NO. 96879-9

IN THE SUPREME COURT

OF THE STATE OF WASHINGTON

MASCO CORPORATION, *PETITONER,*

v.

ALFREDO SUAREZ, *RESPONDENT.*

ANSWER TO PETITION FOR REVIEW

Court of Appeals No. 51143-6-II

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

CASES

OTHER AUTHORITIES

INTRODUCTION

This is an appeal of a Penalty Order issued by the Department of Labor and Industries against a self-insured employer in the sum of $6,911.01 for failure to timely pay time loss benefits owing in the sum of $27,647.91.

ISSUE FOR REVIEW

1. Did the Court of Appeals, Division Two, error in concluding under RCW 51.52.050(2)(b) that back time loss payment to Alfredo Suarez became due when ordered by the Department of Labor and Industries?

    a. Does the plain meaning of the statute require payment of benefits following the filing of a motion to stay benefits on appeal to the Board of Industrial Insurance Appeals by a self-insured employer? And

    b. Is the relief available to the self-insured employer under RCW 51.32.240 if the Department order to pay benefits is reversed on appeal?

2. Did Division Two at the Court of Appeals error in reversing the trial court and reinstating the decision of the Board and the Department that the self-insured employer under

RCW 51.48.017 unreasonably delayed payment of benefits as they became due?

a. Does RCW 51.32.190(3) requiring payment of benefits within 14 days set the standard as to what is otherwise a reasonable delay in the payment of benefits?

b. Must there be objective evidence, as opposed to a subjective state of mind, to support a genuine legal or medical doubt that payment is due to delay payment of benefits?

CONSIDERATIONS GOVERNING ACCEPTANCE OF REVIEW

(1) The decision of the Court of Appeals is not in conflict with a decision of the Supreme Court.

(2) The decision of the Court of Appeals is not in conflict with the published opinion of the Court of Appeals.

(3) There is no question of law under the Constitution of the State of Washington or of the United States. RCW 51.52.050 provides that if a self-insured employer prevails on the merits, any benefits paid may be recouped pursuant to RCW 51.32.240.

(4) The petition does not include an issue of substantial public interest that should be determined by the Supreme Court. This issue here only applies to the Industrial Insurance Act, Title 51, and only involves statutory rights between injured workers and self-insured employers.

STATEMENT OF THE CASE

On December 19, 2014, the Department of Labor and Industries ordered the self-insured employer, Masco Corporation, to pay the claimant, Alfredo Suarez, back time loss benefits from October 11, 2013, through December 10, 2014. On January 20, 2015, Masco Corporation filed a Notice of Appeal to the Board of Industrial Insurance Appeals, and included a motion to stay benefits pending a final decision on the merits of its appeal. The Board entered its Order Granting Appeal, advising the parties that if employer's motion to stay benefits is granted, benefits will stop during the appeal process. On February 25, 2015, the Board denied Masco's motion to stay benefits based on the Department file as it existed on December 19, 2014, pursuant to RCW 51.52.050(2)(b).

Accompanying the Board Decision and Order on Motion to Stay Benefits Pending Appeal, was a two page notice advising any party who disagrees with the decision of the Board of their right to appeal to Superior Court of the State of Washington. No appeal was filed in Superior Court to the Board order denying motion to stay benefits. On March 6, 2015, Masco paid the sum of $27,647.91 to Mr. Suarez. On August 25, 2015, the

Department ordered Masco, aka Service Partners Supply LLC, to pay Mr. Suarez a penalty in the sum of $6,911.01, based on 25% of the amount due for unreasonable delay in payment of benefits, in addition to the benefits previously paid, pursuant to RCW 51.48.017.

On September 23, 2015, Masco appealed the penalty order to the Board. On July 1, 2016, following an evidentiary hearing, an Industrial Appeals Judge issued a Proposed Decision and Order finding that there was an unreasonable delay in payment of benefits pursuant to RCW 51.48.017, and affirming the Department order of August 25, 2015. On July 28, 2016, Masco filed its Petition for Review to the Board claiming that they were not obligated to pay benefits until the Board decided their motion to stay benefits, and that they had a genuine legal doubt as to when payment was due. On November 21, 2016, the Board entered its Decision and Order deciding that there was no objective evidence of a genuine legal doubt that Masco had as of December 19, 2014, that time loss benefits were not owing as ordered by the Department.

