NO. 90961-0

SUPREME COURT OF THE STATE OF WASHINGTON

MARIO ARRIAGA,

Petitioner,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON,

Respondent.

ANSWER TO PETITION FOR REVIEW

ROBERT W. FERGUSON
Attorney General

James P. Mills
Assistant Attorney General
WSBA No. 36978
Office No. 91040
1250 Pacific Avenue, Suite 105
Tacoma WA 98402
(253) 597-3896

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

I. INTRODUCTION

In an unbroken line of cases dating from 1927 through this Court's 2009 decision in *Shafer v. Department of Labor & Industries*, 166 Wn.2d 710, 717, 213 P.3d 591 (2009), this Court has held that the Department of Labor & Industries communicates an order to a party when the order "is received by the respective party." Here, the attending physician, who must receive a copy of the order, received the order at issue two days after the Department mailed it as shown by the date stamp on the order. No one disputes that this is when the doctor's office received the order but instead Mario Arriaga claims that due to a breakdown in mailroom procedures, his doctor did not personally read the order.

Now Arriaga attempts to stretch the holdings of this Court and the language of the statute to disregard the receipt of the order by his doctor's office and to require that his doctor's staff personally provide the order to the doctor and that the doctor actually read it. But this Court held in *Rodriguez v. Department of Labor & Industries*, 85 Wn.2d 949, 951-52, 540 P.2d 1359 (1975), and *Nafus v. Department of Labor & Industries*, 142 Wash. 48, 52, 251 P. 877 (1927), that communication is made when the order is received; the receiving party need not actually read the order for the sender's communication to have been completed. The breakdown in the doctor's mailroom procedures does not obviate this holding, and to

create a rule that a properly addressed and received order was not communicated because of the vagaries of office staff would produce an unworkable and undesirable result. No conflict with case law or issue of substantial public interest is presented by a well-reasoned Court of Appeals decision applying *Shafer*, *Rodriguez*, and *Nafus* to the facts of this case.

II. COUNTERSTATEMENT OF THE ISSUES

Review is not warranted in this case, but if review were accepted, the issues presented would be:

1. RCW 51.52.050(1), and .060 require an attending physician to file a protest or appeal within 60 days from the time the order is communicated to the attending physician. Is communication of an order established when the order is received at the recipient's address?

2. The Industrial Insurance Act provides finality to decisions of the Department if they are not protested or appealed within sixty days. Does substantial evidence support the finding that the order denying responsibility for the cervical degenerative disc condition was received by Arriaga's attending physician on October 31, 2008, when it is undisputed his physician's office received the order on this date?

III. COUNTERSTATEMENT OF THE CASE

A. Arriaga Had an Industrial Injury and Received Treatment From Dr. Sherfey

After an injury at work, Arriaga applied for and received workers' compensation benefits. BR 102-03. Justin Sherfey, D. O., became his at-

tending physician. BR 102-03; BR Sherfey 4-5, 9.[1] Dr. Sherfey first treated Arriaga for this industrial injury in early January 2006. BR Sherfey 10. He last saw Arriaga in September, 2010. BR Sherfey 10.

As part of his practice, Dr. Sherfey functions as the attending physician for injured workers. BR Sherfey 8. Accordingly, he is familiar with the rules and regulations of the Department. BR Sherfey 8. Dr. Sherfey's practice has four doctors and four physician's assistants, and about forty total employees. BR Sherfey 10-11. Dr. Sherfey routinely receives mail from the Department, including letters from the Department asking for information about a patient's conditions and work status. BR Sherfey 12.

