No. 90071-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

DELLEN WOOD PRODUCTS, INC.,

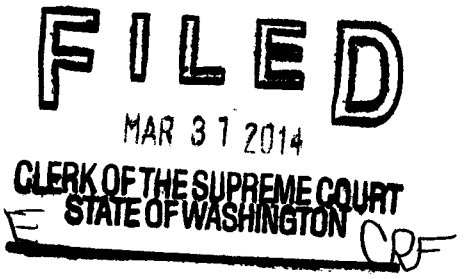
Petitioner,

vs.

WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

PETITION FOR REVIEW



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IDENTITY OF PETITIONER

The Petitioner is Dellen Wood Products, Inc., a Washington corporation.

COURT OF APPEALS DECISION

The Petitioner seeks review of the decision of the Court of Appeals of the State of Washington, Division II, No. 43636-1-II, which affirmed decisions forfeiting Dellen Wood Products, Inc.'s (Dellen's) interest in an Industrial Insurance surety fund administered by the Washington State Department of Labor and Industries (L&I). That opinion was filed on February 25, 2014. No motion for reconsideration was filed.

ISSUES PRESENTED FOR REVIEW

When Dellen Wood Products, Inc. stopped maintaining any employees in 2002, it sent the Department of Labor and Industries a letter – at L&I's instructions – that it wished to "default" on its self-insurance program in order to have L&I administer the surety fund for its few remaining claims. Despite L&I's repeated representations that Dellen could receive a refund of the monies remaining after claims were paid in full, L&I refused the refund over seven years later, claiming Dellen was never entitled to it based on its failure to administer the fund, file reports, and pay administrative expenses, although all claims were properly paid. In a matter of first impression in Washington, did Dellen forfeit all right to the $500,000 surety fund it provided to L&I because it was in "default"?

L&I did not give Dellen any notice, in accordance with its practices or the applicable statute, that Dellen was in default on claims, or was delinquent in failing to file quarterly or annual reports, or in paying administrative assessments. When Dellen requested a refund in 2008 of its surety fund, for the first time L&I changed its position and asserted that Dellen had been in default since 2002, and had forfeited its right to the fund. Was Dellen denied its due process when L&I failed to give it notice

or opportunity to comply with claimed defaults as they were allegedly occurring in 2002?

STATEMENT OF THE CASE

A. On L&I's instruction, Dellen sent it a letter stating that it had elected to "default" on its self-insurance program so that L&I could administer the fund and few remaining claims.

Dellen Wood Products, Inc., operated a wood processing and manufacturing plant in Spokane, Washington. (RP 9-10; AR 94) Beginning in 1986, Dellen operated as a certified self-insured workers' compensation employer under RCW ch. 51.14 and Department of Labor and Industries regulations (WAC 296-15). (RP 9-10, 78; Ex. 17) In order to qualify as a self-insured employer, Dellen provided a cash surety to L&I in order to guarantee payment of all worker compensation claims and paid various assessments to L&I. (RP 78-79; Ex. 18; AR 195)

At the end of 2001, Dellen ceased its operations and sold its manufacturing equipment. (RP 10) As a result, Dellen had no employees and ceased being an employer effective December 31, 2001. (FF 1.2, CP 87[1]; RP 10) In order to ensure it complied with the procedures for winding-up its self-insurance program, Dellen's CFO, Gene Olsen, telephoned L&I's Self-Insurance Certification and Compliance Manager,

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[1] Cites to FF or CL are to the Findings of Fact and Conclusions of Law of the Thurston County Superior Court; cites to AR are to the Administrative Record.

Larry Wilkinson. (RP 7-8, 11, 15-16, 52) Olsen asked Wilkinson whether L&I could take over administration of Dellen's claims after Dellen ceased having employees. (RP 16, 57-58) Wilkinson told Olsen that "the only way that the Department could take over the claims was if the employer defaulted on that obligation." (RP 58) On Wilkinson's instruction, Olsen sent a letter to L&I on January 18, 2002, that stated: "Per our discussion...Dellen Wood Products, Inc., elects to default .... Please advise what the procedures are to complete this request." (FF 1.3, CP 87; Ex. 2[2]; RP 19, 43, 58; AR 111) Wilkinson did not inform Olsen that by "defaulting" Dellen would forfeit all right and interest to any surety provided by Dellen. (RP 46)

Dellen understood that it remained responsible for any claims filed by its former employees for injuries sustained prior to December 31, 2001 and fully intended to "make whatever payments were required." (RP 44) In order to ensure the payment of these claims, Dellen provided L&I a $422,853.81 surety after confirming with Wilkinson that this amount

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[2] Ex. 2 is erroneously dated January 18, 2001. The letter was sent on January 18, 2002. (RP 17-18)

would cover Dellen's claims. (RP 19; Ex. 3 at 1 (reflecting $422,853.81 surety deposit); Ex. 9)[3]

In January 2002, Wilkinson told Dellen employee Jeremy Dunlap that L&I would maintain the surety for 11 years after the last employee claim closed. (Ex. 1; RP 61-62) Wilkinson's personal file notes of this discussion memorialized Wilkinson's representation that Dunlap asked how long L&I would keep the surety fund, and he responded that it could be maintained for 11 years after the last claim closed. (Ex. 1) As a result, Dellen believed that it could obtain a refund of what remained in the surety after payment of all claims and applicable assessments, and Olsen regularly called Wilkinson to obtain the surety fund balance and the amount of interest it had earned. (RP 19, 27, 32, 48, 74; Exs, 3, 20) During a 2005 Chapter 11 bankruptcy reorganization by Dellen, Wilkinson filed a declaration again confirming that a refund could be available eleven years after Dellen was no longer required to file quarterly reports. (Ex. 13 at 2-3) L&I never gave Dellen any indication that it would not be entitled to a return of its surety. (RP 19, 46)

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[3] L&I received an additional $98,562.44 deposit into the surety in June 2005 when one of Dellen's former employees reimbursed L&I for benefits received after recovering against an equipment manufacturer on her third-party claim. (RP 24-25; Ex. 3 at 1) Although Dellen had directly paid a substantial portion of the employee's benefits and was entitled to a pro rata share of the reimbursement, L&I required the former employee to pay L&I the entire reimbursement amount. (RP 24-25; Ex. 9)

As of January 2002, Dellen had paid all benefits to employees currently due and L&I had not sent Dellen notice that it had failed to pay any amounts due. (FF 1.15, CP 88; RP 19-20, 22, 55-57, 60) And both Wilkinson and Olsen believed that Dellen was no longer required to file reports after Dellen sent its January 2002 letter to L&I. (RP 33-34, 65, 73) From 2002 to 2005, L&I paid claims to Dellen employees and reimbursed itself from the surety provided by Dellen. (RP 26-27, 76, 93; Ex. 3) During this period, L&I never notified Dellen that it had failed to pay a required assessment or failed to file a required report. (RP 22, 49-51, 56, 72-73, 85, 93-95) No Dellen employees filed new claims after December 31, 2001 and claims were closed by the end of 2004. (RP 29-31, 73-74; Ex. 3) Since Dellen ended its self-insurance program, Dellen's surety has provided full compensation for all Dellen employees. (RP 93)

B. Dellen sought a refund of the remaining surety amount, as represented by L&I.

On June 19, 2008, seven years after its last employee claim was filed, Dellen requested the return of all but $20,000 of its surety fund.

In response, on July 28, 2008, Wilkinson sent Dellen a letter stating that when Dellen elected to "default" on its self-insurance program on January 18, 2002, it forfeited all interest in the surety fund. (FF 1.1.1, CP 87; AR 51-52; RP 55; Ex. 7) This letter sent nearly seven years after

the alleged default, informed Dellen for the first time of L&I's position that Dellen had forfeited all interest in the surety fund. (RP 46, 63) Wilkinson acknowledged that "this is not the response you anticipated" (Ex. 7 at 2) and thereafter testified that he changed his position that the fund would go back to Dellen. (RP 1-62)

C. The Board of Industrial Insurance Appeals recognized the need for a hearing to further develop testing on the unique issue of whether Dellen was "in default."

On September 19, 2008, L&I issued an order confirming its letter decision. (FF 1.1.1, CP 87; AR 57; Ex. 8) An Industrial Insurance Appeals judge issued a proposed Declaration and Order (PD&O) affirming L&I's Order. However, the Board of Industrial Insurance Appeals granted Dellen's petition for review, reversed the PD&O, and remanded the matter for hearing on the issue of Dellen's "default," recognizing that there existed "an important question of fact" on whether Dellen could be declared in default, based on WAC 296-15-125(1) which defines a default as an occurrence when a "self insured employer" no longer provides benefits. (AR 139-140) Dellen was no longer an employer, nor had it failed to pay any benefits. Irrespective of that, after testimony, the Board affirmed L&I's Order, despite contradictory findings

on when the alleged default occurred.[4] (CP 87; CP 15-17; AR 2-4) Dellen timely appealed the Board's order to the Thurston County Superior Court. (FF 1.1.5, CP 87)

D. The trial court affirmed L&I's order and found that Dellen had "defaulted" on its self-insurance obligations in January 2002 based on intended "future" conduct, and acts which were not due at that time.

The trial court similarly affirmed the Board's order, holding that Dellen's actions constituted a "default" on its self-insurance obligations. (FF 1.8, CP 88; CL 2.2, CP 88) Although Dellen was not delinquent on any benefit, assessment, or contribution as of January 18, 2002, the trial court found that Dellen "intended to default on payments coming due in the future." (FF 1.15, CP 88; CL 2.2, CP 88) The trial court further found that since January 18, 2002, Dellen has not filed annual or quarterly reports as required by RCW Title 51 and L&I regulations, or paid any assessments. (FF 1.647, CP 88) The trial court basically found that the default for failing to file reports or pay assessments happened anticipatorily, before they were due. According to the trial court, because Dellen "defaulted," it lost all property interest in the surety fund. (FF 1.10, CP 88; CL 2.3, CP 88) The trial court further found that Dellen had the

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[4] L&I's first notice date, September 19, 2008, states that Dellen defaulted on January 18, 2001 (AR 57; Ex. 8) PD&O found Dellen had defaulted "by March 1, 2002." (CP 87; CP 15-17)

appropriate notice and opportunity to be heard during its appeals before the Board and thus L&I did not violate Dellen's due process rights. (FF 1.9, 1.11, CP 88; CL 2.6, CP 88)

E. The Court of Appeals similarly affirmed the "default," recognizing that the definition of "default" in this context was a matter of first impression.

The Court of Appeals noted that it was an issue of "first impression" as to whether a "default" under Title 51 was limited to a failure to pay workers' compensation benefits, or included **any** failure to satisfy any legal obligations under the Act. Dellen Wood Products, Inc. v. Washington State Department of Labor and Industries, ___ Wn.App. ____, 319 P.3d 847 (2014) (App. 1) The Court of Appeals concluded that Dellen's turnover of administration to L&I, its failure to file annual and quarterly reports, or pay assessments constituted a default. Id. It also found that no due process rights were violated because Dellen had "plain" notice of the statutory scheme, which deprived it of the right to the fund and thus any notice. Id.

ARGUMENT

A petition for review should be accepted by the Supreme Court if there is a significant question of law under the Constitution, or if the petition involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b). In this instance, the

Court of Appeals recognized that this matter is of "first impression," and would determine whether and how the Department of Labor and Industries can seize hundreds of thousands of dollars in a surety fund from a self-insured, former employer. The Supreme Court most often accepts review of decisions which will determine matters of first impression for all Washington courts. See e.g., State v. Olsen, 92 Wn.2d 134, 135, 594 P.2d 1337 (1979) (petition for review granted "upon a showing that the facts of the case present a question of first impression in this state"). This petition also asserts both lack of due process under the Washington Constitution and a significant error of law by the Court of Appeals that would require a former employer to forfeit a significant amount of money to the State. Based on the constitutional and legal issues dramatically impacting all state employers, the Supreme Court should accept review of this matter.

