

FILED
COURT OF APPEALS
DIVISION II

2013 FEB -6 PM 1:26

STATE OF WASHINGTON

BY Ch
DEPUTY

NO. 43636-1-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

DELLEN WOOD PRODUCTS, INC.,

Appellant,

v.

DEPARTMENT OF LABOR & INDUSTRIES
OF THE STATE OF WASHINGTON,

Respondent.

**BRIEF OF RESPONDENT
DEPARTMENT OF LABOR AND INDUSTRIES**

ROBERT W. FERGUSON
Attorney General

STEVE VINYARD
Assistant Attorney General

WSBA No. 29737
Labor and Industries Division
PO Box 40121
7141 Cleanwater Drive SW
Olympia, WA 98504-0121
(360) 586-7715

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	COUNTER STATEMENT OF THE ISSUES	2
III.	STATEMENT OF THE CASE	3
IV.	SUMMARY OF THE ARGUMENT	10
V.	STANDARD OF REVIEW.....	11
VI.	ARGUMENT	13
	A. Dellen Voluntarily Defaulted On Its Obligations As A Self-Insured Employer When It Submitted Its January 2002 Letter, And, Therefore It Forfeited All Right And Title To, Any Interest In, And Any Right To Control The Surety	13
	1. A Former Self-Insured Employer Remains Responsible For Its Workers’ Outstanding Claims If It Terminates Its Status As A Self-Insured Employer	15
	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.....	19
	3. The Fact That The Department Did Not Specifically Inform Dellen That RCW 51.14.020 Provides That A Default Results In A Forfeiture Of An Employer’s Interest In Its Surety Is Not A Valid Basis To Grant Relief To Dellen	25
	4. It Is Dellen, Not The Department, Who Seeks A Windfall.....	29
	B. Even Assuming That Dellen’s January 2002 Letter Did Not Result In A Default, It Defaulted When It Failed, After January 2002, To Manage Any Of Its Workers’	

Claims, To Pay Benefits On Any Of Those Claims, To File Reports Regarding Its Claims, Or To Pay Any Assessments	30
1. Dellen’s Failure To Pay Benefits To Its Workers After January of 2002 Resulted In A Default.....	31
2. Dellen Defaulted When It Failed To File Reports Or Pay The Department The Assessments It Was Responsible For As A Self-Insured Employer	35
C. Because It Defaulted, Dellen Forfeited All Of Its Rights To The Surety	39
D. Dellen Was Not Deprived Of Due Process.....	44
E. Even Assuming Arguendo That Dellen Did Not Default, It Is Not Entitled To A Refund Of Its Surety At This Time	48
VII. CONCLUSION	50

TABLE OF AUTHORITIES

Cases

<i>Ass'n of Washington Bus. v. Dep't of Revenue,</i> 155 Wn.2d 430, 120 P.3d 46 (2005).....	40, 42
<i>Bennerstrom v. Dep't of Labor & Indus.,</i> 120 Wn. App. 853, 86 P.3d 826 (2004).....	13
<i>Bering v. Share,</i> 106 Wn.2d 212, 721 P.2d 918 (1986).....	12
<i>Cowiche Canyon Conserv. v. Bosley,</i> 118 Wn.2d 801, 828 P.2d 549 (1992).....	31
<i>Dep't of Labor & Indus. v. Allen,</i> 100 Wn. App. 526, 997 P.2d 977 (2000).....	13
<i>Dep't of Labor & Indus v. Metro Hauling,</i> 48 Wn. App. 214, 738 P.2d 1063 (1987).....	38
<i>Driscoll v. City of Bremerton,</i> 48 Wn.2d 95, 291 P.2d 642 (1955).....	40
<i>Floor Decorators, Inc. v. Dep't of Labor & Indus.,</i> 44 Wn. App. 503, 722 P.2d 884 (1986).....	38
<i>Greenen v. Wash. State Bd. of Accountancy,</i> 126 Wn. App. 824, 110 P.3d 224 (2005).....	40
<i>Harman v. Department of Labor & Industries,</i> 111 Wn. App. 920, 47 P.3d 169 (2002).....	26
<i>In Re Estate of Lint,</i> 135 Wn.2d 518, 957 P.2d 755 (1998).....	12, 13
<i>Johnson v. Dep't of Health,</i> 133 Wn. App. 403, 136 P.3d 760 (2006).....	12, 22

<i>Malang v. Dep't of Labor & Indus.</i> , 139 Wn. App. 677, 162 P.3d 450 (2007).....	11
<i>Pearson Construction Corp. v. Intertherm, Inc.</i> , 18 Wn. App. 17, 566 P.2d 575 (1977).....	35
<i>Rogers v. Dep't of Labor & Indus.</i> , 151 Wn. App. 174, 210 P.3d 355 (2009).....	12
<i>Ruse v. Dep't of Labor & Indus.</i> , 138 Wn.2d 1, 977 P.2d 570 (1999).....	11, 22
<i>State v. J.P.</i> , 149 Wn.2d 444, 69 P.3d 318 (2003).....	33
<i>Taylor v. Nalley's Fine Foods</i> , 119 Wn. App. 919, 83 P.3d 1018 (2004).....	34, 38

Statutes

RCW 51.14.020	passim
RCW 51.14.030	passim
RCW 51.14.050	15
RCW 51.14.060	passim
RCW 51.14.060(3).....	17
RCW 51.32.160	17
RCW 51.52.115	46

Other Authorities

House Bill Report, SB 5668 (1995).....	41, 42
--	--------

Regulations

WAC 296-15-121.....	passim
WAC 296-15-121(1)(b)	32
WAC 296-15-121(8).....	15, 21, 36
WAC 296-15-121(8)(9)	17
WAC 296-15-121(8)(b)	36, 37
WAC 296-15-121(9).....	16, 17
WAC 296-15-125.....	18, 21, 47
WAC 296-15-125(2).....	46, 47, 48
WAC 296-15-221.....	16, 23, 29
WAC 296-15-221(4)(a)	36
WAC 296-15-223.....	1, 36, 37
WAC 296-15-225.....	1, 36, 37
WAC 296-15-227.....	1, 36, 37
WAC 296-15-229.....	1, 36, 37
WAC 296-15-310.....	16, 23

I. INTRODUCTION

This is a workers' compensation case under Title 51, RCW, the Industrial Insurance Act.

Dellen Wood Products (Dellen), a Washington employer, became self-insured in 1986. At the time that it became self-insured, it provided the Department of Labor & Industries (Department) with surety¹ in the form of a cash deposit in an escrow account. Dellen ended the bulk of its business operations in December 2001, and it elected to default on its obligations as a self-insured employer so that the Department would take over the active administration of its workers' claims.

Although Dellen now claims it merely "terminated" its status as a self-insured employer rather than having "defaulted," had it only done so then Department rules would have required Dellen to continue to administer the workers' compensation claims itself, to make reports, and to pay assessments.² It is only when a self-insured employer defaults that the statutes and regulations allow the Department to administer a former

¹ WAC 296-15-121 defines "surety" as "a legal financial guarantee" that is provided by a prospective self-insured employer to ensure that the Department can pay benefits on its workers' claims in the event that the employer defaults.

² Self-insured employers must, in addition to paying benefits on their workers' claims, pay assessments into various funds that are managed by the Department. WAC 296-15-223 (administrative assessment); WAC 296-15-225 (second injury fund assessment); WAC 296-15-227 (insolvency trust fund assessment); WAC 296-15-229 (supplemental pension fund and asbestosis assessments).

self-insured employer's claims and use the surety to cover the cost of its workers' benefits.

