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NO. 51143-6-II

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

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MASCO CORPORATION,

Appellant,

v.

ALFREDO SUAREZ

Respondent.

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**BRIEF OF RESPONDENT  
DEPARTMENT OF LABOR & INDUSTRIES**

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ROBERT W. FERGUSON  
Attorney General

Paul Weideman  
Assistant Attorney General  
WSBA No. 42254  
Office Id. No. 91018  
800 Fifth Avenue, Suite 2000  
Seattle, WA 98104  
(206) 389-3820

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## I. INTRODUCTION

Many injured workers and their families face unexpected financial distress after a disabling work injury. Losing a paycheck, even temporarily, makes it hard to put food on the table or support a family. Recognizing this reality, the Legislature makes wage replacement benefits due immediately and mandates penalties for self-insured employers that unreasonably delay payment, even if they have appealed the benefit award. By regulation, the Department of Labor & Industries allows a 14-day grace period to pay. Only if the Board of Industrial Insurance Appeals orders a stay pending appeal can a self-insurer delay payment.

Masco Corporation received no stay but delayed paying Alfredo Suarez for 77 days after benefits were due. The superior court decided that Masco's pending stay motion excused its long delay. But that misinterprets RCW 51.52.050(2)(b), which requires a stay to delay payment, not just a motion.

The superior court also erred by applying the Board's outdated *Frank Madrid* decision. That case allows self-insurers to circumvent penalties by asserting a genuine doubt about paying benefits. But the Legislature has since amended the Industrial Insurance Act to require immediate payment or a stay to avoid penalties, and the Department has since adopted a regulation that it will issue a penalty if the self-insurer

does not pay within 14 days. Doubt is no longer enough. This Court should reverse.

## II. ASSIGNMENTS OF ERROR

1. A pending stay motion is not a valid legal basis under RCW 51.52.050(2)(b) for not paying benefits. The trial court therefore erred in concluding that a self-insured employer may defer payment of benefits until the Board has acted on the employer's stay motion (conclusion of law 3).
2. Under RCW 51.52.050(2)(b)'s plain language, benefits are due on the date of the Department's order, and only an order that stays benefits—not a pending stay motion—stays the payment of benefits on appeal. The trial court therefore erred in concluding that benefits were not due until Masco received the Board's order denying its stay (conclusion of law 4) and that Masco did not unreasonably delay the payment of benefits because benefits were not due until Masco received the Board's order denying its stay (conclusion of law 5).
3. RCW 51.52.050(2)(b)'s plain language establishes that benefits are due on the date of the Department's order, absent a stay. The trial court therefore erred in concluding that, even if benefits were due before the Board denied the stay motion, Masco had a genuine legal doubt about its obligation to pay benefits (conclusion of law 5).

## III. ISSUES

The Department must issue a penalty to a self-insurer that unreasonably delays benefits "as they become due." In 2008, the Legislature created a comprehensive scheme that made benefits due on the date of the Department's order, unless the Board stays payment.

1. Masco paid benefits 77 days after the Department's order, and the Board never issued a stay. Did the Department correctly issue a penalty because Masco's 77-day delay was unreasonable?

2. Does the Legislature's 2008 amendment control over the Board's decision in *Frank Madrid*, No. 860224A, 1987 WL 61383 (Wash. Bd. Indus. Ins. Appeals, Sept. 4, 1987), which allows a self-insurer to circumvent a penalty by arguing it had a genuine legal or medical doubt about payment?

#### IV. STATEMENT OF THE CASE

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

In 2012, Suarez worked for Masco, a self-insured employer. Ex 7 at 1. Because Masco self-insures, the company must directly pay benefits for its workers' compensation claims. *See Boeing Co. v. Doss*, 183 Wn.2d 54, 58, 347 P.3d 1083 (2015); RCW 51.08.173 (defining "self-insurer"); WAC 296-15-330 (describing self-insured employers' medical authorization requirements).

While at work, Suarez grabbed a roll of insulation that had started to roll down a slope and felt pain in his back, neck, and right shoulder. Ex 7 at 1. The Department allowed his workers' compensation claim and Masco paid for medical treatment. *See* Ex 7 at 1.

On December 19, 2014, the Department ordered Masco to pay time-loss compensation benefits to Suarez for the period from October 11, 2013, through December 10, 2014. Ex 1. Time-loss compensation is a wage-replacement benefit that compensates a worker's lost earning

capacity due to a temporary and total disability. RCW 51.32.090(1); *Double D Hop Ranch v. Sanchez*, 133 Wn.2d 793, 798, 947 P.2d 727, 952 P.2d 590 (1997).

Masco did not pay these time-loss benefits to Suarez for 77 days. Ex 6; AR Anderson 15.<sup>1</sup> Instead, six weeks after the Department's order, Masco appealed the Department's order that awarded time-loss benefits to the Board. Ex 2; AR Anderson 10. In its notice of appeal, Masco also moved to stay payment of benefits pending the appeal's resolution. Ex. 2; AR Anderson 9-10; *see also* RCW 51.52.050(2)(b).

On February 25, 2014, the Board denied the stay. Ex 4. On March 6, Masco issued a check to Suarez, 77 days after the Department's order. Ex 6; AR Anderson 15.

On the merits, the Board later decided that Masco did not owe Suarez time-loss benefits during this period. Ex 7; AR Anderson 18. On appeal, the superior court agreed, and Suarez has appealed to this Court. *See Suarez v. Masco Corp.*, No. 50566-5. The Department takes no position in that appeal. If Masco wins, Suarez will have to repay all the time-loss compensation benefits. RCW 51.32.240(4). If Masco's

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<sup>1</sup> The portion of the administrative record (the certified appeal board record) that consists of witness testimony is cited to as "AR" followed by the witness name and page number. Other portions are cited as "AR" followed by the page number that the Board applied when it prepared the record for superior court.

collection efforts are not successful, it will be fully reimbursed by the self-insured employer overpayment reimbursement fund. RCW 51.32.240(4)(c).