A. This is a matter of first impression, and the Court of Appeals' incorrect interpretation of what constitutes a "default" under the Industrial Insurance Act entitling the State to take a half a million dollar surety fund impacts all self-insurers in the State.

This matter revolves around the definition of a "default" under the Industrial Insurance Act by an employer who seeks to have the State administer its self-insured surety fund for workers' compensation claims after the employer ceases having employees. It is undisputed that the term "default" is not defined in the statute, and the only discussion of an

employer default indicates it "occurs when a self-insured employer no longer provides benefits to its injured workers," which did not occur here. See, WAC 296-15-125(1).

The Court of Appeals made an error of law, and an illogical and contradictory legal analysis of the central issue: the default of the former employer. The trial court, as well as the Court of Appeals, strained to find Dellen in default for acts that L&I witnesses testified were not due at the time of the undeclared default, and ignored the L&I representations made to Dellen regarding its obligations and the right to refund throughout the process.

1. The Court of Appeals improperly declared Dellen in default for acts about which there was extensive contradictory testimony and applicable law.

The Court of Appeals concluded that the undeclared forfeiture of Dellen's surety fund was justified by the former employer's "default" by failure to (a) make quarterly reports or annual reports which first came due no earlier than March 2002, and (b) pay an administrative assessment due March 31, 2002. The Court of Appeals was in essence affirming the superior court findings of default that allegedly occurred in January 2002, three months **before** these alleged acts constituting default.

However, no applicable statute or regulation defines "default" as a failure to file reports, and L&I never provided Dellen notice for failure to

file a report. See, WAC 296-15-181; WAC 296-15-121(1); see also, WAC 296-15-125; Department of L&I v. Metro Hauling, Inc., 48 Wn.App. 214, 220, 221, 738 P.2d 1063 (1987) ("the Legislature intended the word "default" to mean any failure to pay a sum due..."). It does not include failure to file a report. In fact, Wilkinson also testified that Dellen did not owe the filing of reports subsequent to January 2002. Dellen did not file reports because Wilkinson agreed with Olsen that Dellen should not do so. (RP 33-34, 65, 73)

Similarly, no portion of the statute defines default as a failure to pay an assessment. Wilkinson had testified that delinquent administrative assessments are first met with a telephone notice, then a written notice. (AR 56, 85, 95) A "self-insurer is determined to have defaulted...if the self-insurer does not respond...to the Department's contact.) WAC 296-15-125(2). The Court of Appeals ignored the lack of such required notice when it declared Dellen in default.

When winding up its self-insurance program Dellen intended to pay whatever amounts were necessary, including assessments. (RP 44) L&I could have paid itself all applicable assessments from the surety, but as a matter of policy L&I chose not to charge those assessments to the surety. (RP 99) And in fact, two of the alleged unpaid assessments were no longer chargeable to Dellen after it ceased its operations because they

were based on worker hours. See, WAC 296-15-221(4)(a)(ii) (1999); (RP 83). And as noted, L&I's opinion on when Dellen's default occurred shifted in time from January to March, and is apparently an "anticipatory" event in which the State seized the fund in January, for events that Dellen would not have performed in the future.

As a result, the declaration of default for these administrative obligations so significantly broadens L&I's abilities to declare even future defaults, and seize former employer's funds that review by this Court is critical.

2. The Court of Appeals misunderstood the impact of L&I's false representations, and change in position regarding the alleged "default."

Wilkinson's personal notes of his conversation with Jeremy Dunlap prior to Dellen's "default" letter of January 18, 2002, memorialized Wilkinson's representation that L&I would only maintain the fund for 11 years after the last claim was paid. (Ex. 1; AR 111; see, WAC 296-15-121(9)) Five years later, at the time of Dellen's successful Chapter 11 Plan of Reorganization, which specifically provided for distribution of the refunded surety fund, Wilkinson's Declaration indicates that Dellen could receive a refund. (Ex. 13, 2-3)

However, all of these representations were proved false when Wilkinson testified he changed his position on the refund; L&I finally

landed on the position that the fund was actually fully forfeited in January 2002. (RP 62, 84; Ex. 7)

It is simply impossible to interpret that Dellen was firmly in default in January of 2002, despite repeated representations that refund was possible, and when the alleged default was based on lack of reports and payments that were simply not due as of January 2002. Very clearly, the statutory scheme, L&I's conduct, and the illogical and contradictory nature of the evidence and rulings demand further review.

3. The incorrect analysis of the facts and the law here result in a significant forfeiture.

"Forfeitures are not favored; they should be enforced only when within both the letter and the spirit of the law." City of Walla Walla v. $401,333.44, 164 Wn. App. 236, 246, 1112, 262 P.3d 1239 (2011) (citing Bruett v. Real Prop. Known as 18328 11th Ave. N.E., 93 Wn. App. 290, 295, 968 P.2d 913 (1998)); see also, Jones Associates, Inc. v. Eastside Properties, Inc., 41 Wn. App. 462, 469, 704 P.2d 681 (1985) ("[F]orfeitures are not favored in law and are never enforced in equity unless the right thereto is so clear as to permit of no denial") (quotation omitted). Where a statute authorizes forfeiture the government must strictly adhere to statutory procedures. City of Walla Walla, 164 Wn. App. at 246, 11 12 (forfeiture "will be denied absent compliance with proper

forfeiture procedure"). The finding that Dellen defaulted under RCW 51.14.060 conflicts with both the letter and spirit of RCW ch. 51.14.

Self-insured employers must provide surety to L&I "in an amount reasonably sufficient in the director's discretion to insure payment of reasonably foreseeable compensation and assessments," RCW 51.14.020(2); WAC 296-15-021(6)-(7); WAC 296-15-121. The surety "so deposited shall be held by the director solely for the payment of compensation by the self-insurer and his or her assessments." RCW 51.14.020(2).

RCW ch. 51.14 provides that an employer may end its self-insurance program upon the employer's written notice to L&I stating its intention to terminate as a self-insured employer, or upon an employer's "default." See, RCW 51.14.050-.060; see also, RCW 51.14.030 (employer's self-insurance certification "shall remain in effect until withdrawn by the director or surrendered by the employer with the approval of the director"). Under RCW 51.14.050(1), "Any employer may at any time terminate his or her status as a self-insurer by giving the director written notice stating when, not less than thirty days thereafter, such termination shall be effective .." If an employer chooses to terminate its self-insured status in this manner it "must maintain money, securities, or surety bonds deemed sufficient in the director's discretion to cover the

entire liability of such employer for injuries or occupational diseases to his or her employees which occurred during the period of self-insurance....." RCW 51.14.050(2). By contrast, an employer who defaults on its obligations ends its status as a self-insured employer. RCW 51.14.060.

RCW ch. 51.14 does not define "default." However, WAC 296-15-181, adopted in 1999, states that a self-insurer defaults when it "stops paying workers' compensation benefits or assessments."[5] Under RCW 51.14.060, "The director may, in cases of default...after ten days notice by certified mail to the defaulting self-insurer...apply the money deposited in order to pay compensation and discharge the obligations of the defaulting self-insurer under this title." See also, WAC 296-15-125(2) (after learning of default "the department first corresponds with the self-insured employer to determine if the self-insurer will resume the provision of benefits. If the self-insurer does not respond to the department and resume the provision of benefits within ten days, the self-insured employer is determined to have defaulted.").

RCW 51.14.020(2) states that "[i]n the event of default the self-insurer loses all right and title to, any interest in, and any right to control the surety." The Legislature added this provision to the statute to prevent

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[5] In 2006, L&I adopted WAC 296-15-125 that states, "A default occurs when a self-insured employer no longer provides benefits to its injured workers."

bankrupt self-insured employers from recovering their surety in order to pay third-party creditors. See, Final Bill Report, SB 5668, (1995) ("Some bankrupt defaulting self-insurers have filed suit to obtain these sureties for the benefit of third-party creditors."); Laws of 1995, ch. 31, §1. The legislative history further notes that "[t]he rules adopted by the Department of Labor and Industries that allow return of the remaining security after all obligations are met will still apply." House Bill Report, SB 5668 (1995); see also, WAC 296-15-121(1)(c) (surety "will not be released by the department if the self insurer files a petition for dissolution or relief under bankruptcy laws").

L&I's regulations continue to allow L&I to release a surety to a former self-insured employer when all claims against the self-insured are closed and the self-insured employer has been released from quarterly reporting for at least ten years. WAC 296-15-121(9)(a). An employer may be released from quarterly reporting after it has had no claim activity for a full year. WAC 296-15-121(8)(b).

Contrary to the Court of Appeals ruling, Dellen did not commit any acts of default in failing to pay required claims. It is undisputed that all money paid to Dellen employees ultimately came from funds paid by Dellen and that L&I was fully reimbursed for all funds it paid to Dellen employees. (RP 93; Ex. 3) L&I has no need for the over $500,000

remaining surety balance because no new claims have been filed since 2001 and by L&I's own calculation no surety is required for future claims. (RP 25, 29-31, 37-39, 72-74; Ex. 3; see, RCW 51.14.020(2) (surety "so deposited shall be held by the director solely for the payment of compensation by the self-insurer and his or her assessments") (emphasis added); WAC 296-15-121(1) ("If a self insurer defaults on (stops payment of) benefits and assessments, the department will use its surety to cover these costs.") (emphasis added))

Allowing L&I to retain these excess funds would be especially unjust because at no point prior to July 28, 2008, did L&I explain the consequences of "default" or the alternative methods for ending one's self-insured status, or give Dellen any notice that it had "defaulted." (FF 1.12) Nor can Dellen have "defaulted" when L&I never informed it of any amount owed. See, Pearson Const. Corp. v. Intertherm, Inc., 18 Wn. App. 17, 20, 566 P.2d 575 (1977) ("[A] person must know what sum he owes before he can be held in default for not paying").

B. The lack of due process to declare a default before the State seizes $500,000 from a former self-insured employer is a matter of constitutional and public concern which the court should review.

"No person shall be deprived of life, liberty, or property, without due process of law." Wash. Const. Art. I, §3; U.S. Const. amend. XIV, §1.

L&I denied Dellen its fundamental right to due process of law by failing to notify Dellen for seven years of its position that Dellen had forfeited its $500,000 surety even though it knew that Dellen expected the return of its excess surety. This Court should review the conduct of the State here in altering its position and declaring that a citizen forfeited all rights to its property by its conduct in 2002.

"The essential requirements of procedural due process are notice and an opportunity for a hearing appropriate to the nature of the case." In re C.R.B., 62 Wn. App. 608, 614, 814 P.2d 1197 (1991). The opportunity for a hearing must be held "at a meaningful time and in a meaningful manner." City of Redmond v. Moore, 151 Wn.2d 664, 670, 91 P.3d 875 (2004). This almost always requires a pre-deprivation hearing. Mansour v. King County, 131 Wn.App., 255, 272, 128 P.3d 1241 (2006) (person must have time to respond to charges).

The Court of Appeals' assertion that Dellen had meaningful notice that it was in default by the "plainly stated" terms of RCW 51.14.020, and thus had no legitimate claim to the fund, is directly contrary to the rest of its opinion. The Court of Appeals acknowledges that what constitutes a default, in order to deprive an employer of its right to a refund, is a matter of "first impression"; it is not specifically defined in the relevant statutes.

The Court of Appeals even analyzed the law of other jurisdictions to establish its broad interpretation of default.