After Dellen voluntarily defaulted, the Department paid benefits on Dellens' workers' claims out of the medical aid and accident funds, and it reimbursed those funds through the surety that Dellen had provided. In 2008, Dellen requested that the surety, or at least the bulk of it, be released to it. The Department denied this request because Dellen had forfeited all rights to the surety when it voluntarily defaulted.

The Board of Industrial Insurance Appeals (Board) and the superior court affirmed the Department's decision, finding that Dellen had defaulted and that, as a result of its default, it forfeited its interest in its surety. As Dellen fails to advance any convincing argument as to why it is entitled to have the surety released to it, this Court should affirm.

II. COUNTER STATEMENT OF THE ISSUES

RCW 51.14.020 states that self-insured employers who default on their obligations forfeit their interest in any surety provided to the Department. Department rules further clarify that an employer who terminates its status as a self-insurer remains obligated to manage its workers' claims, to pay benefits on those claims, to file reports with the Department, and to pay assessments.

Under RCW 51.14.020, does substantial evidence support the superior court's conclusion that Dellen defaulted on its obligations as a self-insured employer and thereby forfeited any interest in the surety, when an employer who terminates its status as a self-insurer but who does not default remains obligated to fulfill its obligations as a self-insurer, 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?

III. STATEMENT OF THE CASE

Dellen manufactured finger-jointed wood molding in Spokane, Washington. BR Olsen 9-10.³ In 1986, Dellen chose to become self-insured. BR Wilkinson 78, BR Exhibit (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. The account could not

³ 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.

be accessed by either Dellen or the Department unless certain conditions were met. BR Wilkinson 79. During the period that Dellen was self-insured, the amount of required surety fluctuated, and Dellen, with the Department's permission, adjusted the amount held in escrow at various times. BR Olsen 13-14.

In December 2001, the Department learned that Dellen had sold the majority of its operations and that it had terminated its employees. BR Olsen 14. Dellen continued to have some operations, but it used leased employees (who worked for a state fund employer) to perform such work. BR Olsen 40-41. Despite having ceased to function as an employer as of December 31, 2001, Dellen continued to administer its workers' claims and to provide benefits to its injured workers. BR Olsen 42. Dellen did not provide the Department with written notice (in December 2011) that it had effectively ceased to operate as an employer, and, instead, it informed the Department of this through oral communication. BR Olsen 42; BR Wilkinson 83.

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 Mr. Wilkinson, a 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 “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.

In response to Dellen's letter, the Department made arrangements to pick up Dellen's claim files. BR Wilkinson 90. The Department maintains only partial copies of self-insured employer claim files, as the Department does not have primary administrative responsibilities (absent default by the self-insured employer). BR Wilkinson 90. Mr. Wilkinson went to Spokane and personally obtained Dellen's claim files. BR Olsen 48; 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.

As indicated above, before Dellen elected to default, it used a cash escrow account to secure its self-insured obligations. BR Wilkinson 79. The escrow account was held on behalf of the Department and Dellen at US Bank. BR Wilkinson 79. Neither the Department nor Dellen had unfettered access to the account. BR Wilkinson 79-80. Under the parties' agreement, US Bank could only release the money to Dellen if the Department released it to Dellen, and the bank could only release the money to the Department if Dellen defaulted. BR Olsen 45-46; BR Wilkinson 80.

After Dellen sent in a letter indicating that it elected to default on its self-insured obligations, the Department demanded the surety from the bank, sending it a copy of Dellen's letter to substantiate its assertion that

Dellen had defaulted. BR Wilkinson 80. The bank, satisfied that the conditions of the escrow account were met, released the funds to the Department. BR Olsen 45-46; BR Wilkinson 80, 92.

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. BR Wilkinson 99. Instead, as is typical, the Department reserved the surety proceeds for benefit payments. BR Wilkinson 99.

After January 2002, Dellen did not file any further reports, nor pay 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.

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. 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 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), which ever is later.” BR Ex. 13. Mr. Wilkinson did not state in that declaration that Dellen’s surety would ever be released to it. *See* BR. Ex 13.

In June 2008, Dellen requested that the balance of the surety funds be returned to it. BR Ex. 9. By order dated September 2008, 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. In November 2008, Dellen filed an appeal to that order. BR 49. The Board ultimately affirmed the Department’s order. BR 2-4.

Dellen appealed the Board’s decision to Thurston County Superior Court. CP 87. The superior court affirmed the Board. CP 86-89.

The superior court found, among other things:

- 1.3 On January 18, 2002, Dellen's Chief Financial Officer, Eugene Olsen, sent a letter to the Department indicating that Dellen elected to default on its payment of claims under the self-insured program and requested the Department to take over the administration of its claims.
- 1.4 On January 31, 2002, Dellen stopped paying industrial insurance benefits to its injured workers and no longer administered its injured workers['] claims.
- 1.5 Dellen turned over its claim files to the Department for administration and payment of benefits. Dellen made no further payments or handled its claims after turning the claims over to the Department.
- 1.6 Since January 18, 2002, Dellen has not filed annual and quarterly reports as required by Title 51 RCW and Department rules.
- 1.7 Since January 18, 2002, Dellen has failed to pay assessments for the insolvency trust fund, administrative assessments, supplemental pension fund, and the asbestosis fund.
- 1.8 Dellen defaulted on its self-insurance obligations including the payment of benefits to its injured workers, the administration of its claims, the filing of required reports and the payment of self-insured assessments.
- 1.9 Dellen had appropriate notice and the right to be heard during the appeal process before the Board.
- ...
- 1.15 While Dellen was not delinquent in payment of any benefit, allotment, or contribution as of January 18, 2002, Dellen intended to default on payments coming due in the future.

Dellen now appeals.

IV. SUMMARY OF THE ARGUMENT

Under the plain language of RCW 51.14.020, a former self-insured employer who defaults on its obligations under the Industrial Insurance Act forfeits its interests in its surety.

Dellen suggests that it did not truly intend to “default” in 2001, and that it merely intended to terminate its status as a self-insured employer. However, substantial evidence supports the superior court’s finding that Dellen intended to default.

Indeed, it is plain from the record that Dellen wished for the Department to take over the administration of its claims, which is something that the Department could only do if Dellen defaulted. If Dellen had merely terminated its status as a self-insured employer in January 2002, it would have remained obligated to manage its workers’ claims and pay benefits to them out of its own funds, and it would not have been able to access the surety to provide those benefits. It also would have remained obligated to submit reports to the Department and to pay additional assessments to it on top of the cost of its workers’ claims.

As it is plain that Dellen did not intend to continue performing those duties, it is implausible that Dellen’s intention in January 2002 was to terminate its status as a self-insured employer but to not default. In any event, the superior court’s finding that Dellen intended to default on

payments that would otherwise come due after it submitted its January 2002 letter is supported by substantial evidence, and, as such, this Court should uphold it.

Furthermore, assuming for the sake of argument that Dellen's letter of January 2002 did not result in a voluntary default, Dellen defaulted when it failed, after January 2002, to manage its workers' claims, to pay benefits to its workers, to file reports with the Department, or to pay any further assessments.

Dellen advances several arguments as to why it should not be held to have defaulted, but none of those arguments is supportable. In conclusion, the Board and the superior court properly determined that Dellen defaulted as a self-insurer and that it forfeited its right to its surety as a result of this. This Court should affirm as well.

V. STANDARD OF REVIEW

In a workers' compensation matter involving an appeal from a superior court's decision to this Court, the ordinary civil standard of review applies, and a superior court's decision is reviewed to determine whether substantial evidence supports its findings and whether its conclusions follow from its findings of fact. *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999); *Malang v. Dep't of Labor & Indus.*, 139 Wn. App. 677, 683, 162 P.3d 450 (2007). It is the decision of

the superior court that is reviewed, not that of the Board.⁴ *See Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179-81, 210 P.3d 355 (2009).

“Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise.” *Bering v. Share*, 106 Wn.2d 212, 220, 721 P.2d 918 (1986). Applying the deferential substantial evidence standard, the Court views the evidence and all reasonable inferences from the evidence in the light most favorable to the prevailing party. *Johnson v. Dep't of Health*, 133 Wn. App. 403, 411, 136 P.3d 760 (2006).

Dellen assigns error to several of the superior court's findings of fact, including the findings 1.4., 1.5, and 1.6, which determined, respectively, that it stopped paying benefits on its workers' claims after January 2002, that it turned over its claims to the Department at that time, and that it failed to file reports or pay assessments to the Department after that time. App's Br. at 3-4; CP 88. However, where a party purports to assign error to a finding of fact but failed to present clear argument as to how the finding is not supported by substantial evidence, the finding is a verity. *In Re Estate of Lint*, 135 Wn.2d 518, 531-33, 957 P.2d 755 (1998).

⁴ Dellen assigns error to the decisions of the Department and the Board, as well as assigning error to the superior court's findings and conclusions. App's Br. at 2. However, those assignments are immaterial, as this Court reviews only the decision of the superior court. *See Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179-81, 210 P.3d 355 (2009).

Here, Dellen provides no argument establishing that findings of fact 1.4, 1.5, and 1.6 lack substantial evidence. Therefore, those findings are verities. *See Lint*, 135 Wn.2d at 531-33.

Questions of law are reviewed de novo. *Bennerstrom v. Dep't of Labor & Indus.*, 120 Wn. App. 853, 858, 86 P.3d 826 (2004). Although this Court may substitute its judgment for that of the Department, great weight is accorded to the agency's view of the law it administers. *Dep't of Labor & Indus. v. Allen*, 100 Wn. App. 526, 530, 997 P.2d 977 (2000).

VI. ARGUMENT

A. **Dellen Voluntarily Defaulted On Its Obligations As A Self-Insured Employer When It Submitted Its January 2002 Letter And, Therefore, It Forfeited All Right And Title To, Any Interest In, And Any Right To Control The Surety**

RCW 51.14.020 provides that, “[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.” Thus, under the plain language of that statute, an employer who defaults forfeits all of its interests in its surety. The Department determined, and the Board and the superior court agreed, that Dellen defaulted and that it lost all right and title to its surety as a result of its default. BR 2-5; CP 86-89.

RCW 51.14.020 provides that a default results in a forfeiture of an employer's rights to its surety, but it does not define the term “default”

itself. No statute expressly defines “default” under the Industrial Insurance Act, but a related statute and administrative rules adopted by the Department show that it means failing to perform obligations imposed on self-insurers under the Industrial insurance Act. RCW 51.14.060; WAC 296-15-121.

First, RCW 51.14.060 provides some guidance as to what the legislature understood the term to mean: RCW 51.14.060 sets forth the actions that the Director can take “in cases of default upon any obligation under this title by a self-insurer.” From this, it can be inferred that the Legislature understood “default” to refer to a self-insurer failing to perform an obligation that is imposed on it as a self-insurer under the Industrial Insurance Act. *See* RCW 51.14.060. Second, further guidance as to what constitutes a “default” is contained in WAC 296-15-121, as it explains that a default occurs when a self-insured employer stops paying workers’ compensation benefits or the necessary assessments.

Here, the superior court found that Dellen submitted a letter in January 2002 in which it elected to default and that Dellen intended to default on payments that would otherwise come due in the future after it submitted that letter. CP 87-88. These findings are supported by substantial evidence, and the conclusion that Dellen voluntarily defaulted as a result of submitting the January 2002 letter follows from those

findings. Therefore, this Court should affirm the superior court's decision that Dellen defaulted and, thereby, forfeited its interests to the surety.

1. A Former Self-Insured Employer Remains Responsible For Its Workers' Outstanding Claims If It Terminates Its Status As A Self-Insured Employer

Before turning to the specific question of whether Dellen intended for its January 2002 letter to result in a default or for that letter to result in a mere termination of Dellen's status as a self-insured employer, it is helpful to consider the rules that govern self-insured employers who terminate their status as self-insurers, in order to place that issue in the proper context.

Under RCW 51.14.050, an employer may, with written notice to the Department, terminate its status as a self-insured employer. However, such an employer remains responsible to provide benefits to its workers for any injuries that occurred while it was self-insured and to continue performing many of the administrative duties it had as a self-insured employer. WAC 296-15-121(8).

Pursuant to WAC 296-15-121(8), the former self-insured employer must continue to:

- (a) Pay benefits on claims incurred during its period of self insurance. Claim reopening and new claims filed for occupational diseases incurred during the period of self insurance remain the obligation of the former self insurer.

(b) File quarterly and annual reports as long as quarterly reporting is required. A former self insurer may ask the Department to release it from quarterly reporting after it has had no claim activity with the exception of pension or death benefits for a full year.

(c) Provide surety at the department required level. The department may require an increase in surety based on annual reports as they continue to be filed. Surety will not be reduced from the last required level (while self insured) until three full calendar years after the certificate was terminated. A bond may be cancelled for future obligations, but it continues to provide surety for claims occurring prior to its cancellation.

(d) Pay insolvency trust assessments for three years after surrender or withdrawal of certificate.

(e) Pay all expenses for a final audit of its self insurance program.

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.⁵ RCW 51.14.030; WAC 296-15-121.

If a former self-insured employer does not default on its obligations as an employer, it is *eligible* to have its surety returned to it when all of its claims are closed and when it has been released from submitting reports to the Department for ten years. *See* WAC 296-15-121(9) (stating that the Department "may consider" releasing surety to

⁵ Alternatively, a self-insured employer may pay a third-party administrator to manage its claims. WAC 296-15-221; WAC 296-15-310.

employer when the necessary conditions are met).⁶ Since the Department will only release an employer from submitting reports when no “claim activity” has occurred on any claim for one year, the earliest the Department could consider releasing a surety to any former self-insured employer would be 11 years after the employers’ last claim was closed. WAC 296-15-121(8)(9). If the Department releases a former self-insured employer’s surety to it, the self-insured employer is still liable for any benefits that might need to be provided if any of those claims are subsequently reopened. WAC 296-15-121(9).

In the event that a former self-insured employer defaults on its obligations, it immediately forfeits “all right and title to, any interest in, and any right to control” its surety. RCW 51.14.020. Furthermore, if an employer has defaulted on its obligations, the Department is directed by RCW 51.14.060(3) to deposit whatever balance may remain of the

⁶ Although not relevant here in light of Dellen’s status as an employer who has defaulted, there is good reason why the Department must have the discretion to continue to require a non-defaulting employer to maintain its surety even after the requirements of WAC 296-15-121 are met. In general, an injured worker must file to reopen his or her claim within seven years of the date that the worker’s claim was last closed or else the worker is eligible only for medical treatment (and not for disability benefits). RCW 51.32.160. However, the Department has the discretion to reopen a worker’s claim for benefits at any time for full disability benefits. *Id.* Although such situations would likely be rare, it is possible that all of an employer’s workers’ claims could have been closed for eleven years or more, yet for the Department to continue to have good cause to suspect that one or more of those claims would likely be reopened in the future for significant medical treatment and, perhaps, disability benefits on a discretionary basis, and, therefore, the Department could reasonably determine that it would be premature to release the surety to the employer.

employer's surety in the insolvency trust fund once all of the employers' claims are closed and the employer has been in default for ten years.

When a default occurs, the Department takes over the active administration of the self-insured employer's claims, pays the worker's benefits as necessary out of the state funds managed by the Department, and uses the surety to reimburse those funds. RCW 51.14.020; RCW 51.14.030; WAC 296-15-125. A default also results in the self-insured employer surrendering its certificate of self-insurance. WAC 296-15-125.

