

FILED
Court of Appeals
Division II
State of Washington
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No. 51143-6-II

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

ALFREDO SUAREZ, *Appellant*,

v.

MASCO CORP., et al., *Respondent*.

**EMPLOYER'S RESPONSE TO DEPARTMENT OF LABOR AND
INDUSTRIES' BRIEF**



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INTRODUCTION

The Masco Corp., by way of their attorneys, now responds to the Brief of Respondent Department of Labor and Industries. The Department misinterprets RCW 51.52.050 which was correctly remedied by the Superior Court. The Department relies on language that was not in effect at the time of this proceeding and argues that both the Board of Industrial Insurance Appeals and the Superior Court misinterpreted the legislature. The employer seeks affirmance of the Superior Court's Conclusions of Law.

STATEMENT OF THE CASE

On December 19, 2014, the Department of Labor and Industries (Department) ordered self-insured employer, Masco Corp., to pay time-loss benefits to claimant, Alfred Suarez, from October 11, 2013, through December 10, 2014, for an industrial injury suffered during his employment, Clerks Papers No. 10, Certified Appeal Board Record (CABR). The employer filed a timely Notice of Appeal to the Board of Industrial Insurance Appeals on February 2, 2015, and simultaneously filed a Motion for Stay of Benefits.

On February 25, 2015, the Board issued an order denying the employer's Motion for Stay of Benefits. CP, CABR, Exhibit 4, Appendix D. The employer provided the claimant with provisional benefits on March 6, 2015, immediately within one week of receiving the order denying the Motion for Stay of Benefits. The Motion for the Stay of Benefits was not appealed.

The Department received a written request from the claimant's attorney on July 30, 2015, seeking a penalty against the employer for delaying the time-loss benefits. The Department issued a penalty against the employer citing unreasonable delay and this order was affirmed and then appealed to the Board. CP, CABR, at 33-34.

The Board affirmed this decision and Masco appealed to Superior Court. The Superior 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 Superior Court further decided that if the benefits were payable prior to that date, Masco had a genuine legal doubt of its obligation to pay such benefits. Report of Proceedings (RAP) at 1-61.

ARGUMENT

A. Genuine Legal Doubt Does Not Constitute an Unreasonable Delay

The Legislature penalizes self-insured employers if they unreasonably delay or refuse to pay benefits. RCW 51.48.017. However, the Board has consistently held that in order for a delay to be unreasonable, there can be “genuine doubt from a medical or legal standpoint as to the liability for benefits.” *Taylor v. Nalley's Fine Foods*, 119 Wn. App. 919 (2004); *In re Frank Madrid*, BIIA Dec., 86 0224-A (1987). The Department is assuming that there was no such genuine legal doubt as to whether benefits were due in the interim while the Motion for Stay was pending. In order for two adjudication bodies to hold this case in opposite ways demonstrates that this is an unsettled issue and therefore there is clearly reasonable legal doubt as to if benefits were due during that period of time.

B. Statutory Interpretation Requires the Entire Statute to be Considered

When interpreting a statute, the purpose is to give effect to the Legislature’s intent. *State v. Larson*, 184 Wn.2d 843, 848, 365 P.3d 740 (2015). The Legislature clearly provided a mechanism for this when designing the language of RCW 51.52.050. “. . . if the Department order is appealed, the order shall not be stayed pending a final decision *on the merits* unless ordered by the Board.” (emphasis added). Statutes must be interpreted and construed so that all

the language used is given effect with no portion rendered meaningless or superfluous. *Stone v. Chelan County Sheriffs Dep't*, 110 Wash. 2d 806, 810, 756 P.2d 735 (1988). The Department and Mr. Suarez are asking to make the language “on the merits” superfluous because without that language it would be clear that benefits are clearly due until a stay is granted by the Board. By adding that language, it implies that benefits are stayed while an expedited decision on a Motion to Stay, not on the merits, is being made.