It is undisputed that a self-insured employer has the right to a return of the unused portion of its surety fund under certain circumstances, and thus has a legitimate interest for the purposes of necessitating due process. See, WAC 296-15-121(9). The issue here was whether Dellen was so entitled, which hinged on a never before established analysis of the term of "default." Moreover, that L&I considered Dellen in a state of "default" did not deprive Dellen of its property interest; rather, L&I's conclusion that Dellen forfeited its surety due to an alleged default deprived Dellen of its property and required notice. See, Speelman v. Bellingham/Whatcom County Hous. Authorities, 167 Wn.App. 624, 631, 273 P.3d 1035 (2012) ("procedural due process requires that an individual receive notice of the deprivation and an opportunity to be heard to guard against erroneous deprivation").

Moreover, the Court of Appeals' assertion that Dellen was not entitled to notice also ignores the conduct of the Department in changing its position on whether or not Dellen was entitled to the fund. The Department's representations that Dellen could receive a refund highlights the legitimate property interest Dellen had.

Once the potential claim to the fund is established, it is undisputed that L&I gave Dellen no notice that it had forfeited its $500,000 surety in 2002, when it claims the forfeiture occurred. Nor did L&I ever notify Dellen that it had failed to pay a required assessment or failed to file a required report. (FF 1.12, CP 88; FP 22, 49-51, 56, 72-73, 85, 93-95) The Court of Appeals' determination that Dellen had "notice" in 2005 when Wilkinson provided a declaration in the bankruptcy proceeding, or in 2008 when the refund was denied ignores the concept of "meaningful" timing of notice. See, Mansour, supra. L&I's change in position in 2008 was apparently retroactive to 2002 forward, and notice of this position in 2008 was meaningless to Dellen's ability to obtain Departmental direction, comply with the administrative requests, or remedy any alleged deficiencies. This is not the right to due process established by the Constitution.

CONCLUSION

For the foregoing reasons, the Supreme Court should accept review.

DATED this 27 day of March, 2014.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington as follows: That on March 27, 2014, I served the foregoing document by causing a true and correct copy of said document to be delivered to counsel named below via email service with consent, as follows:

Steve Vinyard	VIA REGULAR MAIL ☐
Department of Labor & Industries	**VIA EMAIL (with consent)** ☒
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DATED at Spokane, Washington, on March 27, 2014.

TABLE OF APPENDICES

Appendix 1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

DELLEN WOOD PRODUCTS, INC., Appellant, v. WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES, Respondent.	No. 43636-1-II PUBLISHED OPINION

HUNT, J. — Dellen Wood Products, Inc. (Dellen) appeals the superior court's affirmance of the Board of Industrial Insurance Appeals' (Board) decision that Dellen defaulted on its obligations as a self-insured employer and thereby lost its right to its surety funds. Dellen's first argument presents an issue of first impression: whether the superior court erred in construing "default" under the Industrial Insurance Act[1] to mean a self-insured employer's failure to satisfy its legal obligations under the Act, instead of ruling that "default" means only a self-insured employer's failure to pay workers' compensation benefits. Dellen also argues that the superior court erred in ruling that (1) Dellen "defaulted"[2] under the Act even though it intended to "terminate"[3] its self-insured employer obligations under the Act; and (2) the Washington State

[1] Title 51 RCW; RCW 51.14.020.

[2] Br. of Appellant at 20.

[3] Br. of Appellant at 22.

Department of Labor and Industries (Department) did not violate Dellen's due process rights[4] in retaining the excess surety funds.

We hold that as used in section RCW 51.14.020 of the Industrial Insurance Act, "default" means a self-insured employer's failure to satisfy any of its multiple legal obligations under the Act, not solely its failure to satisfy its single obligation to pay workers' compensation benefits. We further hold that substantial evidence supports the superior court's ruling that (1) Dellen defaulted as a self-insured employer when it stopped paying industrial insurance to its injured workers, ceased administering its injured workers' claims, turned over its claim files to the Department to administer, failed to file required reports, and failed to pay industrial insurance assessments; (2) Dellen has no right to recoup the remaining surety funds deposited with the Department; and (3) the Department did not violate Dellen's procedural due process rights because Dellen had (a) no property interest in the proceeds of its surety and (b) appropriate notice and an opportunity to be heard. We affirm.

FACTS

Beginning in 1986, Dellen Wood Products, Inc., operated as a self-insured employer under the Industrial Insurance Act; Dellen backed its obligation to pay its worker compensation claims directly to its injured employees[5] with a surety in an escrow account. In December 2001,

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[4] As we explain later, we do not address Dellen's equity argument, which it improperly raises for the first time in its reply brief.

[5] The Industrial Insurance Act allows a self-insured employer to provide workers' compensation benefits directly to its injured workers in the same manner that the Department would pay if the employer had instead paid insurance funds to the Department. To qualify as a self-insured employer under the Act (and to relieve itself from the normal obligation to pay industrial insurance funds to the Department), the employer must demonstrate that it has sufficient financial ability to pay its workers' compensation claims. RCW 51.14.020(1).

Dellen ceased operations, sold its manufacturing equipment, and terminated its employees. From January 2002 to December 31, 2005, Dellen continued some operations with "leased" employees. Administrative Record (AR) at 95.

In January 2002, Dellen's Chief Financial Officer, Eugene Olsen, contacted Larry Wilkinson, the Department's self-insured certification manager, asking how the Department could take over the administration of Dellen's ongoing injured employee claims. Wilkinson told Olsen that the Department would take over administration of the claims only if Dellen "defaulted"; Wilkinson advised Olsen to send a notice of "default."[6] Administrative Transcript (AT) at 44.

I. DELLEN'S INDUSTRIAL INSURANCE ACT DEFAULT

Soon thereafter, on January 18, 2002, Olsen sent the Department a letter (1) giving notice that Dellen was electing to "default" on payment of injured workers' claims under the Act's self-insured employer program,[7] and (2) asking the Department to take over administration of these claims.[8] AR at 111. Dellen provided the Department with a $422,853.81 surety deposit to cover these claims. In response, Wilkinson retrieved Dellen's injured employee claims files and turned

[6] Wilkinson did not inform Olsen that by defaulting, Dellen would forfeit all right and interest to its surety bond; nor did Olsen inquire about this subject.

[7] WAC 296-15-125(1) provides:

> . . . A default occurs when a self-insured employer no longer provides benefits to its injured workers in accordance with Title 51 of the Revised Code of Washington. A default can be a voluntary action of the self-insured employer, or an action brought on by the employer's inability to pay the obligation.

[8] The letter contains a typographical error: It mistakenly states the year as 2001 instead of 2002.

them over to the Department. The Department administered these claims for almost two and a half years until the last Dellen employee claim closed in May 2004.

After Dellen's January 2002 default letter, (1) Dellen did not file quarterly or annual reports with the Department, (2) Dellen did not pay the Department any industrial insurance assessments, and (3) the Department paid Dellen's injured workers' claims. A year later, in January 2003, Wilkinson reported to Dellen that the Department had "assumed jurisdiction" over Dellen's workers' claims and that the surety bond's balance was $403,833.58. Administrative Record Exhibits (ARE) (Ex. 20).

A year later, in 2004, Dellen filed for bankruptcy. In connection with Dellen's bankruptcy proceeding, Wilkinson filed a declaration stating that (1) Dellen had surrendered its self-insurance certification to the Department on December 31, 2001; (2) Dellen had defaulted on its self-insurance obligations on January 31, 2002 (one month later); and (3) as a result of this default, Dellen has lost its right and title to any interest in and right to control its surety. ARE (Ex. 13).

Three years later, on June 19, 2008, Dellen sent the Department a letter requesting (1) the return of all but $20,000 of its remaining surety fund, and (2) treatment of its January 2002 letter as Dellen's written notice to terminate its status as a self-insurer under RCW 51.14.050[9]. Dellen stated that the last day any employees had worked for Dellen had been December 31, 2001, and the last day Dellen had operated as a business had been September 30, 2005. The Department responded on July 28, stating that when Dellen sent its January 18, 2002 letter expressing intent

[9] The legislature amended RCW 51.14.050 in 2010. LAWS OF 2010, ch. 8, § 14004. The amendments did not alter the statute in any way relevant to this case; accordingly, we cite the current version of the statute.

to default on its self-insurance obligations, it lost all rights to the surety fund it had provided under RCW 51.14.020(2).

II. PROCEDURE

On September 19, 2008, the Department issued an order reiterating its July 28 decision that Dellen had lost all rights and interest to its surety fund when it defaulted in January 2002 and asked the Department to administer Dellen's injured employees' claims. Dellen appealed this Department order.

An Industrial Appeals Judge (IAJ) ruled that (1) Dellen had defaulted on its RCW 51.14.020(2) self-insured employer obligations and consequently lost its rights, title to, interest in, and any right to control the surety; (2) Dellen did not comply with WAC 296-15-121(8), which set forth requirements for a former self-insured employer that "terminates" its self-insurer status, instead of "defaults" on its obligations; and (3) therefore, Dellen had "defaulted" under WAC 296-15-125. The IAJ issued an order affirming the Department's September 19 2008 order and ruling that Dellen had forfeited all its interest in the surety fund. Dellen appealed the IAJ's decision to the Board.

The Board affirmed the IAJ's rulings and entered the following conclusions of law: (1) Dellen defaulted on its obligations as a self-insured employer under RCW 51.14.020(2) and therefore, lost all right and title to, any interest in, and any right to control its surety; (2) Dellen had defaulted under WAC 296-15-125; and (3) Dellen did not comply with WAC 296-15-121(8) requirements for "terminating" its self-insurer worker's compensation program. The Board also affirmed the Department's September 19, 2008 order.

Dellen petitioned the superior court to review the Board's decision. The superior court made the following oral rulings: (1) "'[D]efault'"[10] under RCW 51.14.020(2)[11] means failure to fulfill a legal obligation, a broader definition than a self-insured employer's failure to pay claims; (2) Dellen defaulted on January 18, 2002[12], when it submitted the letter electing to default and asking the Department to assume administration of worker compensation payments to injured Dellen employees; (3) nevertheless, Dellen did not terminate its self-insurer status under RCW 51.14.050 because it did not comply with the statute's self-insurer notice of termination requirements and other obligations[13]; and (4) Dellen was entitled to a hearing on whether there had been a default, but after that hearing and a determination of default, there was no due process issue.

The superior court also affirmed the Board's September 18, 2008 order, entering the following findings of fact:

> 1.2 On December 31, 2001, Dellen [surrendered] its self-insurance certification because it was no longer a Washington employer and ceased to have any employees.
>
> 1.3 On January 18, 2002, Dellen's Chief Financial Officer, Eugene Olsen, sent a letter to the Department indicating that Dellen elected to default on its payment of claims under the self-insured program and requested the Department to take over the administration of its claims.

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[10] Report of Proceedings (RP) (Mar. 30, 2012) at 57.

[11] RCW 51.14.020(2)(a) provides in pertinent part: "In the event of *default* the self-insurer loses all right and title to, any interest in, and any right to control the surety." (Emphasis added).

[12] *See* n.8: The superior court says, "January 18, 2001 letter," in its oral ruling. But as we noted earlier, the letter contained a typographical error and should have read, "January 18, 2002."

[13] RCW 51.14.050 provides the mechanism for terminating self-insurer status as follows: "Any employer may at any time terminate his or her status as a self-insurer by *giving the director written notice*." (Emphasis added).

1.4 On January 31, 2002, Dellen stopped paying industrial insurance benefits to its injured workers and no longer administered its injured workers claims.

1.5 Dellen turned over its claim files to the Department for administration and payment of benefits. Dellen made no further payments or handled its claims after turning the claims over to the Department.

1.6 Since January 18, 2002, Dellen had not filed annual and quarterly reports as required by Title 51 RCW and Department rules.

1.7. Since January 18, 2002, Dellen has failed to pay assessments for the insolvency trust fund, administrative assessments, supplement pension fund, and the asbestosis fund.