B. Dr. Sherfey Maintained Correspondence From the Department in Arriaga's Medical File and Reviewed Documents Provided to Him

As part of his treatment of Arriaga, Dr. Sherfey maintained an electronic file that contained documents received from the parties involved in the claim, outside studies including radiographic studies, testing results, and other medical information. BR Sherfey 9-10. He maintained a separate section in the file for correspondence with the Department. BR Sher-

[1] BR refers to the certified appeal board record provided by the Board. The Department will refer to documents in the administrative record by reference to machine-stamped numbers supplied by the Board, except when referring to witness testimony, where the Department will give the name of the witness and the page number in the transcript for that witness.

fey 22. Dr. Sherfey's practice has a department that manages Labor & Industries paperwork, including getting authorizations, coordinating depositions, coordinating independent exams, and reviewing "some of those records." BR Sherfey 23. The medical records department is more involved with scanning the documents. BR Sherfey 23. There is no standard protocol in place to determine whether Dr. Sherfey should review a document, "except that typically paperwork that involves a patient is supposed to come across the physician's desk for review." BR Sherfey 23. Dr. Sherfey agreed that his staff may not provide to him all the documents that are specifically addressed to him. BR Sherfey 27.

In 2008, the office practice for incoming mail was to electronically scan the hard copy of the document and place the hard copy in Dr. Sherfey's in-box for his review. BR Sherfey 12. After he reviewed the document, he typically initialed it. BR Sherfey 12. Once he verified that he reviewed the document, the document would be scanned into the medical record. BR Sherfey 12-13. He conceded that there have been instances where a piece of mail was placed into the patient's file without his review, but he could not estimate the frequency. BR Sherfey 13.

Dr. Sherfey reviews mail throughout the day: when he has breaks between patients, over lunch, and at the end of the day or the following day. BR Sherfey 13. He is sure there have been times when mail was

placed into the patient's file without him seeing it first. BR Sherfey 13. Even when a Department document was received by Dr. Sherfey's office, he would not necessarily be aware of that document's existence unless it was either placed into his box or scanned into a patient's file. BR Sherfey 13-14.

C. Dr. Sherfey Received the Department Order Two Days After It Was Issued

The Department issued an order dated October 29, 2008, that stated: "The Department is not responsible for the condition diagnosed as: cervical disck [sic] degenerative, determined by medical evidence to be unrelated to the industrial injury for which this claim was filed." BR 28. The Department mailed this "segregation" order to the address it had on file for Dr. Sherfey. BR 28. Dr. Sherfey's office staff dated stamped the order as received on October 31, 2008. *See* BR Sherfey 18. Arriaga's medical file contains a copy of the order. BR Sherfey 18. Despite being contained in Arriaga's records since 2008, Dr. Sherfey did not initial the document and could not recall whether or not he had reviewed the October 29, 2008 order until Arriaga's attorney brought it to his attention nearly two years later in 2010. BR Sherfey 14-15. On cross-examination, Dr. Sherfey conceded that there were multiple documents from the Department in Arriaga's file that he had not initialed, including letters addressed

directly to him. BR Sherfey 18-19, 21, 26-27. According to Dr. Sherfey, that means that the documents "may have been scanned in without my direct visualization." BR Sherfey 21.[2]

D. The Board Determined That the Protest Was Untimely

This appeal originated from the Department order dated October 29, 2008, that denied responsibility for Arriaga's cervical degenerative disc condition. BR 28. After being asked to review the order by Arriaga's attorney in December 2010, Dr. Sherfey protested the segregation order through a chart note that indicated that he believed Arriaga's neck needed to be looked at. BR Sherfey 15. In December 2010, the Department issued an order declining to reconsider the 2008 order as the protest was untimely. BR 46.

Arriaga administratively appealed. BR 21-28. The industrial appeals judge issued a proposed decision and order finding that the appeal was untimely and dismissing it. BR 15-19. Arriaga petitioned for review of that decision, and the Board adopted the dismissal. BR 1, 5-10.

---

[2] During the time period relevant for this appeal, Dr. Sherfey's office practice for incoming mail was to electronically scan the hard copy of the document and place the hard copy in Dr. Sherfey's in-box for his review. BR Sherfey 12. Although it is irrelevant to analysis here because the order was communicated, Dr. Sherfey stated that there was in fact "no standard protocol in place" to review medical records "except typically paperwork that involves the patient is supposed to come across the physician's desk for review." BR Sherfey 23.