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

In July 2015, Suarez asked the Department to consider a penalty for Masco for unreasonably delaying the benefit payment. Ex 10; AR Whitcomb 7. The Department reviewed the penalty request, seeking further information from Suarez and Masco. Ex 13; AR Whitcomb 14.

In August 2015, the Department issued a penalty order determining that Masco had unreasonably delayed the payment of benefits for all but about one month from the period from October 11, 2013 through December 10, 2014. Ex 12.<sup>2</sup> The Department ordered Masco to pay a \$6,911.01 penalty to Suarez. Ex. 12.

**C. The Board Affirmed the Penalty, but the Superior Court Reversed, Concluding That Masco Could Wait for the Board to Rule on the Stay Motion Before Paying Benefits**

Masco appealed the Department's penalty order to the Board. *See* AR 3. At an administrative hearing, Jeffrey Anderson, a claims manager

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<sup>2</sup> The Department determined that Masco did not unreasonably delay the payment of benefits for the period from October 11, 2013 through November 9, 2013. Ex. 12. The basis for this determination is not in the record. *See* Ex 14 (rejected exhibit that explains the basis for this determination). The Department's penalty also covered the period from December 11, 2014 through December 21, 2014. Ex 12.

for Masco's third party administrator, testified that after he received the Department's December 2014 order awarding time-loss benefits, he discussed the order with counsel, and Masco decided to appeal. AR Anderson 6-9. He testified that he did not believe Masco unreasonably delayed payment because it appealed the Department's order and asked for a stay:

Q: Do you agree that there was any unreasonable delay on the payment of benefits in this claim?

A: No

Q: And can you explain to me, Mr. Anderson, why it is you feel that there was no unreasonable delay in the payment of benefits to Mr. Suarez?

A: First of all, the case was on appeal to the Board. And secondly, a stay of benefits was requested, which was ultimately denied, but nevertheless, the case was on appeal and there was an active request for a stay of benefits that the Board was reviewing.

AR Anderson 19.

The Board affirmed the penalty, concluding that Masco had unreasonably delayed payment of benefits. AR 8. In doing so, it reaffirmed that, under its *Madrid* decision, "a self-insured employer should not be penalized for the failure to timely pay benefits if it had a genuine doubt from a medical or legal standpoint as to the liability for

benefits.” AR 3 (citing *Madrid*, 1987 WL 61383 at \*3). But the Board concluded that Masco did not establish genuine doubt. AR 3.

Masco appealed to superior court. *See* CP 70. The superior court concluded that when a self-insured employer has timely moved to stay benefits, benefits are not due until the self-insured employer has received a Board order denying the stay. CP 72. It therefore concluded that Masco had not unreasonably delayed paying benefits. CP 72. It further concluded that even if Masco had a duty to pay while the stay motion was pending, it had a genuine legal doubt about its obligation to pay benefits “based upon the lack of case law interpreting the statute.” CP 72.

Suarez now appeals.

## V. STANDARD OF REVIEW

In workers’ compensation cases, the ordinary civil standard of review applies. RCW 51.52.140; *Malang v. Dep’t of Labor & Indus.*, 139 Wn. App. 677, 683, 162 P.3d 450 (2007). The appellate court reviews the trial court’s decision, not the Board’s decision, and the Administrative Procedure Act does not apply. *See Rogers v. Dep’t of Labor & Indus.*, 151 Wn. App. 174, 179-81, 210 P.3d 355 (2009).

Statutory interpretation is a question of law reviewed de novo. *Kustura v. Dep’t of Labor & Indus.*, 169 Wn.2d 81, 87, 233 P.3d 853 (2010). The Department’s interpretation of the Industrial Insurance Act is

entitled to deference because the Department is the executive agency charged with administering the Act. *Dep't of Labor & Indus. v. Slauch*, 177 Wn. App. 439, 452, 312 P.3d 676 (2013). The court liberally construes the Industrial Insurance Act to reduce economic hardship and to further sure and certain relief to workers. RCW 51.04.010; RCW 51.12.010.

## VI. ARGUMENT

Losing a steady paycheck hurts workers and their families. The Legislature tempers this loss by requiring self-insurers to pay wage replacement benefits quickly when the Department orders payment. To ensure that self-insurers do not simply ignore its policy, the Legislature requires the Department to issue penalties if they unreasonably delay payment. Under the comprehensive scheme that the Legislature enacted in 2008, even if self-insurers appeal the benefits determination to the Board, they must pay benefits immediately when the Department orders payment, unless the Board issues a stay. Immediate payment mitigates the hardship of lost wages.<sup>3</sup>

Here, Masco waited 77 days to pay benefits to Suarez after the Department ordered it to pay. That was unreasonable, and the Department correctly issued a penalty. The superior court incorrectly decided that

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<sup>3</sup> Workers only receive 60 to 75 percent of their paychecks in wage replacement benefits, subject to a high-earner cap, but it is critical that they receive the amount they are entitled to. *See* RCW 51.32.060, .090.

Masco could wait for the Board's ruling on its stay motion before paying. The statute's plain language requires the Board to *grant* a stay before a self-insurer can refuse payment. RCW 51.52.050(2)(b). Hoping for a favorable stay ruling does not excuse a self-insurer's delay under the statute. This Court should reverse and reinstate the penalty.