1.8 Dellen defaulted on its self-insurance obligations including the payment of benefits to its injured workers, the administration of its claims, the filing of required reports and the payment of self-insured assessments.

1.9 Dellen had appropriate notice and the right to be heard during the appeal process before the Board.

1.10 Dellen had no property interest in the proceeds of its surety upon default.

1.11 Dellen failed to establish that the Department's actions violated Dellen's Due Process rights.

1.12 The Dep[artment] did not give Dellen notice of default or failure to pay any assessment.

1.1[3] While Dellen was not delinquent in payment of any benefit, assessment, or contribution as of Jan[uary] 18, 2002, Dellen intended to default on payments coming due in the future.

CP at 87-88.

The superior court also entered the following conclusions of law:

2.2 Dellen defaulted on its self-insured obligations, including the payment of benefits to its injured workers, the administration of its claims, the filing of required reports and the payment of self-insured assessments.

2.3 Pursuant to RCW 51.14.020(2), Dellen lost all right, title to, any interest in and any right to control the surety.

> 2.4 The Board's May 16, 20011[sic] Decision and Order is correct for the reasons stated herein and affirmed.
>
> 2.5 Dellen was not barred from arguing that the Department violated Dellen's Due Process Rights.
>
> 2.6 The Department did not violate Dellen's Due Process rights.
>
> 2.8 The September 18, 2008 Department order is correct and is affirmed.

CP at 88.

The superior court entered judgment for the Department and awarded it statutory attorney fees of $200 and interest from the date of the judgment's entry. Dellen appeals.

ANALYSIS

Dellen argues that (1) the Board and the superior court erred in misinterpreting "default" for purposes of the self-insured employer portions of Washington's Industrial Insurance Act; and (2) Dellen did not "default" for purposes of RCW 51.14.020(2)(a), under which a defaulting self-insured employer loses all right to the surety it provided (to secure its financial obligations to its injured employees) when the self-insured employer turns over administration of its injured employees' claims to the Department. Br. of Appellant at 14, 20. We disagree. Although "default" under RCW 51.14.020 includes a self-insured employer's failure to pay workers' compensation benefits and assessments, this is not the only obligation for which a self-insured employer's failure to satisfy will result in default under the Act. We affirm the superior court's rulings that Dellen defaulted and that the Department did not violate Dellen's due process rights in retaining the surety fund after Dellen defaulted.

I. "DEFAULT" UNDER THE INDUSTRIAL INSURANCE ACT

Dellen argues that the Board and the superior court erred in interpreting "default" for purposes of RCW 51.14.020(2)(a) as occurring when a self-insured employer stops paying workers' compensation benefits or assessments. Br. of Appellant at 18. We disagree.

Both parties agree that Washington's Industrial Insurance Act[14] does not define "default." They cite no case law expressly providing a definition. Thus, the definition of "default" for purposes of RCW 51.14.020 is an issue of first impression in Washington.

A. Standard of Review

We review issues of statutory construction de novo, with the primary goal of carrying out legislative intent. *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001). The legislative intent of Title 51 RCW, the Industrial Insurance Act, is to provide "sure and certain relief for workers . . . injured in their work." RCW 51.04.010. We do not construe an unambiguous statute where plain words do not require construction. *Davis v. Dep't of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999). Instead, we discern a statute's plain meaning from the ordinary meaning of the language at issue, the context of the statutory provision, related

[14] A worker injured during the course of employment may file a claim for benefits under Washington's Industrial Insurance Act. Either the State or a self-insured employer administers the injured worker's claim. RCW 51.14.020, .030; ch. 296-15 WAC. An employer has a duty to secure the payment of its injured workers' compensation by (1) insuring the payment of benefits from the State fund; or (2) qualifying as a self-insurer under Title 51 RCW. RCW 51.14.010. To qualify as a self-insured employer, an employer must first establish that it has sufficient financial ability to pay workers' compensation benefits and assessments under the Act. RCW 51.14.020(1). The Department can require a self-insured employer to provide a surety in an amount sufficient to ensure payment of reasonably foreseeable compensation and assessments for the employer's injured workers. RCW 51.14.020(2).

provisions, and the statutory scheme as a "whole." *State v. Engel*, 166 Wn.2d 572, 578, 210 P.3d 1007 (2009).

B. Reference to Other Statutory and Regulatory Language

Because the Act does not define "default," we look to other statutory provisions for guidance. For example, the Act describes what happens after a self-insured employer "defaults"[15] on "*any obligation* under this title." RCW 51.14.060(1)[16] (emphasis added). Use of the phrase "any obligation under this title" shows the legislature's intent to encompass within "default" a self-insured employer's failure to pay injured workers' compensation benefits and industrial insurance assessments, one of several obligations listed under the Act.[17]

Consistent with this conclusion, Dellen cites WAC 296-15-181 and WAC 296-15-121(1) as addressing specific instances when a default results from a self-insured employer's failure to pay workers' compensation benefits. WAC 296-15-125(1),[18] for example, provides that a

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[15] As an alternative to defaulting under RCW 51.14.060, an employer may "terminate" its self-insured status under RCW 51.14.050. As we explain later in this analysis, Dellen did not elect this option.

[16] The legislature amended RCW 51.14.060 in 2010. LAWS OF 2010, ch. 213, § 2. The amendments did not alter the statute in any way relevant to this case; accordingly, we cite the current version of the statute.

[17] "Default" can also encompass, for example, a self-insured employer's failure to meet its other legal obligations under chapter RCW 51.14, such as its duty to maintain records (RCW 51.14.110), its duty to maintain an insolvency trust (RCW 51.14.077), and its special duties after termination of self-insured employer status (WAC 296-15-121(8)).

[18] WAC 296-15-125 provides in full:

> (1) What is a default? A default occurs when a self-insured employer no longer provides benefits to its injured workers in accordance with Title 51 of the Revised Code of Washington. A default can be a voluntary action of the self-insured employer, or an action brought on by the employer's inability to pay the obligation.

default occurs when a self-insured employer no longer provides benefits to its injured workers "in accordance with Title 51 of the Revised Code of Washington." Similarly, the language of WAC 296-15-181(1) contemplates default as encompassing a self-insured employer's failure to pay worker compensation benefits (*unless* the default results from a "claims administration decision").[19]

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(2) What happens when the department first learns a self-insured employer has defaulted on its obligation? The department first corresponds with the self-insured employer to determine if the self-insurer will resume the provision of benefits. If the self-insurer does not respond to the department and resume the provision of benefits within ten days, the self-insured employer is determined to have defaulted.

(3) What happens when the department confirms that a self-insurer has defaulted on its obligation? There are two actions that the department takes when a default by a self-insured employer is confirmed:

(a) First, the department assumes jurisdiction of the claims of the defaulting self-insurer and begins to provide benefits to those injured workers.

(b) Second, the department makes demand upon the surety provided by that self-insurer for the full amount of the surety. The proceeds of the surety are deposited with the department and accrue interest, which will be used to supplement the surety in providing benefits to those injured workers.

(4) What happens to a self-insured employer's certification when it defaults? The employer surrenders its self-insurance certification when it defaults. Any remaining employment in the state would need industrial insurance coverage through the state fund effective with the default by the employer.

[19] WAC 296-15-181(1) provides:

. . . When a [self-insurer] stops paying workers' compensation benefits or assessments, *and the default is not due to a claims administration decision*, the department will take over its surety and claim.

(Emphasis added).

We also look to other jurisdictions' workers' compensation statutes that define "default" by self-insured employers.[20] Like Washington's Act, Mississippi's workers' compensation act, for example, allows employers to self-insure. *See* MISS. CODE ANN. § 71-3-151 to -181. A self-insurer in Mississippi "defaults" when it fails to fulfill any of its multiple legal obligations under Mississippi's Act, including its workers' compensation benefits:

> "Self-insurer in default" means an individual self-insurer or a group self-insurer as defined by this chapter that has defaulted or failed for any reason to satisfy *any of its obligations* under the Workers' Compensation Law, *including, without limitation,* all obligations for payment of indemnity compensation, disability, expenses of medical, hospital, surgical, rehabilitation and other services, death benefits and funeral expenses, whether such default or failure is the result of insolvency or bankruptcy or receivership or otherwise.

MISS. CODE ANN. § 71-3-157(f) (emphasis added). Other states such as Virginia, Georgia, Louisiana, and South Dakota have similarly adopted broad interpretations of "default" to encompass a self-insured employer's failure to comply with various enumerated obligations under their respective workers' compensation acts, including failure to pay injured employees workers' compensation benefits. *See* GA. CODE ANN. § 34-9-381; LA. REV. STAT. ANN. § 23:1168.3; S.D. CODIFIED LAWS § 62-5-10; W. VA. CODE § 5A-3-10a(3).

Considering Washington's statutory scheme as a whole, the related WAC provisions, and other jurisdictions' analogous statutes, we hold that a self-insured employer's "default" under Washington's Industrial Insurance Act encompasses a self-insured employer's failure to satisfy any of its multiple legal obligations under the Act, not solely its failure to pay workers' compensation benefits and assessments.

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[20] In addressing an issue of first impression, we may look to other jurisdictions for guidance. *See In re Dependency of M.J.L.*, 124 Wn. App. 36, 40, 96 P.3d 996 (2004).

II. SUBSTANTIAL EVIDENCE SUPPORTS THAT DELLEN "DEFAULTED" UNDER THE ACT

Dellen next argues that the Board and the superior court erred in concluding that it (Dellen) "defaulted" under the Act because (1) it intended to "terminate" its self-insurance obligations, not to declare or to be in "default" under the Act; (2) it was current on all its self-insurance obligations, even when it ceased being a self-insured employer; (3) it intended to continue making "'whatever payments were required'"[21] to the Department; (4) it had provided a surety in excess of its injured workers' claims; and (5) it used the term "default" in its letter to the Department only because the Department had so instructed. Reply Br. of Appellant at 3. These arguments fail.

A. Standard of Review

In reviewing a Board decision under the Industrial Insurance Act, a superior court considers the issues de novo, relying on the certified Board record. *Watson v. Dep't of Labor & Indus.*, 133 Wn. App. 903, 909, 138 P.3d 177 (2006), RCW 51.52.115. Our review of a superior court's decision is limited to examining the Board record to determine whether substantial evidence supports the superior court's de novo review findings and whether the court's conclusions of law flow from those findings. *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5-6, 977 P.2d 570 (1999). When reviewing factual issues, the substantial evidence standard is highly deferential to the agency fact finder. *Chandler v. Office of Ins. Comm'r*, 141 Wn. App. 639, 648, 173 P.3d 275 (2007), *review denied*, 163 Wn.2d 1056 (2008). We do not weigh the evidence or substitute our judgment about witness credibility for that of the agency. *Chandler*, 141 Wn. App. at 648.

[21] Reply Br. of Appellant at 3 (quoting AT at 44).

B. Dellen "Defaulted" under the Act

Dellen challenges the superior court's findings of fact that it "defaulted" on its obligations and that Dellen did not "terminate" its status as a self-insured employer under the Act. Dellen argues that the superior court erred in entering these findings because (1) Dellen defaulted on paying its employees benefits and after ending its status as a self-insured employer, (2) Dellen failed to file annual or quarterly reports, (3) Dellen failed to pay assessments, and (4) Dellen's January 2002 letter informing the Department of its election to "default" did not constitute a default under the Act because Dellen used the word "default" only because of the Department's instructions and Dellen instead intended the letter to be a notice of "termination" of self-insurer status under RCW 51.14.050. Br. of Appellant at 20. These arguments fail.

1. Dellen's letter elected "default"

Under WAC 296-15-125(1), a "default" occurs when a self-insured employer no longer provides benefits to its injured workers in accordance with Title 51 RCW. A default can be a "voluntary action" of the self-insured employer or an action precipitated by the self-insured employer's inability to pay its industrial insurance obligations. WAC 296-15-125(1). When such a default occurs, the Department takes over administration of the former self-insured employer's injured workers' benefits claims.[22] RCW 51.14.060(2).