On December 21, 2016, Masco filed its appeal in Superior Court for Clark County, and the case proceeded to bench trial on September 11, 2017. Though RCW 51.52.050(2)(b) provides that when the Department order is appealed, namely the order of December 19, 2014, the order shall not be stayed pending a final decision on the merits unless ordered by the Board, the trial court decided that the benefits were not due and payable until Masco received notice of the order denying the Motion for Stay of Benefits. The trial court also decided that if the benefits were payable prior to that date, Masco had a genuine legal doubt as to its obligation to pay such benefits.

On November 9, 2017, Alfredo Suarez filed his appeal in Superior Court for Clark County to the Court of Appeals, Division II. On December 3, 2018, oral arguments were held in Tacoma, and on January 23, 2019, the Court of Appeals issued its Published Opinion reversing the trial court and affirming the decision of the Board of Industrial Insurance Appeals and the order of the Department of Labor and Industries. The Court of Appeals concluded under RCW 51.52.050(2)(b) payment becomes due when ordered by the Department, and that Masco Corporation unreasonably delayed making payment of benefits. The penalty imposed by the Department in the sum of $6,911.01 pursuant to RCW 51.48.017 was upheld, and Masco, on February 22, 2019, filed a Petition for Review to the Supreme Court.

ARGUMENT

A. Statutory Interpretation

The meaning of a statute is a question of law reviewed *de novo.* The court's fundamental objective is to ascertain and carry out the Legislature's intent. If the statutes' meaning is plain on its face, the court must give effect to the plain meaning as an expression of legislative intent. The meaning of a statute must be derived from the wording of the statute itself where the statutory language is plain and unambiguous. *Dept. of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). Unless the statute is susceptible to more than one meaning, after the textual inquiry, the statute is unambiguous, and the courts inquiry is over. Only if the statute is susceptible to more than one reasonable interpretation, is it appropriate for the court to

resort to aids to construction, including legislative history, to determine intent. *Crabb v. Labor & Indus.*, 181 Wn. App. 648, 654-5, 326 P.3d 815 (2014).

The statute under consideration, RCW 51.52.050(2)(a) reads as follows:

> An order by the department awarding benefits shall become effective and benefits due on the date issued. Subject to (b)(i) and (ii) of this subsection, if the department order is appealed the order shall not be stayed pending a final decision on the merits unless ordered by the board. Upon issuance of the order granting the appeal, the board will provide the worker with notice concerning the potential of an overpayment of benefits paid pending the outcome of the appeal and the requirements for interest on unpaid benefits pursuant to RCW 51.52.135. A worker may request that benefits cease pending appeal at any time following the employer's motion for stay or the board's order granting appeal. The request must be submitted in writing to the employer, the board, and the department. Any employer may move for a stay of the order on appeal, in whole or in part. The motion must be filed within fifteen days of the order granting appeal. The board shall conduct an expedited review of the claim file provided by the department as it existed on the date of the department order. The board shall issue a final decision within twenty-five days of the filing of the motion for stay or the order granting appeal, whichever is later. The board's final decision may be appealed to superior court in accordance with RCW 51.52.110. The board shall grant a motion to stay if the moving party demonstrates that it is more likely than not to prevail on the facts as they existed at the time of the order on appeal. The board shall not consider the likelihood of recoupment of benefits as a basis to grant or deny a motion to stay. If a self-insured employer prevails on the merits, any benefits paid may be recouped pursuant to RCW 51.32.240.

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What is significant in the wording of the statute is that the department order awarding benefits, the order here dated December 19, 2014, shall be effective on the date issued. The language is followed by the provision that if the Department order is appealed, which the employer did on January 20, 2015, the order shall not be stayed pending a final decision on the merits unless ordered by the Board. Nothing could be clearer than the plain language of the statute using the words "unless stayed by the Board." There is no ambiguity that can be construed into the statute by the language setting the time line for the Board to issue its final decision on the motion for stay. The Board issued its final decision on February 25, 2015, and the self-insured employer did not make payment until March 6, 2015, 77 days following the entry of the Department order.

