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NO. 365638-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

LEONARD ELLERBROEK and
DEPARTMENT OF LABOR AND INDUSTRIES

Respondents.

v.

CHS, INC.,

Appellant,

BRIEF OF RESPONDENT
DEPARTMENT OF LABOR & INDUSTRIES

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Appendix

Appendix A: RCW 51.52.050

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 on the date” that the Department of Labor and Industries issues an order requiring payment in RCW 51.52.050(2)(b), as this Court recently confirmed in *Masco Corp. v. Suarez*, 7 Wn. App. 2d 342, 433 P.3d 824, 830, *review denied*, 441 P.3d 1194 (2019). The Legislature mandates penalties for self-insured employers that unreasonably delay payment, even if they have appealed the benefit order. Only if the Board of Industrial Insurance Appeals orders a stay pending appeal of the benefit order can a self-insurer delay payment.

CHS, Inc. received no stay but did not pay after the Department’s order to pay benefits to Leonard Ellerbroek. Failing to pay benefits when due is unreasonable, so the Department correctly issued a penalty. Though the Department reconsidered its benefit order 65 days after issuance, that does not affect the analysis, as CHS failed to comply to pay Ellerbroek during those 65 days. This Court should apply the plain language of RCW 51.52.050(2)(b) as affirmed by *Suarez*—a case directly on point that CHS fails to cite—and affirm the penalty.

II. 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. CHS paid benefits 102 days after the Department’s order, and the Board never issued a stay. Did the Department correctly issue a penalty because CHS’s 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?

III. STATEMENT OF THE CASE

A. The Department Ordered CHS to Pay Time-Loss Compensation Benefits to Ellerbroek, but CHS Did Not Pay the Benefits after the Order

In 2013, Ellerbroek worked for CHS, a self-insured employer, delivering propane to customers. AR Ellerbroek 51-52, 68.¹ His work required pumping propane through a hose attached to the truck. AR Ellerbroek 52-53. Because CHS self-insures, the company must directly

¹ 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. Transcripts that do not consist of witness testimony and that have no page number applied by the Board are cited as “Tr.” followed by the hearing date.

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).

On March 27, 2013, Ellerbroek crushed his left thumb at work while reeling the hose back into his truck. AR Ellerbroek 68-69, 73, 137. He filed a workers' compensation claim, which was allowed. *See* AR Ellerbroek 73; AR Steeves 78-79. CHS paid for medical treatment and time-loss compensation benefits. AR Steeves 79-80. 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).

On October 8, 2014, CHS stopped paying time loss benefits to Ellerbroek because his attending physician did not provide objective findings to support work restrictions. AR Steeves 79-80, 109.

1. On February 2, the Department ordered CHS to pay benefits, but CHS did not pay

On February 2, 2015, the Department ordered CHS to reinstate time loss benefits beginning October 9, 2014. Ex 10. A chart note in January 2015 from Ellerbroek's attending physician had stated that he

could not return to his job of injury. Ex 12 at 3, 7, 14. As of the date of the Department's order, CHS had not paid time loss benefits between October 9, 2014 and February 2, 2015. Ex 12 at 4, 14; AR Steeves 101.

Despite the February 2, 2015 order, CHS did not pay benefits until May 15, which is 102 days after the original February 2 benefit order. AR Steeves 91, 112.

2. CHS appealed the February 2 order but did not pay while the Department considered its protest or the Board considered its stay motion

During those 102 days, CHS exercised its right to appeal the Department's February 2 order. *See* RCW 51.52.050, .060. On February 4, CHS protested the order, and the Department affirmed it in a February 24 order. Ex 11; AR Steeves 81. On March 5, CHS appealed the February 24 order to the Board and moved to stay payment of benefits. AR Steeves 83.

While the stay was pending at the Board, CHS did not pay benefits to Ellerbroek. AR Steeves 91, 112. On March 12, CHS's attorney left a voicemail with Ellerbroek's attorney stating that if the Board denied CHS's stay motion, CHS would pay the time loss benefits. Tr. (2/4/16) at 5-7. In the voicemail, CHS's attorney asked Ellerbroek's attorney to contact him if he had any concerns. Tr. (2/4/16) at 5-7. Ellerbroek's attorney did not return the call until April 30. Tr. (2/4/16) at 5-7.

