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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

BRIEF OF APPELLANT

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. ASSIGNMENTS OF ERROR 2

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR 6

IV. STATEMENT OF THE CASE 7

A. On L&I's Instruction Dellen Sent L&I A Letter Stating That It Had Elected To "Default" On Its Self-Insurance Program. L&I Did Not Notify Dellen That This "Default" Resulted In The Forfeiture Of $500,000 Provided To L&I By Dellen Until Seven Years Later. 7

B. The Trial Court Affirmed L&I's Order And Found That Dellen Had "Defaulted" On Its Self-Insurance Obligations Despite Having Fully Provided For The Payment Of Its Employees' Claims. 12

V. ARGUMENT 14

A. The Legislature Provided Two Methods For A Self-Insured Workers Compensation Employer To Wind Up Its Operations And To End Its Self-Insurance Program. 14

B. Dellen Did Not "Default" Under RCW Ch. 51.14, But Instead Terminated Its Status As A Self-Insurer Because It Fully Provided For The Payment Of Its Employees' Claims. 20

C. L&I Violated Dellen's Right To Due Process By Failing To Give Dellen Notice For Seven Years That It Had Forfeited The Entire Surety Fund By Stating That It Wished To "Default" On Its Self-Insurance Obligations. 27

VI. CONCLUSION 31

APPENDICES:

App. A: Order and Notice. (Ex. 8)

App. B: Decision and Order. (AR 2-4)

App. C: Findings of Fact and Conclusions of Law and Judgment. (CP 86-89)

TABLE OF AUTHORITIES

FEDERAL CASES

Clement v. City of Glendale, 518 F.3d 1090 (9th Cir. 2008) 29

Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) 27-28, 30

STATE CASES

Berst v. Snohomish County, 114 Wn. App. 245, 57 P.3d 273 (2002), *rev. denied*, 150 Wn.2d 1015 (2003) 28-29

Bruett v. Real Prop. Known as 18328 11th Ave. N.E., 93 Wn. App. 290, 968 P.2d 913 (1998) 21

City of Redmond v. Moore, 151 Wn.2d 664, 91 P.3d 875 (2004) 27, 30

City of Walla Walla v. $401,333.44, 164 Wn. App. 236, 262 P.3d 1239 (2011) 21

Frizzell v. Murray, 170 Wn. App. 420, 283 P.3d 1139 (2012) 22

In re C.R.B., 62 Wn. App. 608, 814 P.2d 1197 (1991) 27-29

Jackson v. Harvey, 72 Wn. App. 507, 864 P.2d 975, *rev. denied*, 124 Wn.2d 1003 (1994) 15

Jones Associates, Inc. v. Eastside Properties, Inc., 41 Wn. App. 462, 704 P.2d 681 (1985) 21

Pearson Const. Corp. v. Intertherm, Inc., 18 Wn. App. 17, 566 P.2d 575 (1977) 24

Somsak v. Criton Technologies/Heath Tecna, Inc., 113 Wn. App. 84, 52 P.3d 43 (2002), *modified sub nom.* ***Somsak v. Criton Technologies/Heath Tecna, Inc.***, 63 P.3d 800 (Wash. Ct. App. 2003) 15

Speelman v. Bellingham/Whatcom County Hous. Authorities, 167 Wn. App. 624, 273 P.3d 1035 (2012) 29

STATUTES

RCW 4.56.110 5

RCW ch. 51.14 ..... *passim*

RCW 51.14.010 15

RCW 51.14.020 ..... 5-7, 16, 19, 23-24

RCW 51.14.030 17

RCW 51.14.050 ..... 17, 21-22

RCW 51.14.060 ..... 17-18, 21, 30

RCW 51.14.110 17

RCW 51.52.115 15

RULES AND REGULATIONS

U.S. Const. amend. XIV, § 1 27

Wash. Const. art. I, § 3 27

WAC ch. 296-15 7

WAC 296-15-021 16

WAC 296-15-121 ..... 16, 18-20, 22-23, 25, 28

WAC 296-15-125 ..... 18, 25, 30

WAC 296-15-181 ..... 18, 22, 25

WAC 296-15-221 16-17

WAC 296-15-221 (1999) 26

Wash. St. Reg. 06-07-141 18

Wash. St. Reg. 09-13-018 16

Wash. St. Reg. 99-23-107 18

OTHER AUTHORITIES

Final Bill Report, SB 5668 (1995) 19, 25

House Bill Report, SB 5668 (1995) 19, 25

Laws of 1995, ch. 31, § 1 19

I. INTRODUCTION

After successfully running its self-insured workers' compensation program for 16 years, in January 2002 Dellen Wood Products, Inc., shut down its operations and terminated its workers' compensation program. When Dellen inquired on Friday, Jan. 18, about how to end its self-insurance program, the Department of Labor and Industries instructed Dellen to send L&I a letter stating it elected to "default" on its self-insurance program. L&I did not inform Dellen of any distinction between "default" and "termination" under RCW ch. 51.14 or the consequences of a "default." Dellen sent L&I the requested letter and provided L&I with a $500,000 surety to cover the costs of compensation claims that arose after Dellen ceased its operations. L&I fully paid all of Dellen's compensation claims with surety funds over the next seven years, never notifying Dellen of L&I's position that by using the word "default," Dellen forfeited any right to have surplus surety funds returned after all Dellen's compensation claims were closed.

