100655-1

NO. 55377-5-II

COURT OF APPEALS,

DIVISION II

OF THE STATE OF WASHINGTON

ALFREDO SUAREZ, *APPELLANT*

v.

MASCO CORPORATION, TOP BUILD, *RESPONDENT*

PETITION FOR REVIEW TO THE SUPREME COURT OF WASHINGTON

By Steven L. Busick, WSBA #1643
Law Office of Steven L. Busick, PLLC
PO Box 1385
Vancouver, WA 98666
Ph. (360)696-0228
Attorney for Appellant

A. IDENTITY OF PETITIONER

Alfredo Suarez, the appellant, asks the court to accept review of the Court of Appeals' decision terminating review designated in Part B of this Petition.

B. COURT OF APPEALS DECISION

The Unpublished Opinion of the Court of Appeals, Division Two, filed on January 19, 2022, affirming the suspension of time loss benefits by the Superior Court, which had affirmed the suspension by the Board of Industrial Insurance Appeals. The Unpublished Opinion is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

Can there be substantial evidence to support the trial court's decision to affirm the Board's decision affirming a Department of Labor and Industries order to suspend time loss benefits of Mr. Suarez without first balancing the interests of Mr. Suarez in not attending a medical evaluation at the request of Masco Corporation against the interest of Masco in Mr. Suarez attending the medical evaluation? None of those tribunals required balancing of these interests of Mr. Suarez and Masco Corporation

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to determine whether Mr. Suarez had good cause not to attend the medical evaluation on May 16, 2015, as required by *Romo v. Dep't of Labor and Indus.*, 92 Wn. App. 348, 962 P.2d 844 (1998).

D. STATEMENT OF THE CASE

Alfredo Suarez had been a ten year employee of Gale Insulation, which had changed its name to Masco Corporation, installing insulation in homes and businesses. On June 27, 2012, Mr. Suarez suffered an industrial injury rolling a bundle of insulation into a home in Happy Valley, Oregon. Mr. Suarez injured his neck and his right shoulder, and had neck and right shoulder surgery. Mr. Suarez had gone to the second grade in school in Mexico, could read and write in Spanish, but could not read or write in English, and testified through a Spanish interpreter at hearing before an Industrial Appeals Judge at the Board of Industrial Insurance Appeals on May 1, 2019. CP 2, Certified Appeal Board Record, pages 213-215.

On March 17, 2017, the Department of Labor and Industries suspended Mr. Suarez's time loss benefits for not attending a medical examination by an orthopedic surgeon selected by the employer's private claim administrator. CP 2, CABR, pages 179-180. At hearing before the Board, the issue was whether Mr. Suarez had good cause within the meaning of RCW 51.32.110 for not attending the medical examination.

CP 2, CABR, page 163. Mr. Suarez presented his case at hearing through exhibits that were admitted into evidence, and Masco called Mr. Suarez's attorney as an adverse witness to establish the initial reason why Mr. Suarez objected to the fourth medical evaluation being scheduled by Masco's private claim administrator. Mr. Suarez had previously been examined by Clarence Fossier, MD, an orthopedic surgeon, on November 15, 2013, John Thompson, MD, a neurosurgeon, on November 4, 2014, and Mr. Suarez was now being scheduled with a third orthopedic surgeon on May 16, 2015. CP 2, CABR, pages 221-228, and pages 234-344.

Mr. Suarez's attorney objected to the fourth medical evaluation being scheduled with Joseph Lynch, MD, on May 16, 2015, and Mr. Suarez did not attend. Employer's attorney wrote the Penalty Adjudicator at the Department of Labor and Industries a letter dated August 10, 2015, Exhibit No. 9, in response, stating that Dr. Rosenbaum declined to comment about the orthopedic-based shoulder condition, and that is why they needed an orthopedist like Dr. Lynch to address the shoulder as being part of the claim. Employer's attorney acknowledges in Exhibit No. 9 that the employer has filed an appeal to a Department order dated December 19, 2014, to pay time loss benefits from October 11, 2013, through December 10, 2014. Mr. Suarez's attorney responded, Exhibit No. 10, with a letter to the Penalty Adjudicator dated August 12, 2015, stating that the employer already has

two orthopedic surgeons scheduled to testify before the Board of Industrial Insurance Appeals on Masco's appeal of the back time loss order, they do not need a third to testify against Mr. Suarez, and the previous orthopedic surgeon had just examined Mr. Suarez on November 4, 2014. CP 2, CABR, pages 243-245.

Then on September 3, 2015, the Claim Adjudicator at the Department issued an order assessing a no show fee for not attending the medical evaluation with Dr. Lynch on May 16, 2015, in the sum of $597.50, which is Exhibit No. 11. Included is a letter of the same date to employer's attorney, the Claim Adjudicator stated that the Department considers the request for a suspension of time loss benefits to be withdrawn, because his letter of June 8, 2015, does meet the criteria outlined in the Claim Adjudicator Guidelines for non-cooperation. CP 2, CABR, pages 246-249.

As provided in RCW 51.52.050(2)(c), Mr. Suarez's attorney on October 30, 2015, filed a protest and request for reconsideration to the Order dated September 3, 2015, Exhibit No. 12, assessing a no show fee in the sum of $597.50 for not attending the medical evaluation on May 16, 2015. The attorney identified the orthopedic surgeon who examined Mr. Suarez on November 4, 2014, as John Thompson, MD, and stated that he had not been advised of scheduling the medical evaluation with Dr. Thompson, and

that Mr. Suarez had good cause not to attend the medical evaluation on May 16, 2015, with Dr. Lynch. CP 2, CABR, page 250.

On November 12, 2015, the Department affirmed the order dated September 3, 2015, assessing the no show fee, Exhibit No. 13. In a letter of the same date, the Department stated that the fact that Mr. Suarez attended the medical evaluation with Dr. Thompson on November 4, 2014, and Dr. Rosenbaum on January 5, 2015[1], did not establish good cause for failing to attend the medical evaluation on May 16, 2015. Mr. Suarez appealed the order dated November 12, 2015, to the Board and the appeal proceeded to a full evidentiary hearing. The Industrial Appeals Judge issued a Proposed Decision and Order dated August 18, 2016, finding that Mr. Suarez did not otherwise have good cause for not attending the medical evaluation on May 16, 2015, but that because Mr. Suarez provided timely notice that he would not attend the scheduled examination, the self-insured employer is estopped from assessing a no show fee. CP 2, CABR, pages 251-254, 257-299 and 338-343.

Then on March 17, 2017, the Claim Adjudicator at the Department issued an order suspending Mr. Suarez's time loss benefits for failure to submit to the medical evaluation May 16, 2015, with Dr. Lynch, pursuant

[1] The notice for the medical evaluation with Dr. Rosenbaum, Exhibit No. 17, the previous examiner, correctly states that the examination was on January 30, 2015, and not January 5, 2015. CP 2, CABR, pages 306-307.

to RCW 51.32.110. CP 2, CABR, pages 179-180. Mr. Suarez through his attorney on March 23, 2015, appealed to the Board. The Industrial Appeals Judge issued his Proposed Decision and Order dated May 24, 2019, in which he relied on the testimony of Mr. Suarez's attorney called as an adverse witness without considering the balance of Exhibit Nos. 1 through 12. Specifically there is the letter to the Penalty Adjudicator at the Department dated August 12, 2015, Exhibit No. 10, stating that the employer already had two orthopedic surgeons scheduled to testify before the Board, and the protest letter dated October 30, 2015, Exhibit No. 12, to the order dated September 3, 2015. Mr. Suarez had already attended a medical evaluation with another orthopedic surgeon, John Thompson, MD, and Mr. Suarez's attorney had not been given notice of scheduling that medical evaluation as he had been the others, which was good cause not to attend the medical evaluation with Dr. Lynch. CP 2, CABR, pages 35-38, 245 and 250.