In contrast, when an employer "terminates" its self-insured status, the Department does not take over the employer's injured workers' benefits claims. Instead, the former self-insured employer remains responsible for managing claims for its employees' injuries that occurred

[22] In connection with the Department's taking over administration of a former self-insured employer's injured workers' benefits claims, RCW 51.14.020(2) expressly provides that such a defaulting self-insured employer loses all rights and title to its surety fund.

when it was self-insured; the employer can pay a third party administrator to manage these claims or continue to maintain staff to manage these claims.[23] RCW 51.14.030[24]; WAC 296-15-121(8). To qualify as a "termination" under RCW 51.14.050, a self-insured employer must provide written notice of "termination" to the Department:

> Any employer may at any time terminate his or her status as a self-insurer by giving the [Department] director written notice stating when, not less than thirty days thereafter, such termination shall be effective, provided such termination shall not be effective until the employer either shall have ceased to be an employer or shall have filed with the director for state industrial insurance coverage under this title.

RCW 51.14.050(1). But Dellen's January 2002 letter said nothing about "terminating" its status as a self-insurer, as the statute requires if it was electing termination. Instead, Dellen's letter expressly stated that it elected to "default":

> Per our discussion, this letter is to notify the Department that Dellen Wood Products, Inc, *elects to default* on its payment of claims under the self insured program and requests that the Department take over administration of the claims.

AR at 111 (emphasis added). Dellen argues that it used the word "default" only because the Department instructed it to default. Br. of Appellant at 20. But substantial evidence supports the superior court's contrary finding of Dellen's intent to default: Dellen called the Department in 2001 and asked whether the Department could *take over administration* of Dellen's injured employee claims. The Department responded saying that to take over administration of these

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[23] Unlike a default, termination of self-insured status does not result in the employer's automatic loss of right and title to its surety fund. WAC 296-15-121(9); RCW 51.14.020(2).

[24] The legislature amended RCW 51.14.030 in 2005. LAWS OF 2005, ch. 1145, § 3. The amendments did not alter the statute in any way relevant to this case; accordingly, we cite the current version of the statute.

claims, Dellen would have to default.[25] Given that the only way for the Department to take over a former self-insured employer's worker's compensation claims is if the employer defaults under chapter 51.14 RCW, Dellen's only option under the law to accomplish his request was to default. Consistent with the law and the Department's advice, Dellen expressly elected to default in its January 2002 letter.[26]

2. Dellen did not "terminate" its self-insured employer status under RCW 51.14.050

An employer who elects to terminate its self-insured status under RCW 51.14.050 must nevertheless continue to fulfill ongoing statutory obligations under the Act, such as (1) maintaining money, securities, or surety bonds the Department deems sufficient to cover the employer's entire liability under RCW 51.14.050(2); (2) paying benefits on injured worker claims incurred during its preceding period of self-insurance; (3) filing quarterly and annual reports, unless the employer requests and receives release from such reporting requirements; (4) paying insolvency trust assessments for three years after terminating its self-insurer status; and

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[25] In contrast, termination would not have allowed the Department to take over Dellen's claims. *See* WAC 296-15-121(8). Nor did Dellen meet the basic statutory requirements for filing a notice of termination. RCW 51.14.050(1). As the superior court noted, and Dellen conceded, Dellen did not provide written notice stating that in not less than 30 days, the termination of its self-insurer status would be effective:

> [THE COURT:] But you didn't give the [Department] director written notice stating when, not less than 30 days thereafter, such terminations would be effective.
>
> [DELLEN'S COUNSEL:] We did not say "30 days" in the letter.

RP (Mar. 30, 2012) at 28.

[26] That Dellen later claimed to have misunderstood or to have had a different intent than that which it stated in this letter does not undermine the superior court's or the Board's findings.

(5) paying all expenses for a final audit of its self-insurance program. WAC 296-15-121(8).[27]

The record supports the superior court's findings that Dellen failed to meet these obligations for termination of self-insurance status.

a. Failure to continue paying workers' compensation benefits

Under WAC 296-15-121(8)(a), an employer that terminates its self-insured status must pay benefits on already pending workers' compensation claims incurred during its period of self-insurance and administer workers' claim re-openings and new claims filed during the period of self-insurance.[28] WAC 296-15-121(8)(a). Dellen asserts it continued to provide for payment of

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[27] WAC 296-15-121(8) provides that when "a self insurer ends its self insured workers' compensation program," such "former" self-insured employer "*must continue to do all* of the following":

> (a) Pay benefits on claims incurred during its period of self insurance. Claim re-openings and new claims filed for occupational diseases incurred during the period of self insurance remain the obligation of the former self insurer.
> (b) File quarterly and annual reports as long as quarterly reporting is required. A former self insurer may ask the department to release it from quarterly reporting after it has had no claim activity with the exception of pension or death benefits for a full year.
> (c) Provide surety at the department required level. The department may require an increase in surety based on annual reports as they continue to be filed. Surety will not be reduced from the last required level (while self insured) until three full calendar years after the certificate was terminated. A bond may be cancelled for future obligations, but it continues to provide surety for claims occurring prior to its cancellation.
> (d) Pay insolvency trust assessments for three years after surrender or withdrawal of certificate.
> (e) Pay all expenses for a final audit of its self insurance program.

(Emphasis added).

[28] These pre-existing worker compensation benefits payments cannot come from the employer's surety fund if the employer is "terminating" its self-insured status under the Act. Rather, these payments can come from the surety fund only if the self-insured employer "defaults." *See* RCW 51.14.060, WAC 296-15-121(1)(b).

injured employee benefits and assessments and; therefore, it "terminat[ed]" its self-insured status under the Act (rather than "default[ing]"). Br. of Appellant at 22. Dellen's assertion that it continued payments, however, stems from its provision of a "$422,853.81" surety to the Department when Dellen defaulted and asked the Department to take over administration of Dellen's injured employees' claims. Br. of Appellant at 22. Provision of this surety neither transformed Dellen's default into a termination of self-insured status nor fulfilled its obligations for termination of self-insured status under the Act.

As we have previously noted, WAC 296-15-121(8)(a) requires an employer "terminating" its self-insured status to continue using its own funds to pay benefits on injured workers' claims previously incurred during its self-insured status; in other words, a former self-insured employer that "terminates" its self-insured status cannot make these payments from the surety it provided to the Department. Therefore, contrary to Dellen's assertion, its having provided the Department with the $422,853.81 surety does not constitute a payment of benefits under WAC 296-15-121(8)(a) for purposes of showing that Dellen complied with statutory termination claims payment requirements.

Dellen further asserts that the payment of workers' compensation benefits is the only obligation that RCW 51.14.050 imposes on former self-insured employers. This assertion is also incorrect. WAC 296-15-121(8) expressly states that an employer electing to terminate its self-insured status must comply with *all* the requirements listed under WAC 296-15-121(8), including taking responsibility for *new* claims. WAC 296-15-121(8)(a). Here, however, after sending its January 2002 letter electing default, Dellen turned over its injured worker claims files to the Department for administration of its injured workers' claims. And, as Dellen concedes,

after sending this letter, it stopped administering its own injured workers' claims and stopped paying benefits.

Because Dellen did not pay benefits on its injured workers' claims incurred during its previous self-insurance period and it did not administer claim re-openings or new claims, we hold that Dellen did not comply with WAC 296-15-121(8)(a) and, thus, as the superior court ruled, did not terminate its self-insured status under the Act.

2. Failure to file reports to the Department

Under WAC 296-15-121(8)(b), an employer terminating its self-insured status must continue to file quarterly and annual reports with the Department. Dellen argues that the superior court erred in finding that it defaulted, based on Dellen's failing to file annual or quarterly reports, because, Dellen asserts, no applicable statute or regulation defines "default" as a failure to file reports. Br. of Appellant at 25. This argument also fails.

Dellen concedes that it did not file quarterly and annual reports with the Department; again, Dellen asserts that the Department told it not to do so. The record does not support this assertion. Instead, the record shows that the Department did not notify Dellen to continue filing reports because Dellen had sent the Department a letter electing to default and asking the Department to take over administration of Dellen's workers' compensation benefit payments; accordingly, the Department understood Dellen to be in default status, for which continued reporting was not required.[29]

[29] In contrast, had Dellen not elected to default, and had elected instead to terminate its self-insured status, the Department would have sent a notice of late reporting.

Furthermore, WAC 296-15-121(8)(b) provides that the Department may release an employer terminating its self-insured status from its reporting requirement when no activity occurs for a full year on any of the employer's injured worker claims. Dellen's last injured employee claim activity occurred in 2004; thus, if Dellen had terminated its self-insured status (instead of defaulting), it would have been required to file quarterly reports until 2005. Accordingly, Dellen's failure to file such reports (1) would have constituted a failure to comply with WAC 296-15-121(8)(b) termination requirements; and (2) further supports the superior court's finding that Dellen did not terminate its self-insured status, but instead was in default.

3. Failure to pay assessments

WAC 296-15-121(8)(d) also requires a former self-insured employer to pay insolvency trust assessments for three years after surrender or withdrawal of its self-insured certificate. Nothing in the WAC or Title 51 RCW states that the Department must give a former self-insured employer notice when that employer fails to pay a required assessment; on the contrary, the regulations state only that a former self-insured employer has a duty to pay assessments[30], regardless of whether it receives notice from the Department. Absent any authority requiring the Department to give a former self-insured employer notice of failure to pay an assessment, Dellen's argument fails. The record shows that Dellen failed to pay any assessments after

[30] *See* former WAC 296-15-221(4)(a)(iii)(B) (2001) (employers no longer self-insured must pay adjusted assessment rate until one year after all self-insurance liabilities and responsibilities are terminated); former WAC 296-15-221(4)(a)(iv)(B) (2001) (self-insurers must maintain minimum balance of $200,000 in their "second injury fund"); RCW 51.14.077; former WAC 296-15-221(4)(a)(v) (2001) (insolvency trust members who voluntarily surrender their self-insurance certificates must continue to pay an assessment for three years after the date of surrender).

January 2002. Thus, we hold substantial evidence supports the superior court's finding that Dellen failed to pay any assessments.

We hold that substantial evidence supports the Board's and the superior court's findings that Dellen's letter expressed its intent to default and that Dellen's subsequent actions were consistent with its expressed intent to default.[31] We further hold that the superior court's findings support its conclusions of law that Dellen defaulted on its obligations as a self-insured employer and that its actions did not qualify as a termination under RCW 51.14.050.

III. PROCEDURAL DUE PROCESS

Dellen next argues that the superior court erred in ruling that the Department did not violate its procedural due process rights in retaining its surety fund after Dellen defaulted.[32]

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[31] The superior court did not enter this finding in its judgment order. But during the hearing, it stated:

> . . . I'm prepared to find the time of default as the time of submission of what I think you identified as Exhibit 2, the letter from Dellen dated January 18, [2002]. To me, that's clearly a statement of Dellen's intent, and all of the actions Dellen took after that were consistent with that statement of intent. And so I would find that as the date of default, and at that moment in time, under [RCW] 51.14.020, the fund transfers to the Department.
>
> . . .
>
> I can only determine which of these two options the actions of the parties support, and the only one that makes sense to me is default, because the other one, the termination, requires this notice with particular requirements. That clearly wasn't done in this case. And it also anticipates that Dellen will continue to fulfill other certain obligations, which Dellen did not do.

RP (Mar. 30, 2012) at 57-58.