The trial court held that Dellen had forfeited any right to recover the more than $500,000 in remaining surety funds that is undisputedly *not* needed to pay any workers' compensation claim

owed by Dellen. The trial court held that by using the word "default," Dellen forfeited all its rights in the surety, ignoring that as a matter of fact Dellen had fully provided for the payment of its compensation claims and that L&I did not notify Dellen of this purported forfeiture until seven years later. This court should remand with instructions to the trial court to enter an order requiring L&I to refund the remaining surety to Dellen.

II. ASSIGNMENTS OF ERROR

A. The Department of Labor and Industries erred in issuing its July 28, 2008, letter finding that Dellen "defaulted on its self-insured obligation to provide benefits to its injured workers on January 31, 2002" and "lost all rights to the surety resource it had provided." (AR 51-52; Ex. 7)[1]

B. The Department of Labor and Industries erred in entering its September 19, 2008, order that "no surety proceeds previously provided by Dellen Wood Products, Inc. be reimbursed to Dellen Woods Products, Inc." (AR 57; Ex. 8) (App. A)

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[1] Citations to the administrative record are abbreviated as "AR." Citations to the report of proceedings ("RP") are to the hearing held on December 13, 2010 before Industrial Appeals Judge Meng Li Che. Citations to exhibits are to exhibits submitted to Judge Che.

C. Industrial Appeals Judge Meng Li Che erred in entering a March 14, 2011, Proposed Decision and Order affirming the Department of Labor and Industries, September 19, 2008, order. (AR 35-47)

D. The Board of Industrial Insurance Appeals erred in entering its May 16, 2011, Decision and Order affirming the Department of Labor and Industries September 19, 2008, order. (AR 2-4; CP 15-17) (App. B)

E. The trial court erred in entering the following portions of its Findings of Fact and Conclusions of Law. (App. C):

1. Finding of Fact 1.4 (CP 88):

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

2. Finding of Fact 1.5 (CP 88):

> Dellen turned over its claims 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.

3. Finding of Fact 1.6 (CP 88):

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

4. Finding of Fact 1.7 (CP 88):

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

5. Finding of Fact 1.8 (CP 88):

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

6. Finding of Fact 1.9 (CP 88):

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

7. Finding of Fact 1.10 (CP 88):

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

8. Finding of Fact 1.11 (CP 88):

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

9. Finding of Fact 1.15 (CP 88):

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

10. Conclusion of Law 2.2 (CP 88):

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.

11. Conclusion of Law 2.3 (CP 88):

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

12. Conclusion of Law 2.4 (CP 88):

The Board's May 16, 201[1,] Decision and Order is correct for the reasons stated herein and is affirmed.

13. Conclusion of Law 2.6 (CP 88):

The Department did not violate Dellen's Due Process rights.

14. Conclusion of Law 2.8 (CP 88):

The September 1[9], 2008 Department order is correct and is affirmed.

15. Conclusion of Law 3.1 (CP 89):

The May 16, 2011 Board of Industrial Insurance Appeals Decision and Order which affirmed the Department of Labor and Industries September 19, 2008 order, is hereby affirmed.

16. Conclusion of Law 3.3 (CP 89):

The Defendant is awarded, and the Plaintiff is ordered to pay, a statutory attorney fee of $200.00.

17. Conclusion of Law 3.4 (CP 89):

The Department is awarded interest from the date of entry of this judgment as provided by RCW 4.56.110.

F. The trial court erred in entering judgment against Dellen. (CP 89)

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR

RCW ch. 51.14 provides two methods by which a self-insured employer may end its status as a self-insurer: (1) termination and (2) default. If an employer terminates its self-insurance status L&I may refund the employer the surety required by RCW 51.14.020. In contrast, if an employer defaults it "loses all right and title to, any interest in, and any right to control the surety" under RCW 51.14.020 but retains a right to seek reimbursement of the surety after all claims against the self-insured have been closed for at least ten years. In response to Dellen's inquiry upon the cessation of its business operations, L&I simply instructed Dellen to "default," stating that Dellen could receive a refund of its surety.

1. Did Dellen forfeit all right to its $500,000 surety provided to L&I after it ended its self-insurance program by sending L&I a letter – at L&I's instruction – that it wished to "default" on its self-insurance program, when Dellen in fact fully provided for the payment of all its workers' claims through its surety?

2. Did L&I violate Dellen's due process rights by seizing its $500,000 surety because of Dellen's alleged "default" on its self-insurance obligations without providing Dellen notice of the default

or an opportunity to be heard until seven years after the alleged default?

IV. STATEMENT OF THE CASE

A. On L&I's Instruction Dellen Sent L&I A Letter Stating That It Had Elected To "Default" On Its Self-Insurance Program. L&I Did Not Notify Dellen That This "Default" Resulted In The Forfeiture Of $500,000 Provided To L&I By Dellen Until Seven Years Later.

