NO. 90071-0

SUPREME COURT OF THE STATE OF WASHINGTON

DELLEN WOOD PRODUCTS, INC.,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES
OF THE STATE OF WASHINGTON,

Respondent.

ANSWER TO PETITION FOR REVIEW DEPARTMENT OF LABOR AND INDUSTRIES

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I. INTRODUCTION

The Department of Labor and Industries (Department) opposes further review of this workers' compensation appeal. *See Dellen Wood Products v. Dep't of Labor & Indus.*, __ Wn. App. __, 319 P.3d 847 (2014). Dellen Wood Products voluntarily defaulted on its obligations as a self-insured employer, and, thereafter, it paid no claims, paid no assessments, and otherwise failed to meet the obligations of a self-insured employer. Apparently unaware that defaulting would cause Dellen to forfeit its interest in its surety, Dellen now claims that it did not default. This Court should deny review because the Court of Appeals' decision primarily involves the application of the particular facts of this case to a correct legal standard. As such, the case does not raise an issue of substantial public interest that should be decided by this Court. And, in any event, the Court of Appeals decision is correct and consistent with the plain language of the relevant statutes and regulations.

Dellen has also failed to demonstrate that there is a significant question of constitutional law that merits review. Although Dellen argues that it was deprived of its due process, Dellen received notice that it would be defaulting because Dellen itself voluntarily submitted a letter to the Department stating that it was defaulting, and Dellen has received an

ample opportunity to be heard. Furthermore, RCW 51.14.020 provides that an employer who defaults thereby loses its interests in its surety.

Therefore, this Court should deny Dellen's petition for review.

II. ISSUE PRESENTED

Discretionary review is not merited in this case, but if review were granted, the following issue would be presented:

1. Under RCW 51.14.020, does substantial evidence show that Dellen defaulted on its obligations as a self-insured employer when Dellen sent the Department a letter in 2002 in which it stated that it elected to default, when it failed to pay any benefits to any of its injured workers on their outstanding claims at any time after 2002, and when Dellen failed to either submit any reports to the Department or pay any assessments of any kind after 2002?

2. Was Dellen deprived of its right to due process regarding its surety when the Department determined that Dellen defaulted based on Dellen's submission of a letter stating that it elected to default and when RCW 51.14.020 plainly provides that an employer who defaults on its obligations as a self-insured employer loses any right to its surety?

III. STATEMENT OF THE CASE

A. Dellen Sent A Notice To The Department That It Was Defaulting On Its Self-Insured Obligations

Dellen manufactured finger-jointed wood molding in Spokane, Washington. BR Olsen 9-10.[1] In 1986, Dellen chose to become

[1] The certified appeal board record is cited to as "BR," followed by the appropriate page number. Citations to the testimony of witness will be cited to as "BR," followed by the name of the witness and the page number of the applicable transcript.

self-insured. BR Wilkinson 78, BR Ex. 17. The Department certified it as a self-insured employer. BR Wilkinson 78-79.

RCW 51.14.020 authorizes the Department to require self-insured employers to provide a surety to ensure that the state fund will not bear the costs of its workers' claims. Dellen elected to place the required surety amount in an escrow account. BR Wilkinson 79.

In December 2001, the Department learned that Dellen had sold the majority of its operations and that it no longer had employees. BR Olsen 14. During the first part of January 2002, Dellen was considering what it should do regarding the administration of its claims. BR Olsen 43. Dellen's owner, David Lentis, and Dellen's Chief Financial Officer, Gene Olsen, discussed the matter. BR Olsen 43. Mr. Olsen then contacted Larry Wilkinson, the Department employee who is in charge of the "certification" and "compliance" units of the Department's self-insurance program, and asked whether it would be possible for the Department to take over the active administration of Dellen's claims. BR Olsen 43; BR Wilkinson 53. Mr. Wilkinson informed him that the Department would be able to take over the administration of these claims only if Dellen defaulted. BR Olsen 43-44. Mr. Wilkinson, when asked how long the surety would be held, indicated that the surety would have to be held for eleven years after Dellen's last claim was closed. BR Ex. 1.

Mr. Wilkinson did not state that the surety would be released to Dellen if it defaulted. BR Olsen 46.

