NO. 101107-5

SUPREME COURT OF THE STATE OF WASHINGTON

SHAWN SMITH,

Petitioner,

v.

DEPARTMENT OF LABOR & INDUSTRIES OF THE STATE OF WASHINGTON,

Respondent.

ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

I. INTRODUCTION

Injured workers constitute a vulnerable population, and the Legislature has acted in a number of ways to protect them from fraud and theft. Pertinent here, under RCW 51.04.080, a worker must provide written authorization to the Department of Labor & Industries before the agency can send its notices, orders, and payments to any person other than the worker. As the Court of Appeals properly determined, under the statute's plain language, attorneys are not excluded from this requirement—until a workers' compensation claimant indicates in writing that L&I should send orders and payments to the claimant's lawyer, the statute requires that all such materials be sent "directly to the claimant." RCW 51.04.080; *Smith v. Dep't of Lab. & Indus.*, 22 Wn. App. 2d 500, 512 P.3d 566 (2022).

Shawn Smith's petition fails to identify any issue warranting this Court's review. Contrary to Smith's assertion, the Court of Appeals' routine exercise of statutory interpretation does not conflict with any Washington appellate

decision. Nor does the court's analysis raise any issue of substantial public interest when it tracks the statute's plain language and advances the Legislature's aim to protect workers from unwanted (and potentially fraudulent) representations. L&I contacted Smith's lawyer on multiple occasions to tell him that Smith needed to provide written authorization before it could send the lawyer orders or payments in Smith's workers' compensation case. Yet the lawyer took no action for more than a year after the claim was closed. Because there is no dispute that L&I sent its rejection order directly to Smith (as required by the statute), the Board of Industrial Insurance Appeals correctly determined that the order became final and binding. This Court should deny Smith's petition for review.

II. ISSUE

> RCW 51.04.080 requires L&I to send its orders and payments directly to a workers' compensation claimant unless the claimant states in writing that the claimant wants L&I to send these materials to the claimant's representative. L&I received a letter from Carson Law stating that it would represent Smith, but it did not receive a written statement from Smith authorizing L&I to forward orders and

payments to the law firm. Did L&I properly send the order rejecting Smith's claim directly to Smith?

III. STATEMENT OF FACTS

A. Overview of Industrial Insurance Law

Workers who believe they were injured on the job may apply for workers' compensation benefits with L&I. RCW 51.28.010. If L&I allows the claim, it provides the worker with proper and necessary medical treatment for conditions proximately caused by the injury. RCW 51.36.010. If L&I makes a decision that a claimant disagrees with, the claimant has 60 days to either request that L&I reconsider the decision or appeal the decision to the Board of Industrial Insurance Appeals. RCW 51.52.050, .060. The failure to timely challenge an L&I order renders it final and binding and prevents relitigation of the decision, even if it contains a clear error of law. *Marley v. Dep't of Lab. & Indus.*, 125 Wn.2d 533, 886 P.2d 189 (1994).

RCW 51.04.080 requires L&I to send its notices, orders, and payments directly to the claimant unless the claimant requests in writing that L&I send these decisions to a representative. L&I has developed an authorization form, which claimants can fill out to signify that they wish for L&I's decisions to be sent to a representative.

B. Smith Filed a Claim with L&I and L&I Rejected It

Smith submitted a claim in June 2017 that alleged that Smith had developed an occupational disease. CP 81, 108. L&I assigned claim number BB76955 to the claim. CP 81, 108. On July 13, 2017, Carson Law faxed a letter to L&I stating that it represented Smith in this claim and that it was requesting reconsideration of any adverse orders that L&I might have issued. CP 78, 83-84. Carson Law did not include an authorization form filled out by Smith that confirmed that Smith wanted for L&I's decisions on that claim to be sent to Carson Law. CP 78, 83, 85. Nor did Smith provide any other

written statement signifying that he wanted L&I to send its decisions to the law firm.

An L&I claims manager notified Carson Law that its letter did not comply with RCW 51.04.080 because it did not include an authorization form from Smith. CP 78; *see* CP 218. The claims manager called Carson Law on July 17 and July 27, 2017. CP 78, 85, 86. She asked Carson Law to send L&I an "authorization from Mr. Smith" to L&I. CP 78, 85.

On August 11, 2017, L&I issued an order rejecting the claim because it determined that Smith's condition was not an occupational disease. AR 88. L&I mailed the order to Smith, his doctor, the employer, and the employer group. CP 88. L&I did not mail it to Carson Law because, as of August 2017, L&I had not received any written authorization from Smith to send such orders to the law firm.