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 ch. 296-15). (RP 9-10, 78; Ex. 17) In order to qualify as a self-insured employer, Dellen provided a cash surety[2] 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) L&I adjusted the required surety amount annually based on quarterly and annual reports filed by Dellen. (RP 13-14, 65-68; AR 195; Ex. 18) L&I complimented Dellen's administration of its self-insurance program. (RP 10)

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[2] This surety could be in the form of money, securities, bond, or letter of credit under RCW 51.14.020. (*See also* RP 78)

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; 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, 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[3]; 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)

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

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 would cover Dellen's claims. (RP 19; Ex. 3 at 1 (reflecting $422,853.81 surety deposit); Ex. 9)[4]

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) Olsen believed based on his discussions with Wilkinson that Dellen could obtain a refund of what remained in the surety after payment of all claims and applicable assessments, and regularly called Wilkinson to obtain the surety fund balance and the amount of interest it had earned. (RP 19, 27, 32, 46, 74; Exs. 3, 20) During a 2005 Chapter 11

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[4] 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)

bankruptcy reorganization by Dellen, Wilkinson filed a declaration indicating 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)

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) 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)

Under L&I's formula for calculating an employer's annual required surety, Dellen would not have been required to post a surety in 2008. (RP 37-39, 72) 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, which then totaled $291,601.50. (Ex. 9)

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 relinquished all interest in the surety fund by submitting a letter at Wilkinson's direction stating that it wished to "default" on its self-insurer status. (RP 46, 63) Wilkinson acknowledged that "this is not the response you anticipated." (Ex. 7 at 2) On September 19, 2008, L&I issued an order confirming its letter decision. (FF 1.1.1, CP 87; AR 57; Ex. 8)

B. The Trial Court Affirmed L&I's Order And Found That Dellen Had "Defaulted" On Its Self-Insurance Obligations Despite Having Fully Provided For The Payment Of Its Employees' Claims.

Dellen timely appealed L&I's order determining that Dellen had voluntarily defaulted on its self-insured obligation and had lost all interest in its surety fund. (FF 1.1.1, CP 87; AR 58, 61) On November 6, 2009, an Industrial Appeals judge issued a Proposed Decision and Order ("PD&O") affirming L&I's order. (FF 1.1.2, CP 87; AR 119-23)

The Board of Industrial Insurance Appeals ("the Board") granted Dellen's petition for review, reversed the PD&O, and remanded the matter for hearing on the issue of whether Dellen "defaulted" on its self-insurance obligations. (FF 1.1.2, CP 87; AR 135-42) The Board held a hearing on December 13, 2010 before Industrial Appeals Judge Meng Li Che at which both Olsen and Wilkinson testified. (FF 1.1.3, CP 87) By the time of the December 13th, 2010 hearing the surety fund totaled $510,918. (RP 25) On March 14, 2011, Judge Che issued a PD&O affirming L&I's September 19, 2008 order determining that Dellen had forfeited all interest in the surety fund. (FF 1.1.4, CP 87; AR 35-47)

The Board entered a Decision and Order affirming L&I's September 19, 2008 order on May 16, 2011. (FF 1.1.4, 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)

The Honorable Christopher Wickham ("the trial court") affirmed the Board's order. The trial court held 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 found that on January 31, 2002, Dellen stopped paying industrial insurance benefits to its injured workers, no longer administered its injured workers compensation claims, and turned over its claim files to L&I for administration. (FF 1.4-1.5, 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 1.6-1.7, CP 88) 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 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) However, the trial court also found that L&I "did not give Dellen notice of default or failure to pay any assessment" and concluded that Dellen preserved its argument that L&I violated its due process rights. (FF 1.12, CP 88; CL 2.5, CP 88)

The trial court affirmed L&I's September 19, 2008, order and the Board's May 16, 2011, decision. (CL 2.4, 2.8, 3.1, CP 88-89) The trial court entered judgment against Dellen and awarded L&I costs. (CL 3.3-3.4, CP 89)

V. ARGUMENT

A. The Legislature Provided Two Methods For A Self-Insured Workers Compensation Employer To Wind Up Its Operations And To End Its Self-Insurance Program.

The trial court erroneously affirmed the Board's finding that Dellen "defaulted' under Washington's self-insured employer statute, RCW ch. 51.14. This court should reverse the trial court's

erroneous finding that Dellen defaulted and forfeited all interest in its $500,000 surety.

The superior court reviews a Board of Industrial Insurance Appeals decision de novo. RCW 51.52.115; ***Somsak v. Criton Technologies/Heath Tecna, Inc.***, 113 Wn. App. 84, 91, 52 P.3d 43 (2002) (quotations removed), *modified sub nom.* ***Somsak v. Criton Technologies/Heath Tecna, Inc.***, 63 P.3d 800 (Wash. Ct. App. 2003). An appellate court reviews the superior court's findings "to see whether substantial evidence supports the findings made after the superior court's de novo review, and whether the court's conclusions of law flow from the findings." ***Somsak***, 113 Wn. App. at 91-92. Although courts give deference to the Board of Industrial Insurance Appeals' interpretation of RCW title 51, "courts are not bound by the Board's interpretation." ***Jackson v. Harvey***, 72 Wn. App. 507, 513, 864 P.2d 975, *rev. denied*, 124 Wn.2d 1003 (1994).