E. The Superior Court Found the Protest Untimely Because the Doctor Did Not Protest or Appeal Within 60 Days After Its Receipt

Arriaga appealed this decision to the Thurston County Superior Court. The superior court affirmed the Board, adopting findings of fact and conclusions of law consistent with the Board's findings of fact and conclusions of law. CP 31-33. In its oral ruling, the court stated, "[m]y take on this is that the statute requires that communication was met when this order was clearly conveyed to the physician's office." RP 18. It further elaborated: "If the Department had misaddressed this, if there had been some showing that a postal worker was not delivering the mail and threw it all in the back of a station wagon . . . that might be a different situation, but it is clear that it was time stamped two days after it was mailed. It was received." RP 19. Accordingly, the superior court found that "Mario Arriaga's attending physician, Dr. Justin J. Sherfey, received a copy of the Department's October 29, 2008 order on October 31, 2008. Dr. Sherfey did not protest or appeal this order within sixty days of its receipt." CP 32.

The superior court found that neither Mario Arriaga nor Dr. Sherfey filed a timely protest or appeal. CP 32. As a result, the superior court concluded that Arriaga's December 13, 2010 protest to the October 29, 2008 Department order was not timely filed per

RCW 51.52.050, and that the superior court and Board lacked authority to hear the appeal. CP 31-33. The superior court therefore dismissed Arriaga's appeal. CP 32-33.

F. The Court of Appeals Concluded That the Department Communicated the Segregation Order to Dr. Sherfey When His Office Received It in October, 2008

The Court of Appeals affirmed the superior court, concluding that the trial court and Board correctly dismissed his appeal as untimely. *Arriaga v. Dep't of Labor & Indus.*, __ Wn. App. ___, 335 P.3d 977, 978 (2014). It concluded that Dr. Sherfey received a copy of the Department's order on October 31, 2008, and that he did not protest the order within 60 days of its receipt. *Id.* at 982. It reasoned that:

> the fact that Dr. Sherfey did not read the letter upon receipt does not toll the statutory deadline. The Department addressed the order to Dr. Sherfey's correct address, and the order was actually delivered to the correct address. This constitutes communication under RCW 51.52.060.

Id. at 982. "Any failure in Dr. Sherfey's actual receipt of the order was due to the breakdown of his office procedures, not a defect in the Department's mailing." *Id.* at 983.

IV. REASONS WHY REVIEW SHOULD BE DENIED

A Department order becomes final unless an aggrieved person, including a doctor, protests or appeals within 60 days of communication of the order to that person. RCW 51.52.050, .060; *Marley v. Dep't of Labor*

& Indus., 125 Wn.2d 533, 537, 886 P.2d 189 (1994). Here because Dr. Sherfey's office received the Department's October 29, 2008 order on October 31, 2008, and he did not protest until two years later, in December 2010, the order became final. BR Sherfey 17-19.

It is undisputed that Dr. Sherfey actually *received* the order in his office and the order was placed in Arriaga's medical file. Contrary to Arriaga's assertion, the Court of Appeals' decision does not conflict with any Supreme Court decisions discussing the communication of Department orders under RCW 51.52.050 and .060. This Court's decisions promote the timely and orderly processing of Department orders and gives certainty and predictability to all affected persons about the date the order was communicated. No issue of substantial public interest is raised by the Court of Appeals' correct conclusion that the receipt of an order at the attending physician's address completes the communication required under RCW 51.52.050 and .060.

A. The Court of Appeals Decision Is Consistent With Supreme Court Decisions That Do Not Require the Recipient to Read the Order to Constitute Communication

Review is not warranted because the Court of Appeals decision here does not conflict with this Court's decisions holding that receipt of a Department order is communication under RCW 51.52.060. *See Shafer*, 166 Wn.2d at 717; *Rodriguez*, 85 Wn.2d at 952; *Nafus*, 142 Wash. at 52.

In those cases, this Court held that communication is complete if the recipient receives the order, even if the recipient did not read the order. *Rodriguez*, 85 Wn.2d at 951-52; *Nafus*, 142 Wash. at 52.

