

FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY CRD
DEPUTY

NO. 51143-6-II
COURT OF APPEALS
IN THE STATE OF WASHINGTON
DIVISION II

ALFREDO SUAREZ, *APPELLANT*

v.

MASCO CORPORATION, *RESPONDENT*.

BRIEF OF APPELLANT

BUSICK HAMRICK PALMER PLLC
STEVEN L. BUSICK
Attorneys for Appellant/Plaintiff

By STEVEN L. BUSICK, WSBA #1643
Busick Hamrick Palmer PLLC
PO Box 1385
Vancouver, WA 98666
Ph. 360-696-0228

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INTRODUCTION

This is an appeal by Alfredo Suarez of a decision by the trial court that reversed an order of the Board of Industrial Insurance Appeals that affirmed an order of the Department of Labor and Industries that imposed a penalty for delay in payment of benefits pursuant to RCW 51.48.017.

ASSIGNMENTS OF ERROR

1. The trial court erred in deciding that benefits were not due and payable while the employer's motion for a stay of benefits was pending decision by the Board of Industrial Insurance Appeals pursuant to RCW 51.52.050(2)(b). Conclusion of Law No. 4.

a. Is there an automatic stay of benefits once a self insured employer files a motion for stay of benefits on their appeal to the Board while a decision on the motion is pending by the Board?

b. Is there any language in RCW 51.52.050(2)(b) that supports a stay of benefits pending decision on the motion by the Board?

Mr. Suarez maintains that the answer to each of these questions is no.

2. The trial court erred in deciding that the self-insured employer Masco Corporation did not unreasonably delay the payment of benefits ordered by the Department of Labor and Industries pursuant to RCW 51.48.017.

a. Did Masco Corporation through its claim administrator unreasonably delay payment or refuse to pay benefits while their motion to stay benefits was pending before the Board?

b. Does genuine legal or medical doubt pursuant to *Taylor v. Nalley's Fine Foods*, 119 Wn. App. 919, 924, 831, P.3d 1018 (2007) set the standard as to what constitutes unreasonable delay or refusal to pay benefits?

c. Does genuine legal or medical doubt require objective evidence as opposed to a subjective state of mind to support delay or refusal to pay benefits?

d. Was there sufficient evidence of genuine legal doubt to support the finding of fact denominated Conclusion of Law No. 5 by the trial court to overcome the presumption that the Board was correct pursuant to RCW 51.52.115?

Mr. Suarez maintains that the answer to questions a, b and c is yes, and the answer to question d is no.

STATEMENT OF CASE

On December 19, 2014, the Department of Labor and Industries ordered the self insured employer, Masco Corporation, to pay the claimant, Alfredo Suarez, back time loss benefits from October 11, 2013, through

December 10, 2014, Clerks Papers No. 10, Certified Appeal Board Record Exhibit 1, copy attached as Appendix A. On January 20, 2015, Masco Corporation filed its Notice of Appeal to the Board of Industrial Insurance Appeals and included a motion to stay benefits pending a final decision on the merits of its appeal. CP, CABR, Ex. 2, Appendix B. On February 12, 2015, the Board entered its Order Granting Appeal and advising the parties that if employer's motion to stay benefits is granted, benefits will stop during the appeal process. CP, CABR, Ex. 3, Appendix C. On February 25, 2015, the Board denied Masco's motion to stay benefits based on the Department file as it existed on December 19, 2014, pursuant RCW 51.52.050(2)(b). CP, CABR, Exhibit 4, Appendix D.

Accompanying the Board Decision and Order on Motion to Stay Benefits Pending Appeal, Exhibit 4, was a two page notice advising any party who disagrees with the decision of the Board of their right to appeal to Superior Court of the State of Washington. CP, CABR, Exhibit 5, Appendix E. No appeal was filed to the Board order denying motion to stay benefits. On March 6, 2015, Masco paid the sum of \$27,647.91 to Mr. Suarez, CP, CABR, Exhibit 6, Appendix F. On August 25, 2015, the Department ordered Masco, aka Service Partners Supply LLC, to pay Mr. Suarez a penalty in the sum of \$6,911.01, based on 25% of the amount due for unreasonable delay in payment of benefits, in addition to the benefits¹

¹ Since some time loss benefits had been paid during the period of October 11, 2013, through December 20, 2014, the Department phrased Exhibit F as a loss of earning power benefits rather than time loss benefits pursuant to RCW 51.32.090(3)(a)(ii)

previously paid, pursuant RCW 51.48.017. CP, CABR, Exhibit 12, Appendix G.²

On September 23, 2015, Masco appealed the penalty order to the Board. CP, CABR, pages 33-34. On July 1, 2016, following an evidentiary hearing, an Industrial Appeals Judge issued a Proposed Decision and Order finding that there was an unreasonable delay in payment of benefits pursuant to RCW 51.48.017, and affirming the Department order of August 26, 2015. CP, CABR, pages 27-30. On July 29, 2016, Masco filed its Petition for Review to the Board claiming that they were not obligated to pay benefits until the Board decided their motion to stay benefits, and that they had a genuine legal doubt as to when payment was due pursuant to *Taylor v. Nalley's Fine Foods*, 119 Wn. App. 919, 924, 83 P.3d 1018 (2007). CP, CABR, pages 14-21. On November 21, 2016, the Board entered its Decision and Order deciding that there was no objective evidence of a genuine legal doubt that Masco had as of December 19, 2014, that time loss benefits were not owing as ordered by the Department. CP, CABR, pages 3-8.

On December 21, 2016, Masco filed its appeal in Superior Court for Clark County, and the case proceeded to bench trial on September 11, 2017. Report of Proceedings, pages 1-61. Though RCW 51.52.050(2)(b) provides that when the Department order is appealed, namely the order of December 19, 2014, the order shall not be stayed pending a final decision on the merits

² Since some of the language of Exhibit G is partly covered by an exhibit sticker. Page 54 of the CABR is added.

unless ordered by the Board, the trial court decided that the benefits were not due and payable until Masco received notice of the order denying the Motion for Stay of Benefits. The trial court also decided that if the benefits were payable prior to that date, Masco had a genuine legal doubt as to its obligation to pay such benefits. The Order filed on October 19, 2017, Conclusion of Law Nos. 4 and 5, Appendix H.

ARGUMENT

Masco maintains that there is nothing in RCW 51.52.050(2)(b) that states that benefits have to be paid until the Board rules on a motion for stay of benefits. What RCW 51.52.050(2)(b) states is that if the Department order is appealed, the order shall not be stayed pending a final decision on the merits until ordered by the Board. The same section of the statute then states that the employer may move for a stay of the order on appeal. There is no provision in the statute that states the order is stayed pending a decision by the Board on a motion for a stay. Masco would have this court add such language in the statute on the basis that the filing a motion for a stay has no meaning without the additional language.

What the employer would like RCW 51.32.050(2)(b) to state is, “unless a motion for a stay is filed,” instead of what the statute states, “unless ordered by the Board.” But the court cannot read into that statute what is not there. When interpreting a statute, the court attempts to interpret and carry out the legislative intent through a plain meaning imparted by the text of the statutory provision at issue, as well as any related provisions that

discloses legislative intent about the provision in question. Unless the statute is susceptible to more than one reasonable meaning, the statute is unambiguous, and the court's inquiry is over. Only if the statute is susceptible to more than one reasonable interpretation, is it appropriate for the court to resort to aids of construction, including legislative history to determine legislative intent. *Crabb v. Labor & Industries*, 181 Wn. App 648, 654-655, 326 P.3d 815 (2014). The plain meaning of RCW 51.32.050(2)(b), "unless ordered by the Board," can only be read to mean that the order shall not be stayed pending final appeal unless ordered by the Board.