Although there is no statute that is directly on point, it can be inferred that a self-insured employer is liable for the cost of its workers' claims if its surety is insufficient to cover those costs. This can be inferred from the general requirement that self-insured employers are responsible for their workers' claims and from the absence of any statute or rule that releases them from this obligation if their surety proves insufficient.⁷ See RCW 51.14.020; RCW 51.14.030; WAC 296-15-121.

Thus, while a defaulted employer remains liable for claims that the surety does not cover, the act of defaulting frees it from several significant obligations, including the duty to manage its workers claims, to pay

⁷ However, in light of the Department's authority to direct an employer to augment its surety from time to time as necessary, in any situation in which the surety is inadequate to cover the cost of the claims, it is likely that the employer would lack the financial resources to cover the cost of the claims in any fashion. See RCW 51.14.020.

benefits on its claims, to file quarterly and annual reports with the Department, and to pay additional assessments.

Here, as discussed below, Dellen defaulted, and did not merely terminate its status as a self-insurer.

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

Dellen sent the Department a letter in which it expressly stated that it “elected to default” on its obligations under the self-insurance program. BR Ex. 2. The superior court found that Dellen submitted a letter in January 2002 in which it “elected to default on its payment of claims under the self-insured program and requested the Department to take over the administration of its claims” and that Dellen “intended to default on payments coming due in the future” after it submitted that letter. CP 88-89. In essence, the superior court found that Dellen voluntarily defaulted when it submitted the January 2002 letter to the Department. *Id.*

Dellen contends that it did not, through that letter, intend to default, and, instead, it merely intended to terminate its self-insurance certificate. App’s Br. at 20-22. Dellen contends that it only used the word “default” in its letter because the Department “instructed” it to use that word. App’s Br. at 20. However, Dellen’s argument fails because

substantial evidence supports the superior court's findings. Indeed, when one considers both the language of the January 2002 letter itself, and the circumstances under which the letter were written, there is only one, reasonable conclusion that can be made: Dellen intended its January 2002 letter to result in it being found to have voluntarily defaulted, so that the Department would take over the administration of its workers' claims.

In December 2001, Dellen contacted the Department and asked whether it would be possible for the Department to take over the active administration of Dellen's existing claims. BR Olsen 43. The Department, through Mr. Wilkinson, the head of the certification and compliance units of the Department's self-insurance program, responded that the only way it could take over the active administration of Dellen's claims would be for Dellen to default. BR Olsen 43-44.

Despite Dellen's current complaints regarding the Department's response, it was perfectly accurate under the law. As explained above, the only way that the Department could take over administration of Dellen's claims is if Dellen defaulted; if Dellen merely terminated as a self-insurer it would continue to be required to actively administer its workers' claims. 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 informed him that Dellen could do so by

sending the Department a letter in which it stated that it intended to default. BR Olsen 43-44. Thus, the Department “instructed” Dellen to use the word “default” in its letter only after Dellen made it clear that it wished to default, and wanted to know how to do so. *See* BR Olsen 43-44.

It is evident that Dellen understood that if it “defaulted” this meant that the Department would take over the active administration of its claims and that the surety that Dellen had provided would be used to pay benefits on those claims. *See* BR Olsen 42-44. Dellen also plainly understood that, if it defaulted, the Department would take possession of the originals of its workers’ claim files and make all further decisions as to what benefits would be provided under those claims. *See* BR Olsen 42-44; BR Wilkinson 90.

As noted previously, the Department can only actively administer a former self-insured employer’s claims if the employer defaults. RCW 51.14.030; WAC 296-15-121(8); WAC 296-15-125. Furthermore, the terms of the escrow account itself dictated that the Department would not be able to access the surety in order to help pay for the benefits provided on Dellen’s claims unless Dellen defaulted. BR Olsen 45; BR Wilkinson 79.

Based on all of the above evidence, a reasonable trier of fact could properly infer that Dellen intended for its January 2002 letter to result in a

voluntary default. Therefore, substantial evidence supports the superior court's findings that Dellen submitted a letter in January 2002 in which it elected to default and that Dellen intended to default on payments that would otherwise come due after January 2002, and Dellen fails to establish otherwise. *See Ruse*, 138 Wn.2d at 5 (noting that substantial evidence exists if a reasonable and fair-minded person could be persuaded of the truth of a matter based on the evidence in the record); *Johnson*, 133 Wn. App. at 411 (noting that under the deferential substantial evidence standard, a court views the evidence and all reasonable inferences from the evidence in the light most favorable to the prevailing party). As the superior court's findings are supported by substantial evidence, this Court should uphold them. *See Ruse*, 138 Wn.2d at 5.

Indeed, if Dellen's January 2002 letter had had the legal effect of achieving a termination of Dellen's status as a self-insured employer without resulting in a default, Dellen would have remained obliged, *even after submitting that letter*, to actively manage all of its workers' outstanding claims, to pay benefits on those claims using its own money (not the surety in the escrow account), to maintain a staff of employees who were capable of managing those claims (or retain the services of a third-party administrator), to file quarterly reports with the Department regarding those claims, and to pay additional assessments to the

Department at amounts consistent with the information it provided the Department in those reports. RCW 51.14.030 (setting out requirements to be a self-insured employer); WAC 296-15-121 (setting forth continuing duties of employer who terminates its self-insurance certificate); WAC 296-15-221 (referencing employer's ability to use third-party administrator to manage its workers' claims); WAC 296-15-310 (clarifying that self-insurer is ultimately responsible for prompt payment of benefits to its workers regardless of whether it uses a third-party administrator to pay its claims).

Dellen's suggestion that its intention was for the January 2002 letter to result in a termination of its status as a self-insured employer, rather than a default, cannot be reconciled with the fact that it is plain from the record that Dellen wished for its letter to result in it being freed from legal obligations that it would only be freed from if its letter resulted in a default. App's Br. at 20-23; BR Olsen 42-44. Dellen advances no persuasive reason why its January 2002 letter should not be given the very legal effect that Dellen plainly understood that letter to have at the time that it submitted it to the Department: namely, a finding that Dellen had voluntarily defaulted. In any event, the superior court's finding that Dellen intended to default is supported by substantial evidence.

Dellen also argues, in effect, that since it did not intend to forfeit all of its rights to its surety as a result of having defaulted, it follows that it did not intend to default. *See* App's Br. at 20-23. Dellen's conclusion does not follow from its premise. While the record shows Dellen did not realize that its decision to voluntarily default would result in it relinquishing its interests in the surety, it is nonetheless apparent that Dellen did intend to default so that the Department could take over the administration of its claims. BR Olsen 42-44. That Dellen was unaware that one of the legal consequences of defaulting would be that it would forfeit its right to the surety does not change the fact that Dellen intended to default when it sent the Department that letter. BR Olsen 42-44.

Dellen also contends, based on Mr. Olsen's statement that Dellen "would make whatever payments were required," that Dellen did not intend to default on any obligation that it had. App's Br. at 22; BR Olsen 44. However, Mr. Olsen's statement must be placed in the larger context of the record as a whole. Indeed, Mr. Olsen also stated, in reference to his conversations with Mr. Wilkinson, that "we assumed we were basically giving up on our responsibility as a self-insured employer." BR Olsen 42. In any event, it is plain from the record that Dellen wished for the Department to take over the administration of its workers' claims and for it to use the surety to cover the cost of those benefits, and that

Dellen understood that that would only happen if it sent the Department a letter stating that it had elected to default. BR Olsen 42-44. The plausible inference to make from Mr. Olsen's statement is that Dellen "intended" to make the necessary payments until and unless it was released from doing so, and that he understood that Dellen would be released from making further (direct) payments if Dellen defaulted. BR Olsen 42-44.