Mr. Lentis and Mr. Olsen again discussed the matter, and decided to default. BR Olsen 43-44. They reached this decision without conducting legal research or seeking legal counsel. BR Olsen 43-44.

Mr. Olsen then contacted the Department to ask how to default. BR Olsen 43-44. Mr. Wilkinson indicated that Dellen would need to provide the Department with written notice indicating that Dellen would default on its obligations. BR Olsen 43-44. Mr. Olsen then sent a letter to the Department that stated that Dellen "electe[d] to default" on its claims, stating Dellen:

> elects to default on its payment of [its] claims under the self-insured program and requests that the Department take over administration of the claims.

BR Ex. 2.[2]

In response to Dellen's letter, the Department made arrangements to pick up Dellen's claim files. BR Wilkinson 90. Mr. Wilkinson went to Spokane and personally obtained Dellen's claim files. BR Olsen 48;

[2] Years later Dellen claimed that it only used the "default" language because the Department told it to. Pet. at 1; BR. of Appellant at 20; *Dellen*, 319 P.3d at 856-57. But Mr. Olsen contacted the Department and asked whether the Department could "take over administration" of the claims and the default letter similarly asked the Department to do so. BR Olsen 43-44; BR Ex. 1. Mr. Wilkinson advised that the only way for the Department to do so was for Dellen to default. BR Olsen 43-44. This is consistent with RCW 51.14.020 and WAC 296-15-121(8).

BR Wilkinson 90. Mr. Wilkinson brought Dellen's claim files back to Olympia, and turned them over to Department staff to administer. BR Wilkinson 90-91.

B. After Dellen's Default, Dellen Did Not Pay Worker Benefits, File Any Reports, Or Pay Any Assessments

After Dellen's default, the Department administered Dellen's claims, paying benefits from the state fund medical aid and accident funds, as necessary, until the last claim closed in May 2004. BR Wilkinson 76, 91. These costs then were reimbursed quarterly from the proceeds of the escrow account. BR Wilkinson 76, 91. The Department did not use the escrow account proceeds to pay any administration costs, nor to pay any of the assessments that would have accrued after January 2002 had Dellen not defaulted. BR Wilkinson 99.

After January 2002, Dellen neither filed any further reports nor paid any further annual assessments. BR Olsen 49; Wilkinson 94.

In January 2003, Mr. Wilkinson sent a letter to Dellen that reported that the current balance of the surety was $403,833.58. BR Ex. 20. The letter mentioned that the Department had "assumed jurisdiction" over Dellen's workers' claims. BR Ex. 20. The letter did not mention any possibility of the surety being released to Dellen. BR Ex. 20.

C. Dellen Received A Declaration From The Department That In The Event Of Default, The Self-Insurer Loses All Right and Title To The Surety

Dellen later filed for bankruptcy. BR Olsen 32. Mr. Wilkinson filed a declaration in April 2005, while Dellen's bankruptcy action was pending. BR Olsen 33; Ex. 13. In its Petition for Review, Dellen incorrectly states that "[d]uring a 2005 bankruptcy reorganization by Dellen, Wilkinson filed a declaration again confirming that a refund could be available eleven years after Dellen was no longer required to file quarterly reports." Pet. at 4. The record does not contain such a statement from Mr. Wilkinson. Rather, Mr. Wilkinson declared that "[i]n the event of default, RCW 51.14.020 provides that a self-insurer loses all right and title to any interest in and right to control the surety it posted to meet its obligations," that Dellen had defaulted on its self-insurance program effective January 31, 2002, and that Dellen had "lost its right and title to funds on deposit for its self-insurance obligation," effective January 31, 2002. BR Ex. 13. Mr. Wilkinson also declared in the declaration provided to the bankruptcy court that, "[a]ssuming a refund were available, it would not be considered until the last claim is closed, or January 1, 2013 (11 years after [an employer] is no longer required to file quarterly reports), whichever is later." BR Ex. 13.