[32] Dellen also argues for the first time in its reply brief that (1) it is entitled to an immediate refund of its surety as a matter of equity; and (2) under WAC 296-15-121(9), it is "entitled" to a refund in May 2015 because an employer is entitled to such a refund at least ten years after release from monthly reporting requirements. Reply Br. of Appellant at 14. We do not address arguments raised for the first time in reply briefs. RAP 10.3(c); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

Dellen asserts that the Department violated its right to due process by failing to give notice that it had forfeited its entire surety fund and failing to provide a meaningful hearing "at a meaningful time." Br. of Appellant at 27 (citations omitted). Again, this argument fails.

Constitutional issues are issues of law, which we review de novo. *State v. Blilie*, 132 Wn.2d 484, 489, 939 P.2d 691 (1997). The due process clause of the Washington Constitution provides that "[n]o person shall be deprived of life, liberty, or property, without due process of law." WASH CONST. art. I, § 3. Procedural due process refers to the procedures that the government must follow before it deprives a person of life, liberty, or property. *See Nieshe v. Concrete Sch. Dist.*, 129 Wn. App. 632, 640, 127 P.3d 713 (2005). "'When a state seeks to deprive a person of a protected interest, procedural due process requires that an individual receive notice of the deprivation and an opportunity to be heard to guard against erroneous deprivation.'" *Speelman v. Bellingham/Whatcom County Hous. Authorities*, 167 Wn. App. 624, 631, 273 P.3d 1035 (2012) (quoting *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 216, 143 P.3d 571 (2006)). Due process does not require actual notice; rather, it requires the government to provide "'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Speelman*, 167 Wn. App. at 631 (internal quotation marks omitted) (quoting *Jones v. Flowers*, 547 U.S. 220, 226, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006)).

A claimant alleging deprivation of due process must first establish a legitimate claim of entitlement. *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 142, 744 P.2d 1032, 750 P.2d 254 (1988). Legitimate claims of entitlement entail vested liberty or property rights. *Haberman*, 109 Wn.2d at 142 (citing *In re Marriage of MacDonald*, 104 Wn.2d 745, 748, 709

P.2d 1196 (1985)). A vested right must be something more than a mere expectation based upon an anticipated continuance of the existing law; it must have become a title, legal or equitable, to the present or future enjoyment of property, a demand, or a legal exemption from a demand by another. *Caritas Servs., Inc. v. Dep't of Soc. & Health Servs.*, 123 Wn.2d 391, 414, 869 P.2d 28 (1994).

Here, Dellen did not have a legitimate claim of entitlement to the surety, which it had provided when it defaulted and asked the Department to take over administration of Dellen's injured workers' claims. Our state legislature expressly provided that a self-insured employer defaulting on its Act obligations loses all right and title to, any interest in, and any right to control the surety it provided under RCW 51.14.020(2) to secure payment of its employees' workers' compensation claims:

> *In the event of default the self-insurer loses all right and title to, any interest in, and any right to control the surety.* The amount of surety *may* be increased or decreased from time to time by the director. The income from any securities deposited *may* be distributed currently to the self-insurer.

RCW 51.14.020(2) (emphasis added). Thus, under Washington's Industrial Insurance Act, when Dellen defaulted on its obligations as a self-insured employer, it lost all "right and title to, any interest in, and any right to control" its surety.[33] RCW 51.14.020(2). Dellen's loss of its title to the surety was not by virtue of some governmental action; on the contrary, this loss was a result

[33] Moreover, WAC 296-15-121(9)(a) provides only that the Department "may consider" releasing a surety to a former self-insurer, or its successor, if all claims against the self-insurer are closed and the self-insurer has been released from quarterly reporting for at least ten years. This regulation's use of the permissive words "may" and "consider," however, imply that such return of a surety is not mandatory and that, instead, such decision falls within the Department's discretion. Thus, under the plain language of this regulation, Dellen is not "entitled" to a return of its surety.

of its election instead to default as a self-insurer under the Act and to turn over administration of its workers' compensation benefits to the Department to pay on Dellen's behalf from Dellen's surety fund.

Furthermore, again contrary to Dellen's assertions, Dellen did have meaningful notice and an opportunity to be heard. By virtue of the language of the Act and Dellen's communications with the Department, Dellen had, at a minimum, constructive notice that a self-insured employer's "default" results in forfeiture of its surety: When Dellen contacted the Department to inquire how the Department could take over administration of Dellen's workers' compensation claims, the Department told Dellen this could happen if Dellen "defaulted," which Dellen then elected to do so. AT at 44. In addition, the consequences of a self-insured employer's default are plainly stated in RCW 51.14.020(2)[34]; and it is well settled that a person is presumed to know the law such that ignorance of the law is not a defense.[35] *Harman v. Dep't of Labor & Indus.*, 111 Wn. App. 920, 927, 47 P.3d 169 (2002). And this statutory notice was reasonably calculated as a matter of law to "'apprise interested parties'"[36] about the default and surety forfeiture procedures under the Act.

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[34] As Wilkinson later explained in his declaration, Dellen defaulted and, under RCW 51.14.020(2), such a defaulting self-insurer loses its right and title to its surety.

[35] We note that Dellen was not an unsophisticated entity: To qualify as a self-insured employer it had to show that it had the financial capacity to self-insure its employees. *See* RCW 51.14.020(1).

[36] *See Speelman*, 167 Wn. App. at 631 (quoting *Jones*, 547 U.S. at 226).

Moreover, during Dellen's 2005 bankruptcy proceeding, Wilkinson provided a declaration that Dellen had defaulted and that under RCW 51.14.020(2) a defaulting self-insurer loses its right and title to its surety. Thus, Wilkinson's declaration also served as constructive notice of the consequences of Dellen's default under the Act, including forfeiture of its surety. Dellen also had an opportunity to be heard when, in 2008, it asked for a release of its surety and the Department rejected this request. Dellen had received, and exercised, its opportunity to be heard by an IAJ, the Board, and the superior court. We hold that Dellen had notice that its default would result in forfeiture of its surety and that the Department did not violate Dellen's procedural due process rights.

We affirm.

Hunt, J.

We concur:

Worswick, J.

Penoyar, J.

Appendix 2

U.S. Const. amend. XIV, §1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Appendix 3

Wash. Const. Art. I, §3

No person shall be deprived of life, liberty, or property, without due process of law.

Appendix 4

RCW 51.14.020
Qualification.

(1) An employer may qualify as a self-insurer by establishing to the director's satisfaction that he or she has sufficient financial ability to make certain the prompt payment of all compensation under this title and all assessments which may become due from such employer. Each application for certification as a self-insurer submitted by an employer shall be accompanied by payment of a fee of one hundred fifty dollars or such larger sum as the director shall find necessary for the administrative costs of evaluation of the applicant's qualifications. Any employer who has formerly been certified as a self-insurer and thereafter ceases to be so certified may not apply for certification within three years of ceasing to have been so certified.

(2)(a) A self-insurer may be required by the director to supplement existing financial ability by depositing in an escrow account in a depository designated by the director, money and/or corporate or governmental securities approved by the director, or a surety bond written by any company admitted to transact surety business in this state, or provide an irrevocable letter of credit issued by a federally or state chartered commercial banking institution authorized to conduct business in the state of Washington filed with the department. The money, securities, bond, or letter of credit shall be in an amount reasonably sufficient in the director's discretion to insure payment of reasonably foreseeable compensation and assessments but not less than the employer's normal expected annual claim liabilities and in no event less than one hundred thousand dollars. In arriving at the amount of money, securities, bond, or letter of credit required under this subsection, the director shall take into consideration the financial ability of the employer to pay compensation and assessments and his or her probable continuity of operation. However, a letter of credit shall be acceptable only if the self-insurer has a net worth of not less than five hundred million dollars as evidenced in an annual financial statement prepared by a qualified, independent auditor using generally accepted accounting principles. The money, securities, bond, or letter of credit so deposited shall be held by the director solely for the payment of compensation by the self-insurer and his or her assessments. In the event of default the self-insurer loses all right and title to, any interest in, and any right to control the surety. The amount of surety may be increased or decreased from time to time by the director. The income from any securities deposited may be distributed currently to the self-insurer.

(b) The letter of credit option authorized in (a) of this subsection shall not apply to self-insurers authorized under RCW 51.14.150 or to self-insurers who are counties, cities, or municipal corporations.

(3) Securities or money deposited by an employer pursuant to subsection (2) of this section shall be returned to him or her upon his or her written request provided the employer files the bond required by such subsection.

(4) If the employer seeking to qualify as a self-insurer has previously insured with the state fund, the director shall require the employer to make up his or her proper share of any deficit or insufficiency in the state fund as a condition to certification as a self-insurer.

(5) A self-insurer may reinsure a portion of his or her liability under this title with any reinsurer authorized to transact such reinsurance in this state: PROVIDED, That the reinsurer may not participate in the administration of the responsibilities of the self-insurer under this title. Such reinsurance may not exceed eighty percent of the liabilities under this title.

(6) For purposes of the application of this section, the department may adopt separate rules establishing

Appendix 5

RCW 51.14.030
Certification of employer as self-insurer.

The director may issue a certification that an employer is qualified as a self-insurer when such employer meets the following requirements:

(1) He or she has fulfilled the requirements of RCW 51.14.020.

(2) He or she has submitted to the department a payroll report for the preceding consecutive twelve month period.

(3) He or she has submitted to the department a sworn itemized statement accompanied by an independent audit of the employer's books demonstrating to the director's satisfaction that the employer has sufficient liquid assets to meet his or her estimated liabilities as a self-insurer.

(4) He or she has demonstrated to the department the existence of the safety organization maintained by him or her within his or her establishment that indicates a record of accident prevention.

(5) He or she has submitted to the department a description of the administrative organization to be maintained by him or her to manage industrial insurance matters including:

(a) The reporting of injuries;

(b) The authorization of medical care;

(c) The payment of compensation;

(d) The handling of claims for compensation;

(e) The name and location of each business location of the employer; and

(f) The qualifications of the personnel of the employer to perform this service.

(6) He or she has demonstrated to the department the ability and commitment to submit electronically the claims [data] required by RCW 51.14.110.

Such certification shall remain in effect until withdrawn by the director or surrendered by the employer with the approval of the director. An employer's qualification as a self-insurer shall become effective on the date of certification or any date specified in the certificate after the date of certification.

[2005 c 145 § 3; 1977 ex.s. c 323 § 10; 1971 ex.s. c 289 § 28.]

Notes:

Effective date -- 2005 c 145 §§ 2 and 3: See note following RCW 51.14.110.

Severability -- Effective date -- 1977 ex.s. c 323: See notes following RCW 51.04.040.

Appendix 6

RCW 51.14.050

Termination of status — Notice — Financial requirements.

(1) Any employer may at any time terminate his or her status as a self-insurer by giving the director written notice stating when, not less than thirty days thereafter, such termination shall be effective, provided such termination shall not be effective until the employer either shall have ceased to be an employer or shall have filed with the director for state industrial insurance coverage under this title.

(2) An employer who ceases to be a self-insurer, and who so files with the director, must maintain money, securities, or surety bonds deemed sufficient in the director's discretion to cover the entire liability of such employer for injuries or occupational diseases to his or her employees which occurred during the period of self-insurance: PROVIDED, That the director may agree for the medical aid and accident funds to assume the obligation of such claims, in whole or in part, and shall adjust the employer's premium rate to provide for the payment of such obligations on behalf of the employer.

[2010 c 8 § 14004; 1971 ex.s. c 289 § 30.]

Appendix 7

RCW 51.14.060

Default by self-insurer — Authority of director — Liability for reimbursement.

(1) The director may, in cases of default upon any obligation under this title by the self-insurer, after ten days notice by certified mail to the defaulting self-insurer of the intention to do so, bring suit upon such bond or collect the interest and principal of any of the securities as they may become due or sell the securities or any of them as may be required or apply the money deposited, all in order to pay compensation and discharge the obligations of the defaulting self-insurer under this title.