RCW 51.52.050(2)(b) goes on to state that the Board shall conduct an expedited review of the claim file provided by the Department as it existed on the date of the Department order. If the obligation to pay benefits were ongoing, the payment of future benefits would be stayed, and the employer could avoid the risk of additional penalties being entered as those benefits accrue. Here, the benefits ordered are back time loss benefits and are not necessarily ongoing. If the legislature intended to distinguish back time loss benefits from ongoing time loss, it could have done so, but did not. There is nothing in the RCW 51.52.050 that states that time loss benefits are stayed pending decision on the Motion by the Board, and this court should not write additional language into the statute.

RCW 51.52.050(2)(b) first states that an order awarding benefits shall become effective and benefits due on the date issued. Then subject to (b) (i) and (ii) the order can only be stayed pending a final decision on the

merits. Subsection (i) provides that where the Department has ordered on increase in a permanent partial disability from an earlier order, payment of the increased amount is stayed pending final decision on the merits. And subsection (ii) provides that an order establishing the wage on temporary or permanent total disability, payment of the amount above the employer's most recent wage calculation is stayed. If the legislature had intended to provide a stay of back time loss or loss of earning power benefits, or a portion of those benefits, it would have done so. The inclusion of one stated exception to the stay, should exclude other exceptions not stated.

Nothing could be clearer than the stated languages that the Department order awarding benefits shall become effective and benefits due on the date issued, December 19, 2014, and on appeal the Department order shall not be stayed pending a final decision on the merits unless ordered by the Board. The inclusion of additional language in RCW 51.52.050(2)(b) that if the self insured employer prevails on the merits, any benefits paid may be recouped pursuant to RCW 51.32.240 supports the position that the legislation did not intend there be a stay in effect pending a decision by the Board on the motion to stay benefits.

Additional language in RCW 51.52.050(2)(b) supports why a motion for stay are rarely granted. In the expedited review of the Department file on the date the order is granted, the Board shall grant a motion to stay only if the moving party demonstrates that it is more likely than not to prevail on the facts as they existed at the time of the order on appeal, December 19, 2014. Since the self-insured employer is not likely to

prevail on a motion for stay, delaying payment until the Board decides the motion would only encourage stalling tactics by the employer or their claim administrator. The expedited review provisions do not lessen the harm caused by the delay if the employer can delay payment without any further consequences.

RCW 51.48.017 *Self Insurer Delaying or Refusing to Pay Benefits*, provides that the director shall issue an order determining whether there was an unreasonable delay or refusal to pay benefits. Although Board decisions are not controlling authority for the court, they offer guidance when determining the propriety of the Boards penalty assessments. *Taylor v. Nalley's Fine Foods*, 119 Wn. App. 919, 924, 83 P.3d 1018 (2007). The Board has designated *In re: Alfredo Suarez*, BIIA Dec. 15 20822 (2016) as one of its significant decisions, which holds that the delay in payment of benefits is unreasonable if the only basis for not paying benefits is to wait out the time allowed to receive a ruling on a motion to stay benefits. See Appendix I.

Taylor, 119 Wn. App. at 926, acknowledges that *In re Frank Madrid*, BIIA Dec. 86 0224 (1987) establishes what is determined to be unreasonable within the meaning of RCW 51.48.017. An unreasonable delay turns on whether the employer possessed a genuine doubt from a legal or medical standpoint as to who was liable for payment. What *Alfredo Suarez* adds to *Madrid* is that the doubt as to the medical or legal obligation to pay benefits must be supported by evidence as to the factual basis for the doubt to be genuine. In *Alfredo Suarez*, the Board states that the claim

manager's testimony was limited to the order of events resulting in the appeal from the Department order and the eventual payment of benefits, and no additional or separate evidence was presented to support Masco's assertion that there was a genuine medical or legal doubt as to the obligation to pay benefits. CP, CABR, page 3.

Masco argues that because it exercised its right to appeal the Department order imposing a penalty, and because it exercised its further right to file a motion for stay the payment of benefits, the resulting delay in payment of benefits was reasonable. *Alfredo Suarez* at page 4 held that this delay in paying benefits can result in a penalty unless the employer proves that it had a genuine doubt that the benefits were due. It is insufficient for an employer to assert subjectively that if it had a reasonable doubt as to the liability for benefits. Genuine doubt requires an objective standard of proof to assess the reasonableness of such doubt. Exercising the right to appeal and to file a motion to stay benefits absent such objective evidence does not establish a reasonable basis to withhold benefits ordered by the Department. CP, CABR, pages 4-5 and 7.

The Board went on to discuss that RCW 51.52.050(2)(b) was amended in 2008 to give the self-insured employers a mechanism to stop payment of benefits during the pending of an appeal:

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 subsections, if the department order is appealed the order shall not be stayed pending a final decision on the merits unless ordered by the board. (Board's emphasis)

The Board then stated that the language of the statute makes it clear that benefits are due when the Department issues its order directing payment of benefits. The Board found that RCW 51.52.050(2)(b), when taken together with the liberal construction of the Industrial Insurance Act found in RCW 51.12.010, requires the payment of benefits pending appeal and pending a motion to stay benefits. The statute is unambiguous as to being due on the date of the Department order, December 19, 2014, and benefits would only be stayed by a Board order granting the motion. CP, CABR, pages 6-7.

Pursuant to RCW 51.52.050(2)(b), the reasonable doubt, or genuine doubt, has to exist at the time the order is entered, December 19, 2014, and be based on a review of the claim file as it existed on that date, which is all that is required of the Board. It can be argued that the 2008 amendment to the statute obviates the standard of review imposed by *In re Frank Madrid* and *Taylor v. Nalley's Fine Foods*, and that the existence of a genuine doubt as to the medical or legal obligation to pay benefits can no longer delay payment, or at least legal doubt can no longer delay payment.

There was insufficient evidence in the record produced by the self insured employer Masco Corporation to rebut the presumption that the Board was correct in Findings of Fact No. 3. The self insured employer presented no evidence establishing a genuine doubt as to a medical or legal liability to pay benefits. CP, CABR, page 8. RCW 51.52.115 provides that the Boards findings and decision shall be *prime facie* correct. This is interpreted to mean that there is a presumption on appeal to superior court

that the findings and decision of the Board are correct until the trier of fact finds that they are incorrect by a preponderance of evidence. *McClelland v. ITT Rayonier, Inc.*, 65 Wn. App. 386, 828 P.2d 1138 (1992). *Belnap v. Boeing Company*, 64 Wn. App. 212, 823, P. 2d. 528 (1992), *Allison v. Department of Labor and Industries*, 66 Wn. 2d. 263, 401 P.2d. 982 (1965).

ATTORNEY FEES

RCW 51.52.130 authorizes an award of reasonable attorney fees if a workers right to compensation is sustained on an employer's appeal to the superior court or the appellate court, and if Mr. Suarez prevails on his appeal to the Court of Appeals, he is entitled to an award of reasonable attorney fees. *Boeing Company v. Lee*, 102 Wn. App. 552, 558, 8 P. 3d 1064 (2000).

CONCLUSION

The trial court erred in reversing the penalty imposed for unreasonable delay in payment of benefits by the Department of Labor and Industries and affirmed by the Board of Industrial Insurance Appeals, and the appellate court should reverse the Order filed on October 19, 2017, and affirm the Department order dated August 15, 2015, ordering the self insured employer to pay a penalty in the sum of \$6,911.01 to Mr. Suarez.

