

FILED
Court of Appeals
Division III
State of Washington
8/21/2019 3:25 PM

No. 365638

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

CHS INC., *Appellant*,

v.

LEONARD ELLERBROEK, and
DEPARTMENT OF LABOR AND
INDUSTRIES, *Respondents*.

APPELLANT'S REPLY BRIEF


Brett B. Schoepper, WSBA #42177
Of Attorneys for Appellant
Gress, Clark, Young & Schoepper
8705 SW Nimbus Avenue, Suite #240
Beaverton, OR 97008
(971) 285-3525

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

ARGUMENT IN REPLY TO BRIEFS OF RESPONDENTS..... 1

 A. This Court must consider the entirety of RCW 51.52.050(2)(b) and not just its first sentence as the Respondents urge. 1

 B. The Respondent Department continues to ignore the fact that at the time it issued the penalty order against Appellant, there was genuine legal doubt whether Appellant was obliged to pay benefits to Respondent Ellerbroek as no payment order was in effect 1

 C. This Court should follow *Suarez* and decline to abandon the *Madrid* test. 4

 D. Equitable estoppel should prevent a penalty from being assessed against Appellant. 5

 E. The attorney fee award to Respondent Ellerbroek is excessive and the trial court abused its discretion in awarding an unreasonable fee..... 7

CONCLUSION..... 9

TABLE OF AUTHORITIES

Cases

<i>Berryman v. Metcalf</i>	8
<i>Board of Regents of University of Washington v. City of Seattle</i> , 108 Wn.2d 545, 554, 741 P.2d 11 (1987).....	7
<i>Brand v. Dept. of Labor & Indus.</i> , 139 Wn. 2d 659 (1999).....	8
<i>Cockle v. Dep't of Labor & Indus.</i> , 142 Wn.2d 801, 808, 16 P.3d 583 (2001).....	2
<i>Davis v. Department of Licensing</i> , 137 Wn.2d 957, 963 (1999)	2
<i>Masco Corp. v. Saurez</i> , 7 Wash. App. 2d 342, 433 P.3d 824 (2019).....	1
<i>Scott Fetzer Co. v. Weeks</i> , 122 Wash.2d 141, 150, 859 P.2d 1210 (1993).	8

Statutes

RCW 51.52.050(2)(b)	1, 2, 3, 7
---------------------------	------------

Other Authorities

<i>Black's Law Dictionary</i> , 5 th Edition	3
---	---

Regulations

WAC 296-15-266.....	5, 6
---------------------	------

Significant Board Decisions

<i>In re Frank Madrid</i> , BIIA Dec., 86 0224-A (1987).....	5
<i>In re Gerald Wynkoop</i> , BIIA 34,133 (1970).....	4

ARGUMENT IN REPLY TO BRIEFS OF RESPONDENTS

A. This Court must consider the entirety of RCW 51.52.050(2)(b) and not just its first sentence as the Respondents urge.

Respondent Department throughout its brief insists that the statutory language is clear and demands payment of benefits immediately upon issuance of an order. This interpretation of the relevant portion of RCW 51.52.050(2)(b) would be correct if this statutory subsection only consisted of a single sentence. *See* RCW 51.52.050(2)(b). However, the statute continues that “if the Department order is appealed, it shall not be stayed pending a final decision on the merits unless ordered by the Board [of Industrial Insurance Appeals].” *Id.* Appellant is not disputing that once the Board denied its motion for a stay, benefits were due to Respondent Ellerbroek. However, to give this statute its full effect, this Court must look beyond the first sentence as urged by the Respondent Department and as interpreted in error by the Court in *Masco Corp. v. Suarez*, 7 Wash. App. 2d 342, 433 P.3d 824 (2019)

If this Court goes beyond the cursory review performed in *Suarez*, the statute is clear that benefits are not stayed until there is a final decision on the merits by the Board but is silent in regards to an interlocutory appeals such as on a motion for a stay. A stay of benefits is merely an interim decision until a final decision is reached on the merits. Since the

statute is silent in regards to interlocutory appeals, it is not clear on its face as Respondents would like this Court to believe. Consequently, there is more than one reasonable interpretation of the statute's silence regarding interlocutory appeals. If there is more than one reasonable interpretation of a statute, it is considered ambiguous. *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 808, 16 P.3d 583 (2001).