(2) The director shall be authorized to fulfill the defaulting self-insured employer's obligations under this title from the defaulting self-insured employer's deposit or from other funds provided under this title for the satisfaction of claims against the defaulting self-insured employer. The defaulting self-insured employer is liable to and shall reimburse the director for the amounts necessary to fulfill the obligations of the defaulting self-insured employer that are in excess of the amounts received by the director from any bond filed, or securities or money deposited, by the defaulting self-insured employer pursuant to chapter 51.14 RCW. The amounts to be reimbursed shall include all amounts paid or payable as compensation under this title together with administrative costs, including attorneys' fees, and shall be considered taxes due the state of Washington.

(3) The department shall transfer the balance of any defaulted self-insured employer's deposit as required by RCW 51.14.020 into the insolvency trust fund when the following have occurred:

(a) All claims against the defaulted self-insured employer are closed; and

(b) The self-insured employer has been in default for ten years.

[2010 c 213 § 2; 1986 c 57 § 2; 1971 ex.s. c 289 § 31.]

Notes:

Intent -- 1986 c 57: See note following RCW 51.14.077.

Appendix 8

RCW 51.14.110

Employer's duty to maintain records, furnish information — Electronic reporting system — Requirement and penalties — Confidentiality of claims data — Rules.

(1) Every self-insurer shall maintain a record of all payments of compensation made under this title. The self-insurer shall furnish to the director all information the self-insurer has in its possession as to any disputed claim, upon forms approved by the director.

(2)(a) The department shall establish an electronic reporting system for the submission to the department of specified self-insurance claims data to more effectively monitor the performance of self-insurers and to obtain claims information in an efficient manner.

(b) Self-insurers shall submit claims data electronically in the format and frequency prescribed by the department.

(c) Electronic submittal to the department of specified claims data is required to maintain self-insurance certification. The department shall establish an escalating schedule of penalties for noncompliance with this requirement, up to and including withdrawal of self-insurance certification.

(d) Claims data reported to the department electronically by individual self-insurers are confidential in accordance with RCW 51.16.070 and 51.28.070. The department may publish, for statistical purposes, aggregated claims data that contain no personal identifiers.

(3) The department shall adopt rules to administer this section.

[2005 c 145 § 2; (2005 c 145 § 1 expired July 1, 2008); 1971 ex.s. c 289 § 35.]

Notes:

Effective date -- 2005 c 145 §§ 2 and 3: "Sections 2 and 3 of this act take effect July 1, 2008." [2005 c 145 § 5.]

Expiration date -- 2005 c 145 § 1: "Section 1 of this act expires July 1, 2008." [2005 c 145 § 4.]

Appendix 9

WAC 296-15-021

Self-insurance certification requirements and application process.

(1) **What requirements must an employer meet to apply for self-insurance certification?** An employer must meet all the following minimum criteria:

(a) Be in business for three years prior to applying for self-insurance.

(b) Have a written accident prevention program in place in Washington state for at least six months prior to making application.

(c) Have total assets worth at least twenty-five million dollars as verified by audited financial statements prepared by independent certified accountants.

(d) Demonstrate positive earnings in the current year and two out of the last three years. The overall earnings for the last three years must also be positive.

(e) Have a current liquidity ratio of at least 1.3 to 1, and a debt to net worth ratio of not greater than 4 to 1.

(2) **When are applications processed?** The department processes applications for certification the quarter after the application is accepted. Self-insurance certification for approved applicants will be effective the quarter following processing.

(3) **What documentation must be submitted with an application?** The following documentation must be submitted with each self-insurance application:

(a) A completed application form (Form F 207-001-000) with a nonrefundable application fee. The application fee is reviewed annually by the department and is based on the administrative costs incurred in processing an application, but in no instance will it be less than two hundred fifty dollars.

(b) Three years of audited financial statements prepared by independent certified accountants. The audited financial statements must be in the name of the applicant.

(c) A list of all of the applicant's physical locations and addresses in Washington state, including all subsidiary operations.

(d) A copy of the written accident prevention program for each of the applicant's operations in Washington. If the applicant or any of its subsidiaries has multiple locations, more than one copy of the accident prevention program may be required.

(e) A completed Self-Insurance Certification Questionnaire (Form 207-176-000).

(f) A completed self-insurance electronic data reporting system (SIEDRS) enrollment form (Form F 207-193-000).

(4) **What happens during the application review process?** The department:

(a) Assesses the accident prevention program at department-selected sites.

(b) Analyzes the financial information supplied by the applicant. The department may also consider relevant information obtained from other sources to assess the applicant's financial strength.

(c) Reviews the completed Claims Administration Questionnaire and attachments. Additional information may be requested.

The department determines whether the application is denied or tentatively approved. The department notifies each applicant of its decision. If the department denies an application, it will state the reasons for the denial in its notification.

(5) **If the application is denied, when may the applicant submit a new application?** If an application is denied for deficiencies in its accident prevention program, the applicant may submit a new application for certification after the corrections to the program are made and have been in place for six months.

If the application is denied for financial reasons, the applicant may submit a new application for certification after the next annual audited financial statement is available.

If the application is denied because the claims administration organization is deficient, the applicant may submit a new application for certification after corrections to the program are made.

(6) **What if the application is tentatively approved?** The applicant must submit the following:

(a) Surety in the amount determined by the department and issued on the department form.

(b) A signed copy of the service agreement with a third-party administrator, if applicable.

(i) The contract copy may delete clauses(s) relating to payment of services.

(ii) However, if payment for services is based on the number of claims filed by the self-insurer's workers, this must be explained in detail.

(c) A copy of any excess insurance (reinsurance) policy including Washington state endorsements, if obtained.

(d) A signed copy of the Acknowledgement of Self-Insurance Responsibilities form.

(e) Payment of any outstanding premium of the applicant's state industrial insurance account.

(f) Payment of the applicant's estimated portion of the deficit, if a deficit condition in the state industrial insurance fund exists at the time of application.

(g) Adequate electronic test data to SIEDRS, to demonstrate the ability to submit claim data electronically in the required format. Requirements are defined in the SIEDRS enrollment package (Publication F 207-194-000). The department may waive the testing requirement if the applicant has a service agreement with a third-party administrator that already submits data to SIEDRS.

If the required items are not received prior to the end of the quarter, the application may be denied. If the application is denied, the applicant must reapply in order to be considered for self-insurance.

(7) **How is the initial surety requirement established?** The initial surety requirement is established at the highest of the following:

(a) The annual premiums the applicant pays (or would pay) into the state industrial insurance fund; or

(b) The annual average of the last five years of developed incurred costs to the state industrial insurance fund; or

(c) The minimum surety requirement as established annually by the department. The minimum surety requirement is equal to the average total cost of one permanent total disability award.

The applicant has the option of submitting an independent actuarial analysis of its projected liability. The department reserves the right to accept or reject this analysis. In no event will the surety requirement be established at less than the minimum surety in force at that time.

[Statutory Authority: RCW 51.14.110. WSR 09-01-177, § 296-15-021, filed 12/23/08, effective 1/23/09. Statutory Authority: RCW 51.04.020, 51.14.020, 51.32.190, 51.14.090, and 51.14.095. WSR 06-06-066, § 296-15-021, filed 2/28/06, effective 4/1/06. Statutory Authority: RCW 51.14.077, 51.14.120(7), 51.14.150(4), 51.14.160, 51.44.040(3), 51.44.070 and 51.44.150. WSR 99-23-107, § 296-15-021, filed 11/17/99, effective 12/27/99.]

Appendix 10

WAC 296-15-121

Surety for a self insurance program.

(1) **What is surety?** Surety is the legal financial guarantee each self insurer must provide to the department for its self insured workers' compensation program. Failure to provide surety in the amount required by the department will result in the withdrawal of the self insurer's certification. If a self insurer defaults on (stops payment of) benefits and assessments, the department will use its surety to cover these costs.

(a) Surety must be provided on the department's form. The original will be kept by the department. Surety must cover all past, present and future self insurance liabilities.

(b) Surety may not be used by a self insurer to:

(i) Pay its workers' compensation benefits; or

(ii) Serve as collateral for any other banking transactions.

(c) Surety is not an asset of the self insurer and will not be released by the department if the self insurer files a petition for dissolution or relief under bankruptcy laws.

(d) The department will determine the amount of surety each self insurer must provide. The surety level may be increased or decreased to maintain its adequacy when necessary.

(2) **What types of self insurance surety will the department accept?** The department will accept the following types of surety:

(a) Cash, corporate or governmental securities deposited with a department approved escrow agent and administered by a written agreement L&I form F 207-039-000 between the department, self insurer and escrow agent. Use L&I form F 207-137-000 for any rider/amendment to the escrow account.

An escrow account may not be used by the self insurer to satisfy any other obligation to the bank which maintains the escrow account.

(b) A bond on L&I form F 207-068-000 written by a company approved to transact surety business in Washington. Use L&I form F 207-134-000 for any rider/amendment to the bond.

(c) An irrevocable standby letter of credit (LOC) on L&I form F 207-112-000 if the self insurer has a net worth of at least 500 million dollars. Use L&I form F 207-111-000 for any rider/amendment. LOCs are subject to acceptance by the department. Acceptance includes, but is not limited to, approval of the financial condition of the issuing or confirming bank.

(i) The issuing or confirming bank must have a location in Washington. The bank must provide the department with an audited financial statement or call report made to the banking regulatory agencies for the most recent fiscal year. An audited statement/call report is due at LOC issuance and annually while the LOC is in effect.

(ii) The self insurer must provide the department a memorandum of understanding on L&I form F 207-113-000 showing the self insurer's agreement with the following conditions:

(A) The department will automatically extend an LOC for an additional year unless notified otherwise by registered mail at least sixty days prior to expiration.

(B) If the department is notified an LOC will not be replaced, and the self insurer fails to provide acceptable replacement surety within thirty days of notice:

(I) The department will draw the full value of the LOC. All proceeds of the LOC will be deposited with the department;

(II) Accrued interest in excess of the surety requirement will be returned semiannually to the self insurer; and

(III) If acceptable replacement surety is later provided, the proceeds of the LOC and accrued interest will be returned to the self insurer.

(C) If the self insurer defaults on the payment of workers' compensation benefits and has failed to provide acceptable replacement surety for an expired LOC:

(I) The title to the proceeds will be transferred to the department; and

(II) The proceeds and accrued interest will be used to pay the self insurer's workers' compensation benefits.

(D) If the self insurer defaults on the payment of workers' compensation benefits and has an LOC in force:

(I) The department will draw the full value of the LOC. All proceeds of the LOC will be deposited with the department; and

(II) The proceeds and accrued interest will be used to pay the self insurer's workers' compensation benefits.

(iii) If the self insurer provides another acceptable type of surety in the amount required by the department, the department's interest in the LOC will be released.

(iv) All legal proceedings regarding a self insurer's LOC will be subject to Washington laws and courts.

(3) **How often is each self insurer's surety requirement reviewed?** Each self insurer's surety requirement is reviewed annually based on the self insurer's annual report.

(4) **When could a self insurer's surety level change?**

(a) Surety will be maintained at the current level unless the department's estimate or an independent qualified actuary's estimate of the self insurer's outstanding claim liabilities changes by more than twenty-five thousand dollars.

(b) Surety changes are due by July 1 of each year.

(5) **How does the department determine the required surety level?** The department analyzes each self insurer's loss history using incurred development, paid development or other department approved actuarial methods of loss development. The following factors also may influence the surety determination:

(a) Pension claims.

(b) Reinsurance.

(c) Inconsistency in reserving practices.

(d) Independent qualified actuarial estimate.

(e) Surety cap.

(6) **What is considered reinsurance?** For the purposes of Title 51 RCW, excess insurance and reinsurance mean the same thing.