The Proposed Decision and Order decided that Mr. Suarez did not have good cause for failing to attend the examination with Dr. Lynch on May 16, 2015. In the Petition for Review to the Board filed on July 25, 2019, Mr. Suarez's attorney attempted to frame the issue in the context of the medical evaluation being scheduled with Dr. Lynch. The finding of not good cause was based on the testimony of Mr. Suarez's attorney, who was

called as an adverse witness by the employer's attorney without consideration of the exhibits admitted into evidence, which was the basis for Mr. Suarez's appeal to the Board. Mr. Suarez had attended the previous medical evaluations, two with orthopedic surgeons, and one with a neurosurgeon. CP 2, CABR, pages 17-24 and 242.

On September 3, 2019, the Board adopted the Proposed Decision and Order without issuing their own Decision and Order and Mr. Suarez appealed to Superior Court. The case was set for trial before the Court without a jury, and on October 1, 2020, Mr. Suarez's attorney and Masco Corporation's attorney filed trial briefs, and the trial consisted of the two attorneys arguing their respective positions to the trial judge. In his trial brief, Mr. Suarez's attorney focused on Exhibit Nos. 8 and 10 that had not been considered by the Board. On October 22, 2020, the trial court filed the court's Order Affirming the Decision and Order of the Board of Industrial Insurance Appeals. CP 2, CABR, page 4, and CP 20, 22, 24 and 26.

The trial court focused on the testimony of Mr. Suarez's attorney, who was called as an adverse witness by the attorney for Masco Corporation, rather than Exhibit Nos. 8 and 10 admitted before the Board supporting good cause. Commencing at page 4, line 12, the trial court discussed the factors needed to establish good cause in Mr. Suarez's Trial

Brief. Commencing at page 8, line 14, Plaintiff's Trial Brief cited *Romo v. Dep't of Labor & Indus.*, 92 Wn. App. 348, 356, 962 P.2d 844 (1998), citing for authority *In re Bob Edwards,* BIIA Dec., 90 6072 (1992), as the factors necessary to establish good cause for not attending a medical evaluation. Whether good cause exists in a given case depends on a number of non-exclusive factors that require the balancing of the injured worker's interests in attending a medical evaluation against the self-insured employer's interests. For the injured worker, one of the factors is the sophistication of the injured worker.

As to the first factor under *Bob Edwards,* commencing at page 4, line 12, the trial court stated that there was no testimony as to Mr. Suarez's education from pages 208-210 in the Certified Appeal Board Record. Mr. Suarez testified at page 215, lines 14-21:

> Q. So what is the extent of your education?
>
> A. First I just studied until half of second grade.
>
> Q. And where was that?
>
> A. In Mexico.
>
> Q. Can you read and write in Spanish?
>
> A. Yes.

//
//

Q. Do you read and write English?

A. No. CP 2, CABR, page 215

Mr. Suarez's attorney did not receive notice of the medical evaluation with John Thompson, MD, orthopedic surgeon, on November 4, 2014, and Mr. Suarez was not sophisticated enough as only a Spanish speaking American with a first grade education in Mexico to contact his attorney to determine whether he should go to the examination. CP 2, CABR, page 223, line 15.

At page 5, line 1 of the Order, the trial court states that Mr. Suarez does not point to any part of the record that a hearing was pending before the Board on employer's appeal of the Department's time loss order to pay benefits from October 11, 2013, through December 10, 2014, at the time of the evidentiary hearing. Exhibit Nos. 10 and 12, as previously discussed, were as much a part of the record as the testimony elicited of Mr. Suarez's attorney called only as an adverse witness by the employer's attorney, and they did state the reasons why Mr. Suarez would not attend the medical evaluation on May 16, 2015. CP 2 and 26, and CABR, pages 245 and 250.

The Court of Appeals in its Unpublished Opinion dated January 19, 2022, Appendix A, initially stated at page two under Facts, "In 2012, while employed by Masco, Suarez injured his neck and right shoulder."

The Unpublished Opinion at pages 6 through 8, reviewed the Board's consideration of the initial reason why Mr. Suarez did not attend the medical evaluation on May 16, 2015, rather than focusing on Exhibit Nos. 10 and 12, on which Mr. Suarez's case was based to establish good cause not to attend, and why his time loss benefits should not be suspended. CP 2, CABR, pages 245 and 250. In reviewing the trial court's Order from pages 9-12, the Unpublished Opinion again focuses on the initial reason why Mr. Suarez did not attend the fourth medical evaluation, rather than focusing on the exhibits that Mr. Suarez was relying on to avoid assessment of the no show fee and suspension of benefits.

In the Analysis at page 10, the Unpublished Opinion again focuses on the initial reason why Mr. Suarez did not attend the medical evaluation on May 16, 2015, rather than the exhibits showing that Masco had three doctors scheduled to testify before the Board on Masco's appeal of the time loss order, and he did not want a fourth. Under B Requirements under the Industrial Appeals Act, at page 11, the Unpublished Opinion states citing *Romo v. Dep't of Labor & Indus.*, 92 Wn. App. 348, 358, 962 P.2d 844 (1998), "The Department or self-insurer may request an examination to resolve conflicting medical opinions." In *Romo,* the conflicting medical opinion was between a panel of medical examiners and Mr. Romo's attending physician. Here, the conflict is between two of Masco's medical

examiners, which does not justify a fourth medical evaluation on May 16, 2015. *Romo v. Dep't of Labor & Indus.*, 92 Wn. App. at 358. At page 12, the Unpublished Opinion cites WAC 296-14-410 (2) stating, "noncooperation is behavior 'which obstructs and/or delays the department or self-insurer from reaching a timely resolution of the claim.' " Here Masco had appealed a Department order awarding time loss which was scheduled for hearing before the Board, and it cannot be said that Mr. Suarez was delaying a timely resolution of the claim.

Again citing *Romo v. Dep't of Labor & Indus.*, 92 Wn. App. at 357, the Unpublished Opinion at page 13 states, "but 'frustration alone' or an unsupported belief that the examinations are 'redundant and unnecessary' is insufficient." Here Mr. Suarez is maintaining that he had good cause not to attend another medical evaluation while Masco's appeal was pending so the employer could not have a fourth doctor testify against his one. Of note at page 13 is the statement quoting *Romo* at page 357, "Balancing the worker's and the department's or self-insurer's interests is the 'fact finder's obligation.' " In this case the fact finder is the board and the trial court, and Mr. Suarez maintains that neither one balanced his interests against the interests of Masco in deciding that Mr. Suarez did not have good cause in not attending the medical evaluation on May 16, 2015.

Under C Failure to Attend the May 2015 Examination, at page 13, the Unpublished Opinion cites *Hendrickson, v. Dep't of Labor & Indus.*, 2 Wn. App. 2d 343, 351, 409 P.3d 1162 (2018), "but we do not reweigh the evidence on appeal." Mr. Suarez did not ask the Court of Appeals to reweigh the evidence, only to balance the interests of Mr. Suarez in not attending a medical evaluation versus Masco's interests in his attending, which the board and the trial court did not do. The Unpublished Opinion at page 14 continues to focus on Mr. Suarez's initial reason stated for not attending a fourth medical evaluation, rather than the reasons given for not suspending time loss benefits, Exhibit Nos. 10 and 12. CP 2, CABR, pages 245 and 250. At page 15 of the Unpublished Opinion the statement is made, "The superior court's legal conclusions flow from the findings," citing RCW 51.36.070(1)(a). If the Superior Court did not balance the interests in Mr. Suarez attending the medical evaluation on May 16, 2015, versus the interests of Masco in his attendance, the legal conclusions do not flow from the findings.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Since neither the trial court or the board balanced the interests of Mr. Suarez against the interests of Masco to determine whether the injured worker had good cause not to attend the medical evaluation on

May 15, 2016, there is not substantial evidence to support the decision of the trial court. *Romo v. Dep't of Labor & Indus.*, 92 Wn. App. 348, 357, 962 P.2d 844 (1998).