**A. The Legislature Requires Immediate Payment or a Stay to Avoid a Penalty for Unreasonably Delay, and Masco Did Not Pay for 77 Days and Never Received a Stay**

The Legislature ensures self-insurers' compliance with its policy to pay injured workers quickly by penalizing them if they do not. Since 1971, the Industrial Insurance Act has required the Department to penalize self-insurers who unreasonably delay or refuse to pay benefits. RCW 51.48.017; Laws of 1971, Ex. Sess., ch. 289, § 66. Under the Act's penalty statute, if a self-insured employer "unreasonably delays or refuses to pay benefits *as they become due*" to an injured worker, the Department must issue a penalty to the employer. RCW 51.48.017 (emphasis added). The penalty is five hundred dollars, or 25 percent of the amount due, whichever is greater. *Id.* The Department's unreasonable delay order "shall conform to the requirements of RCW 51.52.050." *Id.*

- 1. A self-insurer unreasonably delays payment if it does not pay benefits when due under RCW 51.52.050(2)(b) or within the 14-day grace period in WAC 296-15-266(1)(f).**

The Industrial Insurance Act's primary purpose is to provide "sure and certain relief" to injured workers. RCW 51.04.010. Under the Act, workers and employers made the "grand compromise" to provide workers with the right to "sure and certain relief" in the form of statutorily-defined benefits instead of having the right to pursue relief through tort litigation. RCW 51.04.010; *Birklid v. Boeing Co.*, 127 Wn.2d 853, 859, 904 P.2d 278 (1995).

Under this compromise, workers do not receive the damages they could have received at common law. Instead, they receive only the benefits dictated by the workers' compensation statutes but in an expedited fashion. *Stertz v. Indus. Ins. Comm'n*, 91 Wash. 588, 590-91, 158 P. 256 (1916), *abrogated on other grounds by Birklid*, 127 Wn.2d at 874. A goal of the compromise is to reduce the delay inherent in tort litigation and to provide workers with timely relief. RCW 51.04.010. The fundamental purpose of the penalty statute and the pay during appeal statute is to ensure that workers do not suffer economic hardship from delay. RCW 51.48.017; RCW 51.52.050.

The fundamental purpose in interpreting a statute is to give effect to the Legislature's intent. *State v. Larson*, 184 Wn.2d 843, 848, 365 P.3d 740 (2015). If the statute's meaning is plain then the court must give effect to that plain meaning as an expression of the Legislature's intent. *Id.* The

court discerns plain meaning from the language's ordinary meaning language, the statute's context, related provisions, and the statutory scheme. *Larson*, 184 Wn.2d at 848; *Dep't of Ecology v. Campbell & Gwinn*, 146 Wn.2d 1, 12, 43 P.3d 4 (2002).

If a self-insured employer "unreasonably delays or refuses to pay benefits as they become due" to an injured worker, the Department must issue a penalty to the employer. RCW 51.48.017. In 2008, the Legislature clarified when benefits "become due" under RCW 51.48.017. It made benefits due on the date of the Department's order: "[a]n order by the department awarding benefits shall become effective and *benefits due on the date issued.*"<sup>4</sup> RCW 51.52.050(2)(b); Laws of 2008, ch. 280, § 1. So when the Department issues an order, the benefits are due.

The Legislature's 2008 amendment carved out a narrow exception to this rule. *See* Laws of 2008, ch. 280, § 1. If the Board orders a stay pending the employer's appeal of the benefits determination, the self-insured employer can wait to pay benefits until the Board issues a final order. RCW 51.52.050(2)(b). But if the Board has not ordered a stay, the Department's order is not stayed and benefits are immediately due:

*An order by the department awarding benefits shall become effective and benefits due on the date issued.* Subject to (b)(i) and (ii) of this subsection, if the department order is

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<sup>4</sup> Appendix A includes the full text of RCW 51.52.050.

appealed the order *shall not be stayed pending a final decision on the merits unless ordered by the board. . . .*

RCW 51.52.050(2)(b) (emphases added).<sup>5</sup>

It is unreasonable for a self-insurer to refuse to pay benefits when they are due. The Legislature’s 2008 amendment gave meaning to the phrase “unreasonably delays or refuses to pay benefits as they become due” under RCW 51.48.017. A self-insurer unreasonably delays payment under RCW 51.48.017 if it does not pay benefits when they are due under RCW 51.52.050(2)(b)—the date of the Department’s order— unless the Board has ordered a stay.

Although the benefits are due when the Department orders payment, the Department has adopted a common sense regulation that allows self-insurers 14 days to pay, under its authority to adopt regulations for self-insured penalties. RCW 51.04.020; RCW 51.14.095. An agency has authority to “fill in the gaps” and interpret statutes through rulemaking. *See Hama Hama Co. v. Shorelines Hearings Bd.*, 85 Wn.2d 441, 448, 536 P.2d 157 (1975). Agency regulations have the force and

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<sup>5</sup> The Legislature has established timelines for the stay. An employer must seek a stay within 15 days of the order granting appeal. RCW 51.52.050(2)(b). The Board will then “conduct an expedited review” of the Department’s claim file as it existed on the date of the Department’s order and will issue a final decision on the stay “within twenty-five days of the filing of the motion for stay or the order granting appeal, whichever is later.” *Id.* The Board will grant a stay if it believes the employer will more likely than not to prevail in the appeal. *Id.*

effect of law. *Wingert v. Yellow Freight Sys., Inc.*, 146 Wn.2d 841, 848, 50 P.3d 256 (2002); *Mills v. W. Wash. Univ.*, 170 Wn.2d 903, 910, 246 P.3d 1254 (2011).