Furthermore, the expedited review process contained in RCW 51.52.050(2)(b) is meaningless if the legislature did not contemplate an employer withholding benefits until the Board has ruled on a Motion for a Stay. It is necessary to give effect to all of the statutory language in construing a statute so that no portion is rendered meaningless or superfluous. *Davis v. Department of Licensing*, 137 Wn.2d 957, 963 (1999). All parts of RCW 51.52.050(2)(b) must be considered and given their plain meaning, not merely the first sentence as urged by the Respondents.

Turning specifically to this case, the employer quickly paid the benefits as soon as the motion to stay was denied and an order directing payment of benefits was in effect. Had the employer asserted that they did not have to pay until the appeal was concluded on the merits, a penalty would have been warranted. However, this is not the case. As such, the trial court erred in reinstating the penalty against Appellant.

B. The Respondent Department continues to ignore the fact that at the time the it issued the penalty order against Appellant, there was genuine legal doubt whether Appellant was obliged to pay benefits to Respondent Ellerbroek as no payment order was in effect

At the time Respondent Department issued its penalty order against Appellant, there was no order in requiring payment of benefits in effect. The Department upon reassuming jurisdiction placed its February 24, 2015, order in abeyance. 2/4/16 Hearing Testimony at 90. For some unknown reason, Respondent Department takes issue with Appellant stating that when an order is in abeyance, it is suspended. Br. Respondent Department at 20. But, that is the definition of abeyance. *See Black's Law Dictionary*, 5th Edition (Abeyance: ... a condition of being undetermined or in state of suspension or inactivity). As a result, at the time the Respondent Department issued the penalty order, the Appellant could not have been unreasonably delayed in paying benefits as no order directing payment was in effect.

In addition, as Respondent Department appears to concede in its brief that *In re Gerald Wynkoop*, BIIA 34,133 (1970), affirms the principle that when a party timely requests reconsideration, the order under reconsideration is automatically placed in abeyance. That is what happened in this case. Therefore, between February 3, 2015, when

reconsideration was requested, and February 24, 2015, no order directing Appellant to pay benefits was in effect. Further, as discussed above, when Respondent Department reassumed jurisdiction, it placed the February 24, 2015, order in abeyance thereby suspending Appellant's obligation to pay benefits until it issued a subsequent order. Consequently, Appellant could not unreasonably delay in paying benefits as no order directing payment was in effect.

C. This Court should follow *Suarez* and decline to abandon the *Madrid* test.

Respondent Department urges this Court to abandon the genuine doubt test as announced in *In re Frank Madrid*, BIIA Dec., 86 0224-A (1987). A penalty is necessarily assessed on a case-by-case basis and an important factor in determining whether a penalty is warranted is what the employer believed at the time. As noted in Respondent Department's brief, its own penalty adjudicators continue to consider whether an employer had a genuine doubt as to whether benefits were actually due when assessing penalties. Br. Respondent Department at 25 n. 9.

The Respondent Department urges this Court to abandon the *Madrid* test, but it has proved to be more accurate than the arbitrary one-size-fits-all solution the Respondent Department proposes. In both this case and in *Suarez*, the claimant was denied benefits so the employer

was ultimately proved correct in believing that it did not owe benefits to claimant. However, in both cases, the Department assessed a penalty for unreasonable delay. As a result, the Department has proven that it assesses penalties without regard to the actual facts present in these individual cases. Rather, the Department has simply created an arbitrary 14-day deadline for an employer to pay benefits. *See* WAC 296-15-266. This cannot be what the legislature intended when it passed the 2008 amendments to the Industrial Insurance Act.

Instead this Court should follow the example of the Board and announce the rule that an employer does not unreasonably delay in paying benefits while its motion for a stay is pending if it has a genuine legal or medical doubt that benefits are due at the time. This rule would carry out the actual intent of the legislature in ensuring that workers receive “sure and certain relief,” while at the same time protecting competing the interests of employers that workers only receive the benefits they are actually owed.

D. Equitable estoppel should prevent a penalty from being assessed against Appellant.

While the Department may have a duty to ensure that the Industrial Insurance Act is complied with, a penalty inquiry is performed at the request of an injured worker. Under WAC 296-15-266, the Department

begins its inquiry into unreasonable delay upon the request of a worker. As discussed at length in Appellant's opening brief, it was the actions of Respondent Ellerbroek's counsel that led to Appellant's delay in rendering payment. Br. Appellant at 8-9. Further, contrary to Respondent Department's assertions, all of the elements of estoppel have been met in this case.