Arriaga relies primarily on *Shafer*, which he characterizes as requiring that an injured worker's attending physician "actually receive a Department order before RCW § 51.52.060's 60-day period to appeal begins to run." Pet. at 8. Arriaga would have *Shafer* require more than mailing to the doctor's correct address, receipt by the doctor's office, and placement in the proper medical file—he would have *Shafer* require the doctor's initials on the order as proof the order was communicated. Pet. 7-9. *Shafer* contains no such requirement.

Shafer required the Department to send closing orders to the attending physician in a case where the Department had not even mailed a copy of the order to the doctor. *Shafer*, 166 Wn.2d at 712. Here, in contrast, the Department's order was provided to Dr. Sherfey at the correct address; he simply does not recall actually reviewing the order. BR Sherfey 14.

But no requirement exists in *Shafer* or any other decision of this Court that the recipient actually review the order for the order to have been communicated under RCW 51.52.050 or .060. Indeed, this Court has held precisely to the contrary. In *Nafus*, the Department sent an order to

the worker in the hospital and the worker put it in his pocket and did not read it. *Nafus*, 142 Wash. at 49-50. After the appeal period ran, he tried to appeal, claiming the appeal period should begin from the time he read the order—just as Dr. Sherfey attempted with his untimely protest. *See id.* at 51-52. This Court rejected the very "actual awareness" standard that Arriaga advocates. *See id.* Reading the order was not necessary for communication. *Nafus*, 142 Wash. at 51-52. The Court emphasized that by mailing the order to the worker, the Department "had done all it was required to do":

> The fact that the respondent says that he did not read the letter and did not know its contents is not controlling. The Department had done all it was required to do in making "communication" of its decision in closing the claim to the party affected thereby.

Nafus, 142 Wash. 48 at 52.

Similarly, in *Rodriguez*, a worker could not read English, but the Department had mailed an order to him that he received; the mailing constituted communication. *Rodriguez*, 85 Wn.2d at 953-54. Citing *Nafus*, the *Rodriguez* Court concluded that "communication" means receipt of the order by the worker:

> [W]e are satisfied the word 'communicated' contained in RCW 51.52.060 requires only that a copy of the order be *received* by the workman. Since appellant's notice of appeal was not filed within sixty days of the receipt of the closing order, the notice of appeal was not timely.

Id. (emphasis added); *see also Kaiser Aluminum & Chem. Corp. v. Dep't of Labor & Indus.*, 57 Wn. App. 886, 889, 790 P.2d 1254 (1990) (order is communicated upon receipt).[3]

Here the Court of Appeals correctly applied *Nafus* and *Rodriguez*, reasoning that Dr. Sherfey's failure to *read* the order did not mean that it was not communicated to him. *Arriaga*, 335 P.3d at 982 ("the fact that Dr. Sherfey did not read the letter upon receipt does not toll the statutory deadline"). Indeed, it is not even clear from the facts that Dr. Sherfey did not review the order, but even if he did not, the order was still communicated to him when it was received at his office. BR Sherfey 14.

Nafus and *Rodriguez* stand for the proposition that if a Department order is available for the recipient to read, it is communicated, regardless of whether it was actually read by the recipient. Arriaga argues that *Nafus* and *Rodriguez* do not apply to his facts because in both cases the workers were aware of the Department sending them a letter and did not take action, while Dr. Sherfey testified that he was not aware of the order. Pet. 8-10. But communication was achieved when the order was received by Dr.

---

[3] As the Court of Appeals noted, the *Rodriguez* court ultimately granted equitable relief because the worker was illiterate, but the Court "made it a point to distinguish *Nafus*, which involved 'a mere failure or refusal to read a letter from the department' from a case where 'extreme illiteracy' rendered the claimant virtually incompetent. *Arriaga*, 335 P.3d at 982 (quoting *Rodriguez*, 85 Wn.2d at 954)). Dr. Sherfey is not illiterate.