In any event, even if it is assumed for the sake of argument that Mr. Olsen meant that Dellen "intended" to continue making necessary payments on its claims even after submitting a letter in which it elected to default so that the Department would take over the administration and payment of its claims, substantial evidence still supports the superior court's finding that Dellen intended to default.

3. The Fact That The Department Did Not Specifically Inform Dellen That RCW 51.14.020 Provides That A Default Results In A Forfeiture Of An Employer's Interest In Its Surety Is Not A Valid Basis To Grant Relief To Dellen

Dellen next argues that since the Department failed to inform it that a default would result in forfeiting its surety, it should not be held to have forfeited those rights. App's Br. at 24-25. However, neither RCW 51.14.020 nor any other statute or rule requires the Department to inform a self-insured employer that it will lose its rights to the surety if it

defaults. On the contrary, under the plain language of RCW 51.14.020, the act of defaulting in and of itself results in a forfeiture of those rights.

Furthermore, as the Court of Appeals noted in *Harman v. Department of Labor & Industries*, 111 Wn. App. 920, 927, 47 P.3d 169 (2002), “[i]gnorance of the law has never been an adequate defense.” In *Harman*, the party claiming ignorance of the law, and seeking relief from a harsh legal result, was an injured worker who believed, incorrectly but understandably, that by reporting her injury to her employer and to her medical provider she had taken the necessary steps to file a claim for benefits under the Industrial Insurance Act. *See Harman*, 111 Wn. App. at 922-23. The Court in *Harman* nevertheless held that she could not obtain any benefits for her injury because she failed to file a timely claim, and it declined to grant her relief on an equitable basis. *Id.*

Here, the party claiming ignorance of the law, and seeking relief on that basis, is a self-insured employer who, by becoming such, assumed the responsibility to manage its own injured workers’ claims and to comply with each of the numerous regulations governing self-insured employers. If an injured worker cannot be excused based on his or her ignorance of the law, a self-insured employer can hardly expect to be granted relief on that basis. *See id.* at 927. While it is unfortunate that Dellen elected to default without reviewing any statutes or regulations, or

consulting with an attorney, regarding the consequences of the default, this is not a proper basis to release Dellen from one of the consequences of a decision that Dellen freely made. *See id.*

Furthermore, Dellen fails to support its assertion (at App's Br. at 29) that the Department "consistently indicated that a refund would be available" to it even though it had defaulted. Mr. Olsen did not testify that the Department assured him that Dellen would receive its surety at some point: rather, he testified that he "expected" that some of the surety would be returned to him based on his own "estimate" that he had "mentally made" based on the total amount of the surety as of January 2002 and the costs that Mr. Olsen anticipated would be made. BR Olsen 19. When asked, directly, whether Mr. Wilkinson had "in any way ever made any guarantee" that Dellen's surety would ever be released to it, Mr. Olsen acknowledged that Mr. Wilkinson had not done so. BR Olsen 46.

Furthermore, Dellen fails to show that the three exhibits it relies upon, Exhibits 1, 13, and 20, support its assertion that the Department gave it "every indication" that it would receive the surety at some point. Exhibit 1 is a record of a conversation that Mr. Wilkinson had with Jeremie Dunlap (of Dellen). It indicates that Mr. Wilkinson stated that the surety "would have to be maintained" for 11 years after Dellen's last claim

was closed, but it does not indicate that any promise was made that the surety would actually be released to Dellen.

Exhibit 13 is a declaration that was filed by Mr. Wilkinson while Dellen was in the middle of bankruptcy proceedings. In it, 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), which ever 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 with regard to when its surety might be released “[a]ssuming a refund were available” as an assurance that the surety would actually be returned to it. *See* BR Ex. 13.

Finally, Exhibit 20 does not support Dellen’s assertion, either. In that letter, the Department advised Dellen of what the current balance of its surety was. BR Ex. 20. However, it did not even mention the possibility of the surety being released to Dellen, let alone assure Dellen that such would occur at some point. BR Ex. 20.

4. It Is Dellen, Not The Department, Who Seeks A Windfall

Dellen also asserts that the Department would receive a “windfall” if this Court concludes that Dellen forfeited its right to the surety as a result of voluntarily defaulting. App’s Br. at 26. However, here, it is Dellen who is seeking a windfall. Had Dellen not indicated that it elected to default, Dellen would have been subject to several, considerable, financial and legal burdens over the last several years: it would be responsible to maintain a staff of employees who were capable of adjudicating its workers’ claims (or retain a third-party administrator who could do so), to personally pay the cost of those benefits rather than have them deducted from the surety, to submit quarterly and annual reports to the Department, and to pay additional assessments to the Department. RCW 51.14.030; WAC 296-15-121; WAC 296-15-221.

While the record does not reflect what the cost of meeting those obligations would have been, it is readily apparent that the costs would have been significant, particularly in light of the fact that under WAC 296-15-121 the earliest the Department may “consider” releasing a surety to an employer would be 11 years after its last claim was closed, which, here, would occur at 2016 at the earliest. If Dellen is now held to be entitled to its surety despite having told the Department that it intended to default,

Dellen would receive a windfall, as it would receive the benefit of not having to comply with the significant burdens that would otherwise have been imposed on it as a self-insured employer, while also receiving the benefit of remaining eligible to claim its surety.

B. Even Assuming That Dellen's January 2002 Letter Did Not Result In A Default, It Defaulted When It Failed, After January 2002, To Manage Any Of Its Workers' Claims, To Pay Benefits On Any Of Those Claims, To File Reports Regarding Its Claims, Or To Pay Any Assessments

If it is assumed, *arguendo*, that Dellen's January 2002 letter did not result in a voluntary default, then Dellen defaulted shortly after it sent the Department that letter. As noted above, a self-insured employer who surrenders its certificate of self-insurance, but who does not default, continues to have several, significant, legal responsibilities. WAC 296-15-121. After sending in the January 2002 letter in which it stated that it elected to default, Dellen did not manage its workers' claims, pay benefits to its workers, file reports with the Department, or pay any other assessments. *See* BR Wilkinson 76, 90-91. Thus, if the January 2002 letter did not result in a default, then Dellen's failure to do several of the things that it remained obligated to do under the law did result in one. *See* WAC 296-15-121.

1. Dellen's Failure To Pay Benefits To Its Workers After January of 2002 Resulted In A Default

Dellen contends that since the surety it provided to the Department was sufficient to cover the cost of providing those benefits to its workers, it follows that it did not default, even though it, personally, did not provide any benefits to its workers after January 2002. App's Br. at 23-24. Dellen contends, in effect, that the Department's payment of benefits out of the medical aid and accident fund to Dellen's injured workers constitutes payment of those benefits by Dellen, because the Department used the surety Dellen had provided to reimburse the accident funds and medical aid funds for the cost of those benefits. *See* App's Br. at 23-24.

Dellen provides no legal authority for the novel proposition that the payment of benefits to a self-insured employer's injured workers *by the Department* constitutes payment of benefits *by that self-insured employer* whenever the surety provided by the employer was sufficient to cover the cost of those benefits. *See* App's Br. at 23-24. For that reason alone, Dellen's argument should be rejected. *See Cowiche Canyon Conserv. v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (observing that a party's failure to support its argument with citations to relevant authority will normally preclude appellate review of the argument).