Under the Department's regulation, self-insurers must pay within 14 days to avoid an unreasonable delay order and associated penalties, unless the Board stays payment:

Paying benefits during an appeal to the board of industrial insurance appeals: The department will issue an unreasonable delay order, and assess associated penalties, based on the department's calculation of benefits or fee schedule, if a self-insurer appeals a department order to the board of industrial insurance appeals, and fails to provide the benefits required by the order on appeal within fourteen calendar days of the date of the order, and thereafter at regular fourteen day or semi-monthly intervals, as applicable, until or unless the board of industrial insurance appeals grants a stay of the department order, or until and unless the department reassumes jurisdiction and places the order on appeal in abeyance, or until the claimant returns to work, or the department issues a subsequent order terminating the benefits under appeal.

WAC 296-15-266(1)(f). The 14-day grace period gives the self-insurer time to receive the Department order, gather necessary funds, and arrange and issue payment. It is unreasonable to wait more than 14 days to pay when the benefits are due immediately.

2. **Masco did not pay for 77 days, which was unreasonable under RCW 51.52.050(2)(b)**

Masco's duty to pay benefits arose on December 19, 2014, the date of the Department's order. RCW 51.52.050(2)(b). Masco did not pay for 77 days. It waited six weeks to appeal the benefits determination and move for a stay, and it waited another six weeks to see whether the Board would grant its motion. *See* CP 71-72. It was unreasonable for Masco not to pay the benefits when due. RCW 51.48.017; RCW 51.52.050(2)(b). The Department correctly issued a penalty.<sup>6</sup>

**B. A Pending Stay Motion Is Not a Legal Basis for Nonpayment Under RCW 51.52.050(2)(b) So Masco Unreasonably Delayed Payment**

RCW 51.52.050(2)(b) excuses nonpayment only if the Board orders a stay. Masco delayed payment to Suarez because its appeal and stay motion were pending, as its administrator explained: "there was an active request for a stay of benefits that the Board was reviewing." AR Anderson 19. But a pending motion is not a stay. The superior court committed legal error when it did not give meaning to the statute's plain language, which requires a stay, not a pending motion. Because Masco justified its delay on untenable legal basis, its delay was unreasonable.

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<sup>6</sup> The Department issued the unreasonable delay order to Masco before the effective date of WAC 296-15-266(1)(f), which went into effect in 2015. So in this case, the Department does not rely on Masco's failure to pay within the 14-day grace period. But that does not matter to the resolution of this case. Consistent with the penalty adjudicator's testimony in this case, the Department's policy in issuing penalties is to follow the dictates of RCW 52.52.050(2)(b), meaning "unless a stay is granted, benefits are due." AR Whitcomb 21. Masco did not pay benefits when they were due. Instead, it waited over two months to pay.

Plainly reading RCW 51.52.050(2)(b) reveals that only an order from the Board that stays payment relieves the employer of its immediate obligation to pay benefits. The Department's order paying benefits "shall not be stayed pending a final decision on the merits *unless ordered by the board.*" RCW 51.52.050(2)(b). That language requires the Board to issue an order. Self-insured employers, like all parties, must follow legislative directives even if they provide a strict requirement. *See Dellen Wood Prods., Inc. v. Dep't of Labor & Indus.*, 179 Wn. App. 601, 621, 319 P.3d 847 (2014) (self-insured employer must fulfill statutory obligations under Act even when seeking to terminate self-insured status). Absent a stay, the Department's order that the employer pay benefits "shall become effective and benefits due on the date issued." RCW 51.52.050(2)(b). The statute's language does not support the argument that a request for a stay legally equals a stay.

The Legislature knows how to grant automatic stays on appeal in workers' compensation cases, but it did not do so here. Indeed, the same 2008 amendment established an automatic stay in another circumstance. When an employer appeals a Department order that awards a higher permanent partial disability award (which compensates loss of function, rather than wage loss) than an earlier order had awarded, "*the increase is stayed without further action by the board pending a final decision on the*

merits.” RCW 51.52.050(2)(b)(i) (emphasis added). This contrasts with the operative language here that the order paying benefits “shall not be stayed pending a final decision on the merits unless ordered by the board.” RCW 51.52.050(2)(b). By providing for an automatic stay in one instance, there is not an automatic stay in another instance. *See Det. of Williams*, 147 Wn.2d 476, 491, 55 P.3d 597 (2002) (to express one thing in a law implies the exclusion of the other).

Unlike the superior court’s interpretation, the Department’s interpretation of the 2008 amendment gives meaning to the statute and follows its plain language. Masco is incorrect that the Department’s interpretation “renders the immediate statutory right to request a stay of benefits pending appeal effectively meaningless.” CP 9. Nor does the Department’s interpretation render the stay provision moot. *See* CP 11.

Masco’s arguments rely on the faulty premise that an employer can never receive meaningful relief when the Board orders a stay because a self-insurer will always have paid benefits before the Board can order a stay, due to the 14-day timeline in WAC 296-15-266(1)(f) and the longer timelines for the Board’s decision. *See* CP 9, 11; RP 50, 53, 56. That ignores that a self-insurer is often appealing an order with an ongoing benefit determination, so a stay will provide effective relief in such cases.

And it ignores that nothing stops the Board from acting more quickly than RCW 51.52.050(2)(b) requires.

