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SUPREME COURT
STATE OF WASHINGTON
7/20/2018
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DIVISION II
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NO. 50566-5-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

ALFREDO SUAREZ, *PETITIONER*,

v.

MASCO CORPORATION, *RESPONDENT*.

PETITION FOR REVIEW TO THE SUPREME COURT OF
WASHINGTON

BUSICK HAMRICK PALMER PLLC
STEVEN L. BUSICK
Attorney for Appellant/Petitioner

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INTRODUCTION

Alfredo Suarez was denied access to justice by the refusal of the trial court to continue the jury trial to an available third day for jury instruction on oral argument of counsel, and by the court of appeals in denying oral argument.

ISSUE FOR REVIEW

1. Did the trial court abuse its discretion in denying Mr. Suarez motion to continue the jury trial to an available third day for jury instructions and oral argument of counsel?
2. Did the Court of Appeal abuse its desretion on refusing oral argument over the objection of Mr. Suarez?

CONSIDERATIONS FOR ACCEPTANCE OF REVIEW

Mr. Suarez maintains that there is a significant question of law under the Constitution of the State of Washington, and this appeal involves an issue of subntantial public interest that should be determined by the Supreme Court.

STATEMENT OF THE CASE

Alfredo Suarez came to the United States from Mexico in 1979. He has a second grade education in Mexico, does not read or write in Spanish or

English, and speaks only Spanish. Since coming to the United States, he has worked as a farm laborer in California, and a production worker and insulation installer in Washington. On June 27, 2012, Mr. Suarez injured his neck and right shoulder rolling a bundle of insulation up to a house under construction when the bundle suddenly started to fall down a slope, and he reached out to grab it with his right arm. Mr. Suarez had a cervical microdisectomy at C6-7 in November of 2012 to repair a herniated disc, and right shoulder surgery in July 2013 to break up adhesions that had formed.

After the shoulder surgery, Mr. Suarez was cleared to return to work light duty four hours a day separating work orders at Masco. Mr. Suarez is right handed, and was forced to use his left hand due to ongoing pain in his right shoulder and arm. Mr. Suarez developed left shoulder pain do to overuse, was not able to lift his left arm, and discontinued working after three months. Mr. Suarez changed treating physicians to Richard Heitsch, MD, in September 2013, and on October 11, 2013, Dr. Heitsch took Mr. Suarez off work. Masco Corporation, the self-insured employer, refused to pay Mr. Suarez time loss benefits, and on December 19, 2014, the Department of labor and Industries ordered Masco to pay time loss through December 10, 2014. Masco Corporation appealed the Department order to the Board of Industrial Insurance Appeals.

The appeal was assigned to an Industrial Appeal Judge, and the case proceeded to a full evidentiary hearing. Mr. Suarez, his wife Luz Carillo, nephew Victor Arroola, and Dr. Heitsch testified on behalf of Mr. Suarez; and vocational counselor Todd Martin, and Dr. Clarence Fossier, Dr. John

Thompson, and Dr. Thomas Rosenbaum, who had each conducted independent medical evaluations of Mr. Suarez for the employer, testified for Masco. The Industrial Appeals Judge reversed the Department order to pay time loss benefits, and Mr. Suarez petitioned the Board for review. The petition was summarily denied without review. Mr. Suarez appealed to Superior court for Clark County, and the case proceeded to a six person jury trial.

At the commencement of the trial, the trial court advised the jury,

We generally don't stay be past 5:00 o'clock. The reason is there's some staffing and overtime issues for the courthouse here so in order to avoid running up extra expense we try to be out promptly at 5:00 o'clock RP 2-3

The afternoon of the first day of trial the testimony of Mr. Suarez, Ms. Carillo, Mr. Arroola, and Dr. Heitsch was read to the jury, Mr. Suarez rested, and the testimonial of Mr. Martin VRC concluded the first day's testimony. Court recessed at 4:42 p.m. and the trial court's concluding statement to the jury was that they needed to be back in the jury room the next morning at 8:45 a.m. in order to start trial promptly at 9:00 a.m., RP, at 3.

The next morning, Tuesday, April 25, 2017, the trial court had without notice to the parties scheduled other matters to commence at 9:00 a.m., and trial did not reconvene until 10:17 a.m. with the reading of the defense doctor's testimony. The trial court broke for lunch just before noon with an announced resumption at 1:30 p.m., which did not resume until 1:45 p.m. The reading of the testimony concluded at 3:25, and the trial court announced a recess, Mr.