Moreover, Dellen's notion that reimbursement of costs through a surety constitutes payment of benefits by a self-insured employer is contrary to the plain language of the statutes and regulations that govern those issues. WAC 296-15-121(1)(b) provides that "[s]urety may not be used by a self insurer to: (i) Pay its workers' compensation benefits." Thus, WAC 296-15-121(1)(b) plainly precludes a self-insured employer from using its surety to provide benefits to its injured workers. Furthermore, RCW 51.14.060 only authorizes the Department to use a surety to pay benefits to an employer's workers if the employer has defaulted. Thus, what Dellen claims occurred here, that the Department used the surety it provided to pay benefits to its workers even though it did not default, would be contrary to the plain language of the applicable statutes and regulations.

On a related note, if Dellen is correct that an employer has not defaulted on its obligations if the Department provides its workers with benefits and the surety is sufficient to cover the cost of those benefits, this would lead to absurd results that could not possibly have been intended by the legislature when it enacted RCW 51.14.020. Dellen's argument that a default does not occur if a surety is used to cover the cost of an employer's workers' benefits would, if accepted, create a logical paradox: if the Department cannot use a surety to cover a claim cost unless the employer

defaults, but a default does not occur whenever the claim costs are covered through a surety, then when, if ever, can the surety provided by a self-insured employer actually be used by the Department to cover the cost of an employer's workers' benefits? It is not plausible that the legislature's intention, in enacting RCW 51.14.020, was to require self-insured employers to provide a form of surety to the Department that the Department could only use if the employer defaults, but for the use of the surety by the Department to preclude a finding of the employer having defaulted. As Dellen's argument would lead to an absurd result, it should be rejected. *See State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (noting that a court must avoid an interpretation of a statute that leads to absurd results).

Dellen's argument should also be rejected because accepting it would render a significant provision within a related statute, RCW 51.14.060, meaningless. *See J.P.*, 149 Wn.2d at 450. As noted, RCW 51.14.060 provides that, when an employer has defaulted, the Department "shall" deposit the balance of the surety into the insolvency trust fund once two conditions are met: 1) all of the employer's claims have been closed and 2) ten years have elapsed since the employer defaulted. Under Dellen's theory, a default could not occur until and unless an employer's surety has been depleted. But if an employer's

surety has been depleted, there would be no balance remaining that could be deposited into the insolvency trust fund. Thus, Dellen's proposed definition of "default" would render a significant portion of RCW 51.14.020 meaningless.

Dellen also argues that its failure to pay benefits to its workers after January 2002 could not have resulted in a default because the Department did not inform Dellen that it was required to make those payments. App's Br. at 24. But the reason that the Department did not direct Dellen to provide benefits to its workers after January 2002 was that both Dellen and the Department understood, at the time, that Dellen was voluntarily defaulting and that the Department was taking over the active administration of its workers' claims. *See* BR Olsen 42-44.

Moreover, a self-insured employer has a legal duty to make timely and appropriate payments of benefits to its workers, which exists independent of the Department's oversight of its claims. *See Taylor v. Nalley's Fine Foods*, 119 Wn. App. 919, 83 P.3d 1018 (2004). Thus, it was not necessary for the Department to order Dellen to provide benefits to its workers for Dellen to have the duty to provide those benefits to its workers, something Dellen, itself, did not do after January 2002. *See* BR Wilkinson 76, 90-91.

Dellen cites *Pearson Construction Corp. v. Intertherm, Inc.*, 18 Wn. App. 17, 20, 566 P.2d 575 (1977), for the proposition that a default cannot ever occur unless a person knew the precise amount of the sum owed. App's Br. at 24. However, Dellen's reliance on *Pearson Construction* is misplaced. *Pearson Construction* observed that a party is liable for prejudgment interest only in certain, limited, circumstances, and it then noted that the rationale for that rule "is said to be" that "a person must know what sum he owes before he can be held in default for not paying." *Pearson Constr.*, 18 Wn. App. at 20.

Here, the issue is whether Dellen defaulted for the purposes of RCW 51.14.020, not whether it owes prejudgment interest to the Department. Moreover, Dellen's argument fails when considered against the plain statutory language of RCW 51.14.020.

2. Dellen Defaulted When It Failed To File Reports Or Pay The Department The Assessments It Was Responsible For As A Self-Insured Employer

Dellen also failed to provide the Department with any reports and failed to pay any assessments after January 2002. BR Olsen 49; BR Wilkinson 94. Self-insured employers are required to file quarterly reports, annual reports, and audited financial statements. WAC 296-15-

-221(4)(a); WAC 296-15-221(4)(b); WAC 296-15-221(4)(c).⁸ They are also required to pay a number of different assessments: administrative assessments, second injury fund assessments, insolvency fund assessments, supplemental pension fund assessments, and asbestosis assessments. WAC 296-15-223; WAC 296-15-225; WAC 296-15-227; WAC 296-15-229. These obligations continue even after an employer is no longer in the self-insured program if the employer has terminated rather than defaulted. WAC 296-15-121(8).

Dellen argues that it was released from any reporting requirements or assessment payments on January 2002. App's Br. at 25-26. However, to the extent that the Department released it from these requirement, the release was predicated on the Department's (and Dellen's) understanding that Dellen had voluntarily defaulted on its obligations as self-insured employer. BR Olsen 42-44, 49; BR Wilkinson 94.

If, as Dellen suggests, its letter of January 2002 merely resulted in it surrendering its self-insurance certificate and not in a default, then the Department would not have had any legal basis to release it from its responsibility to file reports and or pay assessments. *See* WAC 296-15-121(8)(b). Under WAC 296-15-121(8)(b), the Department can only properly release an employer from its reporting requirement after no claim

⁸ Self-insured employers are also required to file electronic claims data. However, this was not a requirement until 2008.

activity has occurred for a full year on any of its claims. Here, Dellen's last claim activity occurred in 2004, and, therefore, it would have been required to file its quarterly reports until at least 2005. BR Olsen 31, 49. WAC 296-15-121(8)(b).

Dellen also argues, in effect, that because it was not sent a bill from the Department directing it to pay any specific assessment amounts after January 2002, its failure to pay further assessments cannot constitute a default. App's Br. at 26. However, a self-insured employer has a duty to pay assessments regardless of whether the Department has sent it formal notice of the amount that it expects it to pay. *See* WAC 296-15-223; WAC 296-15-225; WAC 296-15-227; WAC 296-15-229.

WAC 296-15-223 directs self-insured employer to pay an "administrative assessment" at "the same time" that the employer "submits its quarterly report." WAC 296-15-223. It neither states nor implies that an employer may wait for the Department to tell it to pay the assessment before making the payment. Similarly, WACs 296-15-225, 296-15-227, and 296-15-229 each direct a self-insured employer to pay various assessments at the time that it submits its quarterly report. None of those regulations implies that an employer may wait for a demand from the Department before an assessment from it will be due.

Division One and Division Two of the Court of Appeals have reached contrary conclusions as to whether a *state fund* employer can be found to have “defaulted” on its premiums prior to the Department sending it notice that premiums are due. *Compare Dep’t of Labor & Indus v. Metro Hauling*, 48 Wn. App. 214, 2201-21, 738 P.2d 1063 (1987) (stating, “A review of the relevant statutes shows the Legislature intended the word “default” to mean any failure to pay a sum due, regardless of whether a demand for payment is made by the Department of Labor and Industries.”) *with Floor Decorators, Inc. v. Dep’t of Labor & Indus.*, 44 Wn. App. 503, 507-08, 722 P.2d 884 (1986) (concluding that a state fund employer does not default until it fails to comply with an order of the Department to pay a premium).

However, self-insured employers have legal obligations that go above and beyond those that are imposed on state fund employers. For example, a self-insured employer has a duty to pay benefits to its workers as those payment amounts become due, regardless of whether the Department ordered the self-insured employer to provide a given benefit to a given worker. *Taylor*, 119 Wn. App. at 924-26. By analogy, the same should be true with regard to a self-insured employer’s duty to pay assessments: it has a duty to make such payments as they become due whether a formal demand for them has been made or not.