D. The Department Denied Dellen's Request Of Return Of The Surety, Which The Board, Superior Court, And Court of Appeals Affirmed

In June 2008, Dellen requested that the balance of the surety funds be returned to it. BR Ex. 9. Mr. Wilkinson responded to Dellen's request with a letter indicating that the Department could not release any portion of the surety to it because Dellen had defaulted and thereby lost all of its rights to the surety. BR Ex. 7. Mr. Wilkinson noted that he understood that this "was not the response you anticipated." BR Ex. 7. Dellen incorrectly states that Mr. Wilkinson "thereafter testified that he changed his position that the fund would go back to Dellen. (RP 1-62)." Pet. at 6. Nowhere in Mr. Wilkinson's testimony did he say that he originally had the position that Dellen would get the surety and then changed his position about it. *See, e.g.*, BR Wilkinson 62.

The Department denied Dellen's request, on the basis that Dellen had lost all of its rights to the surety as a result of having defaulted. BR Ex. 8. On successive appeals from Dellen, the Board and Thurston County Superior Court affirmed the Department's order. BR 2-4.

The superior court found that Dellen submitted a letter in which it elected to default on its payment of claims under the self-insured program, and that, after submitting that letter, Dellen did not pay benefits to its

workers, manage their claims, file quarterly reports with the Department, or pay any quarterly assessments. CP 86-89.

Dellen appealed. The Court of Appeals affirmed the superior court's decision in a published decision, determining that substantial evidence supported the superior court's findings. *Dellen*, 319 P.3d at 850. Dellen now petitions for review.

IV. ARGUMENT

Dellen sent the Department a letter in January 2002, in which it "elect[ed] to default on its payment of claims under the self-insured program" and in which it requested "that the Department take over administration of the claims." BR Ex. 1. The Department properly denied Dellen's subsequent request to return the surety to Dellen, because, under, RCW 51.14.020 "[i]n the event of default a self-insured employer loses all right and title to, any interest in, and any right to control the surety."

This case does not present a question of substantial public interest because, contrary to Dellen's portrayal, this decision is unlikely to "dramatically impact[] *all* state employers." *See* Pet. at 9 (emphasis added). Most employers are not self-insured, and only a very small number of self-insured employers default. When a self-insured employer defaults, RCW 51.14.020 plainly provides that it thereby loses its interest in the surety. No issue of substantial public interest is raised where a

self-insured employer voluntarily elects to default and acts consistently with that election, but later rues the fact that that decision resulted in a forfeiture of the surety.

Dellen also argues that it was deprived of its right to due process because the Department did not explain to it that, under RCW 51.14.020, a default would result in the forfeiture of its interests in the surety, and that this is a significant question of law under the constitution. Pet. at 9; *see* RAP 13.4(b)(3). No significant constitutional issue is presented where a self-insured employer voluntarily undertakes to default on its obligations, and RCW 51.14.020 informs it of the consequences. As neither of Dellen's arguments have merit, this Court should deny review.

A. No Issue of Substantial Public Interest Is Presented By An Employer Who Voluntarily Defaulted On Its Obligations As A Self-Insured Employer And Who Therefore, Under The Plain Language Of The Statute, Forfeited Its Interest In The Surety

1. A Default Occurs When An Employer Fails To Meet Its Obligations Under the Industrial Insurance Act

There is no issue of substantial public interest here because the Court of Appeals applied the facts of this case to unambiguous statutory language. The Court of Appeals properly concluded, consistent with RCW 51.14.020, that a default occurs when an employer fails to satisfy its legal obligations as a self-insured employer under the Industrial Insurance Act and that Dellen voluntarily defaulted when it submitted a letter

indicating that it did not intend to pay benefits to its workers and asked the Department to take over the management of its worker's claims. *Dellen*, 319 P.3d at 853-57. Dellen argues that a default only occurs when an employer fails to pay benefits to its workers and cannot result from an employer's failure to perform any of its other obligations under the Industrial Insurance Act. Pet. at 10-12.

Dellen's argument fails. First, Dellen has misconstrued the Court of Appeals' holding. The Court of Appeals held that Dellen voluntarily defaulted when it submitted a letter in January 2002 in which it elected to default. *Dellen*, 319 P.3d at 856-57. The court also concluded that substantial evidence showed that Dellen failed, after January 2002, to either pay benefits to its injured workers or manage its workers' claims, or file quarterly reports, or pay quarterly assessments, and it held that those findings established that Dellen defaulted. *Id.* at 857-859.

