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NO. 96879-9

SUPREME COURT OF THE STATE OF WASHINGTON

MASCO CORPORATION,

Petitioner,

v.

ALFREDO SUAREZ,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

The Court of Appeals' routine application of an unambiguously worded statute does not warrant this Court's review. Under RCW 51.52.050(2)(b)'s plain language, self-insured employers must pay workers' compensation benefits to their employees on the date the Department of Labor and Industries orders payment, and there may be no stay of such benefits pending appeal unless ordered by the Board of Industrial Insurance Appeals. The Court of Appeals applied the statute's plain language, ensuring that employers timely pay injured workers, as the Legislature intended. Because Masco Corporation paid benefits to Alfredo Suarez 77 days after the Department's order, the Court of Appeals correctly affirmed a penalty against Masco for unreasonable delay.

Contrary to Masco's argument, the Court of Appeals' opinion does not conflict with two other statutes. Masco's argument turns on a passing, incorrect statement in dicta regarding recoupment procedures not at issue. But courts need not follow dicta, so the Court's misstatement is not a matter of substantial public interest. Masco also raises a procedural due process argument for the first time, but it shows no manifest error under RAP 2.5(a)(3). In any case, Masco received a full evidentiary hearing before an independent tribunal to contest the $6,911 penalty. The independent hearing satisfies due process. This Court should deny review.

II. COUNTERSTATEMENT OF THE ISSUE

Discretionary review is not warranted, but if the Court were to grant review, the following issue would be presented:

> Under RCW 51.52.050(2)(b), benefits are "due" from a self-insured employer on the day the Department issues an order requiring payment, unless the Board of Industrial Insurance Appeals orders a stay. Masco paid benefits to Suarez 77 days after the Department's order, and the Board never issued a stay. Did the Department correctly issue a penalty because Masco's 77-day delay was unreasonable?

III. STATEMENT OF THE CASE

A. The Department Ordered Masco to Pay Time-Loss Compensation Benefits to Suarez, but Masco Did Not Pay the Benefits for 77 Days

Masco has elected to self-insure for workers' compensation benefits, so it must directly pay benefits for its workers' compensation claims. *See Boeing Co. v. Doss*, 183 Wn.2d 54, 58, 347 P.3d 1083 (2015); RCW 51.08.173; RCW 51.14.010, .030, .080, .095.

In 2012, Suarez was injured while working for Masco and the Department allowed Suarez's workers' compensation claim. In 2014, the Department ordered Masco to pay time-loss compensation benefits (a wage replacement benefit) to Suarez for approximately a fourteen-month period. Ex 1; RCW 51.32.090(1).

Masco did not pay these time-loss benefits to Suarez for 77 days. Ex 6; AR Anderson 15.[1] Masco waited approximately six weeks to appeal the Department's order and, when it appealed, it also moved for a stay under RCW 51.52.050(2)(b). Ex 2; AR Anderson 9-10. After the Board denied the stay motion, Masco paid benefits to Suarez, 77 days after the Department's order. Exs 4, 6; AR Anderson 15.

A jury ultimately determined that Suarez was not entitled to these time-loss benefits. *Suarez v. Masco Corp.*, No. 50566-5-II, 2018 WL 3039837, at *1 (Wash. Ct. App. June 19, 2018), *review denied,* 191 Wn.2d 1021, 428 P.3d 1175 (2018) (unpublished opinion). That final determination is not at issue in this appeal. Under recoupment statutes, Masco can recoup these benefits from Suarez. If Masco's recoupment efforts do not work, it can seek reimbursement from a special fund that the Legislature created for such circumstances. RCW 51.32.240(4), (4)(c).

B. The Department Ordered Masco to Pay Suarez a $6,911 Penalty for Unreasonably Delaying the Payment of Benefits

In 2015, Suarez asked the Department to consider a penalty for Masco for unreasonably delaying the payment of time-loss benefits. Ex 10; AR Whitcomb 7. The Department issued a penalty order determining

[1] This brief cites the certified appeal board record as "AR" and witness testimony as "AR" followed by the witness name and page number.

that Masco had unreasonably delayed the payment of benefits for most of the period at issue. Ex 12. The Department ordered Masco to pay a $6,911.01 penalty to Suarez. Ex 12.