Washington law requires employers to ensure that workers compensation benefits are paid to its employees either through participation in the state's compensation fund or by qualifying as a self-insured employer. RCW 51.14.010. In order to qualify as a self-insurer an employer must establish that it "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." RCW 51.14.020; *see also* WAC 296-15-021(1).

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.[5] 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). "The amount of surety may be increased or decreased from time to time by the director." RCW 51.14.020(2); WAC 296-15-121(3) (surety amounts adjusted annually). In addition to providing surety, an employer must file

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[5] Until 2009, assessments were governed by WAC 296-15-221. *See* Wash. St. Reg. 09-13-018. WAC 296-15-221(4)(a)(ii) required employers to pay supplemental pension and asbestosis assessments based on the hours worked by the employer's employees. WAC 296-15-221(4)(a)(iii), (v) required employers to pay an administrative assessment and insolvency assessment based on an employer's total claim costs and established a minimum quarterly assessment of $25. WAC 296-15-221(4)(a)(iv) required employers to pay a second injury fund assessment based on estimated second injury fund costs. (*See also* RP 80-81) These amounts were typically minimal compared to overall claims costs. (*See, e.g.*, Ex. 15 (indicating that by 2010 supplemental pension and asbestos assessments were charged at a combined rate of .0972 per worker hour)

quarterly and annual reports with L&I. *See* RCW 51.14.110; WAC 296-15-221(4).

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 choses 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." *See* Wash. St. Reg. 99-23-107; *see also* 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).[6] 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.").

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[6] 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 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." Wash. St. Reg. 06-07-141.

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 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). If L&I releases the surety, "the former self insurer remains responsible for claim reopenings and new claims filed for occupational disease incurred during the period of self insurance." WAC 296-15-121(9)(b).

The trial court and L&I misapplied the self-insurance statutes and regulations by concluding that Dellen had irrevocably forfeited its surety by reason of "default" on its self-insurance obligations. Dellen did not commit any acts of default, but stated its intent to L&I to terminate its obligations. L&I's order preventing Dellen from obtaining a refund of it surety was an error of law.

B. Dellen Did Not "Default" Under RCW Ch. 51.14, But Instead Terminated Its Status As A Self-Insurer Because It Fully Provided For The Payment Of Its Employees' Claims.

The trial court's order affirming L&I's determination misapplied the statutory provisions and is not supported by substantial evidence that Dellen "defaulted" and thus forfeited its entire surety. Dellen did not intend to default but, in fact, provided for the payment of all its employees claims by providing L&I a $422,000 surety. Dellen used the word "default" in its letter to L&I because L&I instructed it to do so without explaining that default – as opposed to termination – required Dellen to forfeit all interest in

its surety. This court should reverse the trial court's conclusion that Dellen "defaulted" on its self-insurance obligations and thus forfeited all interest in its surety that now totals over $510,000.

"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, ¶ 12, 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, ¶ 12 (forfeiture "will be denied absent compliance with proper forfeiture procedure").

The trial court's finding that Dellen defaulted under RCW 51.14.060 and did not terminate its status as a self-insurer under RCW 51.14.050 conflicts with both the letter and spirit of RCW ch. 51.14. (FF 1.8, FF 1.15, CP 88; CL 2.2-2.4, CL 2.8, CL 3.1, CP 88-

89) At the beginning of 2002, Dellen had fulfilled all of its self-insurance obligations. (FF 1.15, CP 88; RP 19-20, 22, 55-57) Dellen then gave L&I written notice that it intended to terminate its status as a self-insurer as required by RCW 51.14.050(1). (Ex. 2; *see also* RP 96) Although Dellen's January 2002 letter – sent on L&I's instruction – stated that Dellen had elected to "default," Dellen fully intended to ensure payment of all claims filed for injuries sustained prior to December 31, 2001 and provided L&I a $422,853.81 surety after confirming with Wilkinson that this amount was sufficient to pay Dellen's claims and assessments as required by RCW 51.14.050(2). (RP 19, 44; Ex. 3, 9) Thus, Dellen did not "default" because it fully provided for the payment of benefits and assessments. *See* WAC 296-15-121(1); WAC 296-15-181(1). Dellen's full provision for the payment of its employees' claims is a far cry from a knowing and intentional relinquishment of its interest in the surety. ***Frizzell v. Murray***, 170 Wn. App. 420, ¶ 11, 283 P.3d 1139 (2012) ("Waiver is the intentional and voluntary relinquishment of a known right").

Even if Dellen's January 2002 letter resulted in a "default" under the statute, the trial court erred by affirming L&I's September

2008 order that Dellen irrevocably has lost its right to reimbursement of its surety. Consistent with the Department's representations to Dellen in its correspondence and in Wilkinson's 2005 declaration, the Department's rules authorize a return of Dellen's surety after Dellen has been released from quarterly reporting for ten years. (*See* RP 19, 27, 46, 74; Exs. 1, 13, 20; WAC 296-15-121(9)) The trial court's judgment unreasonably forecloses Dellen's reasonable expectancy in a refund of its surety.