Suarez then moved to continue the trial to his following day for jury instructions and oral arguments on the basis that the jury would not receive the case until after 4:00 p.m. and would only have until 5:00 p.m. to deliberate. The jury would feel rushed to conclude deliberations by 5:00 p.m., and in the interest of justice it would be better that the jury come back the next morning to hear jury instructions and the arguments of counsel. RP, at 6

Mr. Suarez, pointed out that jury had previously been advised that the trial could last three days, and the trial court and counsel were available for a third day of trial. In the interest of justice a continuance would be appropriate under the circumstances. Masco opposed the motion, and argued that the jury could take more time if they wanted. RP, at 6-7 The trial court denied the motion stating.

Well I'll note that it's basically an item within the discretion of the court. I'm in favor of good time management. They've already given up two days. They were advised that the trial could certainly go three days.

So I'm inclined – it will take probably ten minutes or less to read the instructions and then we go to closings. So let's see how far they get today and they can certainly be informed that if they need to come back tomorrow morning they'll have time to do that RP, at 7.

After the trial court's instructions to the jury, closing arguments of counsel, and rebuttal, the jury did not retire to deliberate until 4:39 p.m., about the same time they had recessed the previous day. The jury at no time was ever advised by the trial court that they could come back for a third day to continue deliberations. After the jury announced that they had a verdict,

counsel and the court clerk were called and returned to the court room, and the jury was brought in and announced their verdict at 5:08 p.m. in favor of Masco Corporation. Mr. Suarez then appealed the jury verdict to the Court of Appeals, Decision Two, on the basis that the trial court abused its discretion in not continuing the trial to an available third day for the courts instructions to the jury and the closing arguments of counsel. Mr. Suarez filed his Brief of Appellant, Masco filed its Respondents Brief, Mr. Suarez filed his Reply Brief, the Court of Appeals denied oral argument over the objection of Mr. Suarez, and issued its unpublished opinion on June 19, 2018, deciding that the trial court did not abuse its discretion in denying Mr. Suarez motion of continuance of the trial to the following morning.

ARGUMENT

The trial court abused its discretion in not granting Mr. Suarez's motion for a continuance to an available third day for jury instructions and closing arguments, after the trial court had scheduled an unrelated hearing delaying the commencement of trial the second day by 1 hour and 17 minutes, so that jury did not receive the case until 4:39 in the afternoon. By the trial court at the commencement of trial advising the jury that generally we don't stay past 5:00 o'clock because of staffing and overtime issues, there was a limitation placed on the jury to conclude deliberations by 5:00 p.m., and the jury was never advised that they could take more time if necessary, or come back the next day. The jury then announced their verdict at 5:00 p.m. that day in favor of the employer.

Whether a motion for continuance should be granted or denied is a matter of discretion with the trial court, reviewable on appeal for manifest abuse of discretion. In exercising its discretion, a trial court may properly consider the necessity of reasonably prompt disposition of the litigation, the needs of the moving party, the possible prejudice to the adverse party, the prior continuances granted the moving party, and any other matters that have a material bearing on the exercise of the discretion vested in the court. A court abuses its discretion when its decision is based upon a ground, or to an extent, clearly untenable or manifestly unreasonable. *Trummel v. Mitchell*, 156 Wn. 2d 659, 670-671, 131 P. 3d 305 (2006). Since the trial court here had limited court proceedings to 5:00 o'clock, and had delayed commencement of trial the second day by 1 hour and 17 minutes, so that the jury did not receive the case until 4:39 p.m. that day, there is no tenable reason why the court should not have granted the continuance to the available third day, especially when the jury had initially been advised that the trial could go three days.

The grant or denial of a continuance is a discretionary ruling, because the court must consider various factors such as diligence, materiality, due process, a need for an orderly procedure and the possible impact of the result on the trial. *Recall of Lindquest*, 172. Wn 2d 120, 130, 258 P3d 9 (2011). The entire second day of trial was taken up with reading the three defense doctors testimony, who were all specialist, as opposed to Mr. Suarez's doctor the first day, who was not a specialist. The impact of the jury then receiving the case at 4:39 p.m. the second day with only 21 minutes to deliberate was a devastating impact on Mr. Suarez case, which was not considered by the trial

court.

ER 611 (a) cited by the Court of Appeals here states,

The court shall exercise reasonable presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

Since this case was on appeal from a decision of the Board of Industrial Insurance Appeals, and the testimony is read to the jury pursuant to RCW 51.52.115, ER 611 (a) would not apply. RCW 51.52.115, provides that a full opportunity to be heard be given, and with limitations placed on jury deliberations, Mr. Suarez was denied a full opportunity for his case to be considered by the jury.