Over a year later, in October 2018, Carson Law attempted to protest the order rejecting Smith's claim. CP 94.[1] L&I issued an order indicating that it could not reconsider this order because the October 2018 protest was not received within the statutory 60-day appeal period. CP 96.

C. The Board, the Superior Court, and the Court of Appeals Affirmed, Concluding that L&I Properly Sent the Rejection Order Directly to Smith When Smith Had Not Provided Written Authorization for L&I to Send the Order to Any Other Person

Smith appealed to the Board. CP 97-99. The parties stipulated that the August 2017 rejection order was delivered to all its listed recipients, including Smith. CP 78, 88. At hearing, Smith argued, as he does here, that L&I also needed to send this order to Carson Law, and that because it had not done so, the order was not final and binding. *See* CP 70-75.

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[1] That same month, Carson Law also filed a new notice of representation that, unlike the one it provided in August 2017, included a signed authorization from Smith. CP 92. Although the authorization form was dated July 13, 2017, it is undisputed that the law firm did not send the form to L&I until October 2018. CP 78, 94.

The Board rejected this argument and affirmed L&I's order. CP 10-17. It determined that under RCW 51.04.080, a claimant must send L&I a written statement signifying that the claimant wishes for any decisions about the claim to be sent to a representative: "We agree with L&I that a written authorization of representation is necessary before L&I is required to forward copies notices and orders to a designated representative in a specific claim." CP 12-13. The Board emphasized that this statutory requirement allows claimants to "retain the ability to choose when representation is required in a specific claim" and to avoid "pay[ing] fees for representative services that may not be needed." CP 13. Since Smith had provided no written authorization as of August 2017, L&I properly sent the rejection order directly to Smith, and Carson Law's October 2018 challenge to the rejection order was untimely. CP 12-13.

Smith appealed the Board's decision to superior court, which affirmed, adopting the Board's findings of fact and conclusions of law. CP 1-2, 273-76.

Smith then appealed to the Court of Appeals, which again rejected his arguments. Examining the statute's plain language, the court explained that "the statutory language at issue draws a clear distinction between the claimant and the claimant's representative" and that it must therefore "interpret those terms to mean different things." *Smith*, 512 P.3d at 572. The court held that "RCW 51.04.080 authorizes only claimants themselves—and not the claimant's representative—to set forth in writing the name and address of the claimant's representative." *Id*. at 572-73. And because Smith did not provide such a writing before L&I entered its order rejecting Smith's claim, L&I was not required to forward a copy of that order to Carson Law. *Id*. The Court of Appeals thus found no error in the superior court's decision. *Id*.

Smith petitions for review.

IV. ARGUMENT

Smith's arguments do not warrant this Court's review. The Court of Appeals' straightforward analysis of RCW 51.04.080 contains no error and raises no issue of substantial public interest. Smith asserts that the court's opinion conflicts with various appellate decisions applying the doctrine of liberal construction, but this doctrine does not apply when the statute's language is plain on its face. And in any event, unlike Smith's strained reading, the court's interpretation furthers the Legislature's goal to protect injured workers by requiring that they confirm in writing who will receive L&I's orders and payments on their claims. L&I alerted Smith's lawyer that Smith needed to provide written authorization before L&I could send the lawyer its decisions, yet the lawyer took no action until more than a year after L&I rejected Smith's claim. The Court should deny review.

A. The Court of Appeals' Statutory Analysis of RCW 51.04.080 Does Not Conflict with Any Washington Appellate Decision and Presents No Issue of Substantial Public Interest Meriting Review

RCW 51.04.080 is unambiguous: if a claimant wants L&I to send its notices, orders, and payments to an attorney or lay representative instead of the claimant, the claimant must send L&I a written request for L&I to do that. Anything short of a written request by the claimant does not permit L&I to communicate its decisions to an attorney in place of the claimant. Because Smith did not indicate in writing that he wanted L&I to send its orders to Carson Law, under the statute, L&I was required to send such orders directly to Smith.

1. RCW 51.04.080's plain language requires that a claimant, not a person purporting to act on the claimant's behalf, ask that L&I send its decisions to someone other than the claimant

Under RCW 51.04.080, L&I must send notices, orders, and payments "directly to [a] claimant" unless the claimant provides written authorization for L&I to send these decisions to the claimant's chosen representative:

> On all claims under this title, claimants' written notices, orders, or payments must be forwarded directly to the claimant until such time as there has been entered an order on the claim appealable to the board of industrial insurance appeals. Claimants' written notices, orders, or payments may be forwarded to the claimant in care of a representative before an order has been entered if the claimant sets forth in writing the name and address of the representative to whom the claimant desires this information to be forwarded.