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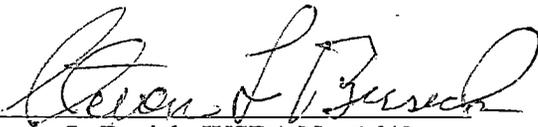
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Dated this 1st day of March, 2018.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Steven L. Busick", written over a horizontal line.

Steven L. Busick, WSBA No. 1643
Attorney for Alfredo Suarez
Respondent

MAILING DATE: 12/19/14
CLAIM ID : SB45649
CLAIMANT : ALFREDO SUAREZ
EMPLOYER : MASCO CORPORATION
INJURY DATE : 6/27/12
SERVICE LOC :
UBI NUMBER : 600-449-288
ACCOUNT ID : 706215-00
RISK CLASS : 0512-00

WORK LOCATION ADDRESS:
NO ADDRESS REPORTED

VONNE MONTAGUE
CLAIMS ADJUDICATOR
SELF INSURANCE SECTION
PO BOX 44892
OLYMPIA, WA 98504-4892
(360) 902-6885
FAX #: (360) 902-6900

ORIG: CLAIMANT: ALFREDO SUAREZ
BUSICK HAMRICK, PLLC, PO BOX 1385,
VANCOUVER WA, 98666-1385
EMPLOYER: MASCO CORPORATION
C/O CONSTITUTION STATES SERVICE CO, PO BOX 6890,
PORTLAND OR, 97228-6890
ATTENDING PHYSICIAN: HEITSCH RICHARD C MD
INTEGRATED MEDICINE GROUP, 163 NE 102ND AVE BLDG V,
PORTLAND OR, 97220-4169
EMPLOYER'S ATTORNEY: JAMES L GRESS
9020 SW WASHINGTON SQ RD #560, PORTLAND OR, 97223-4518

1
2
3 **BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS**

4 **STATE OF WASHINGTON**

5 In re: ALFREDO SUAREZ) Docket No.
6)
7)
8 Claim No. SB45649) **EMPLOYER'S NOTICE OF APPEAL**

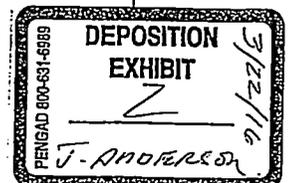
9
10 COMES NOW the employer, Masco Corporation, by and through its attorney,
11 James L. Gress, and appeals to the Board of Industrial Insurance Appeals from the
12 Department's order of December 19, 2014, which directed the self-insured employer to pay
13 time loss benefits for the period of time of October 11, 2013 through December 10, 2014. It is
14 our contention this order is in error. Specifically, the employer contends that claimant's loss of
15 earnings, if present, was not proximately related to the industrial injury of June 27, 2012. In
16 the event claimant had a loss of earnings, it is the position of the employer that this is for
17 reasons unrelated to the industrial injury and as such temporary disability benefits are not due
18 and payable.

19
20 The employer also moves for an order granting a stay of benefits in that based
21 upon the evidence within the Department's file, the employer is reasonably likely to prevail.

22
23
24 I, James L. Gress, certify that:

25
26 I am the attorney representing the employer in the above workers' compensation
27 claim.

Board of Industrial Insurance Appeals
In re: Alfredo Suarez
Docket No. 15 20822
Exhibit No. (2)
 PDD REJ
Date
Law Office of Gress and Clark, PLLC
9020 S.W. Washington Square Rd., Suite #560
Portland, OR 97223



BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

RECEIVED FEB 17 2015

2430 Chandler Court SW, P O Box 42401
Olympia, Washington 98504-2401 • www.bia.wa.gov
(360) 753-6823

In re: ALFREDO SUAREZ

Docket No. 15 11127

Claim No. SB-45649

ORDER GRANTING APPEAL

The EMPLOYER's appeal from the Department's decision dated December 19, 2014 is granted.

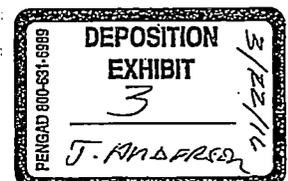
- This order granting appeal does not mean you have won your appeal. It means our agency agrees to hear your appeal.
- You will be notified of a conference date and time to discuss the appeal.
- You may represent yourself at the conference. You may also bring an attorney to represent you, or a family member, friend, or union representative to help you.
- In any proceeding, you may ask the judge questions and have the judge explain the procedures.

Motion to Stay: We received a Motion to Stay Benefits (stop payment of benefits) filed by the employer.

- **Motion Granted:** If the employer's Motion to Stay Benefits is granted, benefits will stop during the appeal process.
- **Motion Denied:** If the employer's motion is denied, the worker will continue to receive any benefits ordered by the Department, unless the worker chooses to stop benefits. See "Notice to Workers" on reverse side.
- **Decision:** The Board must base its decision on the information in the Department file as it existed on the date of the order on appeal. New medical or vocational information in the file or offered by the parties in connection with the motion cannot be considered.
- **Decision Deadline:** The Board has twenty-five (25) days from the date of filing of the motion or the date the appeal is granted, whichever is later, to grant or deny the motion as provided by RCW 51.52.050.
- **Responses:** The Board may issue an order as soon as ten (10) days from the date of this order. If you want the Board to consider a response it must be filed promptly. The Board may not have time to consider responses that are not received within ten (10) days.

The Board will issue an order that informs you of its decision

Board of Industrial Insurance Appeals
In re: Alfredo Suarez
Docket No. 15 20822
Exhibit No. (3)
 ADM. PDU Date REJ.



Notice to Worker. If you are currently receiving benefits, you will likely have to repay the benefits if the employer is successful in the appeal. RCW 51.32.240.

You may request that the Department stop paying benefits during the appeal process. This request must be sent in writing to:

- Department of Labor and Industries, P.O. Box 44287, Olympia, WA 98501-4287
- The employer (address shown on the next page)
- The Board of Industrial Insurance Appeals, P.O. Box 42401, Olympia, WA 98504-2401

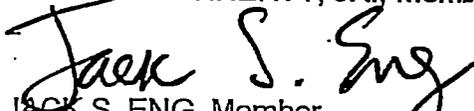
If benefits are stopped during the appeal and you are successful in the appeal, you may be entitled to interest on unpaid benefits. RCW 51.52.135.

Dated February 12, 2015.

BOARD OF INDUSTRIAL INSURANCE APPEALS


DAVID E. THREEDY, Chairperson


FRANK E. FENNERTY, JR., Member


JACK S. ENG, Member

c: DEPARTMENT OF LABOR AND INDUSTRIES

RECEIVED FEB 27 2015

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: ALFREDO SUAREZ) DOCKET NO. 15 11127
)
)
) DECISION AND ORDER ON MOTION TO STAY
CLAIM NO. SB-45649) BENEFITS PENDING APPEAL.

The self-insured employer, Masco Corporation, filed an appeal with the Board of Industrial Insurance Appeals on February 2, 2015, from an order of the Department of Labor and Industries dated December 19, 2014. In this order, the Department directed the self-insured employer to pay time-loss compensation benefits from October 11, 2013, through December 10, 2014.

On February 2, 2015, the self-insured employer filed a Notice of Appeal that included a Motion to Stay Benefits Pending Appeal. The Motion to Stay Benefits Pending Appeal is DENIED.

DECISION

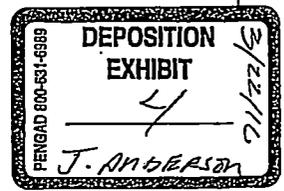
This matter is before the Board for review and decision on a timely motion to stay benefits pending the appeal filed by the self-insured employer, Masco Corporation. For all appeals filed on or after January 2, 2015, WAC 263-12-11802(3) provides as follows:

Motion must be filed separately. An employer must file a motion for a stay of the order on appeal separately from any pleading or other communication with the board and must note "MOTION FOR STAY OF BENEFITS" prominently on the first page of the motion.