The Court of Appeals cites *People in Marshal* 165 Ill. App. 3d 968, 521, N.E. 2d 538, 547 (1987) for the rule that the length of jury deliberations is a matter within the trial court's discretion, and points out that the jury did not retire until 9:42 p.m. There, after denial of defendant's motion for a continuance, a lengthy delay resulted from the court's efforts to determine whether defendant was diligent in his attempts to secure witnesses, and the defendant refused to rest. That case cites *People v. Daily* 41 Sec. 2d 116, 242 N.E. 2d 170 (1968), where after 6 ½ hours of deliberations, the trial judge recalled the jury to ascertain if a verdict had been reached. The foreman announced that it had not, and without disclosing how the jury stood, stated there had been no change in voting for two to three hours. The court then

directed the jurors to return to the jury room for further deliberations, and a short time later a verdict of guilty was returned. These Illinois cases hardly apply to the facts here in which the jury was not given a full opportunity to deliberate.

Mr. Suarez agrees that the jury was not expressly told that it must reach a verdict by 5:00 p.m., but the implication was there by statements previously made to the jury by the court, and the jury was never advised that they could come back the next day for deliberations. No reasonable judge would deny the motion for continuance under the circumstances here and not advise the jury they could continue their deliberations the next day if necessary.

Pursuant to RAP 11.4(j) the Appellate court may on its own incentive decide a case without oral argument. At the same time pursuant to subsection (f) the court ordinarily encourages oral argument. In this case involving a denial of a motion for continuance of a jury trial which has due process implications, and the issue is whether the trial court abused its discretion, the failure to allow oral argument is an abuse of discretion. However, at this time, Mr. Suarez is requesting a new trial, and not the opportunity to argue before the Court of Appeals.

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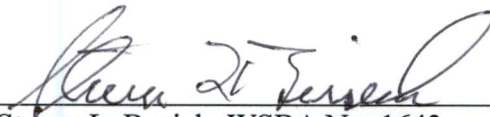
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CONCLUSION

The Supreme Court of the State of Washington should accept review of the Unpublished Opinion of the Court of Appeals Division Two dated June 19, 2018.

Dated: July 16, 2018.



Steven L. Busick, WSBA No. 1643
Busick Hamrick Palmer PLLC
Attorney for Petitioner



Washington State Court of Appeals Division Two

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Derek Byrne, Clerk/Administrator (253) 593-2970 (253) 593-2806 (Fax)

General Orders, Calendar Dates, and General Information at <http://www.courts.wa.gov/courts> **OFFICE HOURS:** 9-12, 1-4

March 13, 2018

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CASE #: 50566-5-II

Alfredo Suarez, Appellant v. MASCO Corp., et al., Respondents

Counsel:

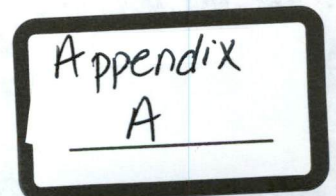
After a careful review of the issues raised in the above referenced appeal, the court has decided to review this case without oral argument. RAP 11.4(j). Any request to change this decision must be filed not later than ten (10) days after the date of this letter. Unless a panel of judges concludes that oral argument would benefit the court, this matter will be set for consideration on May 18, 2018 and a written opinion will be issued thereafter. If a panel of judges agrees that argument would be beneficial, a letter setting the date and time of oral argument will be sent. In most instances, the date set for oral argument will be the date specified above.

Note: In those cases in which this court must consider an affidavit of financial need in ruling on an attorney fees request, the affidavit of financial need must be filed no later than 10 days before May 18, 2018. See RAP 18.1(c).

Very truly yours,

Derek M. Byrne,
Court Clerk

DMB:kc



NO.50566-5-II

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

ALFREDO SUAREZ,)	
)	
Appellant,)	REQUEST TO CHANGE
)	DECISION TO DECIDE
v.)	CASE WITHOUT
)	ORAL ARUGMENT
MASCO CORPORATION,)	
)	
Respondent.)	
_____)	

The appellant, Alfredo Suarez, requests a review of the decision dated March 13, 2018, to decide this appeal without oral argument. This is the second appeal of mine in a row that a decision has been made to decide an appeal without oral argument. I would rather travel to Seattle before Division I, or to Spokane before Division II, than to have this case decided without oral argument, and I request a transfer of this appeal to Division I.