Romo at page 356 cites with authority a significant decision of the Board of Industrial Insurance Appeals, *In re Bob Edwards*, for the factors necessary to establish good cause for not attending a medical evaluation, either at the request of the Department or the self-insured employer pursuant to RCW 51.32.110(2). Whether good cause exists in a given case will depend on a number of factors that require balancing the interest of the worker in not attending the medical evaluation against the interest of the Department or self-insured employer. Those factors to be considered on behalf of the injured worker are his or her physical capacities, sophistication, circumstances of employment, family responsibilities, proven ability to travel, and other relevant concerns, not the least of which is the expectation of receiving a fair and independent medical evaluation. Among the factors to be considered on behalf of the employer are the need to resolve conflicting medical documentation, the location of willing and qualified physicians, the length of time before a qualified physician is available to perform the examination, and the comparative expense of the examination. Neither of the above list of factors is exhaustive. *In re Bob Edwards,* BIIA Dec., 90 6072 (1992).

Among the factors to be considered on behalf of Mr. Suarez, what stands out is the sophistication of Mr. Suarez, and the expectation of receiving a fair and independent medical evaluation. Mr. Suarez had a first grade education, did not read or write in English, and testified at hearing through a Spanish interpreter. Mr. Suarez's attorney was not given notice of the medical evaluation with John Thompson, MD, on November 4, 2014, though he had been given notice of the medical evaluations with Dr. Fossier on November 15, 2013, and Dr. Rosenbaum January 30, 2015. CP 2, CABR, pages 303-307. Mr. Suarez was not sophisticated enough as a Spanish speaking American with a limited education before attending the medical evaluation with Dr. Thompson to check with his attorney to see if he had received notice and whether he should attend.

Mr. Suarez, through his attorney, did not have a reasonable expectation of receiving a fair and independent medical evaluation with Dr. Joseph Lynch. Based on at least two prior occasions when Dr. Lynch testified as a medical expert for other employers before the Board, his attorney had found him biased against injured workers. CAP 2, CABR, page 229. The employer's appeal of the Department order to pay time loss benefits from October 11, 2013, through December 10, 2014, was pending hearing before the Board, and his attorney did not want a third orthopedic surgeon to testify against his one medical expert, the treating physician.

Mr. Suarez's attorney did not have reasonable expectation of receiving a fair and independent medical evaluation with Dr. Lynch. By appealing the Department order to pay time loss benefits claim resolution was not an interest of Masco to be considered.

Balancing against the interest of Mr. Suarez not attending the medical evaluation on May 16, 2015, is the employer's interest on resolving conflicting medical documentation. Since Dr. Rosenbaum was a neurosurgeon and not an orthopedic surgeon, he could not render an opinion on the right shoulder condition. But this stated reason is a fabrication because Dr. Thompson had already addressed the right shoulder condition, and attributed it to Mr. Suarez's past history of type 2 diabetes mellitus rather than the injury of June 27, 2012. Employer's attorney could argue that the opinion of Dr. Clarence Fossier was contrary to Dr. Thompson, but at hearing before the Board on the back time loss issue, employer's attorney flipped Dr. Fossier. Conflicting medical opinion is between an attending physician and a medical examiner, but not between medical examiners scheduled by the same employer. Otherwise, afterward a self-insured employer could continue to schedule medical examiners ad infinitum on that basis. *Romo v. Dep't of Labor & Indus.*, 92 Wn. App. at page 351.

When the interests or reasons of Mr. Suarez in not attending the medical evaluation on May 16, 2015, are balanced against the interests of

the employer in attending the evaluation, there are at least two good reasons for not attending and no good reason to attend, and the employer has none. Mr. Suarez has established good cause for not attending the medical evaluation with Dr. Lynch on May 16, 2015. Neither the trial court or the Board would balance the interests of Mr. Suarez in not attending the medical evaluation on May 16, 2015, against the interest of the employer, Masco, and if they had, they would have found that Mr. Suarez had good cause. The finder of fact must balance those interests, before deciding that substantial evidence supports a finding of good cause or the absence of good cause.

The good cause determination is a mixed question of law and fact. The ultimate determination of good cause is a legal conclusion, based on subsidiary findings by the trier of fact. *Romo v. Dep't of Labor & Indus.*, at page 357, *Garcia v. Dep't of Labor & Indus.*, 86 Wn. App. 748, 939 P.2d 704 (1997). The guiding principle of construing provisions of the Industrial Insurance Act is that the Act is remedial in nature and is to be liberally construed in order to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker. *Dep't of Labor & Indus. v. Shirley,* 171 Wn. App. 870, 879-880, 228 P.3d 390 (2012), *Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 470, 745 P.2d 1295 (1987), RCW 51.12.010. The subsidiary

findings by the trier of fact would be the balancing of the interest of the employer versus the interest of the injured worker, which was not done in this case.

F. CONCLUSION

The Judgment of Superior Court for Clark County dated January 28, 2020, should be reversed and remanded to the Department of Labor and Industries to vacate the Order and Notice dated March 17, 2017, suspending Alfredo Suarez's time loss compensation and determine that he had good cause not to attend the medical evaluation on May 16, 2015.

This document contains 3,797 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Dated this 11th day of February, 2022.

Respectfully submitted,

Steven L. Busick, WSBA #1643
Attorney for Appellant, Alfredo Suarez
1915 Washington Street
PO Box 1385
Vancouver, WA 98666

Filed
Washington State
Court of Appeals
Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

ALFREDO SUAREZ, Appellant, v. MASCO CORPORATION, TOPBUILD; and DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, Respondents.	No. 55377-5-II UNPUBLISHED OPINION

GLASGOW, A.C.J.—Alfredo Suarez was injured while working for Masco Corporation, TopBuild (Masco), and he applied for workers' compensation benefits. To administer Suarez's claim, Masco requested that Suarez attend multiple independent medical examinations. Suarez's counsel objected to one of the examinations, so Suarez did not attend. As a result, the Department of Labor and Industries suspended Suarez's time-loss benefits. Both the Board of Industrial Insurance Appeals and the superior court affirmed the suspension.

On appeal, Suarez argues that he had good cause for failing to attend the medical examination and that the superior court erred because it failed to properly weigh all of the evidence. We hold substantial evidence supports the superior court's factual findings, and those findings support the superior court's conclusions that Suarez was required to submit to the examination and lacked good cause to refuse under RCW 51.32.110. Accordingly, we affirm.

APPENDIX A

FACTS

In 2012, while employed by Masco,[1] Suarez injured his neck and right shoulder. Masco is a self-insured employer.

Suarez opened a claim with the Department and sought benefits. A third party claim administrator requested that Suarez attend several independent medical examinations: one in November 2013 with Dr. Clarence Fossier, an orthopedic surgeon; one in November 2014 with Dr. John Thompson, another orthopedic surgeon; and one in January 2015 with Dr. Thomas Rosenbaum, a neurosurgeon. Suarez attended all three of these examinations.

One of Suarez's medical concerns was adhesive capsulitis, or "frozen shoulder," causing pain and limiting movement in both of his shoulders. Certified Appeal Board R. (CBR) at 325. Fossier opined that Suarez's frozen right shoulder was "causally related to the industrial injury on a more-probable-than-not basis." CBR at 318. In contrast, Thompson reported that "the impairment of his shoulders is 100% due to diabetic frozen shoulder and not related to his work injury." CBR at 337. Rosenbaum did not believe the pain in Suarez's left shoulder was related to his industrial injury and attributed it to Suarez's diabetes. But he opted to "defer to orthopedic surgery" on whether Suarez's frozen right shoulder was related to Suarez's industrial injury or his diabetes, as well as whether this condition required additional treatment or employment restrictions. CBR at 326-27.