On or about March 17, CHS's claims manager spoke to a Department employee and, based on that conversation, believed that the Department planned to "reassume jurisdiction." AR Steeves 89-90. When there is an appeal pending at the Board, the Department can reassume jurisdiction of the order to decide whether to modify, reverse, or change an order. RCW 51.52.060(4)(a).

The Department did not reassume jurisdiction until April 8.² AR 70; AR Steeves 90. On that date, the Department issued an order stating

² In its brief, CHS states incorrectly that the Department "reassumed jurisdiction" on March 17 instead of April 8. AB 2. To support this fact, CHS cites the testimony of its claims manager, Paige Steeves, about her March 17 conversation with a Department employee, but that testimony establishes only that she understood after her conversation that the Department would reassume jurisdiction and that it did so on April 8:

Q: Ms. Steeves, did you have a, a subsequent communication with my office on March 17, 2015, regarding contact with a Department representative, Brian Malcom?

A: Yes

Q: What was your understanding as to whether or not the Department of Labor and Industries was going to be reassuming jurisdiction on the appeal?

A: I understood that they were going to reassume jurisdiction.

Q: And did you receive, in fact, a determination from the Department of Labor and Industries dated April 8, 2015?

A: Yes, I did.

Q: What was that determination?

A: The determination was placing the 2/24/15 order in abeyance, and also reassuming jurisdiction.

AR Steeves 89-90.

that it was holding the February 24 order in abeyance. AR 7; AR Steeves 90. Generally, when the Department reassumes jurisdiction of a pending Board appeal, the Board issues an order sending the appeal back to the Department stating that it no longer has jurisdiction. Because that appeal involved a different docket number at the Board, that order is not in the record before this Court. It is also not in the record whether the Board ruled on the stay before it sent the case back to the Department.

On May 6, the Department affirmed its February 24 order. AR 78. On May 14, CHS appealed that order and moved for a stay. AR 80-84. On May 15, it paid the benefits to Ellerbroek while its stay motion was pending, 102 days after the original February 2 order. AR Steeves 91, 112. On July 28, the Board denied CHS's motion to stay. AR 132.

B. The Department Ordered CHS to Pay Ellerbroek a \$2,955 Penalty for Unreasonably Delaying the Payment of Benefits

On March 23, 2015, Ellerbroek's attorney asked the Department to consider a penalty for CHS for unreasonably delaying the benefit payment. AR McBride 179-80. The Department reviewed the penalty request, seeking further information from the employer. AR McBride 180-81. The Department has 30 days to act on a penalty request. AR McBride 180.

On April 21, 2015, the Department issued a penalty order determining that CHS had unreasonably delayed the payment of benefits between October 9, 2014 and February 2, 2015. AR 70, 119; AR McBride 184-88, 202-04, 209. The Department ordered CHS to pay a \$2,955.56 penalty to Ellerbroek. AR 70. After CHS protested, the Department affirmed the penalty order in May 2015. AR 70, 121.

C. The Superior Court Affirmed the Penalty, Reversing the Board’s Decision That CHS Could Rely on Doubt to Avoid Payment

CHS appealed the Department’s penalty order to the Board. AR 122-127. The Board consolidated that appeal with CHS’s appeal of the Department’s May 6 order that ordered CHS to pay benefits. AR 52, 103. The Board heard evidence about both issues, but the only issue in this appeal is the penalty order.³

The Board reversed the penalty, relying on the “genuine doubt” test it established in its *Madrid* decision from 1987. AR 68, 70 (citing *Madrid*, 1987 WL 61383 at *3). That case holds that a self-insured employer should not be penalized for the failure to timely pay benefits if it

³ Addressing the May 6 order, the Board concluded that Ellerbroek was not entitled to time loss between October 9, 2014 and May 6, 2015. AR 3, 70-71. Ellerbroek and the Department appealed that decision to superior court, but dismissed the appeal. The Department has filed a supplemental designation of clerk’s papers that contains the order dismissing the appeal. So there is a final determination that Ellerbroek was not entitled to time loss between October 9, 2014 and May 6, 2015.

“had a genuine doubt from a medical or legal standpoint as to the liability for benefits.” AR 68 (citing *Madrid*, 1987 WL 61383 at *3). The Board concluded that because CHS “had a genuine doubt” about whether Ellerbroek was entitled to benefits, CHS did not unreasonably delay payment. AR 3, 70-71.