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) To the contrary, L&I repeatedly confused "default" and "termination" by giving Dellen every indication that it would be entitled to a refund of the surety. (RP 19, 27, 32, 46, 74; Exs. 1, 13, 20) 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").

The trial court's findings that Dellen "defaulted" by failing to directly pay benefits and assessments ignored that Dellen provided for these payments through its surety. (FF 1.4-1.5, 1.8, CP 88) Whether claims were paid directly by Dellen or from the surety it provided is immaterial where, as here, Dellen fully intended to "make whatever payments were required" and actually did so through the provision of its surety. (RP 44, 93) The Legislature enacted RCW 51.14.020(2) to prevent bankrupt employers from

using the surety to pay third-party creditors, not to prevent employers who have fully provided for the payment of their employees' claims from recovering the balance of the surety after all claims have been paid. Final Bill Report, SB 5668, (1995); House Bill Report, SB 5668 (1995). Likewise, WAC 296-15-121(1)(b)(i) clarifies that a surety "may not be used by a self insurer to . . . [p]ay workers' compensation benefits" in order to prevent a bankrupt self-insured employer from recovering the surety, not to punish an employer who has fully provided for payments of its employees' claims. *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").

The trial court further erred by finding that Dellen defaulted by failing to file annual or quarterly reports. (FF 1.6, 1.8, CP 88; CL 2.2, CP 88) 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. WAC 296-15-181; WAC 296-15-121(1); *see also* WAC 296-15-125. Moreover, Dellen did not file reports because Wilkinson agreed with Olsen that Dellen should not do so. (RP 33-34, 65, 73)

The trial court's finding that Dellen defaulted because it failed to pay assessments (FF 1.7, CP 88) ignores its later finding that L&I never gave Dellen *any* notice that it had failed to pay a required assessment. (FF 1.12, CP 88; *see also* RP 22, 49-51, 56, 85, 93-95) 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) Two of the 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).

The trial court's decision provided a windfall to L&I and conflicts with the letter and spirit of RCW ch. 51.14 and L&I's own regulation. This court should reverse the court's findings and conclusions that Dellen forfeited over $500,000 by "defaulting" when it in fact fully provided for the payment of benefits to its employees.

C. L&I Violated Dellen's Right To Due Process By Failing To Give Dellen Notice For Seven Years That It Had Forfeited The Entire Surety Fund By Stating That It Wished To "Default" On Its Self-Insurance Obligations.

"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 reverse the trial court's determination that L&I did not violate Dellen's due process rights.

"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) (quoting ***Mathews v. Eldridge***, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)). A court analyzes three elements to determine whether a procedure provided adequate due process: (1) the private interest at stake, (2) the risk that the procedure used will result in error and

the probable value of additional or substitute procedural safeguards, and (3) the government's interest in the procedure used and the fiscal or administrative burden of substitute or additional procedural safeguards. ***In re C.R.B.***, 62 Wn. App. at 614-15 (citing ***Mathews***, 424 U.S. at 335).[7]

The trial court erred in concluding that L&I did not violate Dellen's procedural due process rights. (FF 1.9-1.11, CP 88; CL 2.6, CP 88) Under the first prong of the ***Mathews*** test, Dellen provided a $422,000 surety in 2002. (Ex. 3, 9) Contrary to the trial court's finding, (FF 1.10, CP 88), Dellen did have a reasonable expectation in obtaining the return of its now more than $500,000 surety as authorized by WAC 296-15-121(9)(a). Indeed, L&I never gave Dellen any indication that it would not be entitled to a return of its surety. (RP 19, 46)

Under the second ***Mathews*** prong, L&I's procedure of confiscating an employer's half a million dollar surety without notice or the opportunity to object for nearly seven years is precisely the

---

[7] The procedural due process protection provided by the U.S. Constitution are coextensive with those provided by the Washington Constitution and Washington has adopted the ***Mathews*** test for analyzing procedural due process claims. ***Berst v. Snohomish County***, 114 Wn. App. 245, 254-55, 57 P.3d 273 (2002), *rev. denied*, 150 Wn.2d 1015 (2003).

type of procedure due process protects against. *See, e.g.,* ***In re C.R.B.***, 62 Wn. App. at 619 (termination of parental rights without proper notice of motion for default order violated due process); ***Berst v. Snohomish County***, 114 Wn. App. 245, 255, 57 P.3d 273 (2002) (imposition of moratorium under Forest Practices Act without prior notice violated procedural due process), *rev. denied* 150 Wn.2d 1015 (2003); ***Speelman v. Bellingham/Whatcom County Hous. Authorities***, 167 Wn. App. 624, 273 P.3d 1035 (2012) (termination of housing assistance voucher without proper notice violated due process); ***Clement v. City of Glendale***, 518 F.3d 1090, 1093 (9th Cir. 2008) ("the government may not take property like a thief in the night; rather, it must announce its intentions and give the property owner a chance to argue against the taking").