Sherfey's office such that it *could* be read by Dr. Sherfey. *See Nafus*, 142 Wash. 48 at 49-50, 52. That Dr. Sherfey either did not read it or does not recall reading the order is irrelevant because it was communicated and indeed available in Arriaga's medical file at anytime after October 31, 2018, for Dr. Sherfey's review. BR Sherfey 14, 21.

B. Arriaga Fails to Present an Issue of Substantial Public Interest Because It Is a Routine and Reasonable Rule That Delivery of Mail to an Office Means the Recipient Has Received the Mail

Government agencies, businesses, and private citizens routinely mail correspondence to individuals located at an office. The fate of such correspondence when it is received at an office is entirely within the control of that office. Where, as here, the statute authorizes communication by mail, the sender has done everything reasonably necessary to communicate with a recipient once the correspondence has been delivered to and received at the recipient's office. Creating a new rule that such mail was not delivered until the intended recipient handles the mail could lead to mischief by recipients who miss deadlines and would lead to satellite litigation and evidentiary disputes as to when the mail was placed in the recipient's hands and whether the recipient actually read it. Such a rule could undermine the finality provided for in RCW 51.52.050 and RCW 51.52.060 and indefinitely prolong the opportunity for appeal provided for in these statutes.

There is no issue of substantial public interest raised by the Court of Appeals' correct conclusion that the receipt of an order by the attending physician's office constitutes communication of the Department's order for the purposes establishing deadlines for reconsideration or appeal. Pointing to the important role of doctors in the workers' compensation system, Arriaga argues that a breakdown in his doctor's mailroom procedures should excuse the doctor from the statutory deadline. Pet. at 10-12. Not only is this proposed rule inconsistent with *Nafus* and *Rodriguez*, it is unworkable and unwise.

The Department properly addressed the order to the doctor's address that he provided to the Department. *See* BR 24. There is no dispute that the address was correct, because Dr. Sherfey's office received the order, date stamped it, and placed it in the proper file. BR Sherfey 18. The Department did all it was required to do. *See Nafus*, 142 Wash. 48 at 52. Dr. Sherfey bears responsibility, not the Department, to ensure that mail received in his office is processed in an orderly and reliable fashion. If this were not the rule, then the circumstances present here could become the rule, namely an appeal two years or more after an order was received and deemed final under the statute. Allowing two years of claim adjudication to unravel because of inadequate mail-handling procedures in the doctor's office fundamentally disturbs principles of finality.

Finality applies to the benefit of all parties. *See Kingery v. Dep't of Labor & Indus.*, 132 Wn.2d 162, 170, 937 P.2d 565 (1997) (Talmadge, J. concurring) (unappealed decision by the Department is "final and binding on *all parties* . . .") (emphasis added). The Industrial Insurance Act represents a compromise between business and labor. *Minton v. Ralston Purina Co.*, 146 Wn.2d 385, 390, 47 P.3d 556 (2002). Each forfeited certain rights in exchange for the "sure and certain relief" provided by the Act. RCW 51.04.010; *Minton*, 146 Wn.2d at 390 (citing *West v. Zeibell*, 87 Wn.2d 198, 201, 550 P.2d 522 (1976)). Such sure and certain relief, however, can be obtained only if there is certain deadline to contest orders.

Arriaga argues that he had no control over his doctor's mailroom procedure and should not be penalized. Pet. at 11. But it is often the case that a party is impacted by the actions or inactions of its agents. *See M.A. Morton Co., Inc. v. Timberline Software Corp.*, 93 Wn. App. 819, 838, 970 P.2d 803 (1999); *Lane v. Brown & Haley*, 81 Wn. App. 102, 104, 108, 912 P.2d 1040 (1996); *Haller v. Wallis*, 89 Wn.2d 539, 547, 573 P.2d 1302 (1978). As the *Haller* Court explained, the "attorney's knowledge is deemed to be the client's knowledge, when the attorney acts on his behalf." 89 Wn.2d at 547. Once a party has designated an agent to represent

him in regard to a particular matter, the court and other parties are entitled to rely upon that authority. *Id.*[4]