Pursuant to RAP 11.4(j), the appellate court may on its own initiative decide a case without oral argument. The standard for review of a decision to decide a case without oral argument would seem to be an abuse of decision. I request written documentation of all appeals decided without oral argument verses appeals decided with oral argument over the

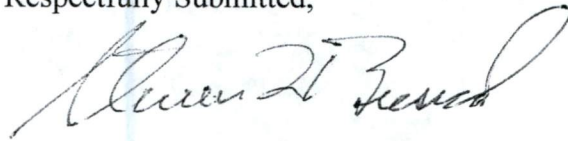
REQUEST TO CHANGE
DECISION TO DECIDE
CASE WITHOUT
ORAL ARUGMENT

Appendix
B

last calendar year by Division II.

Dated this 16th day of March 2018.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Steven L. Busick". The signature is written in a cursive style with a large, looping initial "S".

Steven L. Busick, Attorney for Appellant
Busick Hamrick Palmer PLLC
PO Box 1385
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REQUEST TO CHANGE
DECISION TO DECIDE
CASE WITHOUT
ORAL ARUGMENT

April 17, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

ALFREDO SUAREZ,

Appellant,

v.

MASCO CORPORATION,

Respondent.

No. 50566-5-II

ORDER DENYING MOTION
FOR ORAL ARGUMENT
ORDER DENYING MOTION
TO TRANSFERRING CASE

Appellant Alfredo Suarez filed a motion (1) requesting oral argument in this case, or (2) in the alternative, to transfer his case to another division of the court of appeals. After further review, it is hereby

ORDERED that appellant's motion for oral argument is denied. This case will be decided on this court's non-oral argument docket. See RAP 11.4(j). It is also

ORDERED that the appellant's motion to transfer is denied.

PANEL: Jj. Worswick, Maxa, Lee

DATED this ____ day of _____, 2018.

FOR THE COURT:

Maxa, C.J.

MAXA, C.J.

Appendix
C

June 19, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

ALFREDO SUAREZ,

Appellant

v.

MASCO CORPORATION,

Respondents.

No. 50566-5-II

UNPUBLISHED OPINION

LEE, J. – Alfredo Suarez appeals the jury’s verdict in favor of Masco Corporation,¹ finding that the Board of Industrial Insurance Appeals (the Board) was correct when it decided that Suarez was not entitled to time loss benefits from October 2013 through December 2014. Suarez argues the trial court erred when it denied his motion for a continuance before jury deliberations. We hold that the trial court did not err. Accordingly, we affirm.

FACTS

Suarez worked for Masco, a self-insured employer, as an insulation installer. On June 27, 2012, Suarez was injured while rolling a bundle of insulation toward a house he was insulating when the roll started to fall down a slope. Suarez had a cervical microdiscectomy in November 2012 to repair a herniated disc and shoulder surgery in July 2013 to repair his right shoulder. Suarez returned to work part time, on light duty separating work orders. In October 2013, Suarez

¹ Masco Corporation is now known as TopBuild Corporation.

Appendix
D

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felt he was no longer able to work due to his injuries and filed a claim with the Department of Labor and Industries (the Department).

The Department ordered Masco to pay time loss compensation for the period of October 11, 2013, through December 10, 2014. Masco appealed this order to the Board.

The Board reversed the Department's order, concluding Suarez was not a temporarily totally disabled worker from October 11, 2013, through December 10, 2014; therefore, he was not entitled to time loss compensation for this period. After his petition for review to the Board was denied, Suarez appealed the Board's decision to the superior court.

Before trial, the trial court discussed with the jury "how the scheduling will work." Verbatim Report of Proceedings (VRP) at 2. The trial court informed the jury that they "go from 9:00 o'clock till noon typically" and then take a lunch break. VRP at 2. The trial court advised the jury that "[w]e generally don't stay be - past 5:00 o'clock." VRP at 2. The trial court explained that "there's some staffing and overtime issues for the courthouse here so in order to avoid running up extra expense we try to be out promptly by 5:00 o'clock." VRP at 3.

At trial, the certified board record was read to the jury. On the second day of trial, the parties started at 10:17 AM. The reading of the record ended at 3:21 PM. Suarez then moved to continue the trial to the next day. He argued that retiring the jury for deliberations now would not give them enough time to deliberate. The trial court denied the motion, stating:

Well I'll note that it's basically an item in the discretion of the court. I'm in favor of good time management. They've already given up two days. They were advised that the trial could certainly go three days.

So I'm inclined -- it will take probably ten minutes or less to read the instructions and then we go to closings. So let's see how far they get today and

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they can certainly be informed that if they need to come back tomorrow morning they'll have the time to do that.

VRP at 7.

The jury began deliberations at 4:39 PM and returned a verdict at 5:08 PM. The jury returned a verdict in favor of the Board. Suarez appeals.

ANALYSIS

Suarez contends the trial court abused its discretion in denying his motion for a continuance. We disagree.