Ellerbroek and the Department appealed to superior court. The Department filed a CR 50 motion on the penalty issue, arguing that benefits were due immediately and the Board was wrong to rely on *Madrid*. CP 4-12. The superior court reversed the Board and affirmed the penalty. CP 191-195.

CHS now appeals.

IV. 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.

V. 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 protest the Department's order or 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.⁴

Here, CHS did not pay Ellerbroek after the Department ordered it to. CHS did not pay Ellerbroek while its protest was pending with the Department from February 2 to February 24. CHS waited to appeal for

⁴ 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.

about two weeks and did not pay while it considered whether to appeal. After it appealed and moved for a stay, CHS did not pay while its stay was pending at the Board for approximately a month. It paid only after a second Board appeal, 102 days after the original order.

CHS failed to comply with its statutory duty to pay benefits on the date of the Department's order. RCW 51.52.050(2)(b). As the Court of Appeals recently held in a case directly on point that CHS neglects to cite, benefits are payable to a worker "up until the time of a Board order" staying benefits, including while the stay motion is pending. *Suarez*, 7 Wn. App. 2d at 352. Because CHS failed to pay benefits while exercising its appeal rights even though the Board granted no stay, its delay was unreasonable and the penalty is correct. Hoping for a favorable stay ruling does not excuse a self-insurer's delay under the statute. This Court should affirm the penalty.

A. The Legislature Requires Immediate Payment or a Stay to Avoid a Penalty for Unreasonable Delay, and CHS Did Not Pay After the Department's Order 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, 1st 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, 11-12, 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.”⁵ RCW 51.52.050(2)(b); Laws of 2008, ch. 280, § 1. So when the Department issues an order, the benefits are due. *Suarez*, 7 Wn. App. 2d at 352 (“We hold that under RCW 51.52.050(2)(b), payments are due when ordered by L&I.”)

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 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).⁶

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

⁵ Appendix A includes the full text of RCW 51.52.050.

⁶ 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.*

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 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. CHS did not pay after the Department's order, which was unreasonable under RCW 51.52.050(2)(b)

CHS's duty to pay benefits arose on February 2, 2015, the date of the Department's order. RCW 51.52.050(2)(b). CHS did not pay for 102 days. It did not pay while its protest was pending at Department or while it waited for a ruling on its stay motion at the Board. RCW 51.48.017; RCW 51.52.050(2)(b). The Department correctly issued a penalty.

B. This Court Should Follow *Suarez* and RCW 51.52.050(2)(b)'s Plain Language That A Pending Stay Motion Is Not a Legal Basis for Nonpayment Under RCW 51.52.050(2)(b)

The statute and a recent Court of Appeals decision that CHS does not cite resolve this case against CHS. RCW 51.52.050(2)(b); *Suarez*, 7 Wn. App. 2d at 352. The Court should affirm based on this legal authority.

1. The statute’s plain language requires payment when the Department orders payment, and a pending stay motion does not excuse nonpayment

RCW 51.52.050(2)(b) excuses nonpayment only if the Board orders a stay. CHS argues that the superior court erred when it concluded that CHS had an obligation to pay benefits before the Board ruled on its stay. AB 1. But a pending motion is not a stay. The statute’s plain language requires a stay, not a pending motion, and CHS concedes that this case turns on the statute’s plain language. AB 4. Because CHS justified its delay on untenable legal basis, its delay was unreasonable.

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.⁷

2. *Suarez* is directly on point and rejects CHS’s arguments here

Division II confirmed this analysis in *Suarez*. There, the employer argued that it could wait for the Board’s ruling on a stay motion before it had to pay. The court rejected this argument based on the statute’s language: “Based on RCW 51.52.050(2)(b)’s plain language, we conclude that L&I-ordered benefits to Suarez must have been paid while Masco’s motion for a stay of benefits was pending before the Board.” *Suarez*, 7 Wn. App. 2d at 350. And the Court affirmed that when the Department orders payment, the employer has to pay up until the time of the Board’s order granting a stay:

[T]he plain language of RCW 51.52.050(2)(b) clearly states that if benefits are ordered, the benefits “shall not be stayed” pending a final decision on the merits unless ordered by the board.” Only the Board can order a stay of the payment of benefits. In other words, *benefits are*

⁷ 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).

payable up until the time of a Board order. Thus, benefits are payable while the Board is considering a motion to stay benefits. The meaning of the statute is clear.