Prior to July 2008, L&I never informed Dellen of its position that by following L&I's instruction to "default" in its January 2002 letter Dellen forfeited all title and interest in its surety *even though L&I knew that Dellen fully expected the return of its over $500,000 surety.* (RP 62-63; Ex. 7 at 2 ("I understand this is not the response you anticipated.")) Indeed, in its communications prior to July 2008, L&I consistently indicated that a refund would be available ten

years after Dellen was released from quarterly reporting requirements. (RP 19, 27, 46, 61-62, 74; Exs. 1, 13 at 2-3, 20) Nor did L&I ever send Dellen notice that it had failed to pay a required claim or assessment, or failed to file a required report even though such notifications were required by statute and were standard procedure. *See* 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.") (emphasis added). (FF 1.12, CP 88; RP 22, 49-51, 56, 72-73, 85, 93-95) Notice and an opportunity to be heard *seven years* after the alleged forfeiture is not "meaningful" because such late notice deprived Dellen of the ability to contemporaneously object to L&I's position or to cure any alleged deficiencies. ***Moore***, 151 Wn.2d at 670; WAC 296-15-125(2) (employer is determined to be in default only after it "does not respond to the department and resume the provision of benefits within ten days").

Under the third ***Mathews*** prong, requiring L&I to provide contemporaneous notice to employers that they have forfeited all rights to their surety would impose a minimal burden on L&I. L&I could have simply sent its July 2008 letter informing Dellen of its

position shortly after receiving Dellen's January 2002 letter. But L&I did not do so. To the extent that L&I claims an interest in any assessments that Dellen failed to pay, those amounts were minimal compared to Dellen's $422,000 surety (now over $510,000) and are not grounds for requiring Dellen to forfeit its entire surety. L&I was at all times authorized to pay itself these assessments from the surety, but chose not to. (RP 99)

The trial court's judgment allowed L&I to confiscate – without notice – over $500,000 in funds provided by an employer for the payment of claims to its employees that L&I concedes is not needed to pay those claims. The trial court's decision conflicts with our constitutional prohibition on the deprivation of property without due process of law and provided a windfall to L&I. This court should reverse the trial court's conclusion that L&I did not violate Dellen's due process rights and should remand to the trial court with instructions to enter an order requiring L&I to refund the remaining surety to Dellen.

VI. CONCLUSION

This court should reverse the trial court's findings and conclusions that Dellen "defaulted" on its self-insurance obligations

and thus forfeited its over $500,000 surety to L&I. Dellen never in fact defaulted and L&I's failure to provide notice to Dellen of its alleged forfeiture for seven years violated well-established principles of due process. This court should reverse and remand with instructions to the trial court to enter an order requiring L&I to refund the remaining surety to Dellen.

Dated this 6th day of December, 2012.

SMITH GOODFRIEND, P.S.

By: _____
Howard M. Goodfriend
WSBA No. 14355
Ian C. Cairns
WSBA No. 43210

MURPHY, BANTZ & BURY, P.S.

By: _____ for
John F. Bury
WSBA No. 4949

Attorneys for Appellant

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 December 6, 2012, I arranged for service of the foregoing Brief of Appellant, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division II 950 Broadway, Suite 300 Tacoma, WA 98402	___ Facsimile ___ Messenger _X_ U.S. Mail ___ E-Mail
John F. Bury Murphy, Bantz & Bury, P.S. 818 W Riverside Ave Ste 631 Spokane, WA 99201-0910	___ Facsimile ___ Messenger ___ U.S. Mail _X_ E-Mail
Penny L. Allen Steve Vinyard Office of the Attorney General PO Box 40121 Olympia, WA 98504-0121	___ Facsimile ___ Messenger _X_ U.S. Mail _X_ E-Mail

DATED at Seattle, Washington this 6th day of December, 2012.

V. Isaksen

Victoria K. Isaksen

FILED
COURT OF APPEALS
DIVISION II
2012 DEC -7 PM 12: 02
STATE OF WASHINGTON
BY
DEPUTY

STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES
PO BOX 44892
OLYMPIA, WA 98504-4892

ORDER AND NOTICE

ANY APPEAL FROM THIS ORDER MUST BE MADE TO THE BOARD OF INDUSTRIAL INSURANCE APPEALS, P.O. BOX 42401, OLYMPIA WA 98504-2401 OR SUBMIT IT ON AN ELECTRONIC FORM FOUND AT HTTP://WWW.BIIA.WA.GOV/ WITHIN 60 DAYS AFTER YOU RECEIVE THIS NOTICE, OR THE SAME SHALL BECOME FINAL.

UBI No.	Acct. ID	Date At Olympia
328 056 002	700,418-00	9/19/08

Firm: Dellen Wood Products, Inc.
Attn: C. Eugene Olsen
3014 N. Flora Rd
Spokane WA 99216-1802

Whereas, on January 18, 2001, Dellen Wood Products, Inc. voluntarily defaulted on its self-insurance obligation and requested that the Department take over administration of its claims, and

Whereas, on June 18, 2008, correspondence from John F. Bury on behalf of Dellen Wood Products, Inc. requested release of surety resources deposited by Dellen Wood Products, Inc. prior to its voluntary default,

Therefore, in accordance with the provisions of Revised Code of Washington 51.14.020 (2) which specifies that in the event of a default the self-insurer loses all rights to and any interest in the provided surety, the Department hereby orders that no surety proceeds previously provided by Dellen Wood Products, Inc. be reimbursed to Dellen Wood Products, Inc..