C. The Court of Appeals Affirmed the Penalty, Relying on RCW 51.52.050(2)(b)'s Plain Language

Masco appealed the Department's penalty order to the Board. *See* AR 3. At an administrative hearing, an employee for Masco's third-party administrator testified that Masco had delayed payment because it appealed the Department's order and asked for a stay. The Board affirmed the penalty, concluding that Masco had unreasonably delayed payment of benefits. AR 8.[2] The superior court reversed, concluding that benefits were not due to Suarez until the Board had ruled on Masco's motion to stay. CP 72.

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[2] The Board applied the test from its *Frank Madrid* decision to determine whether Masco unreasonably delayed payment of benefits. *See* Dep't Resp. Br. 22-26; *Frank Madrid*, No. 860224A, 1987 WL 61383 (Wash. Bd. Indus. Ins. Appeals, Sept. 4, 1987). That test asks whether the self-insured employer has a "genuine doubt from a medical or legal standpoint as to the liability for benefits." *Frank Madrid*, 1987 WL 61383, at *3; *see also Taylor v. Nalley's Fine Foods*, 119 Wn. App. 919, 83 P.3d 1018 (2004).

The Department argued to the Court of Appeals that the Legislature's enactment of RCW 51.52.050(2)(b) repudiated the Board's *Frank Madrid* test where the Department issues an order that the self-insured employer pay benefits. *See* Dep't Resp. Br. 22-26. The Department maintains that position. The Court of Appeals noted that the *Frank Madrid* analysis could be instructive in other circumstances when there is a delay (such as when there is an unreasonable delay even when the Department does not issue an order). *Masco Corp. v. Suarez*, __ Wn. App. _, 433 P.3d 824, 830 n.6 (2019). Under the Court's analysis, the *Frank Madrid* analysis does not apply when, as here, there is a Department order directing payment of benefits. *Id.* at 829-30.

The Court of Appeals reversed the superior court, holding that "under RCW 51.52.050(2)(b), payments to Suarez became due when ordered by L&I, and that Masco unreasonably delayed making payments." *Masco Corp. v. Suarez*, __ Wn. App. __, 433 P.3d 824, 826 (2019). The Court of Appeals relied on RCW 51.52.050(2)(b)'s plain language to reject the superior court's analysis that a pending stay motion excused nonpayment:

> Here, RCW 51.52.050(2)(b) clearly states that if benefits are ordered, the benefits shall not be stayed pending a final decision on the merits "unless ordered by the board." Only the Board can order a stay of the payment of benefits. Benefits are payable unless the Board orders otherwise. Thus, benefits are payable while the Board is considering a motion to stay benefits.

Masco Corp., 433 P.3d at 828. The Court of Appeals held that this unambiguous meaning was consistent with the purpose of the Industrial Insurance Act, which is to be liberally construed "in favor of the injured worker" and "to minimize the suffering and economic loss that arises from injuries in the course of employment." *Id.* at 828-829 (internal citations omitted).

Additionally, in dicta, the Court of Appeals addressed whether a self-insured employer who eventually prevailed on the merits could recoup the benefits it had paid to worker:

> Masco argues that self-insured employers will be penalized for exercising their right to move for a stay of benefits by being required to pay benefits while it awaits a Board decision. However, RCW 51.32.240(3) states that "[w]henever the department issues an order rejecting a claim for benefits, . . . after it has been paid by a self-insurer, . . . the recipient thereof shall repay such benefits." Thus, an employer is allowed to recoup payments under RCW 51.32.240(3) if the Board grants the stay.

Masco Corp., 433 P.3d at 829 (footnote omitted).

Masco now seeks review.

IV. ARGUMENT

Masco shows no basis for review. The Court of Appeals applied RCW 51.52.050(2)(b)'s plain language to affirm the penalty against Masco. The court's routine application of a clear and unambiguous statute creates no issue of substantial public interest warranting review.

That statute makes benefits due on the date of the Department's order. RCW 51.52.050(2)(b). Masco waited to pay benefits until 77 days after the Department's order. Because is it unreasonable for an employer to refuse to pay benefits to a disabled worker when they are due, the Department correctly issued a penalty to Masco for an unreasonable delay.

Masco seeks to divert the Court's attention from the Court of Appeals' application of the statute's plain language to an imprecise statement by the Court of Appeals in dicta about a self-insurer's ability to recoup benefits if a stay is ultimately granted. But the recoupment statute

was never at issue in this appeal, so the court's statement was unnecessary to its decision. Further, the Court of Appeals' larger point—that self-insured employers have opportunities to recoup overpayments—remains valid. The court's dicta about recoupment is not a matter of substantial public interest because courts need not follow dicta. *See* RAP 13.4(b)(4). This Court need not accept review to correct a statement in dicta.