The Court of Appeals, Division Two, held at page 9 that under RCW 51.52.050(2)(b) payments are due when ordered by the Department of Labor and Industries. Accordingly, the Superior Court erred in deciding that benefits were not due and payable while Masco's motion for stay of benefits was pending before the Board. The Superior Court further erred in deciding that Masco did not unreasonably delay payment of benefits, and the penalty award was reinstated. RCW 51.52.050(2)(b) further provides that if the self-insured employer prevails on the merits, which they eventually did in this case, any benefits may be recouped pursuant to RCW 51.32.240. This specific language is unambiguous and gives Masco a clear source of recovery. There is no evidence in this appeal that Masco has sought such recovery, and any contentions regarding the application of RCW 51.32.240 would have to await another day.

UNREASONABLE DELAY

Under RCW 51.48.017 if a self-insured employer unreasonably delays payment of benefits to an injured worker as they become due, an additional benefit of 25% of the amount due is imposed as a penalty. RCW 51.48.017 reads as follows:

> If a self-insurer unreasonably delays or refuses to pay benefits as they become due there shall be paid by the self-insurer upon order of the director an additional amount equal to five hundred dollars or twenty-five percent of the amount then due, whichever is greater, which shall accrue for the benefit of the claimant and shall be paid to him or her with the benefits which may be assessed under this title. The director shall issue an order determining whether there was an unreasonable delay or refusal to pay benefits within thirty days upon the request of the claimant. Such an order shall conform to the requirements of RCW 51.52.050.

The Department in applying RCW 51.32.190(3) provides for a 14 day period after notice to determine when the payment is unreasonably delayed after payment is due.[1] Unreasonable delay after the 14 day grace period turns on whether the self-insured employer possessed a genuine doubt from a legal or medical standpoint whether the benefit was payable. *Taylor v. Nalley Fine Foods*, 119 Wn.2d 919, 926, 83 P.3d 1018 (2004).

In re Alfredo Suarez, BIIA Dec., 15 20822 (2016), designated a significant decision by the Board, holds that a genuine doubt requires an objective standard of proof allowing the finder of fact the opportunity to assess the reasonableness of such doubt. Masco Corporation could simply not rely on their belief, contrary to the plain meaning of the statute, that payment was not due until the Board made its decision whether to grant the stay. CP CABR,

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[1] Sheryl Whitcomb, the penalty adjudicator at the Department of Labor and Industries. CP, CABR, pages 31-2.

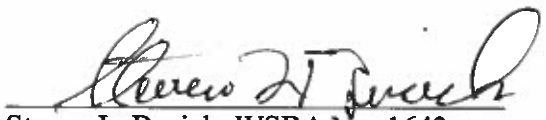
page 5 of 7. While the Board's interpretation of the Industrial Insurance Act is not binding on this court, it is entitled to great deference. *Weyerhaeuser Co. v. Tri*, 117 Wn.2d 128,138, 814 P.2d 629 (1991).

The plain language of RCW51.52.050(2)(b) clearly states that when the benefits are ordered, December 14, 2014, the "benefits shall not be stayed pending a final decision on the merits unless ordered by the board." *Masco Corporation v. Alfredo Suarez*, Washington Court of Appeals No 51143-II, page 8, January 23, 2019.

CONCLUSION

The Supreme Court should deny Masco Corporation's petition for review.

Dated: March 19, 2019.



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IN THE SUPREME COURT

OF THE STATE OF WASHINGTON

In re: ALFREDO SUAREZ	) PROOF OF SERVICE
Claim No. SB-45649	) No. 96879-9

The undersigned states that on Tuesday, the 19th day of March, 2019, I filed via Washington State Appellate Courts' Secure Portal, Answer to Petition for Review to Supreme Court of Washington, addressed to James L. Gress, attorney, and Paul M. Weideman, AAG, addressed as follows:

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I declare under penalty of perjury under the laws of the state of Washington that the foregoing

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Answer to Petition for Review

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