The statute contains no ambiguity. Its first sentence requires that L&I send its notices, orders, and payments "directly to the claimant" until after L&I issues an appealable order in the claim.[2] This provision ensures that any interlocutory notice, order, or payment will go directly to the claimant and that the claimant will also receive the first L&I order that is appealable to the Board. Because the statute

[2] Smith does not argue, nor does the record reflect that, before issuing the order at issue in this appeal, L&I had entered "an order on the claim appealable to the board of industrial insurance appeals." *See* RCW 51.04.080. Accordingly, L&I was required to forward all its notices, orders, and payments directly to Smith absent written authorization under the statute's second sentence.

requires that such materials be forwarded "directly to the claimant," under the plain language of its first sentence, L&I cannot send these decisions to any person other than the claimant.

The statute's second sentence, by contrast, creates an exception to this general rule, providing a mechanism for a claimant to ask L&I to send its orders to the claimant's chosen representative. The "claimant" must set forth this request "in writing" and must identify "the representative to whom the claimant desires this information to be forwarded" by name and address. Again, the language is unambiguous: it is only after a claimant has provided written authorization that L&I may send an order to the claimant's representative rather than to the claimant.

Under the statute's plain language, L&I cannot treat a claimant's lawyer as the claimant for purposes of providing written authorization under RCW 51.04.080's second sentence. *Contra* Pet. 12. Smith does not dispute the Court of Appeals'

determination that "the legislature possesses the authority to impose a requirement on claimants themselves to set forth in writing the name and address of the claimant's representative, regardless of whether that representative is a lawyer or a nonlawyer[.]" *Smith*, 512 P.3d at 572; *see* Pet. 7. And as the court explained, this is what the Legislature did here. *Smith*, 512 P.3d at 572-73. Noting that "[d]ifferent statutory language should not be read to mean the same thing," the court explained that RCW 51.04.080's language "draws a clear distinction between the claimant and the claimant's representative" and that it must therefore "interpret those terms to mean different things." *Id.* at 572-73 (quoting *Ass'n of Wash. Spirits & Wine Distribs. v. Wash. State Liquor Control Bd.*, 182 Wn.2d 342, 353, 340 P.3d 849 (2015)). Thus, in requiring that a "claimant" provide written authorization to L&I, the statute authorizes only claimants themselves—and not the claimant's representative—to set forth in writing the name and address of the claimant's representative. *Id*.

In fact, the Legislature has rejected Smith's contrary interpretation. Smith points to *In re Pamela Miller*, where the Board construed a former version of RCW 51.04.080 to require L&I "to mail the first appealable order to a party's representative," even when the communication regarding the representation came from the claimant's attorney. Pet. 14-15, 15 n.5 (quoting *In re Pamela Miller*, 05 12252, 2006 WL 481047, at *2 (Wash. Bd. Indus. Ins. App. Jan. 11, 2006)). But Smith's reliance on *Miller* is misplaced when the Legislature modified the statute following this decision. The statute effective when *Miller* was decided contained no mechanism for claimants to ask L&I to send orders to a representative, and after the Board's decision, the Legislature added RCW 51.04.080's second sentence, setting out specific procedures controlling the manner in which this could occur. *See* Laws of 2007, ch. 78, § 1. In doing so, the Legislature rejected Smith's argument that L&I must send its orders to a purported representative even when the claimant has not personally made

this request. Instead, as discussed above, the current version of RCW 51.04.080 requires that claimants themselves make such requests in writing.

Smith makes much of the Court of Appeals' statement that the written authorization should be signed by Smith. *See* Pet. 6-7 (citing *Smith*, 512 P.3d at 572). But a lack of signature was not the basis for the court's decision. Smith provided no writing, signed or otherwise, indicating that he wanted L&I to send its orders and payments to Carson Law. Nor is the court's statement about a signature in error. When the law requires that a particular individual provide written authorization (as RCW 51.04.080 does here), the writing must contain some verification of that individual's personal approval. It is hardly unusual to look to a signature in such circumstances. Smith's argument about whether his signature was required raises no issue of substantial public interest warranting review.

Finally, the Court of Appeals did not deny Smith's right to legal representation, as Smith repeatedly asserts. *See* Pet. 1-2,

12-13, 16. Rather, in requiring that Smith himself inform L&I that he wanted the agency to forward its orders and payments to Carson Law, the court simply applied RCW 51.04.080's plain language. Smith shows no error in the court's analysis, and this Court should reject his petition for review.