Nor is Masco's belated procedural due process argument a basis for review. Masco shows no manifest error under RAP 2.5(a)(3) where it fails to cite or apply the factors from *Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). In any case, Masco received ample process to challenge the penalty because it received a full evidentiary hearing before an independent tribunal.

A. The Court of Appeals' Application of RCW 51.52.050(2)(b)'s Plain Language Does Not Create a Matter of Substantial Public Interest

The Court of Appeals applied RCW 51.52.050(2)(b)'s plain language to affirm the penalty against Masco under RCW 51.48.017. Masco shows no reason to review the court's correct interpretation.

1. The Court of Appeals Correctly Applied the Statute's Plain Language

Under the Act's penalty statute, if a self-insured employer "unreasonably delays or refuses to pay benefits *as they become due*" to an

injured worker, the Department must issue a penalty to the employer.

RCW 51.48.017 (emphasis added).

In 2008, the Legislature clarified when benefits "become due." "An order by the department awarding benefits shall become effective and *benefits due on the date issued*." RCW 51.52.050(2)(b) (emphasis added); Laws of 2008, ch. 280, § 1. So when the Department issues an order, the benefits are due on that date.[3] Only if the Board orders a stay pending the employer's appeal of the benefit order can the self-insured employer wait to pay benefits until after a final order on the merits:

> *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. . . .*[4]

RCW 51.52.050(2)(b) (emphases added).

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[3] In 2015, the Department adopted a rule that gives self-insured employers a 14-day grace period from the date of the order to pay benefits before receiving a penalty. WAC 296-15-266(1)(f). The rule does not apply here because the Department adopted the rule after it issued the penalty order to Masco. Contrary to Masco's characterization, however, Sheryl Whitcomb, a Department employee, did not testify that the Department adopted the rule because the statute was ambiguous. Pet. 4 (citing AR Whitcomb 24-25). The Department has statutory authority under RCW 51.48.017 and RCW 51.52.050(2)(b) to issue penalties if self-insurers do not pay benefits immediately after the Department order, but the 14-day standard gives time to the self-insurer to process payment. This makes sense from an administrative perspective. It is not a concession of ambiguity.

[4] The Legislature established timelines for the stay. An employer must seek a stay within 15 days of the order granting appeal. RCW 51.52.050(2)(b). The Board must "conduct an expedited review" of the Department's claim file as it existed on the date of the Department's order and issue a final decision on the stay "within twenty-five days of the filing of the motion for stay or the order granting appeal, whichever is later." *Id.* The Board will grant a stay if it believes the employer will more likely than not to prevail in the appeal. *Id.*

The Court of Appeals correctly applied the plain language of RCW 51.52.050(2)(b) and rejected the argument that Masco could refuse to pay benefits while waiting for a ruling on its request for a stay:

> Here, RCW 51.52.050(2)(b) clearly states that if benefits are ordered, the benefits shall not be stayed pending a final decision on the merits "unless ordered by the board." Only the Board can order a stay of the payment of benefits. Benefits are payable unless the Board orders otherwise. Thus, benefits are payable while the Board is considering a motion to stay benefits.

Masco Corp., 433 P.3d at 828. The Court's analysis applies the statute's plain language.

It is also the only reasonable interpretation, contrary to Masco's implication otherwise. Pet. 3. Masco's interpretation of RCW 51.52.050(2)(b) would effectively allow every employer to obtain a de facto stay while the Board considered a motion to stay, simply by making the request. This is in direct conflict with RCW 51.52.050(2)(b)'s mandate that benefits *shall not be stayed* pending a final decision on the merits "unless ordered by the board." It is also in direct conflict with the purposes of the Industrial Insurance Act, which is to be liberally construed "in favor of the injured worker" and "to provide sure and certain relief for workers." RCW 51.04.010; RCW 51.12.010.

Masco mischaracterizes the Court's plain language analysis in its attempt to obtain review. The Court of Appeals' analysis of the statutory

language did not turn on the fact that employer could recoup benefits later. *Contra* Pet. 1. Rather, the court focused on the statute's plain language about when benefits are due: "RCW 51.52.050(2)(b) clearly states that if benefits are ordered, the benefits shall not be stayed pending a final decision on the merits 'unless ordered by the board.'" *Masco Corp.*, 433 P.3d at 828 (quoting RCW 51.52.050(2)(b)). An employer's ability to recoup has no bearing on this question of statutory interpretation.

