax. *See* WAC 458-20-170(3)(a), (4)(a). Although speculative builders are responsible for "pay[ing] sales tax upon all materials purchased by them and on all charges made by their subcontractors," WAC 458-20-170(2)(e), "sales by legitimate speculative builders of completed buildings are not subject to [the B&O] tax . . . [or] the sales tax . . .," WAC 458-20-170(2)(c). Speculative builders are also subject to Washington's real estate excise tax on the sale of real estate. Ch. 82.45 RCW.

The Department concluded that Douglass was a prime contractor because it was developing on land owned by Summerhill. Douglass argued that it was a speculative builder because it "retained virtually all of the benefits and burdens of ownership even after legal title was transferred to Summerhill." *Douglass*, 25 Wn. App. 2d at 899 (citation omitted). The case reached the Washington Court of Appeals. To qualify as a speculative builder, Douglass had to prove that it was "the owner of the property during construction." *Id*. at 906.

In its analysis, the Court of Appeals emphasized that Douglass and Summerhill are distinct entities. Douglass transferred ownership of the property to Summerhill because it believed it would provide liability protection.

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WE NEED YOUR INPUT!

The Construction Law Section newsletter works best when Section members actively participate.

We welcome your articles, case notes, comments, and suggestions concerning new developments in public procurement and private construction law. Please direct inquiries and submit materials for publication to:

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Lanzce G. Douglass, Inc. v. Department of Revenue

Summerhill "recorded the deed" and "h[eld] itself out to the public as [the] owner." *Id.* Even though Douglass was the sole member of Summerhill, it was Summerhill, not Douglass, that held title to the property during construction, and therefore the court concluded that Douglass was a prime contractor.

The court analyzed the Department's regulations and other Washington cases in its analysis. Of relevance, under WAC 458-20-170(2)(b), "[w]here an owner of real estate sells it to a builder who constructs . . . new or existing buildings . . . thereon, and the builder thereafter resells the improved property back to the owner, the builder will not be considered a speculative builder." Although this situation is slightly different, it indicates an intent by the Department to avoid tax loopholes via the execution of "property transfer schemes." *Douglass*, 25 Wn. App. 2d at 907.

Douglass also argued that it was an owner under the "attributes of ownership" set forth in the section of the Washington Administrative Code discussing speculative builders, WAC 458-20-170(2)(a). Following the reasoning of another Washington court, the court acknowledged that the "attributes of ownership" can be used to differentiate ownership from a security interest or mortgage. But because the purchase and sale agreement in this case clearly conveyed title, not a security interest, the attributes were not applicable.

Developers must be careful before assuming that the speculative builder tax advantages apply to their projects. To trigger the speculative builder tax advantage, the developer must *own* the property during construction. If you have questions about the prime contractor and speculative builder classifications, please contact a Stoel Rives real estate attorney. ■

2024 Construction Law Section Membership Form

January 1 – December 31, 2024

❑ Voting membership: I am an active WSBA member. Please enroll me as a voting member.

My $25 annual dues are enclosed.

❑ Non-voting membership: I am not an active WSBA member. Please enroll me as a subscriber member so I can participate and receive your informational newsletter.

My $25 is enclosed.

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PowerCom, Inc. v. Valley Elec. Co. of Mt. Vernon, *540 P.3d 1181 (2024).*

By: Seth Millstein, Pillar Law PLLC

Judge Bowman authored a recent opinion for Division I of the Court of Appeals relating to how and why a subcontractor's pass-through claim on a "Little Miller Act" claim can be stayed pending the outcome of the general contractor's litigation with the owner. Washington state's Little Miller Act stipulates any project valued at over $150,000 must post both performance and payment bonds for the job. The value of each of these bonds depends on the type of construction project being undertaken. In *PowerCom, Inc. v. Valley Elec. Co. of Mt. Vernon*, 85120-9-I (Wash. App. Jan. 8, 2024), Division I made short work of PowerCom's contention that its Little Miller Act claim was *not* stayed by the subcontract itself.