Arriaga claims his responsibility was met because his doctor had reasonable procedures, essentially arguing in his petition for relief under a theory of excusable neglect.[5] But he cannot meet the criteria for equitable tolling, which provides a method for relief from filing deadlines if the individual case warrants its application. "The predicates for equitable tolling are bad faith, deception, or false assurances by the defendant and the exercise of diligence by the plaintiff." *Millay v. Cam*, 135 Wn.2d 193, 206, 955 P.2d 791 (1998). Courts typically permit equitable tolling to occur only sparingly, and "should not extend it to a garden variety claim of excusable neglect." *Benyaminov v. City of Bellevue*, 144 Wn. App. 755, 761, 183 P.3d 1127 (2008) (citations omitted). Applying well-established principles, a breakdown in mailroom procedures, if one indeed occurred here, does not toll appeal deadlines and presents no issue of substantial public interest.

---

[4] Regardless of any expectation Arriaga had for Dr. Sherfey to protest or appeal adverse orders, Arriaga also had his own independent reconsideration and appeal rights throughout the relevant time period for appeal. *See* RCW 51.52.050(1).

[5] He did not raise this theory below and the Court need not consider it. *Pappas v. Hershberger*, 85 Wn.2d 152, 153-54, 530 P.2d 642 (1975); *accord Hansen v. Friend*, 118 Wn.2d 476, 485, 824 P.2d 483 (1992) (appellate court generally will not consider arguments raised for the first time on appeal); *Van Vonno v. Hertz Corp.*, 120 Wn.2d 416, 426-27, 841 P.2d 1244 (1992) (refusing to consider an argument raised for the first time on appeal).

V. CONCLUSION

The Department properly addressed and mailed the Department order to the address provided by Dr. Sherfey. Arriaga does not dispute that Dr. Sherfey's office received it. Under this Court's decisions in *Shafer*, *Rodriguez*, and *Nafus*, that receipt constituted "communication" and a breakdown in mailroom protocols does not excuse application of the communication rule set forward in those cases. No issue of significant public interest or conflict of law is presented by Arriaga's petition and the Court should deny the petition.

RESPECTFULLY SUBMITTED this 23rd day of December, 2014.

ROBERT W. FERGUSON
Attorney General

JAMES P. MILLS
Assistant Attorney General
WSBA No. 36978
Office No. 91040
1250 Pacific Avenue, Suite 105
PO Box 2317
Tacoma, WA 98401
(253) 593-5243

PROOF OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, hereby certifies that the document to which this proof of service is attached, Answer to Petition for Review, was delivered as follows:

☒ Electronic Service:

Supreme Court of the State of Washington
supreme@courts.wa.gov

dorian@davidvail.com
Dorian D.N. Whitford

☒ US Mail Postage Prepaid via US Mail Service:

Dorian D.N. Whitford
Vail-Cross & Associates
PO Box 5707
Tacoma, WA 98415

DATED this 23rd day of December, 2014.

Desirae Jones

DESIRAE JONES
Legal Assistant

OFFICE RECEPTIONIST, CLERK

To: Jones, Desirae (ATG)
Cc: Dorian Whitford (Dorian@davidbvail.com); Lynn Venegas (lynn@davidbvail.com); Mills, James (ATG)
Subject: RE: Arriaga v. DLI - 90961-0

Received 12-23-2014

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Jones, Desirae (ATG) [mailto:DesiraeJ@ATG.WA.GOV]
Sent: Tuesday, December 23, 2014 9:40 AM
To: OFFICE RECEPTIONIST, CLERK
Cc: Dorian Whitford (Dorian@davidbvail.com); Lynn Venegas (lynn@davidbvail.com); Mills, James (ATG)
Subject: Arriaga v. DLI - 90961-0

Good Morning,

Attached for filing with the court please find the following document:

1. Answer to Petition for Review.

Thank-you,

DESIRAE JONES
Legal Assistant
L&I, Tacoma/Seattle AGO
Phone: (253) 597-4116
Fax: (253) 593-2449
E-mail: desiraej@atg.wa.gov

Print Me Only If You Need Me