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DIVISION II

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STATE OF WASHINGTON
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No. 43636-1

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

DELLEN WOOD PRODUCTS INC.,

Appellant,

vs.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE
OF WASHINGTON,

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COUNTY
THE HONORABLE CHRISTOPHER WICKHAM

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

L&I concedes that “[n]o statute expressly defines ‘default’ under the Industrial Insurance Act” (Resp. Br. 14), but nonetheless asks this court to find that Dellen “defaulted” and forfeited over \$500,000 posted as security for its self-insured workers’ compensation claims based on a misreading of its own regulations and a narrow view of Dellen’s actions in winding-up its self-insurance program. Likewise, L&I concedes that it did not inform Dellen that it “forfeited” its \$500,000 surety for seven years, but argues that this lack of notice did not violate Dellen’s due process rights. This court should reject L&I’s arguments, reverse the trial court’s findings and conclusions that Dellen defaulted and remand to the trial court with instructions to enter an order requiring the refund of Dellen’s surety.

II. REPLY ARGUMENT

A. Dellen’s Interpretation Of “Default” Is Consistent With The Language And Purpose Of RCW Ch. 51.14. The Totality Of Dellen’s Actions Demonstrate That It Did Not Default.

L&I engages in an incomplete review of the statutory and regulatory framework governing self-insurance to argue that Dellen “defaulted” and thus forfeited all right to its \$500,000 surety. This

court should reject L&I's arguments and should instead hold that Dellen did not default based on the totality of its actions, and the entire scheme established by RCW ch. 51.14 and L&I's own regulations.¹

RCW ch. 51.14 establishes the workers compensation self-insurance program and requires that participating employers post a "surety" to guarantee payments of their workers' compensation claims. See RCW 51.14.020(2). Self-insured employers may end their programs either through "termination" (RCW 51.14.050) or "default" (RCW 51.14.060). Under RCW 51.14.050(1) an employer terminates its program "by giving the director written notice stating when, not less than thirty days thereafter, such termination shall be effective." If an employer terminates its self-insurance program 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

¹ Dellen did not waive its assignments of error to FF 1.4-1.6. (Resp. Br. 12) Dellen's argument challenging these findings is in App. Br. 24-25. This court should decide the issue on the merits. RAP 1.2(a); **Washington Ass'n of Neighborhood Stores v. State**, 149 Wn.2d 359, 372 n.3, 70 P.3d 920 (2003) (denying respondent's motion to strike or disregard argument because "there was not a complete failure to raise the issue and no real prejudice or inconvenience is present").

employees which occurred during the period of self-insurance.”
RCW 51.14.050(2).

L&I concedes that RCW ch. 51.14 does not define “default.” (Resp. Br. 14) Dellen argued that the trial court erred by concluding that Dellen defaulted because Dellen was current on all obligations when it ceased being an employer (FF 1.15, CP 88; RP 19-20, 22, 55-57), it intended to “make whatever payments were required” (RP 44), it notified L&I that it had ceased being an employer and requested instructions on how to proceed (RP 11, 15-16, 57-58; Ex. 2), and it provided a surety greatly in excess of its workers’ claims (RP 19; Ex. 3 at 1; Ex. 9). Dellen used the term “default” in a letter to L&I on L&I’s instruction. (RP 19; Ex. 2; App. Br. 20-26) Contrary to L&I’s argument (Resp. Br. 22-23), Dellen fully complied with the only obligation imposed on terminating employers under RCW 51.14.050 by “maintain[ing] money . . . deemed sufficient in the director’s discretion to cover the entire liability of such employer.” (App. Br. 22)

Dellen’s interpretation of default is consistent with the language and purpose of RCW ch. 51.14, and neither creates a “logical paradox” nor leads to “absurd” results. (Resp. Br. 32-33)

L&I asserts that Dellen's argument creates a "paradox" because – according to L&I – L&I may only access a surety if an employer defaults and therefore L&I could not have accessed Dellen's surety as it did unless Dellen defaulted. But this "paradox" exists only if L&I's access to an employer's surety is strictly limited to cases of default. Although RCW 51.14.060 authorizes L&I to use the surety in cases of default, it does not prohibit L&I from using a surety to pay future obligations where, as here, a terminating employer so requests upon ceasing operations. See *also* RCW 51.14.020(2) (surety held by L&I "for the payment of compensation by the self-insurer and his or her assessments"). Likewise, L&I's choice to implement a surety agreement that requires a "default" before L&I can access a surety does not mean that L&I can never access a surety under other circumstances. (Resp. Br. 21)