It is undisputed that Dellen did not pay benefits to its insured workers directly after it sent the default letter in January 2002, and that those benefits were paid by the Department and covered by the surety Dellen had provided. *See* BR Wilkinson 76, 90-91; App's Br. at 23. Dellen suggests, without citation to authority, that the Department's payment of benefits to its workers constituted a payment of those benefits by Dellen because the Department used the surety to cover the benefits it

paid. Pet. at 16-17. The Court of Appeals correctly concluded that payments by the Department do not satisfy Dellen's obligation to pay benefits to its workers simply because the surety was used to cover those costs, and Dellen fails to show that this was error. *Dellen*, 319 P.3d at 858; *see also Cowiche Canyon Conserv. v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (noting that an appellate court generally only considers arguments that are supported by a citation to legal authority).

Furthermore, WAC 296-15-121(1)(b) plainly forbids a self-insured employer from using a surety to pay benefits to its workers, while RCW 51.14.060 only authorizes the Department to use a surety to pay benefits if an employer has defaulted.

Dellen also suggests that it was speculative for the Department to assert a default based on its failure to file a quarterly report or pay assessments after January 2002, as Dellen's obligation to file those reports and pay those assessments did not come about until March 2002. Pet. at 12. However, this ignores the fact that by electing to default in January 2002, Dellen informed the Department that it would not be making those payments or filing those reports, and, after submitting that letter, acted in a manner consistent with it having made that election.

Second, the Court of Appeals properly held that a default occurs when a self-insured employer fails to meet any of its obligations under the

Industrial Insurance Act. *Dellen*, 319 P.3d at 853-55. As the court notes, although RCW 51.14.020 does not define the term "default," RCW 51.14.060 shows that the Legislature understood the term to refer broadly to an employer's failure to meet its legal obligations as a self-insured employer. *Dellen*, 319 P.3d at 854. This is because RCW 51.14.060 references "cases of default *upon any obligation under this title* by a self-insurer." (Emphasis added).

Under Dellen's argument, there is only one obligation that an employer must meet to avoid a default: its obligation to pay benefits to its workers. However, RCW 51.14.060 plainly contemplates that there are multiple obligations that must be met in order to avoid a default as it references a default on "any obligation under this title." While a self-insured employer's duty to pay benefits to its workers is one of great importance, it is not the only obligation a self-insured employer bears under the Industrial Insurance Act.

In particular, WAC 296-15-121(8) provides that a former self-insured employer who terminates its self-insured status must continue to pay benefits on claims, file quarterly reports and annual reports, and pay assessments. Furthermore, because the employer remains responsible for managing claims for injuries that occurred while it was self-insured, the employer must continue to maintain a staff of employees who are capable

of managing its workers' claims or pay a third party administrator to do so. RCW 51.14.030; WAC 296-15-121, WAC 296-15-221, WAC 296-15-310.[3]

The Court of Appeals appropriately concluded that a self-insured employer defaults—and thereby forfeits its interest in its surety—if it either fails to pay benefits to its workers, fails to manage it claims, fails to file quarterly reports with the Department, or fails to pay its assessments. *Dellen*, 319 P.3d at 853-55. In this regard, these legal obligations bear a logical and practical relationship to each other. An employer must manage its workers' claims in order to make proper decisions about what benefits to pay its workers, and an employer must file reports with the Department in order for the Department to be able to determine if benefits are being paid appropriately.

Dellen suggests that WAC 296-15-125(1) shows that a default only occurs if an employer fails to pay benefits to its workers. Pet. at 10-11. But WAC 296-19A-121(1) does not provide that a default only occurs upon a failure to pay benefits. It shows that a failure to pay benefits will lead to a default, but does not preclude a default from occurring due to a failure to meet other duties under the Industrial Insurance Act. *See*

[3] A self-insured employer that *terminates* as a self-insured may receive its surety back after a certain period of time when all obligations are met. *See* WAC 296-15-121. An employer who *defaults* may not. *See* RCW 51.14.020.

WAC 296-15-121(1) (stating that the surety may be used if an employer "defaults on . . . benefits *and assessments*") (emphasis added).