The stay procedure provides an expedited review that can provide effective relief, just as the Legislature intended. First, the Department may order ongoing treatment. A stay of a treatment order would relieve the self-insurer of its obligation to pay for treatment immediately. Second, if it is a pension order that the self-insured employer appeals, which involves an ongoing, lifetime payment, the employer can get effective relief by obtaining a stay. *See* RCW 51.32.060. That will prevent it from needing to pay ongoing monthly pension benefits during the life of the litigation. Third, the Department sometimes issues time-loss orders that order the employer to continue paying time-loss compensation as long as the worker's attending physician certifies the time loss. Again, for these ongoing benefits, a self-insurer can obtain effective relief. Finally, contrary to Masco's assertion otherwise (Resp't Br. 5), there is even potential relief in a case like this one, which involves a period of time-loss compensation that has already passed, although it requires the self-insured employer to act quickly. If the employer seeks a stay immediately after appealing, the Board may take less than the full 25 days to rule on the

stay. In such a case, the Department may not issue a penalty if 14 days have not passed.<sup>7</sup>

The stay procedure is not meaningless just because it did not serve Masco's private interests in this appeal. Though there will be cases where the self-insured employer decides not to appeal immediately (like this one, where Masco waited six weeks to appeal) and so must pay full benefits pending appeal, the Legislature made a policy decision to give the benefit of the doubt to workers in those cases and to require immediate payment. Here, because Masco waited six weeks to appeal, it had to pay the benefits in full before the Board could grant it a stay. That the Legislature struck a balance that did not benefit Masco here does not render the statute meaningless. Many other self-insurers will obtain effective relief from the stay procedure.

Self-insured employers will not pay benefits that they do not owe under this system. When the Legislature enacted the comprehensive amendment in 2008, it foresaw that a self-insurer might prevail in an appeal on the merits of the benefits award after having paid benefits while

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<sup>7</sup> Because Masco is wrong that the Board can never grant relief for benefits involving a time period in the past, the Court should reject the false dichotomy of "retroactive" and "prospective" benefits that Masco has relied on to argue that RCW 51.52.050 was ambiguous. *See* Resp't Br. 5-6, 8; RP 50, 53, 56. Masco has not identified an ambiguous term in the statute. And the potentially different results that could occur when self-insured employers seek stays in cases involving ongoing benefits (treatment, pension) as opposed to cases involving past benefits does not make the statute ambiguous.

the appeal was pending. Before 2008, the Act already allowed self-insurers to recoup these erroneously paid benefits if they prevailed in a final order at the Board. RCW 51.32.240(4). But the Legislature's 2008 amendment created an overpayment recoupment fund to reimburse self-insurers having trouble recouping such benefits from the worker:

If a self-insurer is not fully reimbursed within twenty-four months of the first attempt at recovery through the collection process pursuant to this subsection and by means of processes pursuant to subsection (6) of this section, the self-insurer shall be reimbursed for the remainder of the amount due from the self-insured employer overpayment reimbursement fund.

RCW 51.32.240(4)(c). So if Masco ultimately prevails on the merits, its recourse is to seek recoupment or, if that is unsuccessful, to seek reimbursement from the overpayment reimbursement fund. This is a reasonable balance that the Legislature intended, taking into account competing policy considerations.

Masco addresses fairness concerns (Resp't Br. 4), but the Legislature's balance is fair to both the worker and the employer. Under the Legislature's system, the worker receives benefits while the litigation is pending, unless the Board issues a stay. But the employer can recoup the benefits from the worker or the overpayment recoupment fund if it prevails in the litigation.

The plain language controls, and this Court should reject Masco's reliance on a witness who testified before a Senate committee to support its interpretation. *Contra* Resp't Br. 4; *see also* CP 10, 38-42. Because the statute is not ambiguous, it is not appropriate to resort to legislature history. *Anthis v. Copland*, 173 Wn.2d 752, 756, 270 P.3d 574 (2012). But, in any case, the Department agrees that the statute provides employers with an expedited review process. Expedited review, however, does not mean that payment of benefits is stayed simply because the self-insurer moves for a stay, as Masco appears to believe. It means that the Board decides on the stay motion with 25 days, as the statute requires.

There is no ambiguity in RCW 51.52.050(2)(b), but even if there were, liberal construction supports the Department's interpretation that a stay is required and that a pending stay motion does not excuse nonpayment under RCW 51.52.050(2)(b). The Industrial Insurance Act is remedial: "This title shall be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries . . . ." RCW 51.12.010. And "a liberal construction is not only appropriate but mandatory." *Johnson v. Tradewell Stores, Inc.*, 95 Wn.2d 739, 743, 630 P.2d 441 (2005); *see also* RCW 51.12.010 (providing that the Industrial Insurance Act "shall be liberally construed"). A self-insured employer must provide "sure and certain relief." RCW 51.04.010. The

court resolves any ambiguity “in favor of compensation for the injured worker.” *Ball-Foster Glass Container Co. v. Giovanelli*, 163 Wn.2d 133, 142, 177 P.3d 692 (2008). A core purpose of the Industrial Insurance Act “is to allocate the cost of workplace injuries to the industry that produces them, thereby motivating employers to make workplaces safer.” *Harry v. Buse Timber & Sales, Inc.*, 166 Wn.2d 1, 19, 201 P.3d 1011 (2009). For self-insured employers, the concern is not how a benefit order would economically affect it because to be a self-insured an employer must be solvent. RCW 51.14.020.