2. The Court of Appeals' opinion does not conflict with appellate decisions involving the doctrine of liberal construction

The Court of Appeals' opinion does not conflict with any Washington appellate decision. Smith asserts that the court failed to apply the rule of liberal construction, citing various workers' compensation cases that have applied this doctrine. Pet. 1-2, 8-9.[3] But the liberal construction rule does not apply to unambiguous terms in the Industrial Insurance Act. *See Harris*

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[3] Citing *Street v. Weyerhaeuser Co.*, 189 Wn.2d 187, 399 P.3d 1156 (2017); *Dennis v. Dept. of Lab. & Indus.*, 109 Wn.2d 467, 745 P.2d 1295 (1987); *Sacred Heart Med. Ctr. v. Carrado*, 92 Wn.2d 631, 600 P.2d 1015 (1979); *Lightle v. Dep't of Lab. & Indus.*, 68 Wn.2d 507, 413 P.2d 814 (1966); *Wilber v. Dep't of Lab. & Indus.*, 61 Wn.2d 439, 378 P.2d 684 (1963); *State ex rel. Crabb v. Olinger*, 196 Wash. 308, 82 P.2d 865 (1938); *Gaines v. Dep't of Lab. & Indus.*, 1 Wn. App. 547, 463 P.2d 269 (1969).

v. Dep't of Labor & Indus., 120 Wn.2d 461, 474, 843 P.2d 1056 (1993); *City of Bellevue v. Raum*, 171 Wn. App. 124, 155 n.28, 286 P.3d 695 (2012). Because RCW 51.04.080 unambiguously requires that claimants themselves—and not their purported representatives—personally request that orders and payments be forwarded to such representatives, the doctrine of liberal construction is inapplicable and does not assist Smith here.

In any event, Smith's proposed construction of the statute would not aid injured workers. Smith claims that his failure to provide written authorization was a "procedural technicalit[y]" (Pet. 11), but the Legislature imposed this requirement to protect workers. The statute's purpose is to ensure that claimants receive notices, orders, and payments on their claims, and that only a representative of a claimant's choosing can receive such materials. Yet under Smith's interpretation, any person purporting to represent a claimant could unilaterally demand that L&I send its decisions to them. If the person falsely claimed to represent the claimant, this could impede the

claimant from learning about an order and prevent the claimant's timely appeal. Such a person would also receive payments in instances where the injured worker was entitled to time loss compensation. And even in situations not amounting to fraud, as the Court of Appeals noted, the requirement for the claimant's confirmation "encourages claimants themselves to decide whether they pay the costs associated with representation." *Smith*, 512 P.3d at 572.

Smith's reading of the statute would undermine these legislative goals. While the rule of law he seeks would help him in this particular case, it would harm workers who are the victims of fraudulent representations. The liberal construction standard should not be used to strip a statutory protection from injured workers.

The other cases cited by Smith are likewise inapposite. He points to this Court's acceptance of review in *Cordova v. City of Seattle* (*see* Pet. 1-2, 5-6), but that case involved what constitutes a valid application for benefits, a different area of

law controlled by different statutes.[4] He suggests that the Court of Appeals' opinion runs afoul of *Shafer v. Department of Labor & Industries*, 166 Wn.2d 710, 213 P.3d 591 (2009), asserting this case requires L&I to communicate its orders to any person purporting to represent the worker. *See* Pet. 10-11. But there, the Court held only that L&I must communicate a closing order to the worker's attending physician when the statute gave the physician the right to appeal the order. *Shafer*, 166 Wn.2d at 721. That is not the case here, where RCW 51.04.080 specifies that L&I may send orders to a claimant's representative only with the claimant's written permission. Indeed, it is undisputed that L&I communicated the order to both Smith and his attending physician, as required by RCW 51.04.080 and *Shafer*.

[4] In fact, the Court dismissed the petition for review on the petitioner's motion on August 10, 2022. *Cordova v. City of Seattle*, 199 Wn.2d 1027, 514 P.3d 634 (2022).

Because the Court of Appeals' decision does not conflict with any decision of this Court or the Court of Appeals, Smith's arguments provide no basis for review.

B. The Court of Appeal's Decision Does Not Conflict with the Board's Decisions—Nor Would Such Conflict Warrant Review

The Court of Appeals' opinion does not conflict with any Board decision, contrary to Smith's assertions. *See* Pet. 13-14. As an initial matter, these decisions are merely persuasive authority and are not binding on the Court of Appeals or this Court. *Birrueta v. Dep't of Lab. & Indus.*, 186 Wn.2d 537, 548, 379 P.3d 120 (2016). A conflict with such administrative decisions does not warrant review under RAP 13.4(b). Insofar as Smith seeks review on this ground, his argument lacks merit.