The employer did not comply with this new procedural requirement. We caution the employer as to the need to comply with the procedural requirements of WAC 263-12-11802 to assure our ability and willingness in the future to consider timely filed stay of benefits motions. We considered the Department record as it existed on the date of the Department order, December 19, 2014. As provided by RCW 51.52.050, we are unable to consider new information in the employer's motion or the Department record.

Based solely on the documents contained in the Department file as of December 19, 2014, we find that the employer, Masco Corporation failed to demonstrate that it is more likely than not to

Board of Industrial Insurance Appeals
In re: Alfredo Suarez
Docket No. 15 20822
Exhibit No. (4)
 ADM. PDO REJ.
Date

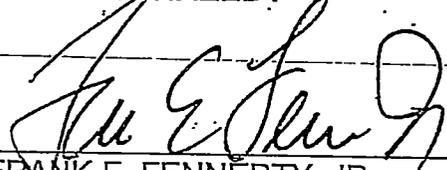


1 prevail in this appeal. The motion to stay benefits pending appeal is DENIED and Masco Corporation
2 shall pay benefits pending appeal as provided by RCW 51.52.050(2)(b).

3 Dated: February 25, 2015

4 BOARD OF INDUSTRIAL INSURANCE APPEALS

5
6 
7
8 DAVID E. THREEDY Chairperson

9
10 
11
12 FRANK E. FENNERTY, JR. Member



STATE OF WASHINGTON

BOARD OF INDUSTRIAL INSURANCE APPEALS

2430 Chandler Ct SW PO Box 42401 • Olympia, WA 98504-2401 • (360) 753-6823 • www.biaa.wa.gov

Enclosed is the Board's order on motion to stay benefits.

What does the order mean?

- **Motion to stay benefits granted.** The benefits described in the enclosed order will not be paid during the appeal. If the worker is successful in the appeal, benefits may resume, and the worker may be entitled to interest for the delay in payment of these benefits.
- **Motion to stay benefits denied.** During the appeal the Department or employer is required by law to continue to pay benefits ordered by the Department. If the employer succeeds in the appeal, it is likely that the worker will be required to repay benefits. The procedures available to the Department or employer to demand repayment of benefits are described in RCW 51.32.240.

What if I disagree with the decision reached in the order?

- Any party who disagrees with the decision may appeal to superior court.

How much time do I have to appeal to superior court?

- Your appeal to superior court must be filed within thirty (30) days from the date you received the order.

In what county do I file a superior court appeal?

- File the appeal either (1) in the county where the injured worker or beneficiary lives, or (2) in the county where the injury took place. If the worker's residence and the place of injury are outside Washington State, file the appeal in Thurston County Superior Court.

Do I need to send copies of the appeal to anyone?

- Copies of the appeal **MUST** be mailed or hand-delivered to:

Board of Industrial Insurance Appeals
2430 Chandler Court SW
P.O. Box 42401
Olympia, WA 98504-2401

Department of Labor and Industries
Office of the Director
P.O. Box 44001
Olympia, WA 98504-4001

Self-Insured Employer (if applicable)

ALFREDO SUAREZ SB45649

DOI = 6/27/12

HEALTHCARE BENEFITS DISCONTINUED 9/25/12

COLA:

7/1/12: 1.00000

7/1/13: \$65.12 X 1.03409 = \$67.34

7/1/14: \$65.12 X 1.05493 = \$68.70

6/29/12-9/24/12 = 88 DAYS @ \$58.70 = \$ 5,165.60

9/25/12-5/17/13 = 235 DAYS @ \$65.12 = \$15,303.20

5/18/13-5/22/13 = 5 DAYS @ 65.12 = \$325.60

RTW 5/23/13

5/30/13-6/30/13 = 32 DAYS @ \$65.12 = \$2083.84

7/1/13-7/14/13 = 14 DAYS @ \$67.34 = \$942.76

RTW 7/15/13 (LIGHT DUTY)

7/15/13-10/10/13 = 88 DAYS @ LOEP = \$2976.20

10/11/13-6/30/14 = 263 DAYS @ \$67.34 = \$17,710.42

7/1/14-12/10/14 = 163 DAYS @ \$68.70 = \$11,198.10

TOTAL OWED: \$ 55,705.72

PREVIOUSLY PAID: \$ 26,657.81

OWED TO INJURED WORKER = \$29,047.91

CALIFORNIA CHILD SUPPORT LIEN 3/3/15:

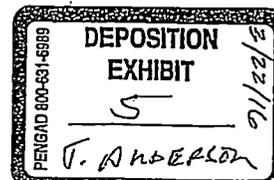
10/11/13-12/10/14 = 14 MONTHS @ \$100.00/MONTH = \$1400.00

\$29,047.91 PROVISIONAL TIMELOSS OWED

1,400.00 TO STATE OF CALIFORNIA

27,647.91 PAYABLE TO SUAREZ

Board of
Industrial Insurance Appeals
In re: Alfredo Suarez
Docket No. 15 20822
Exhibit No. (5)
 ADM. PDO Date REJ.



GSS LLC - PORTLAND BI/P
PORTLAND WC CLAIM
PO BOX 6890
PORTLAND OR 97228-6890

90 66005225

SA00018

Constitution State Services

||
||
||

ALFREDO SUAREZ
C/O PO BOX 1385
VANCOUVER, WA 98666-1385

DATE: 03/05/15
LOSS DATE: 06/27/12
FILE NUMBER: 133 CB ENE3806 A

EMPLOYEE
ALFREDO SUAREZ

ACCOUNT NAME:
MASCO CORP

MASCO CORPORATION

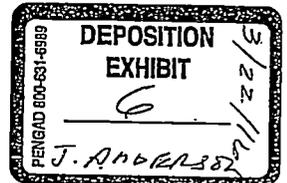
EXPLANATION OF PAYMENT

TEMPORARY TOTAL
FROM: 06/29/2012 TO: 12/11/2014

WEEKLY COMPENSATION RATE: \$410.90
TOTAL PAID: \$27647.91

PAY MISC: PROVISIONAL TTD
PAYEE:
ALFREDO SUAREZ

Board of Industrial Insurance Appeals
In re: Alfredo Suarez
Docket No. 15 20822
Exhibit No. (6)
 PDO
ADM. Date REJ.



PLEASE VISIT OUR WEB SITE MYWCINFO.COM FOR MORE PAYMENT AND CLAIM INFORMATION

ADDITIONAL INFORMATION, CONTACT: JEFF S ANDERSON AT (503)534-4330

ACH CHECK DETACH CHECK

THIS DOCUMENT HAS A RED BACKGROUND. BORDER CONTAINS MICROPRINTING AND AN ARTIFICIAL WATERMARK. HOLD AT AN ANGLE TO VIEW. IT IS...
Bank: N.A.
Penns. Way.
P.O. Box 19720
Constitution State Services LLC
AS SERVICE AGENT FOR
MASCO CORPORATION
(503) 534-4330
903A 66005225
ACCOUNT NUMBER: U18
FILE NUMBER: 133 CB ENE3806 A
VOID IF NOT PRESENTED WITHIN ONE YEAR AFTER DATE OF ISSUE
PAY: \$ 27,647.91
ALFREDO SUAREZ
C/O PO BOX 1385
VANCOUVER, WA 98666-1385
Maria Olivo
AUTHORIZED SIGNATURE

FROM: STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES
DIVISION OF INDUSTRIAL INSURANCE
SELF-INSURANCE SECTION
PO BOX 44892
OLYMPIA WA 98504-4892
FAX (360) 902-6900