A. STANDARD OF REVIEW

We review the trial court's decision to deny a continuance motion for abuse of discretion. *Trummel v. Mitchell*, 156 Wn.2d 653, 670, 131 P.3d 305 (2006). A trial court abuses its discretion when its decision is manifestly unreasonable, or based on untenable grounds or untenable reasons. *Id.* at 671

B. DENIAL OF MOTION FOR CONTINUANCE

In exercising its discretion regarding a continuance motion, a court may consider many factors including the necessity of reasonably prompt disposition of the litigation, the maintenance of orderly procedure, and due process. *Id.* at 670; *In re Recall of Lindquist*, 172 Wn.2d 120, 130, 258 P.3d 9 (2011). Due process requires a fundamentally fair trial. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984).

Under ER 611(a), a trial court is granted reasonable control over the mode of presenting evidence so as to avoid needless consumption of time. Moreover, "[t]he length of jury deliberations is a matter within the trial court's discretion." *People v. Marshall*, 165 Ill. App. 3d

No. 50566-5-II

968, 521 N.E.2d 538, 547, 118 Ill. Dec. 256 (1987). While there is no Washington case directly on point, the Illinois case of *People v. Marshall* is instructive. There, the jury retired to deliberate at 9:20 PM. *Id.* at 542. On appeal, Anthony Marshall argued the verdict was coerced because the jury felt compelled to reach a verdict that evening. The appellate court disagreed, holding, “The length of jury deliberations is a matter within the trial court’s discretion and will not be disturbed absent an abuse of that discretion.” *Id.* at 547. The *Marshall* court found no abuse of discretion. *Id.*

Here, the trial court expressed the importance of “good time management” and recognized that the jury had “already given up two days.” VRP at 7. The trial court considered the time to read the jury instructions and for counsel to make their closing remarks before submitting the matter to the jury for deliberations. The jury would receive the case towards the end of the day; nevertheless, the trial court stated that it would take into consideration “how far [the jury] gets today” and if needed the trial court would inform the jury that it could come back the next day. VRP at 7. The trial court also recognized that the jury was “advised that the trial could certainly go three days.” VRP at 7.

Based on the above, the trial court properly considered the reasonably prompt disposition of the case and the orderly procedure of the case in denying Suarez’s motion for a continuance and allowing the jury to proceed with deliberations. While the jury was informed that “generally” it did not stay past 5:00 PM, the jury was *not* told that it must make a decision by 5:00 PM. There was the possibility that the jury would return the next day if needed. Thus, the trial was not fundamentally unfair, and the trial court did not violate due process by submitting the matter to the jury in the late afternoon.

Suarez has not clearly demonstrated that the trial court's ruling was manifestly unreasonable, or exercised on untenable grounds or for untenable reasons.² Accordingly, the trial court did not abuse its discretion in denying his motion for a continuance.

C. ATTORNEY FEES

Suarez argues that should he prevail on this appeal and on retrial in superior court, he is entitled to attorney fees pursuant to RCW 51.52.130. However, because Suarez does not prevail, he is not entitled to attorney fees.


We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.



Lee, J.

We concur:



Worswick, J.



Maxa, C.J.

² Suarez also argues that, contrary to RCW 51.52.115, he was not given a full opportunity to present his case because of "the restrictions placed on the process by the trial court in limiting jury deliberation." Br. of Appellant at 19. However, Suarez fails to explain what he was prevented from presenting or describe any aspect of his case that he was not allowed to present. RAP 10.3(a)(6). Therefore, we do not consider this argument.

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

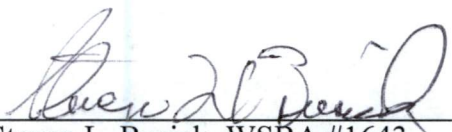
ALFREDO SUAREZ,)	COA No. 50566-5-II
)	
Petitioner,)	
)	PROOF OF SERVICE
v.)	
)	
MASCO CORPORATION, INC.,)	
)	
Respondent.)	
)	

The undersigned states that on July 16, 2017, I served via US mail, as indicated below, Petition for Review to the Supreme Court of Washington, addressed as follows:


James L. Gress, Attorney
Gress, Clark, Young & Schoepper
8705 SW Nimbus Avenue, Suite 240
Beaverton, OR 97008

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated: July 16, 2017.



Steven L. Busick, WSBA #1643
Attorney for Alfredo Suarez, Appellant

FILED
COURT OF APPEALS
DIVISION II
2018 JUL 18 AM 11:43
STATE OF WASHINGTON
BY  **DEPUTY**