Dellen's interpretation of default does not render a portion of RCW 51.14.060 meaningless. (Resp. Br. 33-34) The Legislature amended RCW 51.14.060 to require the transfer of defaulting employer's surety into an "insolvency trust fund" after all claims against the employer are closed and it has been in default for ten years. Laws of 2010, ch. 213, § 2. According to L&I, this

provision is meaningless if an employer does not default until its surety is exhausted because a defaulting employer will never have a surety balance to transfer. But Dellen never argued that it did not default *solely* because its surety covered its workers' claims. Rather, Dellen argued that it did not default because it was current on all obligations when it ceased being an employer, intended to fully provide for the payment of its employees' claims, notified L&I that it had ceased being an employer, requested instructions on how to proceed, *and* provided a surety that fully covered its workers' claims.² (App. Br. 20-26)

Indeed, it is the definition of "default" proposed by L&I that leads to "absurd" results. L&I argues that a default occurs when an employer fails to comply with WAC 296-15-121(8) which imposes certain requirements on self-insurers who "end" their programs. (Resp. Br. 15-16, 22-23, 29-30, 36) WAC 296-15-121(8) applies regardless whether the "self insurer voluntarily surrenders

² Justice Finley noted the difficulty of interpreting a statute based on a subsequent legislature's enactments in his concurrence in ***Anderson v. City of Seattle***, 78 Wn.2d 201, 205, 471 P.2d 87 (1970) ("In seeking the intent of the legislature, the judicial branch of government must ultimately be guided by the language used by those members of the legislature who passed the measure and not by an expression by a session, of different composition which addressed the same subject nine years later.").

certification [i.e., terminates] or has its certificate involuntarily withdrawn by the department [i.e., defaults].” L&I cannot rely on a regulation that applies equally to self-insurers that “terminate” and “default” to establish when an employer defaulted as opposed to terminated. Likewise, RCW 51.14.030 creates requirements for a self-insurer establishing its program, but it sheds no light on what an employer must do when ending its program. (Resp. Br. 16, 23, 29) L&I cites no statute or regulation defining “default” as a failure to file reports. (Resp. Br. 36-37; *see also* App. Br. 25)

The Legislature did not enact RCW 51.14.020 to prevent an employer, such as Dellen, from recovering excess surety amounts after fully providing for its employees' claims. Rather, it enacted the statute to prevent bankrupt employers from using the surety to repay debts owed to third-parties, as L&I concedes. (Resp. Br. 41 (“the legislative history shows that the legislature was concerned that some bankrupt self-insurers had brought suit against their sureties for the benefit of third-party creditors”); *see also* App. Br. 19, 24-25) L&I relies on WAC 296-15-121(1)(b) to argue that an employer cannot use a surety to pay benefits or assessments (Resp. Br. 32), but WAC 296-15-121(1) is similarly intended to

prevent the use of a surety by an insolvent employer. See 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”). In any event, Dellen did not use the surety; L&I did.

L&I’s proffered definition leads to the absurd result of a \$500,000 forfeiture by an employer who provided for the full payment of its employees’ claims. See *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). This court should reverse the trial court’s findings and conclusions that Dellen defaulted.

B. L&I Violated Dellen’s Due Process Rights By Failing To Inform Dellen That It Forfeited Its \$500,000 Surety Until Seven Years After The Alleged Default.

L&I violated established principles of due process when it failed to notify Dellen that its 2002 “default” resulted in the forfeiture of its surety in excess of \$500,000. L&I’s arguments that Dellen was not entitled to notice that it had forfeited its surety and that Dellen’s due process rights were vindicated by a post-deprivation

hearing confuse the protections afforded by due process. This court should reverse the trial court's conclusion that L&I did not violate Dellen's due process rights.

"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. "[T]he fundamental requirement of due process is the opportunity to be heard at a *meaningful time and in a meaningful manner.*" **Post v. City of Tacoma**, 167 Wn.2d 300, 313, ¶ 24, 217 P.3d 1179 (2009) (emphasis added) (citing **Mathews v. Eldridge**, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). This almost always requires a pre-deprivation hearing. **Mansour v. King County**, 131 Wn. App. 255, 272, ¶ 26, 128 P.3d 1241 (2006) (pet owner was "entitled to know" basis for attempt to remove pet from county "in time" to respond to charges); *compare* **City of Redmond v. Moore**, 151 Wn.2d 664, 667, 91 P.3d 875 (2004) (statute that provided for suspension of driver's license without predeprivation hearing violated due process) *with* **City of Bellevue v. Lee**, 166 Wn.2d 581, 583, ¶ 1, 210 P.3d 1011 (2009) (statute that provided hearing before suspension of license did not violate due process).

