

Suarez, Alfredo

[PENALTIES \(RCW 51.48.017\)](#)

Genuine doubt

For purposes of determining genuine doubt, the mere filing of an appeal does not establish genuine doubt. When the self-insured employer delays paying benefits it must have a genuine doubt that the benefits are due and cannot rely on the appeal or stay process under RCW 51.52.050 as a basis for delaying payment if there is no genuine doubt that payment is due. ...***In re Alfredo Suarez, BIIA Dec., 15 20822 (2016)*** [Editor's Note: See also, *Masco Corporation v. Suarez*, 7 Wn. App. 2d 342(2019). (Payment ordered by Department cannot be delayed pending a decision by the Board on a motion for stay filed under RCW 51.52.050.) The Board's decision was appealed to superior court under Clark County Cause No. 16-2-02585-8.]

Scroll down for order.

**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON**

IN RE: ALFREDO SUAREZ) **DOCKET NO. 15 20822**
)
CLAIM NO. SB-45649) **DECISION AND ORDER**

The self-insured employer, Masco Corporation, appeals a Department of Labor and Industries order in which it found the employer unreasonably delayed \$27,644.02 in loss-of-earning-power benefits to Alfredo Suarez for November 10, 2013, through December 21, 2014. The Department ordered the employer to pay a \$6,911.01 penalty to Mr. Suarez. The employer argues that under RCW 51.48.017 penalties are only due if there is unreasonable delay in paying benefits. Further, the employer asserts that because it filed a motion to stay benefits following an appeal to the Board as provided RCW 51.52.050(2)(b), such benefits are not due until after the Board has denied the motion. In accordance with the Board's prior holding in the matter of *In re Frank Madrid*¹ we agree that a self-insured employer should not be penalized for the failure to timely pay benefits if it had a genuine doubt from a medical or legal standpoint as to the liability for benefits. However, we also find that the doubt as to the medical or legal obligation to pay benefits must be supported by evidence as to the factual basis of such doubt. In the present case, the self-insured employer offered only the testimony of the claims manager, Jeffrey Anderson, whose testimony was limited to the order of events resulting in the appeal from the Department order and the eventual payment of benefits. No additional or separate evidence was presented to support Masco's assertion that there was a genuine medical or legal doubt as to the obligation to pay benefits. Masco did not prove by the preponderance of the evidence that it had genuine doubt as to its obligation to pay loss-of-earning-power benefits to Mr. Suarez. The Department order is **AFFIRMED**.

DISCUSSION

We have granted review in order to emphasize a self-insured employer's obligation to pay benefits during the appeal period under RCW 51.52.050(1) and during the pendency of a motion to stay benefits on appeal under RCW 51.52.050(2)(b). A chronology is useful in understanding events:

December 19, 2014	The Department ordered Masco to pay "time loss" from October 11, 2013, through December 10, 2014. Exhibit No. 1.
February 2, 2015	The Board received Masco's appeal of the December 19, 2014 order. The appeal was dated January 30, 2015, and it included a motion to stay the

¹ BIIA Dec., 86 0224-A (1987).

	payment of benefits during the pendency of the appeal as provided by RCW 51.52.050(2)(b). Exhibit No. 2.
February 25, 2015	The Board denied the motion to stay benefits. Exhibit No. 4.
March 6, 2015	Masco pays the benefits. Exhibit No. 6.
July 28, 2015	Claimant's attorney requests a penalty for the "delay" in the payment of benefits under RCW 51.48.017 for October 11, 2013, through December 10, 2014. Exhibit No. 10.
August 25, 2015	The Department determined that Masco did not unreasonably fail to pay benefits from October 11, 2013, through November 9, 2013, and denied a penalty for this period, but determined that loss-of-earning-power benefits had been unreasonably delayed and ordered Masco to pay a penalty of \$6,911.01 for the payment of "LEP" unreasonable delay in paying loss-of-earning-power benefits for November 10, 2013, through December 21, 2014. Exhibit No. 14.

From the Jurisdictional History stipulated to by the parties we note that Masco protested the August 25, 2015 Department order that the Department affirmed on September 9, 2015, giving rise to the present appeal.

The issue presented in this appeal is whether Masco unreasonably delayed the payment of benefits between the date of the Department's order of December 19, 2014, and the date that Masco eventually paid the benefits on March 6, 2015—a period of about 77 days. Masco appealed the December 19, 2014 order directing the payment of loss-of-learning-power benefits (LEP). In conjunction with that appeal, Masco submitted a motion to stay the payment of benefits as provided by RCW 51.52.050(2)(b). Masco did not pay the LEP benefits to Mr. Suarez until after the Board issued its order denying the stay motion. Masco argues that because it exercised its right to appeal the Department's order, and because it exercised its further right to submit a motion to stay the payment of benefits, the resulting delay in paying benefits was presumptively reasonable. We hold that this delay in paying benefits can result in a penalty unless the employer proves that it had a genuine doubt that the benefits were due.