In any case, nothing in the court's decision conflicts with the Board's "body of published decisions[.]" Pet. 14. Smith argues that the Board has required L&I to communicate its orders to a claimant's attorney whenever it receives a notice of representation. *See* Pet. 14-15 (citing *Miller*, 2006 WL 481047).

But as discussed above, the Legislature amended RCW 51.04.080 after *Miller* was decided, and the current statute requires a claimant's written authorization before L&I may send its orders and payments to the claimant's chosen representative. Because the key statutory language at issue did not exist at the time the Board issued the *Miller* decision, this case is of no help in interpreting the effect of that language, and it provides no support for Smith's arguments.

The other Board cases cited by Smith likewise fail to assist him. *See* Pet. 14 (citing *In re David Herring*, Nos. 57,831 & 57,830, 1981 WL 375943 (Wash. Bd. Indus. Ins. App. July 30, 1981); *In re Sound Dive Center*, No. 14 12707, 2015 WL 4153111 (Wash. Bd. Indus. Ins. App. June 8, 2015); *In re Bell & Bell Builders*, No. 90 5119 (Wash. Bd. Indus. Ins. App. Aug. 3, 1992)[5]). None involve the circumstance present here—where a claimant has failed to provide written authorization under

[5] A copy of the Board's decision in *Bell & Bell Builders* is available at http://biia.wa.gov/SDPDF/905119.pdf.

RCW 51.04.080. In *Herring*, the claimant provided written notice of the name and address of his attorneys, complying with RCW 51.04.080. 1981 WL 375943, at *1. And in *Sound Dive* and *Bell & Bell Builders*, the issue was communication to an employer's attorney, not a claimant's, so RCW 51.04.080 did not apply at all. Smith's reliance on these cases is misplaced.

Nor did L&I have a duty to inquire about Carson Law's purported representation. Smith points to *In re Betty Brashear*, No. 96 3341, 1997 WL 593881 (Wash. Bd. Indus. Ins. App. Aug. 8, 1997), asserting that L&I must make reasonable inquiries when there are questions about who represents a worker. *See* Pet. 15-16. But in *Brashear*, as in *Herring*, the claimant provided written authorization for L&I to send its orders to her attorney, distinguishing that case from the circumstances here. *See Brashear*, 1997 WL 593881, at *1. Nothing in RCW 51.04.080 or any other statute requires L&I to make inquiries if a law firm claims to be a worker's

representative but provides no written authorization from the claimant for L&I to send its decisions there.

Indeed, while L&I had no legal duty to do so, it made appropriate inquiries here. A claim manager told Carson Law on multiple occasions that the law firm's August 2017 letter failed to comply with RCW 51.04.080, explaining that it must provide a written statement from Smith to comply with the statute. CP 78, 85, 86. Yet despite being informed of what it needed to do, Carson Law failed to take any timely action. Instead, the law firm waited for more than a year after L&I rejected Smith's claim before attempting to protest this order. This Court's review is hardly warranted in these circumstances.

C. Smith's Passing Reference to Equitable Estoppel Does Not Warrant Review

Smith suggests the doctrine of equitable estoppel is somehow applicable in this case. *See* Pet. 17. But he did not raise this argument in the superior court or at the Court of Appeals, and this Court should decline to review this unpreserved issue. *See State v. O'Hara*, 167 Wn.2d 91, 97-98,

217 P.3d 756 (2009); RAP 2.5(a). Indeed, Smith fails to cite to the record or provide any meaningful analysis relating to his argument, merely noting that the issue was raised in a different petition for review in a separate, unrelated case. *See* Pet. 17. Arguments unsupported by references to the record or citation to authority need not be considered. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). The Court should decline to review Smith's untimely argument.

V. CONCLUSION

For the foregoing reasons, this Court should deny Smith's petition for review.

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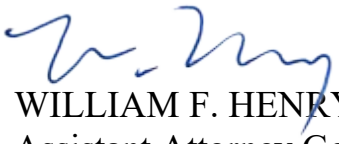
RESPECTFULLY SUBMITTED this 3rd day of October, 2022.

ROBERT W. FERGUSON
Attorney General



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SUPREME COURT
STATE OF WASHINGTON

SHAWN SMITH, Petitioner, v. DEPARTMENT OF LABOR & INDUSTRIES OF THE STATE OF WASHINGTON, Respondent.	CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, she caused to be served the Dept.'s Answer to Petition for Review and this Certificate of Service in the below described manner:

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Erin L. Lennon, Supreme Court Clerk
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DATED this 3rd day of October, 2022.

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