Masco’s interpretation is contrary to a liberal construction and indeed allows the employer responsible for a worker’s injury to enjoy the economic benefit—contrary to RCW 51.52.050’s intent. Under Masco’s interpretation, a self-insurer could wait the full 60 days to appeal and move to stay payment within 15 days of the order granting appeal. If the Board took the full 25 days to rule on the stay motion, the worker would be deprived of benefits for a period exceeding three months. That cannot have been the Legislature’s intent when it stated that benefits were due on the date of the Department’s order.<sup>8</sup>

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<sup>8</sup> Masco incorrectly suggested below that the Department’s adoption of the regulation means that RCW 51.52.050(2)(b) is ambiguous. CP 15. It is not. The statute requires immediate payment or a stay. Though the Department has statutory authority under RCW 51.48.017 and RCW 51.52.050(2)(b) to issue penalties if self-insurers do not pay benefits immediately after the Department order, the Department has adopted a

**C. The Legislature Repudiated the Board's *Madrid* Decision in 2008 When It Enacted a Comprehensive Scheme Requiring an Employer to Pay Benefits Immediately or Obtain a Stay**

A self-insured employer acts unreasonably if it refuses to comply with a statutory duty to pay benefits due and refuses to pay within the 14-day grace period that the Department's regulation allows. Under the comprehensive scheme that the Legislature enacted in 2008, the Department must now issue a penalty to a self-insurer that has not paid Department-ordered benefits and has not obtained a stay. RCW 51.48.017; RCW 51.52.050.

This contradicts the Board's pre-2008 decision in *Madrid*, which allowed self-insured employers to circumvent a penalty by showing a "genuine doubt from a medical or legal standpoint as to the liability for benefits." *Frank Madrid*, 1987 WL 61383, at \*3 (quoting *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.*, 130 Cal. App. 3rd 933, 938, 182 Cal. Rep. 171 (1982)). But the Legislature's 2008 amendment requires more than doubt to avoid a penalty; it requires immediate payment or a stay. The Department agrees with Mr. Suarez's assessment that the 2008 amendment obviates the *Madrid* test. AB 10.<sup>9</sup> This Court should clarify

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reasonable 14-day standard to give time to the self-insurer to make payment. This makes sense from an administrative perspective. It is not a concession of ambiguity.

<sup>9</sup> Suarez and Masco also note that the "genuine doubt" standard is discussed in *Taylor v. Nalley's Fine Foods*, 119 Wn. App. 919, P.3d 1018 (2007). AB 2, 10; Resp't

that the Board's "genuine doubt" test from *Madrid* no longer applies.

Even if it did apply, it would apply only to doubts over the entitlement to benefits, not to doubts over the pay during appeal statute.

**1. *Madrid's* "Genuine Doubt" test is inconsistent with the Legislature's more recent requirement for immediate payment or a stay**

Despite the Legislature's decision in 2008 to enforce a self-insurer's immediate payment of benefits absent a stay, the Board continues to apply its "genuine doubt" test from *Madrid*, as both it and the superior court did. AR 3; CP 72.<sup>10</sup> But the Legislature supplanted the Board's "genuine doubt" test when it enacted RCW 51.52.050(2)(b). *Madrid* cannot be reconciled with that statute, so the Board must abandon it and follow the statute.<sup>11</sup>

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Br. 7. That case preceded the 2008 amendment and applied the *Madrid* test, so its analysis does not survive the 2008 amendment.

<sup>10</sup> Many other recent cases from the Board apply *Madrid's* "genuine doubt" test. See, e.g., *Amela Northrop*, No. 15 18611, 2017 WL 3137751, at \*2 (Wash. Bd. Indus. Ins. Appeals, June 20, 2017); *Jennifer Maphet*, No. 15 21036, 2017 WL 1378024 at \*2 (Wash. Bd. Indus. Ins. Appeals, Mar. 8, 2017); *Vincent Hoffman*, No. 16 13867-A, 2017 WL 955672 at \*2 (Wash. Bd. Indus. Ins. Appeals, Feb. 27, 2017).

<sup>11</sup> At the administrative hearing, the Department's penalty adjudicator testified that she relied on *Madrid* to determine whether a self-insured employer's nonpayment of benefits was reasonable. AR Whitcomb 6, 22, 30-31. But testimony that a particular law applies to a case is a conclusion of law, and a witness may not testify to a conclusion of law. *State v. Olmedo*, 112 Wn. App. 525, 532, 49 P.3d 960 (2002). This Court should disregard that improper testimony. See *Eriks v. Denver*, 118 Wn.2d 451, 458, 824 P.2d 1207 (1992) (court may disregard conclusions of law in experts' affidavits). And though Department's counsel made passing reference to the "genuine doubt" standard during oral argument in superior court, that was in the context of arguing that benefits are due when ordered under RCW 51.52.050(2)(b). See RP 35-36.

*Madrid* must be abandoned for two reasons. First, by enacting RCW 51.52.050(2)(b), the Legislature has resolved all legal doubt about when benefits are due. After the 2008 amendment, an employer can no longer have a “genuine doubt from a . . . legal standpoint” about when benefits are due. Benefits are due “on the date issued,” unless the Board orders a stay. RCW 51.52.050(2)(b). Second, the Legislature’s stay procedure now incorporates a procedure that allows the self-insurer to establish medical doubt. If a self-insurer has any “genuine doubt from a medical . . . standpoint” about paying benefits, it can argue that in its stay motion. *See Frank Madrid*, 1987 WL 61383, at \*3. If the self-insurer persuades the Board that the medical evidence shows it is more likely going to prevail on the merits, the Board will grant a stay.