In April 2015, the claim administrator requested that Suarez attend another examination in May with Dr. Joseph Lynch, a third orthopedic surgeon. The letter stated, "We require 7 days

[1] At the time, Masco was named Gale Insulation.

notice of canceling or rescheduling exams." CBR at 234. Suarez's counsel promptly sent a letter advising that Suarez would not attend the examination, so the claim administrator "should cancel . . . to avoid a no show fee." CBR at 235. He explained, "On January 30, 2015, you scheduled a medical evaluation with Thomas Rosenbaum, MD, which claimant attended. There is no reason to reschedule [another] medical evaluation less than four months [after] the previous one." *Id.*

Masco's counsel urged Suarez's counsel to reconsider. He advised that Masco would seek to suspend all of Suarez's benefits if he did not attend the examination and explained that the examination was intended to "provide clarity in determining whether the shoulder condition is related" to Suarez's industrial injury. CBR at 236. Moreover, Suarez's primary physician, Dr. Richard Heitsch, was "contending the shoulder condition is related but . . . also acknowledging that [Suarez] might not need more treatment." *Id.*

Suarez did not attend the examination in May 2015 and was assessed a no-show fee. Masco asked Suarez's counsel to "confirm in writing [his] belief as to good cause as to why the evaluation was unreasonable." CBR at 238. Again, Suarez's counsel explained that Suarez "just had a medical evaluation at the request of [Masco] less than four months ago, and it did not seem reasonable that he have another one so soon." CBR at 239.

I. No-Show Fee Hearing (Docket No. 15 23126)

In July 2015, Masco requested that the Department's claim adjudicator suspend Suarez's benefits and order payment of the no-show fee. Suarez's counsel wrote to the claim adjudicator, explaining that "when the notice came in" for this examination, "it had only been three months since the last medical evaluation, and I objected on that basis." CBR at 242.

During this time, an appeal of Suarez's entitlement to benefits during 2013 and 2014 was pending before the Board. In August, Suarez wrote to the Department's penalty adjudicator, stating, "Employer's attorney has two orthopedic surgeons scheduled to testify before the [Board] who have examined claimant, as well as Thomas Rosenbaum, MD, and claimant has one witness, Richard Heitsch, MD. So this looks like overkill to me to have another orthopedic surgeon available to testify." CBR at 245.

The Department granted Masco's request to reduce Suarez's time-loss benefits by the amount of the no-show fee "because the worker refused or failed to attend the scheduled medical examination . . . without good cause." CBR at 246. However, it "considered withdrawn" Masco's request to suspend Suarez's benefits because Masco's letter did not meet the guidelines for establishing Suarez's noncooperation. CBR at 248. The Department asked Masco to review the guidelines before resubmitting the request.

Suarez protested the no-show fee assessment, arguing he had good cause not to attend the May 2015 examination because he had attended two other examinations in the last six months—one in November 2014 and one in January 2015. The Department reconsidered and reaffirmed its decision, advising, "Not attending an independent medical examination because you previously attend[ed] an examination[] is not considered good cause." CBR at 253.

Suarez appealed. At a hearing before Industrial Appeals Judge Steven Yeager, Suarez's counsel testified that "the basis for objection" to the May 2015 examination with Dr. Lynch was that Suarez "just had an examination within a four-month period." CBR at 270-71. He agreed that this was the reason given to Masco and the Department's claims adjudicator and that he had told the Department's penalty adjudicator "it looked like [Masco was] piling on essentially medical

examiners" to be witnesses in the separate, pending appeal of Suarez's 2013 and 2014 benefits. CBR at 273. When specifically asked to articulate his reason for the objection for purposes of establishing good cause, Suarez's counsel stated, "So that was a third examination within a six-month period of time, and I didn't think it was reasonable." CBR at 275.

Masco's counsel then confirmed that one of the issues presented "per the litigation order, is whether or not [Suarez] had good cause for failing to attend" the examination. CBR at 276. Judge Yeager agreed that the issue of good cause appeared to be "encompassed in the department order." *Id.* Masco's counsel concluded, "[I]t's our position that the worker has been noncooperative and that the fee should be assessed; and, in the alternative, if the fee should not be assessed because the attorney had let us know more than seven days in advance, that suspension of benefits would have been the appropriate remedy." CBR at 295. In response, Suarez argued that he was the only party who appealed the Department's order and that the order only assessed a no-show fee; it did not suspend benefits.

In a proposed order and decision, Judge Yeager stated, "It is not within the Board's scope of review to determine whether Mr. Suarez's benefits should be suspended for failing to attend a scheduled examination without good cause." CBR at 117. However, Judge Yeager found that the May 2015 examination was "not an unnecessary examination" and that "Suarez did not otherwise present evidence of good cause to fail to attend." CBR at 121. He concluded that the suspension of benefits was "not within the Board's scope of review," that "Suarez did not have good cause for failing to attend . . . within the meaning of RCW 51.32.110," and that "[b]ecause [Suarez] provided timely notice he would not attend the . . . examination, the self-insured employer is estopped from assessing an examination charge." *Id.*

Masco petitioned the Board for review, arguing that Judge Yeager correctly concluded Suarez lacked good cause for failing to attend but incorrectly concluded the Board lacked jurisdiction to suspend Suarez's benefits. In September 2016, the Board denied the petition for review, and Judge Yeager's proposed decision and order became the Board's decision and order. Neither Masco nor Suarez appealed to the superior court.

II. SUSPENSION OF BENEFITS HEARING (DOCKET NO. 17 13423)

In March 2017, the Department suspended Suarez's benefits based on his "failure to submit to, and/or cooperate with a medical examination." CBR at 158. Suarez protested the suspension.

Both Masco and Suarez sought summary judgment, arguing that the prior litigation had resolved this issue. According to Masco, the Board's prior decision and order adopted Judge Yeager's conclusion that, as a matter of law, Suarez was not cooperative and lacked good cause for failing to attend the May 2015 medical examination, and that "triggered the [D]epartment to then say . . . [t]here is a determination that claimant was not cooperative, and so, therefore, the suspension is appropriate." CBR at 185-86. According to Suarez, the Board could not enter an order suspending benefits because Masco never appealed the Department's prior determination not to suspend benefits or the Board's prior decision and order that the suspension of benefits was not within its scope of review. He further argued the finding of fact "that Mr. Suarez did not otherwise present evidence of good cause, does not establish that there was no good cause." CBR at 190.

Industrial Appeals Judge Jeffrey Friedman issued a proposed decision and order stating that although Suarez's "non-attendance" at the May 2015 examination had "previously been litigated," the question of whether his benefits should be suspended was "not decided." CBR at

92-93. He found that the findings of fact and conclusions of law from docket no. 15 23126, the appeal of the no-show fee assessment, were "binding on Mr. Suarez in this appeal" and that "[p]rior to the suspension of benefits, Alfredo Suarez had a full and fair opportunity to explain his reasons for not attending." CBR at 97. Judge Friedman denied Suarez's motion for summary judgment, granted Masco's motion for summary judgment, and affirmed the Department's suspension order.

The superior court reversed, ruling that "the issue of suspension of time loss benefits . . . was not before the [Board] in Docket No. 15 23126, and the Board could not grant summary [judgment] in favor of the self-insured employer, Masco Corporation, in Docket No. 17 13423, on the basis of res judicata, collateral estoppel or issue preclusion." CBR at 58-59. It remanded for "a full evidentiary hearing on the issue of suspension of time loss benefits pursuant to the [Department's 2017] order." CBR at 59.