MAILING DATE: 08/25/15
CLAIM ID : SB45649
CLAIMANT : ALFREDO SUAREZ
EMPLOYER : SERVICE PARTNERS SUP
INJURY DATE : 6/27/12
SERVICE LOC :
UBI NUMBER : 600-449-288
ACCOUNT ID : 706215-00
RISK CLASS : 0512-00

WORK LOCATION ADDRESS:
NO ADDRESS REPORTED

ALFREDO SUAREZ
BUSICK HAMRICK, PLLC
PO BOX 1385
VANCOUVER WA 98666-1385

ORDER AND NOTICE (SELF INSURING EMPLOYER)

THIS ORDER BECOMES FINAL 60 DAYS FROM THE DATE IT IS COMMUNICATED TO YOU UNLESS YOU DO ONE OF THE FOLLOWING: FILE A WRITTEN REQUEST FOR RECONSIDERATION WITH THE DEPARTMENT OR FILE A WRITTEN APPEAL WITH THE BOARD OF INDUSTRIAL INSURANCE APPEALS. IF YOU FILE FOR RECONSIDERATION, YOU SHOULD INCLUDE THE REASONS YOU BELIEVE THIS DECISION IS WRONG AND SEND IT TO: DEPARTMENT OF LABOR AND INDUSTRIES, PO BOX 44892, OLYMPIA, WA 98504-4892. WE WILL REVIEW YOUR REQUEST AND ISSUE A NEW ORDER. IF YOU FILE AN APPEAL, SEND IT TO: BOARD OF INDUSTRIAL INSURANCE APPEALS, PO BOX 42401, OLYMPIA WA 98504-2401 OR SUBMIT IT ON AN ELECTRONIC FORM FOUND AT HTTP://WWW.BIIA.WA.GOV/.

On 07/30/15 the department received from ALFREDO SUAREZ a penalty request for unreasonable delay in the payment of benefits against SERVICE PARTNERS SUPPLY LLC, pursuant to RCW 51.48.017.

RCW 51.48.017 provides for an additional amount to accrue for the benefit of the worker if a self-insurer unreasonably delays benefits as they become due.

On the department's review of the file fails to disclose an unreasonable delay of benefits for the period of 10/11/13 through 11/09/13. The request for a penalty for 10/11/13 through 11/09/13 is denied.

SERVICE PARTNERS SUPPLY LLC unreasonably delayed the payment of loss of earning power for the period of 11/10/13 through 12/21/14 in the amount of \$7644.02.

Total amount of benefits delayed: \$27644.02

SERVICE PARTNERS SUPPLY LLC is ordered to pay a penalty to A of the amount of \$6911.01 pursuant to RCW 51.48.017. Such a penalty is to be paid to ALFREDO SUAREZ in addition to benefits previously paid.

Board of Industrial Insurance Appeals
In re: SECRET
Docket No. 15 20 922
Exhibit No. 12
 3/31/16 Appendix G

(S)

MAILING DATE: 08/25/15
CLAIM ID : SB45649
CLAIMANT : ALFREDO SUAREZ
EMPLOYER : SERVICE PARTNERS SUP
INJURY DATE : 6/27/12
SERVICE LOC :
UBI NUMBER : 600-449-288
ACCOUNT ID : 706215-00
RISK CLASS : 0512-00

WORK LOCATION ADDRESS:
NO ADDRESS REPORTED

claim.

Proof of payment must be submitted to the Self-Insurance Section, PO Box 44892, Olympia, WA 98504-4892.

SHERYL WHITCOMB
PENALTY ADJUDICATOR
SELF INSURANCE SECTION
PO BOX 44892
OLYMPIA, WA 98504-4892
T (360) 902-6905
F (360) 902-6900

ORIG: CLAIMANT: ALFREDO SUAREZ
BUSICK HAMRICK, PLLC, PO BOX 1385,
VANCOUVER WA, 98666-1385
EMPLOYER: SERVICE PARTNERS SUPPLY LLC
21001 VAN BORN RD, TAYLOR MI, 48180-1340
SERV ORIG: CONSTITUTION STATES SERVICE CO
C/O CONSTITUTION STATES SERVICE CO, PO BOX 6890,
PORTLAND OR, 97228-6890
EMPLOYER'S ATTORNEY: JAMES L GRESS
9020 SW WASHINGTON SQ RD #560, PORTLAND OR, 97223-4518



STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES

ALFREDO SUAREZ
 BUSICK HAMRICK, PLLC
 PO BOX 1385
 VANCOUVER WA 98666-1385

AUGUST 25, 2015

SB45649
 ALFREDO SUAREZ
 SERVICE PARTNERS SUP
 INJ: 6/27/12

Dear Mr. Busick:

On 07/30/15 the department received your request for a delay of benefits penalty for 10/11/13 through 12/10/14, based on order issued 12/19/14 and benefits were not paid until 03/05/15.

The 12/19/14 department order directed the payment of time-loss benefits from 10/11/13 through 12/10/14.

RCW 51.52.050(2)(b) indicates that an order by the department awarding benefits shall become effective and benefits due on the date issued.

The self-insured employer appealed the 12/19/14 order on 02/02/15. An appeal to the 12/19/14 order would not change the fact that the benefits were due and owing based on RCW 51.52.050(2)(b) until and if the board grants a stay of the benefits.

Also, the appeal was not received by the Board of Industrial Insurance Appeals until 02/02/15. At the time the self-insurer appealed the 12/19/14 order, the self-insurer had already delayed paying the benefits indicated in the order.

Benefits became effective and benefits due on the date the department issued the order. Payments are considered paid when due when the check is issued and mailed within 14 calendar days from date of the order.

The 12/19/14 order directed the payment of compensation benefits from 10/11/13 through 12/10/14. As loss of earning power benefits had been paid through 11/09/13 on 11/16/13, the benefits for 10/11/13 through 11/09/13 were not delayed, so the penalty request for this period has been denied.

As the time frame of 11/10/13 through 12/10/14 indicated in the 12/19/14 was not paid until 03/06/15, benefits were delayed. While the time-loss for 12/11/14 through 12/21/14 was not included in the 12/19/14 order there a delay in the payment of these benefits. A penalty has been assessed a delay of benefits for 11/10/13 through 12/21/14.

Thank you for allowing me to address your concerns.

Board of Industrial Insurance Appeals
 In re: SUAREZ
 Docket No. 1520822
 Exhibit No. 14
 ADM. 3/31/16 Date REJ.



STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES

AUGUST 25, 2015

SB45649
ALFREDO SUAREZ
SERVICE PARTNERS SUP
INJ: 6/27/12

Sincerely,

SHERYL WHITCOMB
PENALTY ADJUDICATOR
SELF INSURANCE SECTION
PO BOX 44892
OLYMPIA, WA 98504-4892
(360) 902-6905
FAX #: (360) 902-6900

ORIG: CLAIMANT: ALFREDO SUAREZ
BUSICK HAMRICK, PLLC, PO BOX 1385,
VANCOUVER WA, 98666-1385
CC: SERV ORIG: CONSTITUTION STATES SERVIC
C/O CONSTITUTION STATES SERVIC, PO BOX 6890,
PORTLAND OR, 97228-6890
EMPLOYER: SERVICE PARTNERS SUPPLY LLC
21001 VAN BORN RD, TAYLOR MI, 48180-1340
EMPLOYER'S ATTORNEY: JAMES L GRESS
9020 SW WASHINGTON SQ RD #560, PORTLAND OR, 97223-4518

FILED
2017 OCT 19 PM 12:34
SCOTT G. WEBER, CLERK
CLARK COUNTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF CLARK

No.: 16-2-02585-8

ORDER

MASCO CORPORATION,

Plaintiff,

v.