Here, L&I violated Dellen's due process rights because (1) Dellen had a substantial interest in the return of its \$500,000 surety, (2) L&I's practice of informing employers of a forfeiture years after the fact is likely to result in erroneous deprivations, and (3) L&I could have easily provided prompt notice of forfeiture. (App. Br. 27-31 (citing *Mathews*, 424 U.S. at 335)) L&I concedes that it did not provide Dellen any notice that it had forfeited its \$500,000 surety until 2008, seven years after the alleged forfeiture. (Resp. Br. 25 (L&I "failed to inform [Dellen] that a default would result in forfeiting its surety"), 45; see also FF 1.12, CP 88; Ex. 7 at 2 ("I understand this is not the response you anticipated.)) 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; RP 22, 49-51, 56, 72-73, 85, 93-95)

L&I's argument that Dellen was not entitled to notice that it had irrevocably lost all right to its surety, but only notice that L&I considered it to be in a state of default (Resp. Br. 44), ignores the constitutional protections of due process. (See also Resp. Br. 47 ("immaterial" whether Dellen was informed that it had forfeited its surety within days or years of the "default")) That L&I considered

Dellen in a state of “default” did not deprive Dellen of its property; 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, ¶ 14, 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”) (emphasis added); **Berst v. Snohomish County**, 114 Wn. App. 245, 255, 57 P.3d 273 (2002) (county violated procedural due process by failing to give “prior notice of the 2000 action to impose the moratorium once that decision was made”), *rev. denied*, 150 Wn.2d 1015 (2003).

L&I concluded that Dellen lost any right to its surety in 2002, yet it remained silent. L&I’s own brief, and the record, contradict its assertion that it did not conclude that Dellen had forfeited its rights to the surety until 2008 (Resp. Br. 45). (Resp. Br. 13 (“Dellen defaulted and . . . lost all right and title to its surety as a result”); Ex. 7 (“When Dellen defaulted on its self-insurance obligation, it lost all rights to the surety”); Ex. 13 (“On January 31, 2002, [Dellen] lost its

right and title to funds on deposit for its self-insurance obligations.”))

L&I’s provision of a post-deprivation hearing did not allow for a *meaningful hearing at a meaningful time*. See **Mansour**, 131 Wn. App. at 272, ¶ 26; **Moore**, 151 Wn.2d at 667. By 2008, when L&I finally notified Dellen that it had lost all right to its surety, Dellen could no longer protect its interest in the surety by remedying any alleged deficiencies. (App. Br. 30)

Dellen was not “ignorant” of the law (Resp. Br. 26), but rather was misled by L&I’s confusing and contradictory statements regarding its rights to the surety. Although L&I instructed Dellen that it would have to “default” in order for L&I to take over management of Dellen’s claims, L&I never informed Dellen that a “default” would result in Dellen irrevocably losing all right to its surety. (Resp. Br. 25, 45; Ex. 1; RP 19, 46) L&I then made contradictory statements stating that Dellen had both “forfeited” the surety and that it might be entitled to a refund. (Ex. 13; Resp. Br. 28 (acknowledging that L&I’s Self-Insurance Manager Larry Wilkinson had made “statement with regard to when [Dellen’s] surety might be released ‘assuming a refund were available’”)) L&I

offers no explanation for why Wilkinson – L&I's Self-Insurance Certification and Compliance Manager – would “assume” a refund was available if legally impossible as L&I now asserts.

Nor does L&I explain why it sent Dellen quarterly statements indicating the amount of the surety and interest earned during the lengthy period in which Dellen had allegedly irrevocably forfeited all rights to the surety. (RP 26-27, 74; Ex. 20) Although Dellen's CFO, Gene Olsen, said L&I's Larry Wilkinson had never “guaranteed” the return of the surety (Resp. Br. 27), he testified that “[t]he reports I received and every indication was that those dollars still belonged to Dellen, whatever was left.” (RP 46)

Thus, unlike *Harman v. Dep't of Labor Indus.*, 111 Wn. App. 920, 927, 47 P.3d 169, *rev. denied*, 147 Wn.2d 1025 (2002) (Resp. Br. 26), the confusion in this case resulted from L&I's own actions, not those of the party seeking relief. As Judge Sweeney noted in his dissent in *Harman*, trial courts are vested by our state constitution with the power to fashion equitable remedies. 111 Wn. App. at 928 (citing Wash. Const. art. IV, § 6). Here, the trial court failed to fashion such a remedy, but instead allowed L&I to

confiscate an employer's surety without the fundamental protections of due process.