Judge Friedman presided over this evidentiary hearing in May 2019. The judge admitted all of the parties' prior letters as exhibits, as well as the transcript of the hearing held before Judge Yeager during the appeal of the no-show fee assessment. Judge Friedman sought to clarify the basis for Suarez's objection to attending the May 2015 examination, and Suarez's counsel testified, "I thought that every six months would be an appropriate period of time for somebody to attend a medical evaluation." CBR at 229. Counsel insisted that the exams were scheduled "too closely together," before adding, "I had previously cross-examined Dr. Lynch on at least two prior occasions, and so I was aware of his propensity, so to speak." *Id.* Judge Friedman asked, "But your basis is that there were too many [examinations] too close together?" *Id.* Suarez's counsel responded, "Too close together. And particularly Dr. Lynch. I had some objections to him

specifically, but I didn't state them. I thought that was something I could benefit from by the scheduling of the exams too close together." *Id.*

After the hearing, Judge Friedman concluded, "Without other factors, scheduling this [examination] three or four months after the most recent examination is not good cause for failing to attend. Even if this could be considered a valid reason for not attending, it does not establish good cause when balanced against the self-insured employer's interests," which included resolving conflicting medical opinions in order to administer and possibly close the claim. CBR at 36. Judge Friedman found, "Alfredo Suarez failed to attend the medical examination scheduled for May 16, 2015, because he had attended prior medical examinations and the May 16, 2015 examination was scheduled for less than four months after the most recent prior examination." CBR at 37. He concluded that "Suarez did not have good cause within the meaning of RCW 51.32.110 for failing to comply" and that the Department's order was correct. *Id.*

Suarez petitioned the Board for review. The Board granted review and issued a decision and order adopting Judge Friedman's proposed decision and order, concluding it was "supported by the preponderance of the evidence and . . . correct as a matter of law." CBR at 4.

On appeal to the superior court, Suarez argued that Judge Friedman and the Board failed to consider testimony expressing concerns about Dr. Lynch's "propensity to favor the employer on . . . medical issues," especially within the context of Suarez's other pending appeal. Am. Verbatim Report of Proceedings (Oct. 1, 2020) (VRP) at 4. He further argued that statutory language requiring workers to submit to examinations "'from time to time' has to be considered in the context of what is reasonable," and he submitted that "'time to time' would be every six months to a year, and in this case the employer was pushing it." VRP at 8-9 (quoting former RCW

51.32.110(1) (1997)).[2] He argued that good cause was further supported by the prior lack of notice to counsel about the November 2014 exam, Suarez's lack of sophistication due to his educational background and language barriers, and the fact that Dr. Thompson had already provided a conclusive opinion on the shoulder condition.

The superior court concluded, "Viewed in its entirety, the evidence reflects that the principal reason identified by Suarez for failing to attend Dr. Lynch's [examination] on May 16, 2015 was that it was too close to the previous one." Clerk's Papers (CP) at 43. "The record does not clearly reflect . . . that Suarez's argument was based on . . . four factors rather than the timing of the examinations." *Id.* The superior court acknowledged that Suarez's counsel had mentioned he was "aware of [Lynch's] propensity" and suggested that Lynch's testimony tended to favor employers, but the court concluded it was "clear from the transcript that Judge Friedman clarified that the basis for Suarez'[s] refusal to attend . . . was that it was too close to the prior examination." CP at 42.

The superior court found that "Suarez's attorney objected . . . on the basis that [the May 2015 examination] was scheduled only four months after a prior independent medical examination;" that prior to the suspension, "Suarez was given the opportunity to explain his reasons for not attending;" and that "Suarez did not have good cause for failing to attend." Suppl. Clerk's Papers (SCP) at 61-62. It concluded that "[u]nder RCW 51.32.110 and RCW 51.36.070, Mr. Suarez was required to submit to an examination by a physician selected by the self-insured employer" and that "Suarez did not have good cause within the meaning of RCW 51.32.110 for

[2] The legislature amended RCW 51.32.110 in 2020 and deleted the phrase "from time to time." ENGROSSED SUBSTITUTE S.B. 6440, 66th Leg., Reg. Sess. (Wash. 2020).

failing to comply." SCP at 62-63. It concluded that the Board's order was correct and affirmed.

Suarez appeals the superior court's order.

ANALYSIS

GOOD CAUSE FOR FAILING TO ATTEND THE MAY 2015 EXAMINATION

Suarez acknowledges that he has a general obligation to attend medical examinations requested by the claim administrator for the self-insured employer, but he argues that his "obligation is tempered by what is reasonable under the facts of the particular case." Br. of Appellant at 15. Suarez claims he had good cause not to attend the May 2015 examination with Dr. Lynch because he "had already attended two medical evaluations within the last six months" and the scheduled examination was with "another orthopedic surgeon." *Id.* We disagree.

A. Standard of Review

On appeal from the Board to the superior court, the superior court considers de novo the evidence and testimony that was presented to the Board. RCW 51.52.115. The Board's findings and decision are "prima facie correct," and the party challenging the decision bears the burden of proof. *Id.* The superior court may only "'substitute its own findings and decision for the Board's if it finds, from a fair preponderance of credible evidence, that the Board's findings and decisions are incorrect.'" *Romo v. Dep't of Labor & Indus.*, 92 Wn. App. 348, 353, 962 P.2d 844 (1998) (internal quotation marks omitted) (quoting *McClelland v. ITT Rayonier, Inc.*, 65 Wn. App. 386, 390, 828 P.2d 1138 (1992)). If the Board "has acted within its power and has correctly construed the law and found the facts," the superior court will affirm. RCW 51.52.115.

On appeal to this court, we review only whether the superior court's factual findings are supported by substantial evidence and whether its conclusions of law flow from its findings.

Hendrickson v. Dep't of Labor & Indus., 2 Wn. App. 2d 343, 351, 409 P.3d 1162 (2018). Evidence is substantial if it is "'sufficient to persuade a rational, fair-minded person that the finding is true.'" *Id.* at 351-52 (quoting *Cantu v. Dep't of Labor & Indus.*, 168 Wn. App. 14, 21, 277 P.3d 685 (2012)). "We review the record in the light most favorable to the party who prevailed in superior court," and we do not reweigh the evidence. *Id.* at 352. Unchallenged findings of fact become "verities on appeal." *Dep't of Labor & Indus. v. Shirley*, 171 Wn. App. 870, 879, 288 P.3d 390 (2012). The good cause determination is a mixed question of fact and law because the "ultimate determination of good cause is a legal conclusion, based on subsidiary findings by the trier of fact." *Romo*, 92 Wn. App. at 357.

B. Requirements under the Industrial Insurance Act

Any worker who is entitled to receive benefits under the Industrial Insurance Act, title 51 RCW, "shall, if requested by the department or self-insurer, submit [themselves] for medical examination, at a place reasonably convenient for the worker." RCW 51.32.110(1); *see also* RCW 51.36.070(1)(a) (requiring the worker to submit to an examination whenever the Department or self-insurer "deems it necessary" to make a decision, resolve an issue, or evaluate the worker's disability or work restrictions). When this case was before the Board, former RCW 51.32.110(1) only required the worker to submit to a medical examination "from time to time."

The Department or the self-insurer may request an examination for a number of reasons, including to evaluate what conditions are "related to the claimed industrial injury" and to "[e]stablish when the accepted industrial injury . . . has reached maximum medical improvement." WAC 296-23-307(3), (5). The Department or self-insurer may request an examination to "resolve conflicting medical opinions." *Romo*, 92 Wn. App. at 358.

The Department may "reduce, suspend or deny benefits when a worker (or worker's representative) is noncooperative with the management of the claim." WAC 296-14-410(1). Noncooperation is behavior "which obstructs and/or delays the department or self-insurer from reaching a timely resolution of the claim." WAC 296-14-410(2). It includes "[n]ot attending or cooperating with medical examinations" requested by the self-insurer. WAC 296-14-410(2)(a)(i); *see also* RCW 51.32.110(2) ("If the worker refuses to submit to medical examination, . . . the department or the self-insurer upon approval by the department, with notice to the worker may suspend any further action on any claim . . . and reduce, suspend, or deny any compensation for such period.").

Before suspending or denying benefits, the Department or self-insurer must "send a letter to the worker (or the worker's representative) advising that benefits may be suspended and asking for an explanation for the noncooperation." WAC 296-14-410(4)(a). "This written response should include the reason(s) the worker has for not cooperating." WAC 296-14-410(4)(b). The worker has the burden of justifying their refusal to appear. *Andersen v. Dep't of Labor & Indus.*, 93 Wn. App. 60, 64, 967 P.2d 11 (1998). The Department "shall not . . . reduce, suspend, or deny any compensation if a worker has good cause for refusing to submit to . . . any examination." RCW 51.32.110(2)(a).