By clarifying that *Madrid* no longer applies, this Court will give effect to the Legislature’s intent, which is the fundamental purpose in interpreting a statute. *See Larson*, 184 Wn.2d at 848. Although in certain circumstances, this Court defers to the Board’s interpretation of the Act when a statute is ambiguous, there is no ambiguity here. *See Slauch*, 177 Wn. App. at 452. The plain language of RCW 51.48.017 mandates penalties when a self-insurer unreasonably delays or refuses to pay benefits “as they become due,” and RCW 51.52.050(2)(b) states benefits are due on the date of the Department’s order and must be paid absent a

stay. Read together, this means a self-insurer must pay on the date of the order or obtain a stay. This supplants *Madrid*'s "genuine doubt" standard.

There is no ambiguity here. Masco is incorrect when it argues that there was "legal ambiguity" in this case. Resp't Br. 8. It cites no specific ambiguity in the statutory language, and there is none. Even if an ambiguity existed, the Court would defer to the Department's regulation, not the Board's "genuine doubt" test in *Madrid*. See *Mills*, 170 Wn.2d at 910 (rules are binding). And the court defers to the Department when there is a conflict in interpretation between the Department and the Board because the Department is the executive agency charged by the Legislature to administer the statute. *Slaugh*, 177 Wn. App. at 452. The Court should apply the statute and clarify that *Madrid* is not good law.

**2. Unlike *Madrid*, the Legislature's 2008 amendment furthers the policy of sure and certain relief for workers while providing protections to self-insurers**

The Board's incorrect view of the law undermines "sure and certain relief" for workers and their families. RCW 51.04.010. The Legislature's decision in 2008 to require employers to pay benefits immediately, even when appealing the underlying benefits determination, or to obtain a stay, furthers this policy because workers will receive benefits faster.

The Legislature's 2008 amendment provides surer and certain relief to workers than *Madrid's* "genuine doubt" test for at least four reasons. First, an independent agency (the Board) makes the threshold assessment of the strength of the self-insured's case during the stay procedure, rather than the self-interested self-insurer through litigation. Under *Madrid*, the self-insurer can decline to pay benefits, wait for a penalty order, appeal that order, and present evidence about its "genuine doubt" at hearing. Now, a self-insurer with any doubt about paying benefits must obtain a stay.

Second, the Legislature has strengthened the standard for nonpayment and made it more objective. Requiring self-insured employers to show that they are "more likely than not to prevail on the facts as they existed at the time of the order on appeal" (RCW 51.52.050(2)(b)) is a higher and more objective standard than "genuine doubt."

Third, the amendment encourages self-insurers to provide information that is more complete during claim adjudication. That is because the Board reviews only the Department claim file to rule on a stay motion. That in turn encourages employers to present competing medical evidence to the Department earlier, which could cause the Department to change its mind. And it prevents self-insurers from defending against a

penalty order under the *Madrid* standard by presenting medical evidence at hearing that the Department never had the chance to consider.

Finally, the 2008 amendment expedites payment of benefits to workers. That is because *Madrid* allows a self-insured employer to defend against a penalty order by asserting that it had a genuine doubt against paying benefits even, like in this case, *after* the Board has reviewed the employer's motion and denied it because it is not likely to prevail. That does not protect workers.

The Legislature's 2008 amendment balances competing policies. Workers should not have to wait for benefits they are entitled to, and self-insurers should not have to pay benefits they do not owe. By enacting a stay procedure for self-insurers and by creating an overpayment recoupment fund, the Legislature furthered each of these policies. A self-insurer's remedy is now to submit evidence to the Department's claim file for its consideration and, if this does not change the Department's mind, to ask the Board for a stay.

**3. Although the Department does not concede that the *Madrid* test applies, if the test applies the Board correctly applied it**

*Madrid* no longer applies after the Legislature's 2008 amendment. But if this Court disagrees, it should agree with the Board's application of that test, not the superior court's. This Court reviews legal issues de novo.

*Birrueta v. Dep't of Labor & Indus.*, 186 Wn.2d 537, 542-43, 379 P.3d 120 (2016). The superior court applied the *Madrid* test incorrectly. Masco failed to establish a “genuine doubt from a medical or legal standpoint” that it owed the benefits to Suarez.

The law is unambiguous that benefits are due on the date of the Department’s order, unless the Board orders a stay. RCW 51.52.050(2)(a). So Masco could not establish a genuine doubt from a legal standpoint that it owed benefits on the date of the Department’s order. The superior court’s conclusion that Masco had genuine doubt because no case law interprets RCW 51.52.050(2)(a) misses the point. CP 72-73. If the statute is clear, the self-insurer must follow it. A party cannot ignore a clear legislative directive simply because a court has never had occasion to confirm that the statute’s plain language establishes that directive.

Masco also presented no medical evidence in its appeal of the penalty order so it did not establish that it had a genuine doubt from a medical standpoint about paying benefits. The superior court did not address this prong of *Madrid*, but the Board correctly pointed to Masco’s failure to present any medical evidence challenging Suarez’s entitlement to benefits. That is fatal to Masco’s attempt to establish this prong.

## VII. CONCLUSION

The superior court committed legal error when it permitted Masco to delay payment of benefits to Suarez until the Board ruled on its stay motion and when it applied the Board's *Madrid* test. Under RCW 51.52.050(2)(b), Masco had to pay benefits or obtain a stay. It did neither, so the Department correctly issued a penalty. *Madrid* no longer applies after the Legislature's 2008 amendments to the Industrial Insurance Act. This Court should reverse.

RESPECTFULLY SUBMITTED this 4<sup>th</sup> day of April, 2018.