ALFREDO SUAREZ,

Defendant.

This matter was brought on appeal from a Decision and Order issued by the

Board of Industrial Insurance Appeals November 21, 2016. Plaintiff, Masco Corporation, was

represented by James L. Gress. Defendant, Alfredo Suarez, was represented by Steven

Busick. The Department of Labor and Industries was represented by Susan Pierini, Assistant

Attorney General.

The Department of Labor and Industries on August 25, 2015, issued an Order

and Notice finding that the self-insured employer had unreasonably delayed the payment of

temporary disability benefits for the period of November 10, 2013, through December 21, 2014,

in the amount of \$27,644.02. The Department of Labor and Industries therefore directed the

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1 self-insured employer to pay to claimant a penalty in the amount of \$6,911.01. This order was
2 protested and the Department of Labor and Industries affirmed its determination September 9,
3 2015. The employer filed an appeal to the Board of Industrial Insurance Appeals. This appeal
4 was assigned Docket No. 15 20822. Hearings were conducted and the Board of Industrial
5 Insurance Appeals issued a Proposed Decision and Order dated November 21, 2016, in which
6 the following material findings of fact and conclusions of law were made:
7

8
9 FINDINGS OF FACT

- 10 1. The Department issued an order on December 19, 2014, in which it ordered the self-
11 insured employer to pay Mr. Suarez time loss compensation benefits for October 11,
12 2013, through December 10, 2014. The employer filed a Notice of Appeal with the
13 Board dated January 30, 2015, and within the Notice of Appeal moved for an order
14 granting a stay of benefits pending appeal. On February 12, 2015, the Board issued an
15 order granting appeal, and on February 25, 2015, it issued an order denying the motion
16 to stay benefits pending appeal. The employer paid the time loss compensation benefits
17 ordered by the Department's December 19, 2014, order on March 5, 2015.
18
19 2. The self-insured employer presented no evidence establishing a genuine doubt as to the
20 medical or legal liability to pay benefits.
21
22 3. The self-insured employer unreasonably delayed payment of the benefits ordered by the
23 Department in its December 19, 2014, order.
24
25

1 2. On January 30, 2015, plaintiff filed an appeal to the Board of Industrial Insurance
2 Appeals and within that document filed a motion for an order granting a stay of benefits
3 with the Board of Industrial Insurance Appeals.
4

5 3. The Board of Industrial Insurance Appeals issued an order granting the appeal
6 February 12, 2015, and at the same time acknowledged receipt of the motion for an
7 order granting a stay of benefits.
8

9 4. The Board of Industrial Insurance Appeals issued an order denying the Motion for a
10 Stay of Benefits February 25, 2015. This was received by plaintiff February 27, 2015.
11

12 5. Plaintiff made payment of \$27,647.91 to defendant March 6, 2015, within five business
13 days of receipt of the Board's order denying the Motion for a Stay of Benefits.
14

15 6. The Department of Labor and Industries issued an order August 25, 2015, finding that
16 the self-insured employer had unreasonably delayed the payment of temporary disability
17 benefits for the period of November 10, 2013, through December 21, 2014. Following a
18 timely protest, this order was affirmed September 9, 2015. This order was timely
19 challenged to the Board of Industrial Insurance Appeals and plaintiff timely appealed the
20 Board of Industrial Insurance Appeals' determination to this Court.
21

22 **SUPERIOR COURT CONCLUSIONS OF LAW**
23

24 1. This Court has jurisdiction over the parties and the subject matter to this appeal.

25 2. RCW 51.52.050 contains language indicating the order is effective upon issuance. The
statute provides for a party to appeal this determination to the Board of Industrial

1 Insurance Appeals and file a Motion for a Stay of Benefits pending resolution of the
2 appeal.

3
4 3. Where a party has timely appealed an order from the Department of Labor and
5 Industries to the Board of Industrial Insurance Appeals and has timely filed a Motion for
6 a Stay of Benefits, the self-insured employer is entitled to defer payment of such
7 benefits until the Board of Industrial Insurance Appeals has acted upon the Motion for a
8 Stay of Benefits.

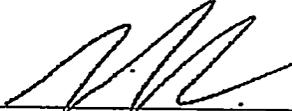
9
10 4. The self-insured employer timely filed an appeal to the Board of Industrial Insurance
11 Appeals from the Department's order in this case at hand and timely filed a Motion for a
12 Stay of Benefits. As such, the benefits were not due and payable until the plaintiff
13 received the Board of Industrial Insurance Appeals' order denying the Motion for a Stay
14 of Benefits which was February 27, 2015.

15
16 5. The plaintiff, self-insured employer, Masco Corporation, did not unreasonably delay the
17 payment of benefits ordered by the Department of Labor and Industries in that the
18 benefits were not due and payable until the order denying the Motion for a Stay of
19 Benefits was received by plaintiff. Even if benefits were due and payable prior to
20 receipt of the Board's order denying the Motion for a Stay of Benefits, plaintiff had a
21 genuine legal doubt as to its obligation to pay such benefits based upon the lack of case
22 law interpreting the statute.
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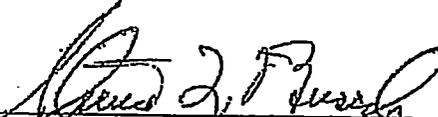
JUDGMENT

1. The Decision and Order of the Board of Industrial Insurance Appeals dated November 21, 2016, is reversed.
2. The defendant is entitled to statutory fees for prevailing in this matter under RCW 4.84.080 in the amount of \$200.00.
3. Defendant is entitled to costs under RCW 4.84.010(7) in the amount of \$275.50.

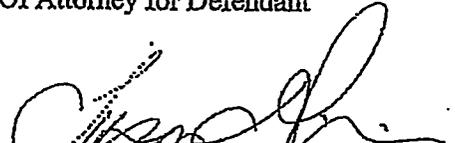
10/18/17
DATE


JAMES L. GRESS, WSBA #25731
Of Attorney for Plaintiff

October 13, 2017
DATE

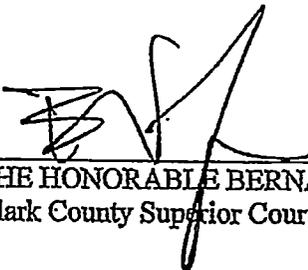

STEVEN L. BUSICK, WSBA #1643
Of Attorney for Defendant

3 Oct 17
DATE


SUSAN PIERINI, WSBA #17714
Assistant Attorney General

IT IS SO ORDERED:

DATE


THE HONORABLE BERNARD VELJACIC
Clark County Superior Court Judge

Suarez, Alfredo

PENALTIES (RCW 51.48.017)

Genuine doubt

For purposes of determining genuine doubt, the mere filing of an appeal does not establish genuine doubt. When the self-insured employer delays paying benefits it must have a genuine doubt that the benefits are due and cannot rely on the appeal or stay process under RCW 51.52.050 as a basis for delaying payment if there is no genuine doubt that payment is due.*In re Alfredo Suarez*, BIIA Dec., 15 20822 (2016) [Editor's Note: The Board's decision was appealed to superior court under Clark County Cause No. 16-2-02585-8.]

Scroll down for order.