First, Respondent Ellerbroek acquiesced to Appellant's withholding of payment pending the Board ruling on his motion for a stay. *See Board of Regents of University of Washington v. City of Seattle*, 108 Wn.2d 545, 554, 741 P.2d 11 (1987) (Where a party knows what is occurring and would be expected to speak, if he wished to protect his interest, his acquiescence manifests his tacit consent). Second, Appellant relied on the fact that Respondent Ellerbroek had been fully informed of Appellant's intentions regarding withholding payment until the Board had ruled on its motion for a stay. Third, by requesting a penalty, Respondent Ellerbroek directly contradicted its previous consent to Appellant's withholding payments leading to a direct injury to Appellant in the form of a penalty order.

Finally, Respondent Department asserts that it is illegal for a self-insured employer to withhold benefit payments with the consent of the injured worker. Br. Respondent DLI at 32. However, RCW

51.52.050(2)(b) itself provides for this course of action. Admittedly, the proper statutory procedure was not followed, but it certainly is not an unlawful act as asserted by the Respondent Department.

E. The attorney fee award to Respondent Ellerbroek is excessive and the trial court abused its discretion in awarding an unreasonable fee.

The attorney fees awarded to Respondent Ellerbroek by the trial court are manifestly unreasonable. The amount in controversy in the penalty case was \$2,955.56. CP 60. The trial court awarded Respondent Ellerbroek \$22,596.00 in fees. This is a fee award that is 764% of the amount in controversy. In *Berryman v. Metcalf* the court noted:

[w]hile it is true that the court will not overturn a large attorney fee award in civil litigation merely because the amount at stake in the case is small. This cautionary observation should not, however, become a talisman for justifying an otherwise excessive award.

177 Wash. App. 644, 312 P.3d 745, 755 (2013) (internal citations omitted). A lodestar figure that “grossly exceeds” the amount in controversy should suggest a downward adjustment. *Id.* citing *Scott Fetzer Co. v. Weeks*, 122 Wash.2d 141, 150, 859 P.2d 1210 (1993).

It is telling that Respondent Ellerbroek quotes *Brand v. Dept. of Labor & Indus.*, 139 Wn.2d 659 (1999), providing an example of the Supreme Court approving a “\$300 award of attorney fees in a case in which the worker recovered only \$1,092.” Br. Respondent Ellerbroek at

12. That 27% fee award the Court considered a “large attorney fee award.” As a result, by any measure of comparison this Court may use, a 764% fee is grossly unreasonable.

In reviewing this fee award, this Court should remember that the reason Appellant delayed in paying benefits to Respondent Ellerbroek is that it believed that he had acquiesced to Appellant withholding benefits because Respondent Ellerbroek’s counsel neglected to answer his phone or return his messages in a timely manner.

Additionally, while Respondent Ellerbroek’s counsel is correct that he did withdraw two of his time entries, February 7, 2018, and February 8, 2018, he offers no defense of the other specific time entries identified in Appellant’s brief. *See* Br. Appellant at 11. These identified entries are merely representative of the excessive number of hours Respondent Ellerbroek’s counsel claims to have worked on the penalty issue alone. However, as discussed in Appellant’s brief, many of these entries related to other issues in this case.

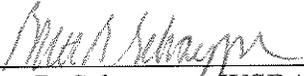
For these reasons, the attorney fee award granted to Respondent Ellerbroek is unreasonable and this Court should reverse.

CONCLUSION

For the reasons set forth in Appellant's opening brief and this reply, the employer asks this Court to REVERSE the Order of Judge Fennessy dated December 17, 2018.

Dated this 21st day of August 2019.

GRESS, CLARK, YOUNG & SCHOEPPER



Brett B. Schoepper, WSBA #42177
Of Attorneys for Appellant

GRESS, CLARK, YOUNG & SCHOEPPER

August 21, 2019 - 3:25 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 36563-8
Appellate Court Case Title: Leonard G. Ellerbroek v. CHS, Inc.
Superior Court Case Number: 16-2-03186-7

The following documents have been uploaded:

- 365638_Briefs_20190821152411D3187049_7509.pdf
This File Contains:
Briefs - Appellants Reply
The Original File Name was 20190821151923066.pdf

A copy of the uploaded files will be sent to:

- jerhert@aol.com
- jim@gressandclarklaw.com
- paulwl@atg.wa.gov

Comments:

Sender Name: Jennifer DeOgny - Email: jennifer@gressandclarklaw.com

Filing on Behalf of: Brett Schoepper - Email: brett@gressandclarklaw.com (Alternate Email:)

Address:
8705 SW Nimbus Avenue, Suite 240
Beaverton, OR, 97008
Phone: (971) 285-3525

Note: The Filing Id is 20190821152411D3187049