ROBERT W. FERGUSON  
Attorney General



PAUL WEIDEMAN, WSBA No. 42254  
Assistant Attorney General  
Office Id. No. 91018  
800 Fifth Ave., Suite 2000  
Seattle, WA 98104  
(206) 389-3820

# Appendix A

**RCW 51.52.050****Service of departmental action—Demand for repayment—Orders amending benefits—Reconsideration or appeal.**

(1) Whenever the department has made any order, decision, or award, it shall promptly serve the worker, beneficiary, employer, or other person affected thereby, with a copy thereof by mail, or if the worker, beneficiary, employer, or other person affected thereby chooses, the department may send correspondence and other legal notices by secure electronic means except for orders communicating the closure of a claim. Persons who choose to receive correspondence and other legal notices electronically shall be provided information to assist them in ensuring all electronic documents and communications are received. Correspondence and notices must be addressed to such a person at his or her last known postal or electronic address as shown by the records of the department. Correspondence and notices sent electronically are considered received on the date sent by the department. The copy, in case the same is a final order, decision, or award, shall bear on the same side of the same page on which is found the amount of the award, a statement, set in black faced type of at least ten point body or size, that such final order, decision, or award shall become final within sixty days from the date the order is communicated to the parties unless a written request for reconsideration is filed with the department of labor and industries, Olympia, or an appeal is filed with the board of industrial insurance appeals, Olympia. However, a department order or decision making demand, whether with or without penalty, for repayment of sums paid to a provider of medical, dental, vocational, or other health services rendered to an industrially injured worker, shall state that such order or decision shall become final within twenty days from the date the order or decision is communicated to the parties unless a written request for reconsideration is filed with the department of labor and industries, Olympia, or an appeal is filed with the board of industrial insurance appeals, Olympia.

(2)(a) Whenever the department has taken any action or made any decision relating to any phase of the administration of this title the worker, beneficiary, employer, or other person aggrieved thereby may request reconsideration of the department, or may appeal to the board. In an appeal before the board, the appellant shall have the burden of proceeding with the evidence to establish a prima facie case for the relief sought in such appeal.

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

existed at the time of the order on appeal. The board shall not consider the likelihood of recoupment of benefits as a basis to grant or deny a motion to stay. If a self-insured employer prevails on the merits, any benefits paid may be recouped pursuant to RCW 51.32.240.

(i) If upon reconsideration requested by a worker or medical provider, the department has ordered an increase in a permanent partial disability award from the amount reflected in an earlier order, the award reflected in the earlier order shall not be stayed pending a final decision on the merits. However, the increase is stayed without further action by the board pending a final decision on the merits.

(ii) If any party appeals an order establishing a worker's wages or the compensation rate at which a worker will be paid temporary or permanent total disability or loss of earning power benefits, the worker shall receive payment pending a final decision on the merits based on the following:

(A) When the employer is self-insured, the wage calculation or compensation rate the employer most recently submitted to the department; or

(B) When the employer is insured through the state fund, the highest wage amount or compensation rate uncontested by the parties.

Payment of benefits or consideration of wages at a rate that is higher than that specified in (b)(ii)(A) or (B) of this subsection is stayed without further action by the board pending a final decision on the merits.

(c) In an appeal from an order of the department that alleges willful misrepresentation, the department or self-insured employer shall initially introduce all evidence in its case in chief. Any such person aggrieved by the decision and order of the board may thereafter appeal to the superior court, as prescribed in this chapter.

[ 2011 c 290 § 9; 2008 c 280 § 1; 2004 c 243 § 8; 1987 c 151 § 1; 1986 c 200 § 10; 1985 c 315 § 9; 1982 c 109 § 4; 1977 ex.s. c 350 § 75; 1975 1st ex.s. c 58 § 1; 1961 c 23 § 51.52.050. Prior: 1957 c 70 § 55; 1951 c 225 § 5; prior: (i) 1947 c 281 § 1, part; 1943 c 210 § 1, part; 1939 c 41 § 1, part; 1937 c 211 § 1, part; 1927 c 310 § 1, part; 1921 c 182 § 1, part; 1919 c 131 § 1, part; 1911 c 74 § 2, part; Rem. Supp. 1947 § 7674, part. (ii) 1947 c 247 § 1, part; 1911 c 74 § 20, part; Rem. Supp. 1947 § 7676e, part. (iii) 1949 c 219 § 6, part; 1943 c 280 § 1, part; 1931 c 90 § 1, part; 1929 c 132 § 6, part; 1927 c 310 § 8, part; 1911 c 74 § 20, part; Rem. Supp. 1949 § 7697, part. (iv) 1923 c 136 § 7, part; 1921 c 182 § 10, part; 1917 c 29 § 3, part; RRS § 7712, part. (v) 1917 c 29 § 11; RRS § 7720. (vi) 1939 c 50 § 1, part; 1927 c 310 § 9, part; 1921 c 182 § 12, part; 1919 c 129 § 5, part; 1917 c 28 § 15, part; RRS § 7724, part.]

**NOTES:**

**Application—2008 c 280:** "This act applies to orders issued on or after June 12, 2008." [ 2008 c 280 § 7.]

**Adoption of rules—2004 c 243:** See note following RCW 51.08.177.

No. 51143-6-II  
**COURT OF APPEALS. DIVISION II  
OF THE STATE OF WASHINGTON**

ALFREDO SUAREZ,

Appellant,

v.

MASCO CORPORATION,

Respondent.

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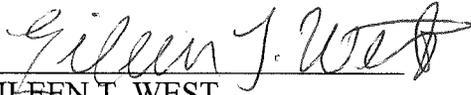
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Beaverton, OR 97008

DATED this 4<sup>th</sup> day of April, 2018.

  
EILEEN T. WEST  
Legal Assistant

**WASHINGTON ST. ATTORNEY GENERAL - LABOR & INDUSTRIES DIVISION - SEATTLE**

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