In *Romo*, Division Three recognized that the good cause determination should balance "the worker's individual circumstances and the Department's interests in requiring the examination." 92 Wn. App. at 357. Thus, "a worker would have good cause to refuse to attend a truly unwarranted examination." *Id.* at 356. And it is relevant if the worker has good reason to suspect the Department or self-insurer's motives for requesting another examination or "to doubt the fairness of the

examination." *Id.* at 359. But "frustration alone," or an unsupported belief that the examinations are "redundant and unnecessary," is insufficient. *Id.* at 358. Balancing the worker's and the Department's or self-insurer's interests is the "fact[]finder's obligation." *Id.* at 357 n.1.

C. Failure to Attend the May 2015 Examination

Suarez challenges the superior court's conclusions that "[u]nder RCW 51.32.110 and RCW 51.36.070, Mr. Suarez was required to submit to an examination by a physician selected by the self-insured employer" and that "Suarez did not have good cause within the meaning of RCW 51.32.110 for failing to comply." SCP at 62-63. He challenges the finding that "Suarez did not have good cause for failing to attend." SCP at 62. He does not challenge the factual finding that "Suarez's attorney objected . . . on the basis that [the May 2015 examination] was scheduled only four months after a prior independent medical examination" or the finding that prior to the suspension, "Suarez was given the opportunity to explain his reasons for not attending." SCP at 61-62. These unchallenged findings are verities on appeal. *Shirley*, 171 Wn. App. at 879.

Suarez alleges the superior court failed to "correctly balance" his interests and Masco's interests and to "give sufficient or equal weight to the exhibits admitted," which included all of Suarez's attorney's letters. Br. of Appellant at 2-3. It is true that the fact finder must balance the parties' interests, *Romo*, 92 Wn. App. at 357 n.1, but we do not reweigh the evidence on appeal, *Hendrickson*, 2 Wn. App. 2d at 352. We view the evidence in the light most favorable to the party who prevailed in superior court and ask only whether substantial evidence supports the superior court's findings. *Id.* at 351-52.

Substantial evidence supports the superior court's finding that Suarez did not have good cause to fail to attend the May 2015 examination. When Suarez's counsel wrote that Suarez would

not attend, he stated, "There is no reason to reschedule [another] medical evaluation less than four months [after] the previous one." CBR at 235. When given the opportunity to explain his reasons for noncooperation pursuant to WAC 296-14-410(4)(b), he again stated, Suarez "just had a medical evaluation at the request of [Masco] less than four months ago, and it did not seem reasonable that he have another one so soon." CBR at 239.

Suarez's counsel presented some evidence that he was concerned about Dr. Lynch's potential bias in favor of employers, especially because Suarez had another pending appeal where independent medical examiners could be called to testify. He told the Department's penalty adjudicator that it "looks like overkill . . . to have another orthopedic surgeon available to testify," and he was concerned about Masco "piling on" witnesses. CBR at 245, 273. He also testified during the evidentiary hearing that he had some specific, unstated objections to Dr. Lynch.

But Suarez's counsel also told the Department's claim adjudicator, "when the notice came in" for this examination, "it had only been three months since the last medical evaluation, and I objected on that basis." CBR at 242. And he testified during the appeal of the no-show fee assessment that "the basis for objection" was that Suarez "just had an examination within a four-month period." CBR at 270-71. When asked to clarify the basis for the objection, Suarez's counsel stated, "So that was a third examination within a six-month period of time, and I didn't think it was reasonable." CBR at 275. Then, during the evidentiary hearing in 2019, Suarez's counsel again testified that the primary basis for his objection was that the examinations were "[t]oo close together." CBR at 229. Suarez's counsel's consistent statements about the reason for his objection were sufficient to persuade a fair-minded, rational person that Suarez objected because the May 2015 examination was scheduled four months after a prior examination. Moreover, the superior

court's order recognized that Suarez's counsel had referenced Dr. Lynch's "propensity," or bias, indicating that the court did not neglect to weigh this evidence in reaching its final determination. CP at 42. We do not reweigh it on appeal.

The superior court's legal conclusions flow from this finding. Under RCW 51.32.110(1) and RCW 51.36.070(1)(a), Suarez was required to submit to a medical examination "requested by the . . . self-insurer" if the self-insurer "deem[ed] it necessary" to resolve an issue. Although former RCW 51.32.110(1) only required the worker to submit to an examination "from time to time," Suarez has not established that an examination four months after the previous one was more often than "from time to time."

Masco explained why the examination was warranted. The two orthopedic surgeons who provided independent medical examinations gave conflicting opinions on whether Suarez's right shoulder condition was related to his industrial injury, and the neurosurgeon who provided an examination less than four months before had deferred back to the orthopedic surgeons on this question. Thus, another examination was reasonably necessary to resolve conflicting medical opinions. And the May 2015 examination was scheduled for six months after the last *orthopedic surgeon* examination. Suarez was required to submit to the examination, and he did not establish good cause for failing to do so.

Suarez raises additional arguments based on specific factors that Division Three has identified as relevant to the good cause balancing inquiry. *See Romo*, 92 Wn. App. at 356 (considering in part the worker's "'sophistication . . . [and] expectation of a fair and independent medical evaluation'" (quoting *In re Edwards*, No. 90 6072, at 3 (Bd. of Indus. Ins. Appeals June 4, 1992), http://www.biia.wa.gov/DO/906072_ORD_19920604_DO.pdf)). Suarez is correct that

the superior court overlooked testimony that Suarez left school at an early age. But we reject his argument that Suarez's lack of sophistication, as well as Suarez's attorney's doubts about Dr. Lynch's objectivity, should have been given more weight. The balancing of these factors is a "fact[]finder's obligation," *Romo*, 92 Wn. App. at 357 n.1, and we decline to rebalance them on appeal. We affirm the superior court's order.

Masco also argues that Suarez's claims are precluded by res judicata because the Board found that Suarez failed to show good cause in its 2016 review of the no-show fee assessment and Suarez did not appeal this order. Because the superior court correctly decided in Masco's favor on the merits, we do not reach Masco's res judicata argument.

ATTORNEY FEES

Suarez requests attorney fees under RCW 51.52.130(1). RCW 51.52.130(1) provides for reasonable attorney fees if, on appeal from a Board decision, the Board's "decision and order is reversed or modified and additional relief is granted to a worker." We affirm the superior court's order affirming the Board's decision and hold that Suarez is not entitled to relief, so Suarez is not entitled to attorney fees under RCW 51.52.130(1).

CONCLUSION

We affirm the superior court's order affirming the Board's decision and order.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Glasgow, A.C.J.

We concur:

Worswick, J.

Cruser, J.

Edwards, Bob

SUSPENSION OF BENEFITS (RCW 51.32.110)

Good cause

The factors used to determine whether a worker had good cause to refuse to undergo examination include the worker's physical capacities, sophistication, circumstances of employment, family responsibilities, proven ability or inability to travel, medical treatment and other relevant concerns, including the expectation of a fair and independent medical examination balanced against the need to resolve conflicting medical documentation, the location of willing and qualified physician, the length of time before a physician is available to perform an examination, and the comparative expense of such. ***....In re Bob Edwards*, BIIA Dec., 90 6072 (1992)**

Refusal to attend medical examination

Where the worker's refusal to attend a medical examination is based only upon the worker's unfounded presumption that the physician would be biased, the worker did not demonstrate good cause for the failure to attend the examination. ***....In re Bob Edwards*, BIIA Dec., 90 6072 (1992)**

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: BOB C. EDWARDS	)	**DOCKET NO. 90 6072**
	)	
CLAIM NO. S-500837	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Bob C. Edwards, by
Springer, Norman & Workman, per
Leonard F. Workman

Self-insured Employer, Weyerhaeuser Company, by
Roberts, Reinisch, Mackenzie, Healy & Wilson, per
Steven R. Reinisch and Craig A. Staples

This is an appeal filed by the claimant, Bob C. Edwards, on November 16, 1990 with the Department of Labor and Industries, which was forwarded to the Board of Industrial Insurance Appeals on December 11, 1990. The appeal is from an order of the Department dated September 17, 1990 which suspended claimant's right to compensation for failure to submit to a medical examination. **AFFIRMED.**

DECISION

Pursuant to RCW 51.52.104 and RCW 51.51.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the self-insured employer to a Proposed Decision and Order issued on November 15, 1991 in which the order of the Department dated September 17, 1990 was reversed and the matter remanded to the Department with instructions to issue an order directing the self-insured employer to provide Mr. Edwards "that compensation to which he is entitled, effective September 17, 1990."