**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON**

1 **IN RE: ALFREDO SUAREZ**)

) **DOCKET NO. 15 20822**

2
3 **CLAIM NO. SB-45649**)

) **DECISION AND ORDER**

4
5 The self-insured employer, Masco Corporation, appeals a Department of Labor and Industries
6 order in which it found the employer unreasonably delayed \$27,644.02 in loss-of-earning-power
7 benefits to Alfredo Suarez for November 10, 2013, through December 21, 2014. The Department
8 ordered the employer to pay a \$6,911.01 penalty to Mr. Suarez. The employer argues that under
9 RCW 51.48.017 penalties are only due if there is unreasonable delay in paying benefits. Further, the
10 employer asserts that because it filed a motion to stay benefits following an appeal to the Board as
11 provided RCW 51.52.050(2)(b), such benefits are not due until after the Board has denied the motion.
12 In accordance with the Board's prior holding in the matter of *In re Frank Madrid*¹ we agree that a
13 self-insured employer should not be penalized for the failure to timely pay benefits if it had a genuine
14 doubt from a medical or legal standpoint as to the liability for benefits. However, we also find that the
15 doubt as to the medical or legal obligation to pay benefits must be supported by evidence as to the
16 factual basis of such doubt. In the present case, the self-insured employer offered only the testimony
17 of the claims manager, Jeffrey Anderson, whose testimony was limited to the order of events resulting
18 in the appeal from the Department order and the eventual payment of benefits. No additional or
19 separate evidence was presented to support Masco's assertion that there was a genuine medical or
20 legal doubt as to the obligation to pay benefits. Masco did not prove by the preponderance of the
21 evidence that it had genuine doubt as to its obligation to pay loss-of-earning-power benefits to
22 Mr. Suarez. The Department order is **AFFIRMED**.

23
24
25 **DISCUSSION**

26 We have granted review in order to emphasize a self-insured employer's obligation to pay
27 benefits during the appeal period under RCW 51.52.050(1) and during the pendency of a motion to
28 stay benefits on appeal under RCW 51.52.050(2)(b). A chronology is useful in understanding events:

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December 19, 2014	The Department ordered Masco to pay "time loss" from October 11, 2013, through December 10, 2014. Exhibit No. 1.
February 2, 2015	The Board received Masco's appeal of the December 19, 2014 order. The appeal was dated January 30, 2015, and it included a motion to stay the

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47 ¹ BIIA Dec., 86 0224-A (1987).

	payment of benefits during the pendency of the appeal as provided by RCW 51.52.050(2)(b). Exhibit No. 2.
February 25, 2015,	The Board denied the motion to stay benefits. Exhibit No. 4.
March 6, 2015	Masco pays the benefits. Exhibit No. 6.
July 28, 2015	Claimant's attorney requests a penalty for the "delay" in the payment of benefits under RCW 51.48.017 for October 11, 2013, through December 10, 2014. Exhibit No. 10.
August 25, 2015	The Department determined that Masco did not unreasonably fail to pay benefits from October 11, 2013, through November 9, 2013, and denied a penalty for this period, but determined that loss-of-earning-power benefits had been unreasonably delayed and ordered Masco to pay a penalty of \$6,911.01 for the payment of "LEP" unreasonable delay in paying loss-of-earning-power benefits for November 10, 2013, through December 21, 2014. Exhibit No. 14.

From the Jurisdictional History stipulated to by the parties we note that Masco protested the August 25, 2015 Department order that the Department affirmed on September 9, 2015, giving rise to the present appeal.

The issue presented in this appeal is whether Masco unreasonably delayed the payment of benefits between the date of the Department's order of December 19, 2014, and the date that Masco eventually paid the benefits on March 6, 2015—a period of about 77 days. Masco appealed the December 19, 2014 order directing the payment of loss-of-learning-power benefits (LEP). In conjunction with that appeal, Masco submitted a motion to stay the payment of benefits as provided by RCW 51.52.050(2)(b). Masco did not pay the LEP benefits to Mr. Suarez until after the Board issued its order denying the stay motion. Masco argues that because it exercised its right to appeal the Department's order, and because it exercised its further right to submit a motion to stay the payment of benefits, the resulting delay in paying benefits was presumptively reasonable. We hold that this delay in paying benefits can result in a penalty unless the employer proves that it had a genuine doubt that the benefits were due.

In *Madrid*, the Board held that a self-insured employer's delay in paying benefits was not unreasonable within the meaning of the penalty provisions of RCW 51.48.017 if the employer had a genuine doubt from a medical or legal standpoint as to the liability for benefits. The questions more

1 specifically presented here are does the filing of a motion to stay benefits insulate the self-insured
2 employer from an assessment of a penalty for delay in paying benefits and how does a self-insured
3 employer prove genuine doubt from a medical or legal standpoint as to the liability for benefits.
4

5
6 The reasonableness of the delay depends on what Masco relies on to demonstrate a genuine
7 medical or legal doubt as to the liability to pay those benefits. It is insufficient for an employer to
8 assert subjectively that it had a reasonable doubt as to the liability to pay benefits. Masco's actions
9 in relation to the Department's December 19, 2014 order are relevant but are not dispositive of the
10 basis for the delay in the payment of benefits. For example, the filing of an appeal from a Department
11 order does not establish, by itself, the basis of a genuine doubt as to the medical or legal liability to
12 pay benefits. In the Board's prior decision of *In re Jacque Slade*² the self-insured employer delayed
13 six weeks while deciding whether or not to file an appeal. The self-insured employer eventually
14 decided not to appeal and the Board found that the delay while considering the appeal was
15 unreasonable. Regarding the delay of benefits during the appeal period the Board stated:
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21 We no longer subscribe to the former rule, which held that benefits were
22 not due until the Department issued a payment order. **Neither will we**
23 **continue to hold that it is reasonable for a self-insured employer to**
24 **wait until the sixty-day appeal period has passed before rendering**
25 **payment.** See, *In re Jackie L Washburn*, BIIA Dec., 03 11104 (2004);
26 overruling *In re Agnes Levings*, BIIA Dec., 99 13954 (2000). According
27 to the Court in *Nallèy*, the Department's ability to issue orders in
28 self-insured claims is to assist injured workers in receiving payments. It
29 was not intended to delay the payments in legitimate claims. **Similarly,**
30 **the statutory appeal period cannot be used as a shield by employers**
31 **who are reluctant to pay benefits.**³ (Emphasis added)

32 A genuine doubt as to the obligation to pay benefits does not arise merely because an
33 employer files an appeal. This is true regardless of whether the employer files a motion to stay
34 benefits. If the employer doesn't pay, it must prove it has a genuine doubt, or risk becoming liable
35 for a penalty. As stated in *Slade*, the appeal period cannot be used as a shield for employers reluctant
36 to pay benefits.
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39 Masco separately appealed the original December 19, 2014 Department order directing the
40 payment of loss-of-earning-power benefits. Exhibit No. 7 is a copy of a Proposed Decision and Order
41 in Docket No. 1511127 that purports to reverse the Department order of December 19, 2014. We
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46 ² BIIA Dec., 04 11552 (2005).

47 ³ *In re Jacque Slade*, BIIA Dec., 04 11552 (2005) at 2 and 3.