2. The Court of Appeals' Application of RCW 51.52.050(2)(b)'s Plain Language Did Not Render the Stay Procedure Moot

The Court of Appeals' decision does not render the stay procedure moot, as Masco posits. Pet. 6. Self-insurers appeal all types of benefit orders, including orders requiring payment of ongoing benefits. A stay will provide effective relief in such cases. For example, when the Department orders that a self-insurer provide ongoing treatment, a pension with an ongoing, monthly payment, or ongoing wage replacement benefits, a stay allows the self-insurer to cease payments until the litigation is resolved. Masco simply ignores these scenarios, concerned only about its own situation involving an order for benefits for a period that has passed. But the unique circumstances of this case does not render the statute moot.

3. A Misstatement in Dicta is Not a Basis for Review

Courts need not follow dicta. So Masco's reliance on an incorrect statement in dicta from the Court of Appeals' opinion is not a basis for review.

Masco argues that a passing statement by the Court of Appeals on an issue that was not directly at issue and that was not a basis for the Court's decision, nevertheless "fundamentally change[d] the meaning of RCW 51.32.240(3) and RCW 51.44.142." Pet. 2, 7-8. It suggests that the court's dicta created a "conflict with the express language" of these statutes, creating an issue of substantial public interest. Pet. 2, 7-8. But the Court cannot "fundamentally change" a statute's meaning in a passing statement in dicta. "Statements in a case that do not relate to an issue before the court and are unnecessary to decide the case constitute obiter dictum, and need not be followed." *Ass'n of Wash. Bus. v. Dep't of Revenue*, 155 Wn.2d 430, 442 n.11, 120 P.3d 46 (2005) (quotations omitted).

The Court did not need to address the recoupment procedures of RCW 51.32.240(3) and RCW 51.44.142 to determine when benefits were due under RCW 51.52.050(2)(b). The Court only cited these statutes to reject Masco's policy argument that self-insurers would be penalized for exercising their appeal rights:

> Masco argues that self-insured employers will be penalized for exercising their right to move for a stay of benefits by being required to pay benefits while it awaits a Board decision. However, RCW 51.32.240(3) states that "[w]henever the department issues an order rejecting a claim for benefits, . . . after it has been paid by a self-insurer, . . . the recipient thereof shall repay such benefits." Thus, an employer is allowed to recoup payments under RCW 51.32.240(3) if the Board grants the stay.

Masco Corp., 433 P.3d at 829.

The paragraph's last sentence is incorrect because, under the recoupment statute, the employer must prevail on appeal on the merits to recoup payments:

> Whenever any payment of benefits under this title has been made pursuant to an adjudication by the department or by order of the board or any court and timely appeal therefrom has been made where the final decision is that any such payment was made pursuant to an erroneous adjudication, the recipient thereof shall repay it and recoupment may be made from any future payments due to the recipient on any claim whether state fund or self-insured.

RCW 51.32.240(4). Under this provision, there must be a "final decision" on the merits before the employer can recoup, not just a stay. *Id.*

But the Court of Appeals' larger point is correct: a self-insured employer who prevails in an appeal can recoup benefits under RCW 51.32.240. The Court of Appeals just cited the wrong subsection of the recoupment statute. After a successful appeal to the Board or the courts, the employer recoups under subsection (4), not subsection (3).

The Court's rejection of Masco's policy argument creates no confusion or "limbo," as it is clear from the recoupment statute that the Court simply cited the wrong subsection in dicta. *See* Pet. 7. For the same reason, Masco's argument about RCW 51.44.142 has no merit. The Court of Appeals cited that statute in a footnote following its erroneous sentence, correctly stating that "[i]f the claimant is unable to pay, the employer can obtain reimbursement from a special fund." *Masco Corp.*, 433 P.3d at 829 n.5. Masco points out that self-insured employers can only access the reimbursement fund after an appeal to the Board and the courts, which would be a recoupment procedure under RCW 51.32.240(4), not RCW 51.32.240(3). Pet. 8. But again, the Court of Appeals' citation of the wrong subsection is dicta and need not be followed, especially as it is clear from the statute that RCW 51.32.240(4) applies to these situations.

Masco is also wrong that an employer's "funds are forfeited" when it pays the worker while its stay motion is pending—the employer can recover any incorrectly paid benefits after a successful appeal under RCW 51.32.240(4) and RCW 51.44.142. Pet. 8. The Court of Appeals' opinion does not affect this right. Its dicta citing an incorrect subsection of the recoupment statute does not create an issue for review.