C. Because It Defaulted, Dellen Forfeited All Of Its Rights To The Surety

Under RCW 51.14.020, a self-insured employer who defaults thereby “loses all right and title to, any interest in, and any right to control the surety.” Furthermore, under RCW 51.14.060, as amended in 2010, the Department must deposit the balance of the surety of a defaulting employer in the insolvency trust fund once all of the employer’s claims are closed and the employer has been in default for ten years. RCW 51.14.060 effectively precludes the Department from releasing a surety to an employer after the employer has defaulted, since, if the Department did so, it could not, as required by the statute, deposit the balance of an employer’s surety into the insolvency fund.

Dellen argues that even if it defaulted, the Department nonetheless should be ordered to release its surety to it. App’s Br. at 22-23. Dellen appears to suggest that RCW 51.14.020’s statement that an employer who defaults “loses all right and title to, any interest in, and any right to control the surety” was merely added by the legislature to prevent a self-insured employer from declaring bankruptcy and then using the surety to pay a third-party creditor, and that that statutory language does not have any other impact on a self-insured employer’s interest in or title to its surety

aside from precluding it from declaring bankruptcy and then seeking to aid its third-party creditors. App's Br. at 24-25.

However, where the language of a statute is plain and ambiguous, it is unnecessary to consider a statute's legislative history to give effect to attempt to discern the legislature's intent in adopting it. *See Ass'n of Washington Bus. v. Dep't of Revenue*, 155 Wn.2d 430, 441, 120 P.3d 46 (2005) (citing *Greenen v. Wash. State Bd. of Accountancy*, 126 Wn. App. 824, 839, 110 P.3d 224 (2005)). Here, RCW 51.14.020 unambiguously states that an employer who defaults loses "all right and title to, any interest in, and any right to control the surety." As the meaning of this statutory language is plain, it is unnecessary to resort to reviewing its legislative history to determine its meaning.

Furthermore, the primary guide to legislative intent is the language of the statute itself. *Driscoll v. City of Bremerton*, 48 Wn.2d 95, 99, 291 P.2d 642 (1955). It is not plausible that the legislature's intent when it broadly declared that a defaulting self-insured employer loses "all right and title to, any interest in, and any right to control" its surety was for this language to merely prevent a bankrupt self-insured employer from bringing suit against its surety for the benefit of third-party creditors, as the language that it employed in the statute does not limit itself in that fashion. Dellen advances no plausible explanation as to why the

legislature would have added this language to the statute if it merely intended to curtail the specific activity of declaring bankruptcy and then seeking to aid third-party creditors. *See* App's Br. at 24-25.

In any event, the mere fact that the legislative history shows that the legislature was concerned that some bankrupt self-insurers had brought suit against their sureties for the benefit of third-party creditors does not support the conclusion that the legislature understood the amendment to have no legal impact aside from barring such suits by bankrupt self-insured employers. On the contrary, the legislature amended the statute by adding broad and sweeping language that states that a defaulting self-insurer loses all rights and title to, any interest in, and any right to control the surety. RCW 51.14.020. This language has the effect of not only barring suits by bankrupt self-insurers for the benefit of third-party creditors, but also of clarifying that a defaulting self-insurer's right to its surety is utterly extinguished as a result of the default.

Dellen also appears to rely on language in the bill report for the amendment to RCW 51.14.020 that indicates that "[t]he rules adopted by the Department of Labor and Industries that allow return of the remaining security after all obligations are met will still apply." *See* App's Br. at 19 (citing House Bill Report, SB 5668 (1995)). Although the House Bill Report does contain that statement, this does not aid Dellen.

First, as noted, RCW 51.14.020's language is plain, and the legislative history need not be consulted to determine its legal effect. *See Ass'n of Washington Bus.*, 155 Wn.2d at 441. However, even leaving that aside, the statement in the bill report that Dellen relies upon does not support Dellen's suggestion that the legislature understood that a *defaulting* self-insurer would remain entitled to its surety after it has defaulted under the amendment. House Bill Report, SB 5668. Rather, it indicates that the legislature understood that the amendment would not prevent a former self-insured employer from receiving its surety if the employer had met "all" of its "obligations". House Bill Report, SB 5668. By definition, a defaulting employer has not met all of its obligations.

Finally, even assuming for the sake of argument that RCW 51.14.020 does not make it plain that an employer loses all right to its surety when it defaults on its claims, RCW 51.14.060, as amended in 2010, does plainly provide for that result. As amended in 2010, the statute provides that the Department "shall" deposit "the balance" of a defaulted employer's surety in the insolvency fund once all of the employer's claims are closed and the employer has been in default for ten years. If the Department had released a surety to a self-insured employer even after the employer defaulted, the Department would be unable to comply with RCW 51.14.060's directive that to deposit the surety in the insolvency

trust fund. Thus, under RCW 51.14.060, as amended, the Department may not, under any circumstances, release a surety to a self-insurer who has defaulted.

Dellen also argues that since RCW 51.14.060 only authorizes the Department to use a surety to cover the cost of an employer's obligations under the Industrial Insurance Act, the Department has no basis to *not* release a surety to an employer unless the Department anticipates that it will need to use the full surety amount to cover the cost of Dellen's workers' claims. App's Br. at 23. However, RCW 51.14.060, as amended, requires the Department to deposit the entirety of the balance of an employer's surety in the insolvency trust fund once the necessary conditions are met. Thus, when the surety that is provided to the Department exceeds what it needs to cover the cost of a given employer's surety, the Department is required by RCW 51.14.060 to deposit the balance of the surety into the insolvency trust fund, and the Department could not comply with that legislative mandate if it were to release all or nearly all of a defaulted self-insured employer's surety to it whenever the amount of surety on deposit exceeded what the Department anticipated it would need to cover the cost of the employer's workers' claims.

D. Dellen Was Not Deprived Of Due Process

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. App’s Br. at 29. Notably, Dellen does not contend that it was entitled to notice that *the Department understood it to have defaulted.*⁹ *Id.* Rather, Dellen argues that it was entitled to notice that, *as a result of defaulting, it had lost any right to its surety.* *See id.* Dellen’s argument fails, because it was given notice and a full opportunity to be heard regarding a return of its surety as soon as it requested one from the Department.

Dellen suggests that the Department decided that it would not release the surety to Dellen at some point shortly after Dellen defaulted, but that the Department chose not to advise Dellen of the fact that it had made that decision for “seven years,” even though the Department “knew” that Dellen expected the surety to be released to it. App’s Br. at 27.

⁹ Dellen could not plausibly argue that it was not given notice of the fact that the Department understood it to be in a state of default. As noted above, Dellen opted to default so that the Department would take over the active administration of its claims. Dellen confirmed that it made this decision in writing. BR Olsen 42-44. Furthermore, Dellen was aware that the Department had assumed the active administration of its claims as Mr. Wilkinson personally picked up the originals of Dellen’s claims files and brought them home with him to the Department’s headquarters in Tumwater. BR Wilkinson 90. Finally, Dellen was also aware that, after January 2002, it had not made any decision on any of its workers’ claims, it had not paid benefits to any of its workers, it had not filed any reports with the Department, and that it had not paid any assessments. BR Olsen 49; BR Wilkinson 94, 99.

However, the record does not support that assertion. Rather, the record indicates that what the Department determined in 2002 was that Dellen had defaulted as a result of having sent a letter stating that it elected to default. BR Olsen 42-44. The Department was only asked to decide whether the default resulted in a forfeiture of Dellen's interests in the surety when Dellen's counsel asked the Department, in June 2008, to release some or all of the surety to it. BR Ex. 9. Once Dellen asked the Department to release the surety to it, the Department promptly notified Dellen in July 2008 that it could not do so as a result of Dellen's default. BR Ex. 7.¹⁰ Dellen was able to, and did, appeal that decision to the Board.