1 note that the Board's decision in this matter has been appealed to Clark County Superior Court and
2 that there is no final determination as to the liability for benefits covered by the Department order at
3 this time. However, the record in this appeal contains nothing that would independently establish
4 Masco's genuine doubt as to the medical or legal liability to pay LEP ordered by the Department.
5

6
7 At hearing, Masco presented the testimony of one witness, Jeffery Anderson, a claims
8 manager for Constitution State Services, a third-party administration company managing workers'
9 compensation claims for Masco in Washington State. Essentially, Mr. Anderson testified to the
10 administrative steps leading to the eventual payment of the loss-of-earning-power benefits ordered
11 by the Department in the December 19, 2014 order. He stated that there was no unreasonable delay
12 to pay these benefits because Masco had appealed the December 19, 2014 order to the Board within
13 the 60-day appeal period provided by RCW 51.52.050(1). He further explained that Masco had also
14 filed a motion to stay the payment of benefits pending appeal as provided by RCW 51.52.050(2)(b).
15 Inherent in this testimony is the assumption that a self-insured employer establishes genuine doubt
16 as to the liability to pay benefits based solely on the actual filing of an appeal.
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22 In the matter of *In re Jackie Washburn*⁴ the Department issued an order denying a penalty for
23 the unreasonable delay in paying benefits under RCW 51.48.017. At hearing the self-insured
24 employer presented extensive medical testimony regarding the basis for not paying benefits. The
25 Board found that the self-insured employer had established a genuine doubt as to the liability to pay
26 benefits and that the delay in paying those benefits was not unreasonable. Masco (perhaps relying
27 on its separate appeal of the December 19, 2014 Department order where the LEP was directly
28 contested) presented no supporting evidence in this appeal regarding the basis for genuine doubt,
29 either medically or legally, as to the liability to pay benefits.
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34 The bulk of Masco's Petition for Review focuses on the period of time following the motion to
35 stay benefits under RCW 51.52.050(2)(b). RCW 51.52.050 was amended in 2008 to give self-insured
36 employers a mechanism to stop the payment of benefits during the pendency of an appeal so as to
37 avoid the difficult process of recouping benefits if an appeal determined they were not payable.
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39

40 An order by the department awarding benefits **shall become effective**
41 **and benefits due on the date issued.** Subject to (b)(i) and (ii) of this
42 subsection, if the department order is appealed **the order shall not be**
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46 ⁴ BIIA Dec., 03 11104 (2004).
47

1 **stayed pending a final decision on the merits unless ordered by the**
2 **board.**⁵ (Emphasis added.)
3

4 The language of the statute makes clear that benefits are due when the Department issues its
5 order directing payment of benefits. Once a motion to stay benefits is filed the Board has 25 days to
6 issue a ruling on the motion. Masco asserts that benefits are only due and payable if the Board
7 denies the self-insured employer's motion. Masco further argues that the legal requirement to pay
8 benefits during the pendency of a stay motion is "unsettled" and, therefore, establishes a genuine
9 legal doubt as to the liability to pay benefits.
10

11 From the Board's prior decisions it is evident that the delay in paying benefits is unreasonable
12 if the only basis for not paying the benefits is to wait out the time allowed to file an appeal and to wait
13 out the time allowed to receive a ruling on a motion to stay benefits.⁶ We find that
14 RCW 51.52.050(2)(b), when taken together with the liberal construction of the Act found in
15 RCW 51.12.010, requires the payment of benefits pending appeal and pending a motion to stay
16 benefits. The statute is unambiguous that benefits are due on the date of the Department order.
17 Benefits would only be stayed on an order by the Board granting the motion. If a self-insured
18 employer chooses not to pay benefits when due, the employer assumes a risk. It may, as here, be
19 required later to demonstrate the reasonableness of its action by presenting objectively based
20 evidence that it had a genuine medical or legal doubt as to the liability to pay such benefits. Genuine
21 doubt requires an objective standard of proof allowing the finder of fact the opportunity to assess the
22 reasonableness of such doubt. Exercising the right to appeal or to file a motion to stay benefits
23 absent such objective evidence does not establish a reasonable basis to withhold benefits ordered
24 by the Department.
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33 **DECISION**

34 In Docket No. 15 20822, the self-insured employer, Masco Corporation, filed an appeal with
35 the Board of Industrial Insurance Appeals on September 23, 2015. The employer appeals a
36 Department order dated September 9, 2015. In this order, the Department affirmed its August 25,
37 2015 order in which it found that the employer unreasonably delayed the payment of
38 loss-of-earning-power benefits for November 10, 2013, through December 21, 2014, in the amount
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46 ⁵ RCW 51:52.050(2)(b).

47 ⁶ *In re Emily Eyrich*, BIIA Dec., 11 22230 (2013).

1 of \$27,644.02, and ordered the employer to pay a \$6,911.01 penalty to Mr. Suarez. This order is
2 correct and is affirmed.
3

4 **FINDINGS OF FACT**

- 5
6 1. On February 1, 2016, an industrial appeals judge certified that the parties
7 agreed to include the Jurisdictional History in the Board record solely for
8 jurisdictional purposes.
9
10 2. The Department issued an order on December 19, 2014, in which it
11 ordered the self-insured employer to pay Mr. Suarez time-loss
12 compensation benefits for October 11, 2013, through December 10,
13 2014. The employer filed a Notice of Appeal with the Board dated
14 January 30, 2015, and within the Notice of Appeal moved for an order
15 granting a stay of benefits pending appeal. On February 12, 2015, the
16 Board issued an Order Granting Appeal, and on February 25, 2015, it
17 issued an order denying the Motion to Stay Benefits Pending Appeal. The
18 employer paid the time-loss compensation benefits ordered by the
19 Department's December 19, 2014 order on March 5, 2015.
20
21 3. The self-insured employer presented no evidence establishing a genuine
22 doubt as to the medical or legal liability to pay benefits.
23
24 4. The self-insured employer unreasonably delayed payment of the benefits
25 ordered by the Department in its December 19, 2014 order.

26 **CONCLUSIONS OF LAW**

- 27 1. The Board of Industrial Insurance Appeals has jurisdiction over the parties
28 and subject matter in this appeal.
29
30 2. The self-insured employer unreasonably delayed the payment of benefits
31 for November 10, 2013, through December 21, 2014, within the meaning
32 of RCW 51.48.017.
33
34 3. The Department order of September 9, 2015, is correct and is affirmed.

35 Dated: November 21, 2016.

36 BOARD OF INDUSTRIAL INSURANCE APPEALS

37 
38 DAVID E. THREEDY, Chairperson

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40 FRANK E. FENNERTY, JR., Member
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Addendum to Decision and Order
In re Alfredo Suarez
Docket No. 15 20822
Claim No. SB-45649

Appearances

Claimant, Alfredo Suarez, by Busick Hamrick Palmer, PLLC, per Steven L. Busick

Self-Insured Employer, Masco Corporation, by Law Office of Gress & Clark, LLC, per Brett Schoepper and James L. Gress

Department of Labor and Industries, by The Office of the Attorney General, per Susan Pierini

Petition for Review

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The employer filed a timely Petition for Review of a Proposed Decision and Order issued on July 1, 2016, in which the industrial appeals judge affirmed the Department order dated September 9, 2015.

Evidentiary Rulings

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. The rulings are affirmed.

FILED
COURT OF APPEALS
DIVISION II

2018 MAR -5 PM 1:10

STATE OF WASHINGTON

BY CEJ
DEPUTY

WASHINGTON STATE COURT OF APPEALS
DIVISION II

ALFREDO SUAREZ,)	No. 51143-6-II
Appellant,)	
v.)	PROOF OF SERVICE
MASCO CORPORATION,)	
Respondent.)	

I certify that on the 2nd day of March, 2018, I deposited in the United States Mail, with proper postage prepaid, corrected title page of Brief of Appellant, dated March 2, 2018, addressed as follows:

Counsel for Respondent (x) U. S. Mail
James L. Gress
Gress, Clark, Young & Schoepper
8705 SW Nimbus Ave. Suite 240
Beaverton, OR 97008

Paul Weideman, AAG (x) U.S. Mail
Attorney General for the State of Washington
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188

PROOF OF SERVICE

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

Dated: March 2, 2018.


Steven L. Busick, WSBA No. 1643

PROOF OF SERVICE