Suarez, 7 Wn. App. 2d at 352 (emphasis added).

Applying the statute's plain language and *Suarez* here, CHS did not comply with its duty to pay, and so its delay was unreasonable.

Benefits are payable "up until the time of a Board order" staying benefits.

Suarez, 7 Wn. App. 2d at 352. Here, CHS had a duty to pay during each of the following periods because there was no stay order excusing nonpayment:

- February 2 to February 24 while the Department considered CHS's protest;
- February 24 to March 5 while CHS considered whether to appeal;
- March 5 to April 8 while CHS was waiting for a ruling on its stay motion; and
- May 6 to May 14 while CHS considered whether to appeal the Department's May 6 order affirming the earlier benefit order.

The Department agrees that CHS had no duty to pay while the Department reconsidered its order during the period of April 8 to May 6. But CHS did not pay during any of the other periods when it had a duty to do so. As *Suarez* made clear, benefits are payable "up until the time of a Board order" staying benefits, which includes all the periods above. *Suarez*, 7

Wn. App. 2d at 352. And *Suarez* is explicit that “benefits are payable while the Board is considering a motion to stay.” *Suarez*, 7 Wn. App. 2d at 352. CHS simply ignores the controlling statute and *Suarez*.

3. An employer is not excused from payment if it protests or appeals the benefit award

CHS tries to divert the Court’s attention by focusing on the Department’s April 8 order to reconsider the benefit award, but it ignores that it did not pay for over two months before the April 8 decision. AB 4 (citing AR 202). An over two-month delay is unreasonable when benefits are due on the date of the Department’s order “up until the time of a Board order” staying benefits. RCW 51.52.050(2)(b); *Suarez*, 7 Wn. App. 2d at 352.

An employer is not excused from payment just because it exercises its protest or appeal rights. That is what the employer did in *Suarez*, but the employer still must pay while the protest and appeal are being addressed. CHS relies on a single Board case to suggest that its duty to pay was relieved by its February 4 protest. It argues that when there is a protest, there is an automatic abeyance suspending the obligation to pay under *Gerald Wynkoop*, No. 34,133, 1970 WL 104558 (Wash. Bd. Indus. Ins. App. July 9, 1970). AB 4.

CHS is wrong that the *Gerald Wynkoop* case relieved it of its obligation to pay benefits when it protested the order on February 4. *Wynkoop* did not address RCW 51.52.050(2)(b), the statute that creates an employer's immediate obligation to pay. The Legislature enacted that statute in 2008, decades after *Wynkoop*. The statute's plain language controls and, in any case, *Wynkoop* is not inconsistent. *Wynkoop* affirmed the principle that when a party timely requests reconsideration, the Department has authority to enter a further appealable order without having to issue an order stating that the initial order was held in abeyance. *Wynkoop*, 1970 WL 104558, at *4. That is what occurred here—the Department issued an order on February 24 affirming the February 2 order without issuing an order of abeyance in the meantime. This does not mean that CHS's obligation to pay was "suspend[ed]," contrary to its arguments. AB 4.

The Department's interpretation of the 2008 amendment gives meaning to the statute and follows its plain language. CHS's reading of the statute does not follow the plain language. It asks the Court to read the statute to "require payment of benefits immediately unless a timely appeal and motion for stay of benefits is filed." AB 6. But that is not what the statute says.

4. The Legislature's system balances competing interests

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 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 CHS 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.

CHS addresses fairness concerns (AB 4), arguing that it is not fair for the employer to have to pay immediately when the Department orders

payment. 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 CHS's reliance on a single witness who testified before a Senate committee to support its interpretation. AB 4; *see also* CP 24. Because the statute is not ambiguous, it is not appropriate to resort to legislative 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 CHS 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 (1981); *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 self-insured an employer must be solvent. RCW 51.14.020.

CHS’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 CHS’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.

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. This Court should clarify 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 it did in this case. AR 3, 68-70.⁸ 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.⁹

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

⁸ 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).