The project's owner was the Port of Seattle. The Port in turn hired Clark Construction Group to serve as the prime contractor on a renovation project at the Seattle-Tacoma International Airport. Clark subcontracted with Valley Electric who in turn subcontracted certain work to Powercom. Powercom alleged it was not paid in full and filed a claim against Valley's surety bonds under the Little Miller Act, RCW 39.08, in the amount of $1,337,080 for contract work, including changes, and $1,306,250 for its total costs relating to COVID-19 restrictions. The subcontract between Clark and Valley incorporated the dispute resolution procedure found in the prime contract for pass-through claims. Arbitration was authorized for non-pass-through claims, but only "at Clark's sole option."

The Port disputed the pass-through claims. Clark and the Port attempted to resolve the matter but failed to do so. Clark sued the Port for recovery of its losses, together with those of Valley and PowerCom. PowerCom moved to compel arbitration of all claims against all parties. Clark argued the trial court should stay PowerCom's COVID-19 related claims pending resolution of its lawsuit against the Port. The trial court agreed, granting only PowerCom's motion to compel arbitration for its non-pass-through claims against Clark. PowerCom appealed.

Washington state's Little Miller Act stipulates any project valued at over $150,000 must post both performance and payment bonds for the job. The value of each of these bonds depends on the type of construction project being undertaken.

First, Division I noted that a trial court has inherent power to stay proceedings where the interest of justice so requires. Next, the court examined whether a subcontractor may waive its right to sue under the Little Miller Act. The court found that it was possible so long as a subcontract explicitly contained such a waiver. Division I found that PowerCom's contract did more than just incorporate by reference a dispute resolution process in the prime; it also notified PowerCom that its claims against the Port will be addressed in a pass-through manner. In other words, Clark and the Port must first resolve such claims, some of which are on behalf of the prime's subcontractors. Division I noted that all such claims will be "bound by the procedures and final determination as specified in the Main Contract." PowerCom's contract also stated that it "will not take, or will suspend, any other action … pending final determination of any dispute resolution process between [the Port] and [Clark]."

Division I held that such language *explicitly* manifests PowerCom's agreement to relinquish the right to resolve pass-through claims with Clark directly, and to pursue no independent litigation on such issues "until that process is complete." The court held that such language was unambiguous and naturally included claims under the Little Miller Act. ■

Court of Appeals Division II Disagrees with Division III Regarding Confirmation of Arbitration Awards

Emily Yoshiwara, Dorsey & Whitney LLP

In March 2023, the Court of Appeals Division II issued an unpublished opinion addressing a party's rights to have an arbitrator's award confirmed by the court. *AURC III, LLC vs. Point Ruston Phase II, LLC, et al*. dealt with a dispute between AURC III, LLC ("AURC"), a lender, and Point Ruston Phase II LLC and several other related entities (collectively "Point Ruston"), who sought to develop a large mixed use development on Tacoma's waterfront. The dispute related to an alleged breach of the parties' loan agreement, which required arbitration of any disputes. The parties engaged in a private arbitration, wherein the arbitrator awarded AURC $10,969,015.00 for current and default interest owed on Point Ruston's loan, in addition to attorneys' fees and arbitration expenses.

After the arbitrator's final award, AURC moved for an order in superior court confirming the arbitrator's award and ordering judgment against Point Ruston. AURC also requested that the arbitrator's interim and final award be attached to any order issued by the court. However, Point Ruston objected to attaching the arbitrator's award. Before the superior court could issue an order confirming the arbitration award, Point Ruston paid the award amount and moved to dismiss the entire action as moot. The superior court denied Point Ruston's motion to dismiss and issued an order confirming the arbitrator's award, attaching the interim and final award, and entered judgment against Point Ruston. Point Ruston appealed the superior court's decision.