Dellen does not seek a "windfall," but the return of its protected property interest. (Resp. Br. 29-30) L&I argues that Dellen – not L&I – obtained a "windfall" when L&I seized a cash surety worth \$500,000 because L&I managed Dellen's claim activity for several years after Dellen "defaulted." But no new claims were filed after L&I took over Dellen's claims, and Dellen's last claim closed in May 2004. (RP 29-31, 72-74; *see also* Resp. Br. 7). As L&I concedes, it could have paid itself assessments and administrative costs from the surety, but as a matter of discretionary policy did not. (Resp. Br. 7; *see also* Resp. Br. 35-38) In the extremely unlikely event a Dellen worker reopened a claim, L&I could recover that cost from Dellen even after the surety has been refunded to Dellen. (Resp. Br. 17; WAC 296-15-121(9)(b)) The windfall fell to L&I when it seized a \$500,000 surety that is *undisputedly* not needed for the payment of any claims by Dellen workers. (RP 25, 29-31, 37-39, 72-74; Ex. 3) This court should reverse the trial court's conclusion that L&I did not violate Dellen's due process rights.

C. This Court Should Order The Immediate Refund Of Dellen's Surety.

Dellen is entitled to the immediate refund of its surety as a matter of equity and based on L&I's own statements. This court should remand to the trial court with instructions to enter an order requiring the immediate refund of Dellen's surety, or, at a minimum, for its refund in May 2015, eleven years after Dellen's last claim closed.

Washington courts have equitable power "to set aside actions of the Department [of Labor and Industries]" "apart from the provisions of Title 51 RCW." ***Rabey v. Dep't of Labor & Indus. of State of Wash.***, 101 Wn. App. 390, 395, 3 P.3d 217, *rev. granted*, 142 Wn.2d 1007 (2000); *see also City of Walla Walla v. \$401,333.44*, 164 Wn. App. 236, 246, ¶ 12, 262 P.3d 1239 (2011) ("Forfeitures are not favored; they should be enforced only when within both the letter and the spirit of the law.") (App. Br. 21) This court, and the trial court, have ample authority to authorize an immediate refund of Dellen's surety as an equitable remedy. ***Weidert v. Hanson***, ___ Wn. App. ___, ¶ 9, 288 P.3d 1165 (2012) ("The power of equity has been construed as broad as equity and justice require. Indeed, the whole idea behind courts of chancery

and their equitable powers was to mitigate the harsh absolute dictates of common law rules.”) (citations and quotations omitted). An immediate refund is consistent with L&I’s own statements stating that a refund of the surety would be available in 2013. (Resp. Br. 8 (citing Ex. 13))

Under WAC 296-15-121(9), L&I may refund a surety after the self-insurer has been released from monthly reporting requirements for at least ten years. A self-insurer may be released from “quarterly reporting after it has had no claim activity with the exception of pension or death benefits for a full year.” WAC 296-151-121(8)(b). Dellen’s last claim closed in May 2004 (Resp. Br. 7; RP 29-31, 72-74), and thus under L&I’s regulations it would be entitled to a refund in May 2015, ten years from when it otherwise would have been released from quarterly reporting requirements. Should this court decline to enter an ordering requiring an immediate refund, it should enter an order entitling Dellen to a refund of its surety in May 2015.

L&I asks this court to force Dellen to engage in the pointless act of managing and filing reports about claims that have not existed for nine years. (Resp. Br. 49) This court should reject L&I’s

request. *Vashon Island Comm. for Self-Gov't v. Washington State Boundary Review Bd. for King County*, 127 Wn.2d 759, 765, 903 P.2d 953 (1995) ("Courts should . . . refrain from requiring the performance of useless or vain acts.").

III. CONCLUSION

This court should reverse and instruct the trial court on remand to enter an order directing the immediate refund of Dellen's surety. At a minimum, this court should enter an order requiring L&I to refund the surety in May 2015.

Dated this 8th day of March, 2013.

SMITH GOODFRIEND, P.S.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on March 8, 2013, I arranged for service of the foregoing Reply Brief of Appellant, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 8th day of March, 2013.



Victoria K. Isaksen