We disagree with the result reached by the Proposed Decision and Order, and affirm the Department order of September 17, 1990.

We have reviewed the evidentiary rulings as stated in the Proposed Decision and Order and find that no prejudicial error was committed and said rulings are hereby affirmed.

The issue presented by this appeal is whether the Department was correct when it issued an order suspending compensation in Mr. Edwards' claim pursuant to RCW 51.32.110 because of Mr. Edwards' failure to submit to a medical examination. Mr. Edwards complained that it was neither fair nor reasonable for him to attend the examination as the Department had requested. First, because the Department and the employer had medical documentation from earlier examinations that

addressed the question of permanent partial disability, he contends the further examination was unnecessary. Second, he contends the Department failed to exercise its independent judgment and failed to maintain fairness in its claims administration by allowing the employer to select the physician who was to perform the further examination. The selected physician, claimant's counsel contends, was expected to prepare an examination report that was unfavorable to Mr. Edwards, thereby "stacking the deck" against him.

As a beginning point, we observe that the Department's decision to suspend benefits pursuant to RCW 51.32.110 is like any other Department decision awarding or denying benefits. On an appeal to the Board from a Department order suspending benefits, the claimant must show, by a preponderance of the evidence, that the Department order is incorrect. Olympia Brewing Co. v. Dep't of Labor & Indus., 34 Wn.2d 498 (1949).

RCW 51.32.110 reads, in relevant part:

> Any worker entitled to receive any benefits or claiming such under this title shall, if requested by the department or self-insurer, submit himself or herself for medical examination, at a time and from time to time, at a place reasonably convenient for the worker and as may be provided by the rules of the department. If the worker refuses to submit to medical examination, or obstructs the same, or, if any injured worker shall persist in unsanitary or injurious practices which tend to imperil or retard his or her recovery, or shall refuse to submit to such medical or surgical treatment as is reasonably essential to his or her recovery or refuse or obstruct evaluation or examination for the purpose of vocational rehabilitation or does not cooperate in reasonable efforts at such rehabilitation, the department or the self-insurer upon approval by the department, with notice to the worker may suspend any further action on any claim of such worker so long as such refusal, obstruction, noncooperation, or practice continues and reduce, suspend, or deny any compensation for such period: Provided, That the department or the self-insurer shall not suspend any further action on any claim of a worker or reduce, suspend, or deny any compensation if a worker has good cause for refusing to submit to or to obstruct any examination, evaluation, treatment or practice requested by the department or required under this section. (Emphasis added)

The issue thus becomes whether Mr. Edwards has proven by a preponderance of the evidence that he had good cause for failing to submit to the medical examination.

Whether good cause exists in a given case will depend on a variety of factors that require balancing from one instance to the next. Among those factors that may be considered are the claimant's physical capacities, sophistication, circumstances of employment, family responsibilities,

proven ability or inability to travel, medical treatment and other relevant concerns, not the least of which is the expectation of a fair and independent medical evaluation.

Balanced against this are the interests of the Department and its statutory responsibility to act in attempting to resolve disputes at the first-step administrative level. This may include the need to resolve conflicting medical documentation, the location of willing and qualified physicians, the length of time before a physician is available to perform an examination, and the comparative expense of such. Neither of the above lists of factors are exhaustive.

In the case at hand, it must be kept in mind that it was Mr. Edwards who caused this matter to be brought back before the Department for further consideration and resolution. Mr. Edwards filed a protest with the Department from an order of February 16, 1990 which had directed: 1) closure of the claim; and 2) payment of a permanent partial disability award by the self-insured employer, for an impairment consistent with Category 4 of permanent lumbosacral impairments. Following receipt of Mr. Edwards' timely protest sent on April 17, 1990, the Department issued a further order on May 8, 1990, placing its February 16, 1990 closing order in abeyance. Thereafter on May 16, 1990, Mr. Edwards' attorney sent him for a new medical examination. The result of this examination was the opinion that Mr. Edwards' condition was worse than determined by the Department's closing order. The doctor conducting the examination reported that Mr. Edwards' impairment was a Category 5 of permanent lumbosacral impairments, and that there were additional findings which were not present at the panel examination performed on August 29, 1989. That earlier examination had been performed at the employer's request, and had formed part of the basis for the closing order of February 16, 1990. A copy of this medical report was sent to the Department and the employer on May 22, 1990. The Department's attempt to gather further information to attempt to resolve the protest and the apparent discrepancy in the disability rating by a further medical examination scheduled for August 6, 1990, was done pursuant to the statutory authority of RCW 51.32.110 and 51.32.055(2)(3) and (4).

Although the further examination may have ultimately inured to the benefit of the employer, in the event of possible adversarial litigation before this Board, we are not prepared to conclude that Mr. Edwards has shown good cause for refusing to attend by virtue of that possibility alone. Assuming that the physician selected for the further examination was unbiased, the Department's right to direct a further medical examination exists independently of any consideration as to which party, be it the claimant or the employer, might possibly "benefit" in possible later full-scale litigation. In this light, it should be noted that the Department was in a non-adversarial position in relation to the employer and

the claimant when it requested the further examination. Given that reasonable medical minds could, and did, disagree as to the extent of Mr. Edwards' permanent partial disability as it was then outlined in the medical records, the Department's effort to obtain more information was reasonable and was done in a setting designed for efficient administrative adjudication absent the trappings of adversarial litigation. Indeed, the Department has the duty to determine the extent of a worker's permanent partial disability when it appears a claim is ready for closure, as was the case here (RCW 51.32.055); and it has the authority to attempt to resolve disputes over such an issue at its administrative level, as the claimant had requested the Department to do. There remains the underlying question as to whether Mr. Edwards would have good cause to object to the Department's choice of physician. As a general rule, when the Department or the self-insured employer schedules an examination under authority of RCW 51.32.110 or 51.32.055, it should be conscious of the requirement to choose a physician who can be both fair and independent. We would certainly not say as a matter of law or policy that the Department may send a claimant to a medical examiner who has demonstrated a pattern of prejudice against injured workers. Here, however, there is absolutely no evidence that the physician selected, Dr. Thomas Rosenbaum, was such a physician. Claimant's counsel simply jumped to that conclusion and believed, unfounded by any apparent knowledge shown by this record, that the employer was attempting to "stack the deck" in support of a Category 4 disability rating. The answers to this assumption are several: (1) It was not solely the employer's choice to have another examination; rather, the Department wanted and requested it. (2) Counsel did not object to the particular physician scheduled -- Dr. Rosenbaum -- on grounds he was biased or prejudiced against injured workers. The objection was simply to any examination whatsoever. (3) Counsel admits that, if the case were to get before this Board on the merits of the proper impairment rating category, the employer would then have the right to a Rule 35 examination by a physician of the employer's sole choice. We conclude that simply suspicion, unfounded by any evidence, of a biased or pre-judged medical examination report, does not prove good cause for refusing to attend the statutorily-authorized medical examination scheduled for August 6, 1990.