In *Madrid*, the Board held that a self-insured employer's delay in paying benefits was not unreasonable within the meaning of the penalty provisions of RCW 51.48.017 if the employer had a genuine doubt from a medical or legal standpoint as to the liability for benefits. The questions more

1 specifically presented here are does the filing of a motion to stay benefits insulate the self-insured
2 employer from an assessment of a penalty for delay in paying benefits and how does a self-insured
3 employer prove genuine doubt from a medical or legal standpoint as to the liability for benefits.
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6 The reasonableness of the delay depends on what Masco relies on to demonstrate a genuine
7 medical or legal doubt as to the liability to pay those benefits. It is insufficient for an employer to
8 assert subjectively that it had a reasonable doubt as to the liability to pay benefits. Masco's actions
9 in relation to the Department's December 19, 2014 order are relevant but are not dispositive of the
10 basis for the delay in the payment of benefits. For example, the filing of an appeal from a Department
11 order does not establish, by itself, the basis of a genuine doubt as to the medical or legal liability to
12 pay benefits. In the Board's prior decision of *In re Jacque Slade*² the self-insured employer delayed
13 six weeks while deciding whether or not to file an appeal. The self-insured employer eventually
14 decided not to appeal and the Board found that the delay while considering the appeal was
15 unreasonable. Regarding the delay of benefits during the appeal period the Board stated:
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21 We no longer subscribe to the former rule, which held that benefits were
22 not due until the Department issued a payment order. **Neither will we**
23 **continue to hold that it is reasonable for a self-insured employer to**
24 **wait until the sixty-day appeal period has passed before rendering**
25 **payment.** See, *In re Jackie L Washburn*, BIIA Dec., 03 11104 (2004);
26 overruling *In re Agnes Levings*, BIIA Dec., 99 13954 (2000). According
27 to the Court in *Nalley*, the Department's ability to issue orders in
28 self-insured claims is to assist injured workers in receiving payments. It
29 was not intended to delay the payments in legitimate claims. **Similarly,**
30 **the statutory appeal period cannot be used as a shield by employers**
31 **who are reluctant to pay benefits.**³ (Emphasis added)

32 A genuine doubt as to the obligation to pay benefits does not arise merely because an
33 employer files an appeal. This is true regardless of whether the employer files a motion to stay
34 benefits. If the employer doesn't pay, it must prove it has a genuine doubt, or risk becoming liable
35 for a penalty. As stated in *Slade*, the appeal period cannot be used as a shield for employers reluctant
36 to pay benefits.
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39 Masco separately appealed the original December 19, 2014 Department order directing the
40 payment of loss-of-earning-power benefits. Exhibit No. 7 is a copy of a Proposed Decision and Order
41 in Docket No. 1511127 that purports to reverse the Department order of December 19, 2014. We
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46 ² BIIA Dec., 04 11552 (2005).

47 ³ *In re Jacque Slade*, BIIA Dec., 04 11552 (2005) at 2 and 3.

1 note that the Board's decision in this matter has been appealed to Clark County Superior Court and
2 that there is no final determination as to the liability for benefits covered by the Department order at
3 this time. However, the record in this appeal contains nothing that would independently establish
4 Masco's genuine doubt as to the medical or legal liability to pay LEP ordered by the Department.
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7 At hearing, Masco presented the testimony of one witness, Jeffery Anderson, a claims
8 manager for Constitution State Services, a third-party administration company managing workers'
9 compensation claims for Masco in Washington State. Essentially, Mr. Anderson testified to the
10 administrative steps leading to the eventual payment of the loss-of-earning-power benefits ordered
11 by the Department in the December 19, 2014 order. He stated that there was no unreasonable delay
12 to pay these benefits because Masco had appealed the December 19, 2014 order to the Board within
13 the 60-day appeal period provided by RCW 51.52.050(1). He further explained that Masco had also
14 filed a motion to stay the payment of benefits pending appeal as provided by RCW 51.52.050(2)(b).
15 Inherent in this testimony is the assumption that a self-insured employer establishes genuine doubt
16 as to the liability to pay benefits based solely on the actual filing of an appeal.
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22 In the matter of *In re Jackie Washburn*⁴ the Department issued an order denying a penalty for
23 the unreasonable delay in paying benefits under RCW 51.48.017. At hearing the self-insured
24 employer presented extensive medical testimony regarding the basis for not paying benefits. The
25 Board found that the self-insured employer had established a genuine doubt as to the liability to pay
26 benefits and that the delay in paying those benefits was not unreasonable. *Masco* (perhaps relying
27 on its separate appeal of the December 19, 2014 Department order where the LEP was directly
28 contested) presented no supporting evidence in this appeal regarding the basis for genuine doubt,
29 either medically or legally, as to the liability to pay benefits.
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34 The bulk of Masco's Petition for Review focuses on the period of time following the motion to
35 stay benefits under RCW 51.52.050(2)(b). RCW 51.52.050 was amended in 2008 to give self-insured
36 employers a mechanism to stop the payment of benefits during the pendency of an appeal so as to
37 avoid the difficult process of recouping benefits if an appeal determined they were not payable.
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40 An order by the department awarding benefits **shall become effective**
41 **and benefits due on the date issued.** Subject to (b)(i) and (ii) of this
42 subsection, if the department order is appealed **the order shall not be**
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47 ⁴ BIIA Dec., 03 11104 (2004).