B. Masco's Bare Assertion of a Procedural Due Process Violation for the First Time on Appeal Does Not Establish a Significant Constitutional Question Warranting Review

No significant constitutional question exists that justifies review. *See* RAP 13.4(b)(3). Masco never raised a procedural due process argument before its petition to this Court. Pet. 9. Its petition does not attempt to establish that it meets RAP 2.5(a)(3) criteria to enable this Court's review. The Court should decline to accept review on a constitutional issue that the parties have never had the opportunity to address. *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007) (under RAP 2.5(a), appellate courts generally do not consider issues raised for first time on appeal).

Not only does Masco raise the argument late, it cites no authority other than the Fourteenth Amendment to support its procedural due process argument. It does not even cite the balancing factors from *Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). It cites no due process case law. Parties must cite authority and present argument to adequately present a constitutional argument. RAP 10.3(a)(6); *Havens v. C & D Plastics, Inc.*, 124 Wn.2d 158, 169, 876 P.2d 435 (1994). "[N]aked castings into the constitutional sea are not sufficient to command judicial consideration[.]" *United States v. Phillips*, 433 F.2d 1364, 1366 (8th Cir. 1970), *quoted in In re Rosier*, 105 Wn.2d 606, 616,

717 P.2d 1353 (1986). Masco fails to present adequate argument as to why a full evidentiary hearing to contest a penalty does not satisfy procedural due process.

Even applying RAP 2.5(a)(3), Masco shows no manifest error. *Kirkman*, 159 Wn.2d at 926-27. The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Mathews*, 424 U.S. at 333. Masco had a full opportunity to contest the Department's penalty at an evidentiary hearing before the Board. A self-insurer's ability to appeal a penalty order and present evidence and legal argument to an independent agency (the Board) is a robust procedure that provides for an independent review of the Department's penalty determination.

None of Masco's other arguments have merit. Masco suggests that the State cannot require an employer to "pay benefits pending an appeal prior to an adjudicative decision" by the Board on its stay motion. Pet. 1. This argument ignores that only the penalty order (not the benefits order) is at issue in this appeal. And, in any case, Masco also received a full evidentiary hearing on the benefits order, prevailed at hearing, and can now recoup the benefits from Suarez or, if that is unsuccessful, can seek reimbursement from the fund that the Legislature created for that purpose. *See* RCW 51.32.240. Once Masco recoups the benefits, it will be made

whole, without being deprived of any property. The appeal procedure fully protected Masco's property interest to the extent that an economic interest creates a property interest.

Masco also seems to suggest in a single sentence that it always violates due process to assess a self-insurer a penalty for unreasonably delaying benefits that it did not ultimately owe. Pet. 9. This is not a procedural due process argument, and Masco provides no argument in support, so this Court should decline to consider this passing argument. This argument fails to perceive that employers have an independent duty under the Industrial Insurance Act to timely pay benefits, which ensures that injured workers receive sure and certain relief. RCW 51.48.017; *Taylor v. Nalley's Fine Foods*, 119 Wn. App. 919, 925, 83 P.3d 1018 (2004).

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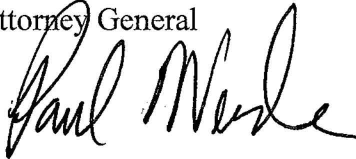
V. CONCLUSION

The Court of Appeals' routine application of statutory language creates no matter of substantial public interest or significant question of constitutional law. This Court should deny review.

RESPECTFULLY SUBMITTED this 22nd day of April, 2019.

ROBERT W. FERGUSON
Attorney General



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No. 96879-9
IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

MASCO CORPORATION, Petitioner, v. ALFREDO SUAREZ, Respondent.	DECLARATION OF SERVICE

DATED at Seattle, Washington:

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I served the Department's Answer to Petitin for Review and this Declaration of Service to counsel for all parties on the record addressed as follows:

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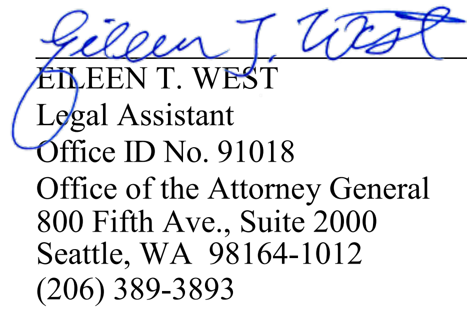

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