Furthermore, Dellen was given a full and complete opportunity to be heard on appeal. *See generally* BR. The Board afforded it the right to call witnesses in support of its appeal, to make a closing statement to the industrial appeals judge, to file briefing with the Board, and to file a petition for review from the industrial appeals judge's proposed decision. Dellen also had the right to, and did, appeal the Board's decision to superior court, where, on appeal, the Board's decision was reviewed

¹⁰ Dellen argues that Mr. Wilkson's statement in the July 2008 letter that "I understand that this is not the response you anticipated" shows that the Department knew from the beginning that Dellen understood that the surety would be returned to it after its default. App's BR at 29. However, this is unsupported and speculative. Mr. Wilkinson made that statement in a letter that he wrote in response to Dellen's request in June 2008 that the bulk of the surety be released to it. BR Exs. 7, 9. Having received that letter from Dellen, Mr. Wilkinson would reasonably understand that Dellen was anticipating a different response from him. BR Exs. 7, 9.

de novo. RCW 51.52.115. Dellen then had, and has exercised, its right to appeal the superior court's decision to this Court, where the legal issues raised by the appeal will be, once again, reviewed de novo.

Under the plain language of RCW 51.14.020, an employer forfeits its rights to a surety at the moment of default. Once Dellen defaulted, it forfeited its interests in the surety. This would be true regardless of whether Dellen learned that it forfeited its interests in its surety within a few months of January 2002, or whether it was advised of this seven years later. As the timing of the Department's notice did not prevent Dellen from having an opportunity to be heard with regard to whether it forfeited its right to the surety, Dellen has failed to show that the notice it was provided was insufficient.

Dellen argues that the notice and opportunity that it received was not "meaningful" because, if it had been told earlier that its default resulted in it forfeiting its right to the surety, it would have had the ability to either "contemporaneously object" or "cure any alleged deficiencies," noting that, under WAC 296-15-125(2), an employer is not determined to have defaulted until ten days after it was told that it had defaulted." App's Br. at 30.

However, again, it must be noted that what Dellen complains of is lack of notice as to the Department's position that a default results in a

forfeiture of the surety, rather than lack of notice that it had, in fact, defaulted. Once Dellen decided to default, and it informed the Department that it had elected to do so, it forfeited its right to the surety by operation of law, under the plain language of RCW 51.14.020. Whether Dellen was informed that its default resulted in a forfeiture of those interests within days of it having defaulted or years later is immaterial.

Furthermore, WAC 296-15-125(2) does not support Dellen's suggestion that it was entitled to have ten days notice to "challenge" the Department's interpretation of the impact of a default or to "cure" its alleged deficiencies. First, WAC 296-15-125 was promulgated after Dellen elected to default, and, therefore, the specific procedure that Dellen references had not yet been formally adopted by any rule. *See* WAC 296-15-125 (rule adopted 2006.)

Second, under WAC 296-15-125(2), if an employer has failed to provide benefits or failed to make any other necessary payments under the Industrial Insurance Act, the Department will contact the employer to see if the employer will resume making the necessary payments within ten days, and the Department will only determine that the employer has defaulted if the employer does not resume payment of benefits within ten days. WAC 296-15-125(2) does not, however, give an employer ten days to "challenge" the Department's interpretation of the legal effect of a

decision to default, nor does it give an employer ten days to change its mind after having previously decided to voluntarily default.

On a related note, the procedure laid out in WAC 296-15-125(2) was inapplicable here in any event, because Dellen contacted the Department and voluntarily defaulted on its obligations under the self-insurance program. Since Dellen had expressly declared that it had elected to default, there was no reason for the Department to contact Dellen and ask it whether it intended to resume making the necessary payments within ten days: it plainly did not intend to do so.

E. Even Assuming Arguendo That Dellen Did Not Default, It Is Not Entitled To A Refund Of Its Surety At This Time

Dellen asserts, without legal support, that if this Court concludes that it did not default, then this Court should direct the Department to release the full amount of Dellen's remaining surety to it. As explained above, Dellen did default, and, as a result of its default, it lost any right to its surety. However, even assuming for the sake of argument that Dellen has not defaulted as of this time, Dellen would still not be entitled to an immediate release of its surety.

Under the plain language of WAC 296-15-121, the earliest the Department may "consider" releasing a surety is ten years after the employer has been released from its reporting requirements. The earliest

an employer can be properly released from its reporting requirements is one year after it has had no claims activity on any of its workers' claims.

Here, the Department determined that Dellen defaulted in January 2002. If the Department was mistaken in making that determination, then the Department was also mistaken in believing that Dellen was no longer required to manage any of its workers' claims, to maintain a claims staff (or retain a third-party administrator) who was capable of managing those claims, to file any reports with the Department, or to pay any further assessments.

Therefore, if this Court determines that Dellen did not default on its claims, the Court, nonetheless, should not direct the Department to release the surety to it. Rather, the Court should remand this issue to the Department with directions that it find that Dellen never defaulted on its claims and that Dellen was never properly released from any of its responsibilities as a self-insurer under the Industrial Insurance Act and the applicable regulations.

On remand, Dellen would be obligated to reassume the management of its workers' claims (in the event that an application to reopen one is filed), to resume filing quarterly and annual reports with the Department until and unless it is released from the obligation to do so, and to continue paying the assessments that are levied on self-insurers who

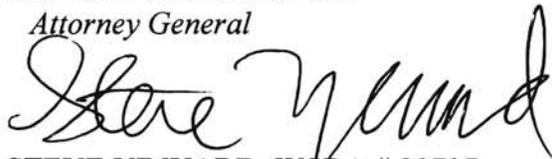
have not defaulted. Any request for a return of the surety could be considered only after the requirements of WAC 296-15-121 are met, namely, that all of Dellen's claims be closed and that ten years elapse from the date that it is properly released from its responsible to file quarterly and annual reports with the Department.

VII. CONCLUSION

For the reasons discussed above, the Department asks that this Court affirm the decision of the superior court that affirmed the decision of the Department.

RESPECTFULLY SUBMITTED this 4 day of February, 2013.

ROBERT W. FERGUSON
Attorney General



STEVE VINYARD, WSBA # 29737
Assistant Attorney General

Labor and Industries Division
7141 Cleanwater Drive SW
PO Box 40121
Olympia, Washington 98504
(360) 586-7715

NO. 43636-1-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

DELLEN WOOD PRODUCTS, INC.,

Appellant,

v.

WASHINGTON STATE
DEPARTMENT OF LABOR AND
INDUSTRIES,

Respondent

**DECLARATION OF
SERVICE**

DATED at Tumwater, Washington:

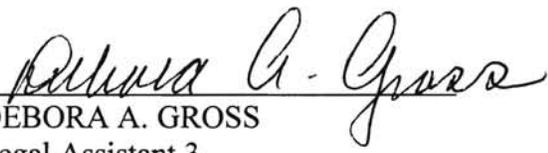
The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I mailed the Department's Brief of Respondent and this Declaration of Service to all parties on record as follows:

Via First Class U.S. Mail, Postage Prepaid, to:

Howard M. Goodfriend
Edwards, Sieh, Smith & Goodfriend, P.S.
500 Watermark Tower
1109 First Avenue
Seattle, WA 98101

John Bury
Murphy, Bantz & Bury, P.S.
Lincoln Building
818 W. Riverside Avenue #631
Spokane, WA 99201

DATED this 4 day of February, 2013.


DEBORA A. GROSS
Legal Assistant 3
(360) 586-7751