After consideration of the Proposed Decision and Order, the Petition for Review filed thereto by the employer, the claimant's Response to Employer's Petition for Review, and a careful review of the entire record before us, we have determined that the Department order dated September 17, 1990 was correct and must be affirmed.

Finally, even in light of this determination, we are compelled to comment on the waste of time and effort this matter has caused for all parties, and for this Board. In actuality, no useful purpose was served by the Department's September 17, 1990 order suspending claimant's "right to compensation." No temporary disability compensation is involved here. The record shows that Mr. Edwards returned to work on March 16, 1989, and has been apparently working steadily since then. The only compensation involved is his award for permanent partial disability. The Category 4 lumbosacral impairment award made by the initial closing order of February 16, 1990 was of course not protested or challenged by the employer since it was based on medical evaluations obtained and submitted by the employer, and was presumably paid to Mr. Edwards in early 1990. If it was not, it certainly should have been.

Following claimant's protest of that order, and the Department's action in holding it in abeyance on May 8, 1990, the claim has remained in an open (though effectively "inactive") status ever since. Even as of now -- mid-1992 -- there is still no closing or terminal date with reference to which claimant's extent of permanent partial disability is to be determined! The Proposed Decision and Order purported to provide Mr. Edwards "that compensation to which he is entitled, effective September 17, 1990." This, too, accomplishes nothing, since there obviously was no compensation to which he was at that time "entitled"-- certainly no permanent partial disability award in addition to the Category 4 impairment he had already been awarded. September 17, 1990 was obviously not a claim closure date. The Department will now, in mid-1992, have to again consider and determine the extent of claimant's permanent partial disability. No doubt this will entail further orthopedic and/or neurologic evaluations of his back condition, since the examinations and evaluations done by Dr. Sears in August 1989 and by Dr. Dimant in May 1990 are now "stale" and of quite marginal relevance to a claim-closing date still yet to be determined in the future -- the relatively near future, we hope, in light of the two years of "limbo" in which this claim has languished.

FINDINGS OF FACT

1. On September 9, 1982 Bob C. Edwards filed an application for benefits alleging the occurrence of an industrial injury to his low back on August 15, 1982, during the course of his employment with the self-insured employer, Weyerhaeuser.

   On February 5, 1985 the Department issued an order allowing the claim for the injury sustained on August 15, 1982.

   On February 16, 1990 the Department issued an order closing the claim with time-loss compensation as paid to March 16, 1989, and with an

award for permanent partial disability consistent with Category 4 of the categories for permanent lumbosacral impairment. The award for back impairment was paid at 75% of its monetary value.

On April 17, 1990 the claimant filed a protest and request for reconsideration with the Department from its order dated February 16, 1990. On May 8, 1990 the Department issued an order placing the February 16, 1990 order in abeyance pending further consideration.

On September 17, 1990 the Department issued an order suspending the claimant's right to compensation for failure to submit to a medical examination. On September 20, 1990 the claimant received the September 17, 1990 order. On November 16, 1990 the claimant filed a protest and request for reconsideration with the Department, which was forwarded to the Board as a direct appeal on December 11, 1990. On January 10, 1991 the Board issued its order granting the appeal.

2. As of late May 1990, the Department had medical reports and opinions from Dr. Stephen Sears dated August 29, 1989, and from Dr. E. E. Hummel dated September 25, 1989, indicating that Mr. Edwards' low back permanent partial disability was best described by Category 4 of WAC 296-20-280. The Department also had a report and opinion from Dr. Stevens Dimant dated May 16, 1990, indicating that Mr. Edwards' low back disability was best described by Category 5 of WAC 296-20-280.

3. In early July 1990, the Department of Labor and Industries, through its claims consultant, Barbara Ferry, requested that the self-insured employer schedule a further medical examination so as to obtain further information to attempt to resolve the extent of Mr. Edwards' low back permanent partial disability.

4. At the Department's request, the self-insured employer scheduled a further examination for Mr. Edwards, to be conducted by Dr. Thomas Rosenbaum on August 6, 1990.

5. Mr. Edwards, through letters from his counsel dated July 5 and July 30, 1990, refused to submit to further examination by Dr. Rosenbaum, and did not attend the examination scheduled for August 6, 1990 with Dr. Rosenbaum.

6. Mr. Edwards failed to show good cause for refusing to submit to an additional examination when the Department had conflicting medical documentation in its file as to the extent of Mr. Edwards' permanent partial disability in his low back resulting from the injury herein.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and the subject matter to this appeal.

2. The claimant, Bob C. Edwards, failed to show good cause, within the meaning of RCW 51.32.110, for refusing to submit to further medical

examination as properly requested by the Department pursuant to that statute and pursuant to RCW 51.32.055(2)(3) and (4).

3. The Department order of September 17, 1990, which suspended Mr. Edwards' right to compensation for his failure to submit to further medical examination, was legally correct and must be affirmed.

It is so **ORDERED**.

Dated this 4th day of June, 1992.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
S. FREDERICK FELLER Chairperson

/s/_____
PHILLIP T. BORK Member

COURT OF APPEALS, DIVISION II

OF THE STATE OF WASHINGTON

ALFREDO SUAREZ, Respondent, v. MASCO CORPORATION, TOP BUILD, Appellant.	Court of Appeals Case No. 55377-5-II PROOF OF SERVICE

The undersigned states that on Friday, the 11th day of February 2022, I deposited in the United States Mail, with proper postage prepaid, corrected Petition for Review to the Supreme Court of Washington, by the method indicated below:

James L. Gress Gress Clark Young & Schoepper 8705 SW Nimbus Ave., Ste. 240 Beaverton, OR 97008 *jim@gressandclarklaw.com*	( ) U.S. Mail (X) Via E-Mail
Anastasia Sandstrom, Senior Counsel Attorney General of Washington 800 Fifth Ave., Ste. 2000 Seattle, WA 98104-3188 *anastasia.sandstrom@atg.wa.*gov	( ) U.S. Mail (X) Via E-Mail

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct:

February 11, 2022, Vancouver, WA

Ashley Sturgis, Legal Assistant

Law Office of Steven L. Busick, PLLC
1915 Washington Street
PO Box 1385
Vancouver, WA 98666-1385
Telephone (360) 696-0228
Fax (360) 696-4453

Attorney
Steven L. Busick

Law Office of Steven L. Busick, PLLC

Office Manager
Ashley Sturgis

Receptionist
Carolyn Nguyen

100655-1

February 11, 2022

Submitted Electronically

Derek M. Byrne, Court Clerk
Washington State Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

Re: Alfredo Suarez v. Masco Corporation Top Build and
The Department of Labor and Industries of the State of Washington
Court of Appeals Case No. 55377-5-II

Dear Mr. Byrne:

Enclosed please a Petition for Review to the Supreme Court of Washington, with the corrected case number for filing.

Sincerely,

Steven L. Busick

SLB:as
Encl.
cc: James L. Gress (w/ encl.)
Anastasia Sandstrom (w/ encl.)
Alfredo Suarez (w/ encl.)

LAW OFFICE OF STEVEN L. BUSICK

February 11, 2022 - 10:07 AM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	55377-5
Appellate Court Case Title:	Alfredo Suarez, Appellant v. Masco Corporation et al., Respondents
Superior Court Case Number:	19-2-02768-5

The following documents have been uploaded:

- 553775_Petition_for_Review_20220211100508D2757161_7136.pdf
  This File Contains:
  Petition for Review
  The Original File Name was Suarez - Corrected PFR Supreme Court 02-11-22.pdf

A copy of the uploaded files will be sent to:

- anastasia.sandstrom@atg.wa.gov
- jim@gressandclarklaw.com
- judyg@atg.wa.gov

Comments:

Corrected case number.

Sender Name: Ashley Sturgis - Email: ashleys@busicklaw.com
Filing on Behalf of: Steven L. Busick - Email: sbusick@busicklaw.com (Alternate Email: ashleys@busicklaw.com)

Address:
PO Box 1385
Vancouver, WA, 98666
Phone: (360) 696-0228

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