⁹ At the administrative hearing, the Department’s penalty adjudicator testified that, consistent with *Madrid*, she considers whether a self-insured employer had a legitimate doubt about paying benefits when deciding whether to issue a penalty. AR McBride 203. 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).

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. CHS is incorrect when it argues that there was “legal ambiguity” at the time the penalty was assessed. AB 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.

CHS is incorrect when it argues that it had legal doubt because the Board ruled in its favor or there was “no controlling case law.” AB 6. That the Board applied the statute wrong does not create legal doubt. Nor is controlling case law necessary where the statute is clear. CHS is also wrong that the “area of law was in flux” because the payment order was issued two weeks after the regulation. The statute requiring payment had been in effect since 2008.

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 more sure 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.

The court in *Suarez* declined to abandon the *Madrid* test, which is also cited in *Taylor v. Nalley's Fine Foods*, 119 Wn. App. 919, 926, 83 P.3d 1018 (2004). As the court explained:

While we agree that the plain language of RCW 51.52.050(2)(b) precludes refusing to pay benefits based on legal or medical doubt here, there may be other circumstances where a delay occurs and this test would be instructive.

Suarez, 7 Wn. App. 2d 352 n. 6. The test would still be instructive in cases where the Department has not issued an order and the Board needs to determine whether there is an unreasonable delay. But where the Department has issued an order, benefits are due on the date of the order under RCW 51.52.050(2)(b). Not paying when benefits are due is unreasonable.

3. Although the Department does not concede that the *Madrid* test applies, if the test applies, CHS had no legal doubt

Madrid no longer applies after the Legislature's 2008 amendment. But if this Court disagrees, CHS failed to establish a "genuine doubt from a medical or legal standpoint" that it owed the benefits to Ellerbroek.

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)(b). So CHS could not establish a genuine doubt from a legal standpoint that it

owed benefits on the date of the Department's order. CHS's argument that it had genuine doubt because no case law interprets RCW 51.52.050(2)(b) misses the point. AB 7. 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.

D. The Department Has the Authority to Issue Penalties if the Facts Warrant, so Equitable Estoppel Does Not Prevent the Penalty

CHS's estoppel argument is misguided. AB 8-9. No matter what actions the parties in a workers' compensation case take, the Department has an independent duty to ensure that self-insurers comply with the Industrial Insurance Act and it must issue a penalty to self-insured employers that unreasonably delay payment. RCW 51.48.017 (stating that penalty "shall be paid" by self-insurer that unreasonably delays or refuses to pay benefits). Parties cannot waive that duty on the Department's behalf through their action or inaction. That Ellerbroek's counsel did not return a voicemail immediately has no bearing on whether the Department can issue a penalty. *See* AB 8-9.

CHS cannot establish equitable estoppel, even addressing the failure to return the voicemail. The elements of equitable estoppel are: (1) a party's admission, statement or act inconsistent with its later claim; (2)

action by another party in reliance on the first party's act, statement or admission; and (3) injury that would result to the relying party from allowing the first party to contradict or repudiate the prior act, statement or admission. *Kramarevsky v. Dep't of Soc. & Health Servs.*, 122 Wn.2d 738, 743, 863 P.2d 535 (1993). CHS must establish all three elements. *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 363, 103 P.3d 773 (2004). CHS's counsel's voicemail that his client was not going to pay unless the stay was denied contradicts the law. *See* RCW 51.52.050(2)(b). There was no need to return a phone call stating that a party plans to act unlawfully. A party cannot acquiesce to an unlawful act. Estoppel does not apply.

VI. CONCLUSION

Under RCW 51.52.050(2)(b), CHS 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 affirm.¹⁰

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¹⁰ The Department takes no position on whether the amount of the attorney fees that the superior court awarded to Ellerbroek's counsel was reasonable. *See* AB 10-14.

RESPECTFULLY SUBMITTED this 22nd day of July, 2019.

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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. 36563-8

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

CHS, INC.,

Appellant,

v.

LEONARD ELLERBROEK AND
DEPARTMENT OF LABOR AND
INDUSTRIES,

Respondents.

CERTIFICATE OF
SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, she caused to be served the DEPARTMENT'S BRIEF OF RESPONDENT and this CERTIFICATE OF SERVICE in the below described manner:

E-filing via Washington State Appellate Courts Portal:

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RESPECTFULLY SUBMITTED this 22nd , day of June, 2019.


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