1 **stayed pending a final decision on the merits unless ordered by the**
2 **board.**⁵ (Emphasis added.)

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4 The language of the statute makes clear that benefits are due when the Department issues its
5 order directing payment of benefits. Once a motion to stay benefits is filed the Board has 25 days to
6 issue a ruling on the motion. Masco asserts that benefits are only due and payable if the Board
7 denies the self-insured employer's motion. Masco further argues that the legal requirement to pay
8 benefits during the pendency of a stay motion is "unsettled" and, therefore, establishes a genuine
9 legal doubt as to the liability to pay benefits.
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12 From the Board's prior decisions it is evident that the delay in paying benefits is unreasonable
13 if the only basis for not paying the benefits is to wait out the time allowed to file an appeal and to wait
14 out the time allowed to receive a ruling on a motion to stay benefits.⁶ We find that
15 RCW 51.52.050(2)(b), when taken together with the liberal construction of the Act found in
16 RCW 51.12.010, requires the payment of benefits pending appeal and pending a motion to stay
17 benefits. The statute is unambiguous that benefits are due on the date of the Department order.
18 Benefits would only be stayed on an order by the Board granting the motion. If a self-insured
19 employer chooses not to pay benefits when due, the employer assumes a risk. It may, as here, be
20 required later to demonstrate the reasonableness of its action by presenting objectively based
21 evidence that it had a genuine medical or legal doubt as to the liability to pay such benefits. Genuine
22 doubt requires an objective standard of proof allowing the finder of fact the opportunity to assess the
23 reasonableness of such doubt. Exercising the right to appeal or to file a motion to stay benefits
24 absent such objective evidence does not establish a reasonable basis to withhold benefits ordered
25 by the Department.
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34 **DECISION**

35 In Docket No. 15 20822, the self-insured employer, Masco Corporation, filed an appeal with
36 the Board of Industrial Insurance Appeals on September 23, 2015. The employer appeals a
37 Department order dated September 9, 2015. In this order, the Department affirmed its August 25,
38 2015 order in which it found that the employer unreasonably delayed the payment of
39 loss-of-earning-power benefits for November 10, 2013, through December 21, 2014, in the amount
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⁵ RCW 51.52.050(2)(b).

47 ⁶ *In re Emily Eyrich*, BIIA Dec., 11 22230 (2013).

1 of \$27,644.02, and ordered the employer to pay a \$6,911.01 penalty to Mr. Suarez. This order is
2 correct and is affirmed.
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4 **FINDINGS OF FACT**

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- 6 1. On February 1, 2016, an industrial appeals judge certified that the parties
7 agreed to include the Jurisdictional History in the Board record solely for
8 jurisdictional purposes.
 - 9 2. The Department issued an order on December 19, 2014, in which it
10 ordered the self-insured employer to pay Mr. Suarez time-loss
11 compensation benefits for October 11, 2013, through December 10,
12 2014. The employer filed a Notice of Appeal with the Board dated
13 January 30, 2015, and within the Notice of Appeal moved for an order
14 granting a stay of benefits pending appeal. On February 12, 2015, the
15 Board issued an Order Granting Appeal, and on February 25, 2015, it
16 issued an order denying the Motion to Stay Benefits Pending Appeal. The
17 employer paid the time-loss compensation benefits ordered by the
18 Department's December 19, 2014 order on March 5, 2015.
 - 19 3. The self-insured employer presented no evidence establishing a genuine
20 doubt as to the medical or legal liability to pay benefits.
 - 21 4. The self-insured employer unreasonably delayed payment of the benefits
22 ordered by the Department in its December 19, 2014 order.

23 **CONCLUSIONS OF LAW**

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- 25 1. The Board of Industrial Insurance Appeals has jurisdiction over the parties
26 and subject matter in this appeal.
 - 27 2. The self-insured employer unreasonably delayed the payment of benefits
28 for November 10, 2013, through December 21, 2014, within the meaning
29 of RCW 51.48.017.
 - 30 3. The Department order of September 9, 2015, is correct and is affirmed.

31 Dated: November 21, 2016.
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37 BOARD OF INDUSTRIAL INSURANCE APPEALS

38 
39 DAVID E. THREEDY, Chairperson

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41 FRANK E. FENNERTY, JR., Member
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**Addendum to Decision and Order
In re Alfredo Suarez
Docket No. 15 20822
Claim No. SB-45649**

Appearances

Claimant, Alfredo Suarez, by Busick Hamrick Palmer, PLLC, per Steven L. Busick

Self-Insured Employer, Masco Corporation, by Law Office of Gress & Clark, LLC, per Brett Schoepper and James L. Gress

Department of Labor and Industries, by The Office of the Attorney General, per Susan Pierini

Petition for Review

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 July 1, 2016, in which the industrial appeals judge affirmed the Department order dated September 9, 2015.

Evidentiary Rulings

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