SUPERVISOR OF INDUSTRIAL INSURANCE

By: Larry J. Wilkinson
SI Certification Manager
Self-Insurance
(360) 902-6867
E-Mail: wilk235@LNI.wa.gov

COPY: Murphy, Bantz, & Bury, P.S.
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Spokane WA 99201

BOARD OF INDUSTRIAL INSURANCE APPEALS
OLYMPIA, WASHINGTON
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Board of Industrial Insurance Appeals
In re: Dellen Wood Products
Docket No. 0915377
Exhibit No. 8, 2 pages
12-13-10

App. A

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: DELLEN WOOD PRODUCTS, INC.	DOCKET NO. 09 15377
FIRM NO. 700,418-00	DECISION AND ORDER

APPEARANCES:

Firm, Dellen Wood Products, Inc., by
Murphy Bantz & Bury, P.S., per
John F. Bury

Department of Labor and Industries, by
The Office of the Attorney General, per
Penny L. Allen, Assistant

The firm, Dellen Wood Products, Inc., filed an appeal with the Board of Industrial Insurance Appeals on May 26, 2009, from an order of the Department of Labor and Industries dated September 19, 2008. In this order, the Department, pursuant to RCW 51.14.020(2), determined that the self-insurer loses all rights to any interest in the provided surety, and ordered that no surety proceeds previously provided by Dellen Wood Products, Inc., be reimbursed. The Department order is **AFFIRMED**.

DECISION

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The employer filed a timely Petition for Review of a Proposed Decision and Order issued on March 14, 2011, in which the industrial appeals judge affirmed the Department order dated September 19, 2008.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. The rulings are affirmed.

The issue presented by this appeal and the evidence presented by the parties are adequately set forth in the Proposed Decision and Order.

After consideration of the Proposed Decision and Order and the Petition for Review filed thereto, and a careful review of the entire record before us, we are persuaded that the Proposed Decision and Order is supported by the preponderance of the evidence and is correct as a matter of law.

FINDINGS OF FACT

1. On July 28, 2008, the Director of the Department of Labor and Industries issued a letter indicating the employer, Dellen Wood Products, Inc., surrendered its self insurance certificate on December 31, 2001, then

defaulted on its self-insured employer's obligation to provide benefits to its injured workers on January 31, 2002; that the Department had assumed jurisdiction of its claims at that time and began providing benefits to the employer's injured workers and took possession of the surety resources that the employer had provided. The Director further determined that RCW 51.14.050(2)(a) indicated that in the event of default, the self-insured employer lost all rights, entitlement to, any interest in, and any right to control the surety regardless of whether claim status at the time was open or closed or was an occupational disease claim that could be filed later. Further, the Director noted that because claims could be reopened at any time in the future with the Director's approval, self-insurance is a long-term commitment and resources must be maintained to ensure that these benefits can be provided.

On September 8, 2008, a Protest and Request for Reconsideration was filed by the firm from the Department's letter of July 28, 2008. On September 19, 2008, the Department issued an order, again determining that the firm had voluntarily defaulted on its self-insurance obligation and requested the Department take over administration of its claims and therefore lost all rights to and any interest in the provided surety and determined that no surety proceeds previously provided by the firm would be reimbursed. A Protest and Request for Reconsideration was filed on behalf of the firm from the Department order dated September 19, 2008, within 60 days of communication of such order. On May 26, 2009, a Notice of Appeal was filed on behalf of the firm from the Department order of September 19, 2008. On June 1, 2009, the Board issued an Order Granting Appeal subject to timeliness under Docket No. 0915377, and agreed to hear the appeal.

2. On December 31, 2001, Dellen Wood Products ceased to have any employees. On January 18, 2002, Mr. Olsen, Dellen's Chief Financial Officer, wrote a letter indicating that Dellen elected to default on its payment of claims under the self-insured program and requested the Department take over administration of the claims.

3. Despite the wording in the January 18, 2002 letter, Mr. Olsen did not intend to forfeit, or waive, any and all right and title to, any interest in, and any right to control Dellen's surety.

4. By January 18, 2002, Dellen intended to surrender its self insurance certification.

5. On January 18, 2002, the Department had taken over administering Dellen's claims and Dellen was no longer providing benefits to its injured workers.

6. By March 1, 2002, Dellen failed to file annual and quarterly reports as required by Title 51 RCW and WAC 296-15-121. Further, Dellen was never released from the reporting requirements in said WAC and RCW. Dellen has not filed such reports since.

7. By March 1, 2002, Dellen had failed to pay assessments for the insolvency trust, administrative assessments, supplemental pension fund,

and an asbestosis fund assessment. Dellen has not paid such assessments since.

8. By March 1, 2002, Dellen defaulted on its self insurance obligations.

9. On January 18, 2008, the firm's representative requested release of surety resources deposited by the self insured employer prior to its default.

10. On September 19, 2008, the Department informed the employer that it had voluntarily defaulted on its self-insurance obligations and therefore had released all rights to and any interest in the provided surety and that none would be returned.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter of this appeal.

