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Court of Appeals  
Division II  
State of Washington  
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No. 50566-5-II

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

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ALFREDO SUAREZ, *Appellant*,

v.

TOPBUILD, ET AL., *Respondent*.

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**RESPONDENT'S BRIEF**

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James L. Gress  
Attorney for Respondent



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## I. INTRODUCTION

The Masco Corp., by way of their attorneys, seeks affirmance of the trial court's denial of Motion for Continuance. The timing of a trial is within the discretion of the trial court and there was no reason to create an unnecessary delay. There was no restriction on the jury deliberation time, and Alfredo Suarez was afforded all the rights of due process required by the Constitution.

### **QUESTIONS PRESENTED ON APPEAL:**

1. **Was the trial court judge within his discretion to deny the continuance and prevent unnecessary delays?**

Yes. It is completely within the judge's discretion to exercise time management and deny the Motion for Continuance.

2. **Was Alfredo Suarez granted an opportunity for his case to be heard in Superior Court under RCW 51.52.115?**

Yes. Alfredo Suarez was given ample time to present his case. His counsel presented the entirety of his case and was allowed the full amount of time for opening and closing arguments as well as an opportunity to object to jury instructions.

3. **Was Alfredo Suarez given full due process of law under the Fourteenth Amendment?**

Yes. Due process requires that Alfredo Suarez have a complete opportunity to present his case and an unbiased deciding body. There is zero evidence that he was not granted this opportunity.

## **PROCEDURAL HISTORY:**

On December 19, 2014, the Department of Labor and Industries (Department) ordered self-insured employer, Masco Corp., to pay time loss benefits to the claimant, Alfredo Suarez, from October 11, 2013, through December 10, 2014, for an industrial injury suffered during his employment.

The employer appealed and an industrial appeals judge issued a Proposed Decision and Order on January 21, 2016, for Docket No. 15 11127. The proposed order reversed the Department order from December 19, 2014, and held that claimant was not entitled to time loss benefits between the dates of October 11, 2013, and December 10, 2014.

Claimant filed a Petition for Review of the Proposed Decision and Order from Docket No. 15 11127. On April 12, 2016, the Board denied the Petition for Review and the Proposed Decision and Order from January 21, 2016, became the Decision and Order of the Board.

Following the January 21, 2016, order, claimant filed an appeal to Superior Court which was assigned Cause No. 16-2-00796. Trial commenced on April 24, 2017, in front of a six-person jury. On April 25, 2017, around 3:20 p.m., appellant's attorney requested a Motion to Continue. Judge David Gregerson denied this motion. At 4:39 p.m. the jury retired to begin deliberations. At 5:08 p.m. the jury returned with a unanimous verdict affirming the Decision and Order of the Board of Industrial Insurance Appeals dated April 12, 2016.

Following the jury trial, Alfredo Suarez appeals this decision which was assigned Court of Appeals No. 50566-6-II.

## **DISCUSSION:**

### **The Trial Court Judge was Within His Discretion to Deny the Motion for Continuance.**

Appellant argues that Judge Gregerson abused his discretion when denying appellant's Motion for Continuance on April 25, 2017. "A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons." *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997). In this instance there was no indication that Judge Gregerson acted unreasonably in his ruling.

Appellant provides no justifying cases in which the judge's conduct in this case would rise to the level of abuse of discretion. While there have been examples of a trial court abusing discretion in the matter of motions for continuance, the employer could find no example of requesting a motion for the sake of jury deliberation. In *Coggle v. Snow*, the Court noted, "The ruling on the motions for a continuance and for reconsideration is within the discretion of the trial court and is reversible by an appellate court only for a manifest abuse of discretion." *Coggle v. Snow*, 56 Wn. App. 499, 504, 784 P.2d 554 (1990). Judge Gregerson clearly states in his reasoning that he is "in favor of good time management." (Report of Proceedings at 7 lines 12-14). "Judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously." *State ex rel. Clark v. Hogan*, 49 Wn.2d 457, 303 P.2d 290 (1956). Appellant argues that time management is an arbitrary and capricious decision which seems counter to the facts.

### **Alfredo Suarez was Given an Opportunity to Present his Case in Full.**

Appellant argues that under RCW 51.52.115 "Mr. Suarez was not given a full opportunity to present his case by the restrictions placed on the proceeding by the trial court in

limiting the jury deliberation.” Brief of Appellant at 18-19. Appellant fails to provide any evidence to support this claim. Appellant solely contends that jury deliberation was limited and makes no claims that appellant was not given the opportunity to adequately present his case to the jury. Appellant also fails to demonstrate how jury deliberations were restricted. *Id.* The jury was told that the trial could last for three days, and the jury was given instructions as agreed upon by the both parties. Under CR 51(f), counsel for Mr. Suarez was granted an adequate opportunity to object to the jury instructions or ask for a modification to include additional language. The instruction that the jury was given about leaving at 5:00 p.m. (Report of Proceedings at 2, line 25) was given at the beginning of trial, not immediately before deliberations. It was given in the context of an overall schedule of the day. The jury was never told that they needed to make a decision within a certain time frame and there is zero evidence in the record that they were pressured to make a determination.