C. The Legislature Provided a Mechanism for Stay of Benefit Decisions

The Department argues that all things involving industrial insurance should be construed strongly in favor of the employee. However, as previously reiterated in the record, the legislature developed an expedited process for this situation. “The Board shall conduct an expedited review of the claim file . . . The Board shall issue a final decision within twenty-five days of the filing of the Motion for Stay or the order granting appeal. . .” RCW 51.52.050(2)(b). This requirement of an expedited process relieves the worker of the extended burden while the appeal is being decided *on the merits* and does not unreasonably shift the financial burden to the employer with no recourse.

The Department’s interpretation of the statute ignores the language of the statute and compares it to another statute with an automatic stay provision. The employer does not presume that benefits will be stayed automatically pending the entire appeals process, as the Department seems to assume. The Department claims that the employer relies on the premise that the employer can never receive meaningful relief when the Board orders a stay. (Brief of Respondent Department at 16). This is a misinterpretation of the employer’s argument. The employer does not ignore that the Board may act more quickly than RCW 51.52.050 requires.

However, the Department ignores that it is completely out of the control of the employer how quickly the Board acts and therefore the employer can follow the letter of the law in the appeals process, which occurred in this case, and the Department is asserting that it is still on the hook for the interim time with no recourse. The employer does not assert that this will happen in every single case, but the Department is suggesting that the employer must rely on Board decisions being made quicker than is mandated. If the Department's interpretation is deemed correct, it is in conflict with *In re Frank Madrid*, BIIA Dec., 86 0224-A (1987), stating that "we should not penalize an employer for exercising its legal rights conferred by RCW 51.52.050."

The Department relies heavily on the language from WAC 296-15-266(1)(f), citing a 14-day grace period for the self-insured employer. (Brief of Department Respondent at 13-15). It later admits after describing this mechanic that this particular language did not exist at the time of this proceeding. In 2015 WAC 296-15-266(1)(f) was amended to include the 14-day grace period and the language "until or unless the Board of Industrial Insurance Appeals grants a stay." The lack of this language prior to 2015 demonstrates a clear ambiguity which rises to the level of genuine legal doubt. Furthermore, the Department cannot rely on this language to make its argument because it was not in effect at the time of this proceeding.

D. The Madrid Test is not Inconsistent with the Legislature and is Still Regularly Used

The Department argues that the 2008 legislature clarifies the statute to the point where the *Madrid* test on "genuine doubt" would no longer apply. The 2008 Legislature Amendment did not make the *Madrid* test obsolete, it merely began the clarification of when it would apply. While the employer admits that RCW 51.52.050(2)(b) makes it clear that benefits shall not be stayed pending an appeal on the merits without a stay, the ambiguity of the time period in

question is still at issue. The *Madrid* test applies to any time there is genuine legal doubt, and while the further amendments to the legislature help alleviate the instances where this specific test would apply, there is no indication that is obsolete. As the Department correctly points out, the *Madrid* test has continually been used by the Board and the Superior Court. (Brief of Department at 23). As the legislature continues to clarify the law, the threshold for genuine legal doubt may be greater, but the test still applies. The Department argues that there is no possibility for legal doubt after the 2008 amendments, but as these proceedings themselves demonstrate, there is clearly room for interpretation within the statute.

CONCLUSION

The Department has clarified its position on benefits in language that became effective after these proceedings occurred. It is now trying to retroactively apply those clarified policies despite the genuine doubt that the employer had at the time of these proceedings. The employer requests that this Court uphold the Superior Court's conclusions of law which correctly interpreted the Washington Administrative Code and the Revised Code of Washington as they existed at the time.



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CERTIFICATE OF MAILING

I hereby certify that I caused to be served the foregoing **Employer's Response to Department of Labor and Industries' Brief** on the following individuals on May 2, 2018, by mailing to said individuals true copies thereof, certified by me as such, contained in sealed envelopes, with postage prepaid, addressed to said individuals at their last known addresses to

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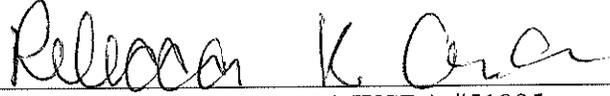
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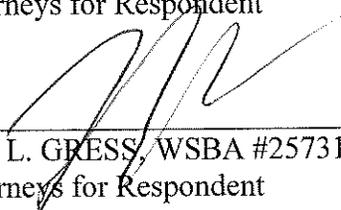
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