2. Dellen Wood Products defaulted on its obligations as a self-insured employer pursuant to RCW 51.14.020(2), and therefore lost all right and title to, any interest in, and any right to control the surety.

3. Dellen defaulted per WAC 296-15-125 and *Department of Labor & Indus. v. Metro Hauling, Inc.* 48 Wn. App. 214, 738 (1987).

4. Dellen did not comply with WAC 296-15-121(8).

5. The Department's September 19, 2008 order is correct and is affirmed.

Dated: May 16, 2011.

BOARD OF INDUSTRIAL INSURANCE APPEALS

DAVID E. THREEDY Chairperson

FRANK E. FENNERTY, JR. Member

LARRY DITTMAN Member

4

STATE OF WASHINGTON
THURTSON COUNTY SUPERIOR COURT

DELLEN WOOD PRODUCTS, INC, Plaintiff, v. DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, Defendant.	NO. 11-2-01303-8 FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT **Clerk's Action Required**

JUDGMENT SUMMARY (RCW 4.64.030)

1. Judgment Creditor:	State of Washington Department of Labor and Industries
2. Judgment Debtor:	DellenWood Products
3. Principal Amount of Judgment:	- 0 -
4. Interest to Date of Judgment:	- 0 -
5. Statutory Attorney Fees:	$200.00
6. Costs:	$0
7. Other Recovery Amounts:	$0

8. Principal Judgment Amount shall bear interest at 0% per annum.

9. Attorney Fees, Costs and Other Recovery Amounts shall bear Interest at 12% per annum.

10. Attorney for Judgment Creditor:	Penny L. Allen, Sr. Counsel
11. Attorney for Judgment Debtor:	Murphy, Bantz & Bury, PLLC per John F. Bury

ATTORNEY GENERAL OF WASHINGTON
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This matter came on regularly before the Honorable H. Christopher Wickam, in open court on March 30, 2012. The Plaintiff, Dellen Wood Products (Dellen), appeared by its counsel, Murphy, Bantz & Bury, PLLC per John F. Bury; the Defendant, Department of Labor and Industries (Department), appeared by its counsel, Robert M. McKenna, Attorney General, per Penny L. Allen, Senior Counsel. The Court reviewed the records and files herein, including the Certified Appeal Board Record, and briefs submitted by counsel, and heard argument of Counsel.

Therefore, being fully informed, the Court makes the following:

I. FINDINGS OF FACT

1.1 Procedural History:

1.1.1 On July 28, 2008, the Department sent a letter responding to Dellen's request for the proceeds of its surety, and on September 19, 2008, the Department issued an order which determined that Dellen had voluntarily defaulted on its self insured obligation and had lost all rights and interest to its surety proceeds. Dellen timely appealed to the Board of Industrial Insurance Appeals (Board).

1.1.2 The Department filed a Motion for Summary Judgment on September 4, 2009, and Dellen responded. On November 6, 2009, the Industrial Appeals Judge (IAJ) issued a Proposed Decision and Order (PD&O) which affirmed the Department order. Dellen timely filed a petition for review and on January 1, 2010, the Board vacated the November 6, 2009 PD&O and remanded the matter to the hearing process.

1.1.3 Hearings were held at the Board of Industrial Insurance Appeals (Board) on December 13, 2010.

1.1.4 Thereafter an IAJ Judge issued a Proposed Decision and Order on March 14, 2011 affirming the Department September 19, 2008 order. Dellen filed a timely Petition for Review. On April 26, 2011 the Board, having considered Plaintiff's Petition for Review, granted review and issued its Decision and Order on May 16, 2011.

1.1.5 Plaintiff thereupon timely appealed the Board's May 16, 2011 order to this Court.

1.2 On December 31, 2001, Dellen surrended 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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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 has not filed annual and quarterly reports as required by Title 51 RCW and Department rules. ~~Dellen was not released from these reporting requirements.~~ CW

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. CW 1.12 The Dept did not give Dellen notice of default or failure to pay any assessment.

Based upon the foregoing Findings of Fact, the Court now makes the following

II. CONCLUSIONS OF LAW

2.1 This Court has jurisdiction over the parties to, and the subject matter of, this appeal.

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 Decision and Order is correct for the reasons stated herein and is 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.

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

Based on the foregoing Findings of Fact and Conclusions of Law the Court enters judgment as follows:

III. JUDGMENT

3.1 The May 16, 2011 Board of Industrial Insurance Appeals Decision and Order which affirmed the Department of Labor and Industries September 19, 2008 order, is hereby affirmed.

3.3 The Defendant is awarded, and the Plaintiff is ordered to pay, a statutory attorney fee of $200.00.

3.4 The Department is awarded interest from the date of entry of this judgment as provided by RCW 4.56.110.

DATED this 8 day of June, 2012.

H. CHRISTOPHER WICKAM
SUPERIOR COURT JUDGE

Presented by:
ROBERT M. MCKENNA
Attorney General

PENNY L. ALLEN WSBA #18821
Assistant Attorney General
Attorney for the Department

Copy received,
Approved as to form and
notice of presentation waived:

JOHN F. BURY
WSBA # 4949
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