Jury instructions are discretionary within the trial courts. “Taken together, jury instructions are sufficient if they are readily understood and not misleading to the ordinary mind and permit a party to satisfactorily argue his or her theory of the case to the jury. The number and specific language of the instructions are matters left to the trial court’s discretion.” *Peterson v. State*, 100 Wn.2d 421, 671 P.2d 230 (1983) (internal citations omitted). In the present case, nothing was said to mislead the jury that they would be required to complete deliberations by 5:00 p.m., only that courthouse policy dictates that they leave the building at 5:00 p.m. Reading the statement in context, the judge was providing an overview of a typical daily schedule. Including the language that “we don’t stay past 5 o’clock” in the same statement as “the court starts promptly at 9 o’clock” is merely describing the typical schedule for the day. (Report of Proceedings at 2, lines 20-24). As counsel pointed out, there was trial time allotted for the next

morning and the jury was informed of that. With time allotted for the following morning, it is reasonable to expect that the jury understood they could continue deliberations if needed.

At the conclusion of trial, the jury was read the pattern jury instructions for civil trials. WPI 1.02 (incorporated in WPI 155.01 for Workers' Compensation trials) states:

As jurors, you have a duty to consult with one another and to deliberate with the intention of reaching a verdict. Each of you must decide the case for yourself, but only after an impartial consideration of all of the evidence with your fellow jurors. Listen to one another carefully. In the course of your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon the evidence. You should not surrender your honest convictions about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of obtaining enough votes for a verdict.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, bias, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

This instruction was read to the jury and the jury swore an oath to follow the instructions as given to them. The jury was never told that they must finish deliberations by 5:00 p.m., but they were given the previous instruction clearly stating that they should not change their minds in order to obtain votes. Based on this, appellant is alleging jury misconduct occurred. Under RCW 4.44.380, the jury only needed five votes in order to reach a binding verdict, so at least two jurors must have committed misconduct in order for the unanimous result to occur. While appellant alludes that this must have occurred, he provides no evidence to support this theory aside from a quick verdict.

### **There Was No Violation of Due Process**

Under the Fourteenth Amendment, the essential requirements for due process are a notice and hearing before an impartial tribunal. "[S]ome form of hearing is required before an individual is finally deprived of a property [or liberty] interest." *Mathews v. Eldridge*, 424 U.S.

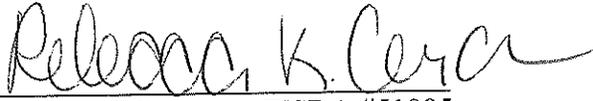
319, 333 (1976). Additionally, he was granted an impartial tribunal, “[t]he neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law... At the same time, it preserves both the appearance and reality of fairness... by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.” *Marshall v. Jerrico*, 446 U.S. 238, 242 (1980); *Schweiker v. McClure*, 456 U.S. 188, 195 (1982). There is no indication here that these requirements have not been met. Appellant claims that “[h]ad the motion to continue the case... there would have been a cooling off period, the jury would have slept on what they had heard over the course of the two days, not just the second.” (Brief of Appellant at 20). The difficulty with this logic is that he additionally argues that the delay of the morning contributed to his motion. Therefore, if the trial had commenced without any delay, the jury would still have begun deliberation on the same day as the respondent’s testimony. This refutes the idea that there is somehow a required “cooling off period” between testimony and closing argument. There is no other evidence that supports the idea that Alfredo Suarez was not provided due process.

## **CONCLUSION:**

Based on the preceding evidence, there is no indication that the trial court abused its discretion by not granting appellant’s Motion for Continuance. Motions for continuance and time management are firmly within the discretion of the trial court and there is an interest in not creating unnecessary delays. Additionally, the jury was never told they needed to cease deliberations or were hurried in their decision making process. Without further evidence that the jury was actually pressured into making a premature decision, there is no reason to believe that appellant was not granted a full and fair trial.

The employer respectfully requests that the Court uphold the trial court decision.

James L. Gress  
Attorney for Respondent

A handwritten signature in cursive script that reads "Rebecca K. Corcoran". The signature is written in black ink and is positioned above a horizontal line.

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**COURT OF APPEALS FOR DIVISION  
II  
STATE OF WASHINGTON**

ALFREDO SUAREZ,	)	No. 50566-5-II
	)	
Appellant,	)	
	)	
v.	)	
	)	PROOF OF MAILING
TOPBUILD et al.,	)	BRIEF OF RESPONDENT
	)	
Respondent.	)	
	)	
	)	
	)	

The undersigned states that on November 28, 2017, I deposited in the United States mail, with proper postage prepaid, Brief of Respondent as attached, addressed as follows:

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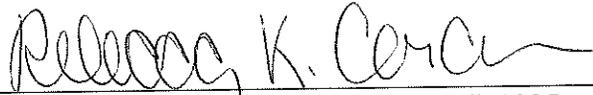
20 by e-filing it on November 28, 2017.

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

23 DATED: November 28, 2017.

24 Respectfully submitted,

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