On appeal, Division II upheld the superior court's order. Division II looked to RCW 7.04A.220, which it held created a mandatory duty for the superior court to confirm the arbitrator's award. Division II explained that absent modification, correction, or vacation (exceptions which are enumerated in the statute), the superior court has a mandatory duty to confirm an arbitration award. Even though the underlying amounts in the award had already been paid, Division II held that effective relief could still be provided in the form of a written confirmation order. Division II also held that it was proper to attach the arbitrator's interim and final awards to the order, noting that this "merely identified the awards the superior court was confirming, nothing more or less."

Notably, Division II declined to follow the reasoning utilized by Division III in a case that looked at the same issue, *Kenneth W. Brooks Trust v. Pac. Media LLC*, 111 Wn. App. 393,44 P.3d 938 (2002). Division III had previously held in *Brooks Trust* that a trial court could deny a motion to confirm an arbitration award and dismiss the underlying claim with prejudice when satisfaction of the award had rendered the controversy moot. Likely for this reason, the Supreme Court granted review of the case and heard argument in January. ■

Absent modification, correction, or vacation (exceptions which are enumerated in the statute), the superior court has a mandatory duty to confirm an arbitration award. Even though the underlying amounts in the award had already been paid, effective relief could still be provided in the form of a written confirmation order.

Newly Effective Law Prohibits Most Pre-Employment Cannabis Testing

By Tamara Comeau, Dorsey & Whitney LLP

Construction companies who rely on pre-employment drug testing face a new law in Washington that could change the breadth of those tests with respect to cannabis. Rewinding to over a decade ago, Washington was one of the first states in the country to legalize the recreational use of cannabis for adults. Until recently, despite this legalization, employers in the state were able to require pre-employment drug tests to prevent hiring employees that use cannabis recreationally or even medically.

Senate Bill 5123, which was signed into law by Gov. Inslee last year, codified principally as RCW 49.44.240, and took effect in January, generally prohibits potential employers, with exceptions, from discriminating against a person pre-employment if said discrimination is based upon the person's cannabis use off the job and away from the workplace. If a pre-employment drug screening is required, it cannot test for the presence of non-psychoactive cannabis metabolites.

Companies retain the right to maintain a drug- and alcohol-free workplace. Nothing in this bill would prevent employers from performing post-employment testing, such as after an accident or because of suspicion of impairment.

So what does this mean for construction companies? A notable exception to the bill is for the hiring of "safety sensitive" positions where impairment while working presents a substantial risk of death. Such positions must be identified by the employer prior to receiving an applicant's application for employment.

Other states and the federal courts have considered the definition of "safety sensitive" positions, often interpreting the term broadly to apply where impairment while working presents a substantial risk of not only death, but also serious bodily injury or significant property or environmental damage. The Iowa Supreme Court recently interpreted its state's statutory definition of "safety sensitive" jobs in the workplace drug testing context to disallow blanket classifications of warehouse employees. Federal courts have interpreted the term similarly. Thus, construction employers likely will want to document the particular job functions they consider to be safety sensitive instead of generally classifying as safety sensitive all positions that involve construction work or positions based on a physical location such as all warehouse workers.

Interestingly, the first version of S.B. 5123 included an exception specifically for those in the building and construction trades, and this exception was removed from the bill by the Labor and Commerce Senate Committee before it was passed. At the public hearing on the bill, the committee heard testimony that cannabis helps people who work in construction with pain from their job, and that letting construction companies continue to discriminate against cannabis use away from the workplace in the hiring process harms construction work recruitment.

An important note—cannabis remains illegal under federal law, and this law specifically excludes any federally required drug screening for cannabis. Because of this exclusion, this law likely would not apply to federal government contractors. ■

Senate Bill 5123 … generally prohibits potential employers, with exceptions, from discriminating against a person pre-employment if said discrimination is based upon the person's cannabis use off the job and away from the workplace.