2. Substantial Evidence Supports The Superior Court's Finding That Dellen Voluntarily Defaulted When It Sent The Department A Letter In Which It Elected To Default

At heart, this is a case about substantial evidence, and as such does not create an issue of substantial public interest. The Court of Appeals properly concluded that substantial evidence supports the superior court's finding that Dellen voluntarily defaulted when it submitted a letter in which it stated that it elected to default. *Dellen*, 319 P.3d at 855-859. Although Dellen suggests that it did not intend to default when it submitted that letter and that it used the word "default" in that letter only because it was instructed to do so by the Department, the record does not support this characterization of the case. Pet. at 1. Nor, as Dellen claims, did the Department represent that it would return the surety to Dellen at some point. Pet. at 12-13.

The record shows that the Department only instructed Dellen to use the word "default" in its letter after Dellen had made it clear that it wished to cease paying benefits on its workers' claims and have the Department take over the active management of those claims. *See* BR Olsen 43-44. The Department told it, correctly, that the only way

this could occur was if Dellen defaulted. BR Olsen 43-44. After being accurately informed that it must default in order to avoid its obligations to actively administer its claims, Dellen asked how it could default, and Mr. Wilkinson said Dellen could do so by sending the Department a letter in which it stated that it elected to default. BR Olsen 43-44.

Dellen fails to support its allegation that the Department made "repeated representations" that the surety would be released to it. Pet. at 13. As the Court of Appeals explains, while it is true that the Department did not inform Dellen that under RCW 51.14.020 a default results in forfeiture of an employer's interests in the surety, the record does not show that the Department ever told Dellen that the surety would be released to it. *Dellen*, 319 P.3d at 856-57.

Dellen argues that the Department represented that the surety would be released to it when Mr. Wilkinson told Dellen that the surety "would have to be maintained" for 11 years after Dellen's last claim was closed. Pet. at 12. However, Mr. Wilkinson's statement was correct: the surety is maintained for 11 years to cover the cost of any benefits that are paid to the employer's injured workers. After that time has elapsed, the surety is deposited in the insolvency trust fund. Mr. Wilkinson did not tell Dellen that the surety would be released to Dellen after 11 years.

Raising an argument not raised in its previous appellate briefing, Dellen also argues that Mr. Wilkinson testified that the Department changed its mind as to whether it would release the surety to Dellen at some point. Pet. at 12. *See Pappas v. Hershberger*, 85 Wn.2d 152, 154, 530 P.2d 642 (1975) (noting that the Supreme Court generally will not consider an argument not raised before the Court of Appeals). However, Mr. Wilkinson did not state that it was ever the Department's position that Dellen would be entitled to the surety after it defaulted, nor that he had ever told Dellen that the surety would be released to it.

Dellen also argues that Mr. Wilkinson's statements in a declaration that was filed while Dellen was in the middle of bankruptcy proceedings was a representation that the surety would be released to it. Pet. at 12. Dellen is incorrect. In his declaration, Mr. Wilkinson stated that a default resulted in an employer losing all right to or interest in its surety, and that Dellen lost any right to its surety as a result of defaulting. BR Ex. 13. Mr. Wilkinson also declared that "[a]ssuming a refund were available, it would not be considered until the last claim is closed, or January 1, 2013 (11 years after [an employer] is no longer required to file quarterly reports), whichever is later." BR Ex. 13. However, in light of his explicit statement in the declaration that Dellen had lost all of its right to its surety,

Dellen could not reasonably rely on his statement as an assurance that the surety would actually be returned to it. *See* BR Ex. 13.

B. Dellen Was Not Deprived Of Due Process

Dellen has raised no meritorious constitutional argument that warrants this Court's review. Dellen argues that the Department deprived it of its right to procedural due process by not notifying Dellen that, as a result of defaulting on its claims, Dellen had forfeited its rights to the surety. Pet. at 17-20. Dellen argues that it was not given a meaningful opportunity to be heard because it was only informed of the consequence of defaulting after it had decided to default, and suggests that it was entitled to a "pre-deprivation hearing." Pet. at 17-20.