(7) **May a self insurer reinsure part of its liability?**

(a) A self insurer may reinsure up to eighty percent of its liability under Title 51 RCW.

(b) The reinsuring company and its personnel are prohibited from participating in the administration of the responsibilities of the self insurer.

(c) Reinsurance policies issued after July 1, 1975, must include endorsements which state (a) and (b) of this subsection.

(d) The self insurer must:

(i) Notify the department of the name of the insurance carrier, the extent and coverage period of the policy; and

(ii) Submit copies of all reinsurance policies in force including all modifications and renewal provisions.

(e) The department may accept a certificate of insurance on L&I form F 207-095-000 in place of the policy if the certificate certifies all coverage conditions and exceptions and that the reinsurance company and its personnel do not participate in the administration of the responsibilities of the self insurer under Title 51 RCW.

(8) **What if a self insurer ends its self insured workers' compensation program?** If a self insurer voluntarily surrenders certification or has its certificate involuntarily withdrawn by the department, the former self insurer must continue to do all of the following:

(a) Pay benefits on claims incurred during its period of self insurance. Claim reopenings and new claims filed for occupational diseases incurred during the period of self insurance remain the obligation of the former self insurer.

(b) File quarterly and annual reports as long as quarterly reporting is required. A former self insurer may ask the department to release it from quarterly reporting after it has had no claim activity with the exception of pension or death benefits for a full year.

(c) Provide surety at the department required level. The department may require an increase in surety based on annual reports as they continue to be filed. Surety will not be reduced from the last required level (while self insured) until three full calendar years after the certificate was terminated. A bond may be cancelled for future obligations, but it continues to provide surety for claims occurring prior to its cancellation.

(d) Pay insolvency trust assessments for three years after surrender or withdrawal of certificate.

(e) Pay all expenses for a final audit of its self insurance program.

(9) **When could the department consider releasing surety to a former self insurer or its successor?**

(a) The department may consider releasing surety to a former self insurer or its successor when all of the following have occurred:

(i) All claims against the self insurer are closed; and

(ii) The self insurer has been released from quarterly reporting for at least ten years.

(b) If the department releases surety, the former self insurer remains responsible for claim reopenings and new claims filed for occupational disease incurred during the period of self insurance.

[Statutory Authority: RCW 51.14.077, 51.14.120(7), 51.14.150(4), 51.14.160, 51.44.040(3), 51.44.070 and 51.44.150. WSR 99-23-107, § 296-15-121, filed 11/17/99, effective 12/27/99.]

Appendix 11

WAC 296-15-125

Default by a self-insurer.

(1) What is a default? A default occurs when a self-insured employer no longer provides benefits to its injured workers in accordance with Title 51 of the Revised Code of Washington. A default can be a voluntary action of the self-insured employer, or an action brought on by the employer's inability to pay the obligation.

(2) What happens when the department first learns a self-insured employer has defaulted on its obligation? The department first corresponds with the self-insured employer to determine if the self-insurer will resume the provision of benefits. If the self-insurer does not respond to the department and resume the provision of benefits within ten days, the self-insured employer is determined to have defaulted.

(3) What happens when the department confirms that a self-insurer has defaulted on its obligation? There are two actions that the department takes when a default by a self-insured employer is confirmed:

(a) First, the department assumes jurisdiction of the claims of the defaulting self-insurer and begins to provide benefits to those injured workers.

(b) Second, the department makes demand upon the surety provided by that self-insurer for the full amount of the surety. The proceeds of the surety are deposited with the department and accrue interest, which will be used to supplement the surety in providing benefits to those injured workers.

(4) What happens to a self-insured employer's certification when it defaults? The employer surrenders its self-insurance certification when it defaults. Any remaining employment in the state would need industrial insurance coverage through the state fund effective with the default by the employer.

[Statutory Authority: RCW 51.04.020, 51.14.020, 51.32.190, 51.14.090, and 51.14.095. WSR 06-07-141, § 296-15-125, filed 3/21/06, effective 5/1/06.]

Appendix 12

WAC 296-15-181

Funding the benefits of an insolvent self-insurer.

(1) **What happens when a self-insurer defaults on (stops paying) workers' compensation benefits and assessments?** When a self-insurer stops paying workers' compensation benefits or assessments, and the default is not due to a claims administration decision, the department will take over its surety and claims.

(2) **If a defaulting self-insurer has multiple types of surety, who determines the order in which surety will be used?** The department has the sole authority to determine the order in which surety types will be used.

(3) **What happens if the defaulting self-insurer's surety is exhausted?** When surety is exhausted, the insolvency trust (all self-insurers except school districts, cities and counties) will be assessed quarterly to cover the claim costs paid on behalf of the defaulted self-insurer.

(4) **Who is on the insolvency trust board?** The insolvency trust board consists of the director or designee, three representatives of self-insured employers and one representative of workers. Representatives are nominated by the self-insured and labor communities and are appointed by the director for overlapping two year terms.

(5) **What does the insolvency trust board do?** The board advises the department on insolvency trust matters. The department makes all final decisions.

(6) **What annual report is provided on the insolvency trust fund?** The department provides an annual written status report on the insolvency trust fund as of the end of the previous calendar year to the workers' compensation advisory committee. The report is presented at the committee's first quarterly meeting no later than March 31.

[Statutory Authority: RCW 51.04.020, 51.14.020, 51.32.190, 51.14.090, and 51.14.095. WSR 06-06-066, § 296-15-181, filed 2/28/06, effective 4/1/06. Statutory Authority: RCW 51.14.077, 51.14.120(7), 51.14.150(4), 51.14.160, 51.44.040(3), 51.44.070 and 51.44.150. WSR 99-23-107, § 296-15-181, filed 11/17/99, effective 12/27/99.]

the security requirements applicable to units of local government. In setting such requirements, the department shall take into consideration the ability of the governmental unit to meet its self-insured obligations, such as but not limited to source of funds, permanency, and right of default.

(7) The director shall adopt rules to carry out the purposes of this section including, but not limited to, rules respecting the terms and conditions of letters of credit and the establishment of the appropriate level of net worth of the self-insurer to qualify for use of the letter of credit. Only letters of credit issued in strict compliance with the rules shall be deemed acceptable.

[1995 c 31 § 1; 1990 c 209 § 1; 1986 c 57 § 1; 1977 ex.s. c 323 § 9; 1972 ex.s. c 43 § 16; 1971 ex.s. c 289 § 27.]

Notes:

Effective date -- 1990 c 209 § 1: "Section 1 of this act shall take effect January 1, 1991." [1990 c 209 § 3.]

Intent -- 1986 c 57: See note following RCW 51.14.077.

Severability -- Effective date -- 1977 ex.s. c 323: See notes following RCW 51.04.040.

Appendix 13

WAC 296-15-221

Self-insurers' reporting requirements.

(1) **What information must self-insurers report to the department?** Each self-insurer must provide the department:

(a) The name, title, address and phone number of the single contact person who is the liaison with the department in all self-insurance matters. This contact will be sent all department correspondence and is responsible for forwarding information to appropriate parties for timely action.

(b) A copy of its current policy of applying sick leave, health and welfare benefits or any other compensation in conjunction with, or as a substitute for, time loss benefits.

(2) **When must self-insurers notify the department of business status changes?** Self-insurers must notify the department in writing:

(a) Immediately, of any plans to:

(i) Cease business entirely or cease business in Washington; or

(ii) Dispose of controlling financial interest of the original self-insurer. The self-insurer must surrender its certificate for cancellation if requested by the department.

(b) Within thirty days, of any:

(i) Amendment(s) or modification(s) to the self-insurer's articles, charter or agreement of incorporation, association, copartnership or sole proprietorship which will materially change the business identity or structure originally certified.

(A) The department may require additional documentation.

(B) If the self-insurer becomes a subsidiary to another firm, the parent must provide the department with its written guarantee on L&I form F 207-040-001 to assume responsibility for all workers' compensation liabilities of the subsidiary if the subsidiary defaults on its liabilities. See WAC 296-15-021 for additional information.

(ii) Separation (for example, divestiture or spinoff) of any part of the original self-insurer.

(A) The original self-insurer remains responsible for claims liability of the separated part up to the date of separation unless the department approves an alternative.

(B) If the separating part wishes to continue being self-insured, it must submit an application for self-insurance certification (L&I Form F 207-001-000) to the department at least thirty days before separation.

(C) If certification cannot be granted before separation, industrial insurance coverage must be purchased from the state fund effective the date of separation.

(iii) Relocation, addition or closure of physical locations.

(3) **When must self-insurers notify the department of administrative changes?** A self-insurer must notify the department in writing within ten days, of any change to its:

(a) Single contact person who is the liaison with the department in all self-insurance matters. The self-insurer must include the contact's title, address and phone number.

(b) Contract with a service organization or third party administrator independent of the self-insurer which will participate in the self-insurer's responsibilities. The self-insurer must submit a copy of the new or updated service contract. See WAC 296-15-021 for additional information.

(c) Administrator of its workers' compensation program, if the self-insurer is self administered instead of contracting with a service organization or third party administrator.

(4) **What reports must self-insurers submit to the department?** Each self-insurer must submit:

(a) Complete and accurate quarterly reports summarizing worker hours and claim costs paid the previous quarter. Self-insurers must use a form substantially similar to the preprinted Quarterly Report for Self-Insured Business, L&I form F 207-006-000, form sent by the department. This report is the basis for determining the administrative, second injury fund, supplemental pension, asbestosis and insolvency trust assessments. Payment is due by the date specified on the preprinted report sent by the department.

(i) Worker hours must be reported as defined in chapter 296-17 WAC General reporting rules, audit and recordkeeping, rates and rating system for Washington workers' compensation insurance.

(ii) Claim costs include, but are not limited to:

(A) Time loss compensation. Include the amount of time loss the worker would have been entitled to if kept on full salary.

(B) Permanent partial disability (PPD) awards.
(C) Medical bills.
(D) Prescriptions.
(E) Medical appliances.
(F) Independent medical examinations and/or consultations.
(G) Loss of earning power.
(H) Travel expenses for treatment or rehabilitation.
(I) Vocational rehabilitation expenses.
(J) Penalties paid to injured workers.
(K) Interest on board orders.

(b) A complete and accurate annual report of all claim costs paid for each year of liability with an estimate of future claim costs. The self-insurer must use a form substantially similar to the Annual Report for Self-Insured Businesses (SIF-7), L&I form F 207-007-000. This report is due March 1 of each year. The department uses this for the annual determination of each self-insurer's surety requirement.

(c) A fully audited financial statement within six months after the end of the self-insurer's fiscal year. This report demonstrates the self-insurer's continued ability to provide benefits and pay assessments as required. The department will consider a written request for filing time extension.

(i) This statement must be prepared by a certified public accountant.

(ii) A self-insurer with a parental guarantee may submit the parent's fully audited financial statement if the parent's audited statement includes the financial condition of all subsidiaries, including the self-insurer.

(iii) A political subdivision of the state may submit a state auditor's report if it includes the self-insurer's audited financial statement. If the state auditor does not audit the self-insurer annually, the self-insurer must submit financial statements prepared internally for any year a report by the state auditor is not available.

[Statutory Authority: RCW 51.14.077, 51.14.150, 51.14.160, 51.44.040, 51.44.070, and 51.44.150. WSR 09-13-018, § 296-15-221, filed 6/5/09, effective 7/6/09. Statutory Authority: RCW 51.14.077, 51.14.120(7), 51.14.150(4), 51.14.160, 51.44.040(3), 51.44.070 and 51.44.150. WSR 99-23-107, § 296-15-221, filed 11/17/99, effective 12/27/99.]

WINSTON CASHATT LAW OFFICE

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Court of Appeals Case Number: 43636-1

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