The Court of Appeals properly rejected Dellen's argument that it was deprived of due process. *Dellen*, 319 P.3d at 859-61. Due process requires that a party receive notice of a decision and a meaningful opportunity to be heard. *See, e.g*, *In re Morgan*, No. 86234-6, 2014 WL 1847790, *4 (Wash. May 8, 2014). As the Court of Appeals noted, Dellen submitted a letter in which it elected to default. *Dellen*, 319 P.3d at 860. Thus, Dellen's forfeiture of the surety was a result of its own decision to default, not adverse action by a governmental entity. *Id.* The Court of Appeals also noted that, at a minimum, Dellen had constructive notice that

a default resulted in a forfeiture of the surety, since RCW 51.14.020 plainly provides for that result. *Dellen*, 319 P.3d at 860.

Dellen argues that RCW 51.14.020 did not give it constructive notice that a default results in forfeiture of an employer's interests in a surety, noting that the Court of Appeals acknowledges that the case raised issues of first impression as to the meaning of "default" under RCW 51.14.020. Pet. at 18-19. Dellen's argument fails. First, there is no contradiction between an appellate court noting that a case raises an issue of first impression as to the meaning of a statute and a court holding that the terms of the statute were plain. A statute that has never been reviewed by an appellate court in a published Court of Appeals necessarily presents an issue of first impression, even if the language of the statute is plain.

Second, RCW 51.14.020 plainly provides that if an employer defaults, the employer thereby loses all right and title to, any interest in, and any right to control the surety. Dellen points to no ambiguity in the statute regarding the legal effect of a default, and instead argues that the term "default" itself is not defined by the statute. Pet. at 18-19. Again, Dellen's argument ignores the fact that it elected to default. Since Dellen elected to default, the issue of precisely which obligations by an employer in order to avoid defaulting is irrelevant, and the relevant question is whether—after electing to default—Dellen would continue to have a legal

right to its surety. As to the latter point, RCW 51.14.020 unambiguously provides that a default results in forfeiture of an employer's interests in the surety, and Dellen does not argue otherwise.

Furthermore, Dellen was given a full and complete opportunity to be heard on appeal. Thus, Dellen received both notice of the Department's decision and an ample opportunity to be heard as to whether the Department's decision was correct.

Dellen argues that the Department failed to follow the procedures in WAC 296-15-124(2). Pet. at 19. But WAC 296-15-125 was adopted after Dellen elected to default. *See* WAC 296-15-125 (rule adopted 2006). In any event, Dellen stated to the Department that it elected to default, so the provision about the Department contacting the defaulting self-insured employer to see if it intends to resume paying benefits does not apply.

Finally, Dellen cites *Mansour v. King County*, 131 Wn. App. 255, 272, 128 P.3d 875 (2006), for the proposition that due process "almost always requires a pre-deprivation hearing." Pet. at 18. *Mansour* does not support that assertion. *See id.* In *Mansour*, the issue was whether an individual had been given notice of what he would be required to prove at an administrative hearing, not whether due process required a pre-deprivation hearing. *Id.* at 270-72. *Mansour* does not imply that a pre-deprivation hearing is usually, let alone "almost always," necessary.

Id. In any event, Dellen received notice that it was defaulting because Dellen itself voluntarily defaulted.

V. CONCLUSION

The Court of Appeals properly concluded that Dellen voluntarily defaulted when it sent in a letter in which it elected to default and when it failed, after submitting that letter, to manage its workers' claims, pay benefits to its workers, file quarterly reports, or pay assessments. The Court of Appeals' decision is consistent with the plain language of RCW 51.14.020 and the related statutes. Dellen has failed to show error, statutory or constitutional, let alone error warranting this Court's review. The Department asks this Court to deny review

RESPECTFULLY SUBMITTED this 22 day of May, 2014.

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To: OFFICE RECEPTIONIST, CLERK
Subject: Supreme Cause No 90071-0; Dellen Wood v DLI.....
Importance: High

Good afternoon Mr. Carpenter! Attached is the Department's Answer to Petition for Review along with a Cert of Mailing and letter explaining for filing in the above noted matter. Thank you!

Dellen Wood Products, Inc. v. Department of Labor & Industries
Supreme Court No. **90071-0**
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