No. 44615-4-II

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

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MARIO ARRIAGA,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON,

Respondent,

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# APPELLANT'S OPENING BRIEF

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Eric A. Holte, WSBA# 44475
Vail, Cross-Euteneier & Associates
819 Martin Luther King Jr. Way
P.O. Box 5707
Tacoma, WA 98415-0707
(253) 383-8770
Attorney for Mario Arriaga

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## I. INTRODUCTION

Comes now the Appellant, Mario Arriaga, Plaintiff below, by and through his attorney of record, Eric A. Holte of the Law Offices of David B. Vail, Jennifer Cross-Euteneier & Associates, and hereby offers this brief in support of his appeal.

This case originates from an Administrative Law Review (ALR) appeal from an Industrial Appeals Judge's Proposed Decision and Order dated March 23, 2012, and adopted as the Decision and Order of the Board of Industrial Insurance Appeals ("the Board") on May 18, 2012, which dismissed Mr. Arriaga's appeal as untimely. Mr. Arriaga appealed that decision to Superior Court asserting that the Board had erred in dismissing his appeal as a result of the Board's misapplication of the law concerning communication of Department of Labor and Industries ("Department") orders to attending physicians.

The Superior Court affirmed the Board's decision after considering briefing and oral argument.

As will be described further below, Mr. Arriaga's attending physician, Dr. Sherfey, did not receive the Department's October 29, 2008 segregation order. Pursuant to case law interpreting the Industrial Insurance Act, in such a situation the Department order cannot be said to

have been "communicated" to Dr. Sherfey. Department orders do not become final until 60 days after being communicated. Mr. Arriaga appealed the order within 60 days of Dr. Sherfey actually receiving and learning of the order. Therefore, his appeal was timely, and the Superior Court erred by affirming the Board's dismissal of Mr. Arriaga's appeal of the October 29, 2008 Department order.

## II. ASSIGNMENTS OF ERROR

A. THE SUPERIOR COURT AND THE BOARD ERRED IN HOLDING THAT MR. ARRIAGA'S APPEAL WAS UNTIMELY BECAUSE THE DEPARTMENT'S ORDER DATED OCTOBER 29, 2008, WAS NOT COMMUNICATED AND DID NOT BECOME FINAL MORE THAN 60 DAYS BEFORE DR. SHERFEY'S PROTEST ON BEHALF OF MR. ARRIAGA.

1. The Superior Court misinterpreted the legal requirement of communication of Department orders to injured workers' attending physicians, which was laid out in *Shafer v. Dep't of Labor and Indus.*, 166 Wn.2d 710, 213 P.3d 591 (2009), and as a result, the Superior Court has misapplied the law, which resulted in prejudicial error in the form of dismissal of Mr. Arriaga's appeal.
2. The Superior Court failed to follow the Board's guidance concerning the presumption of receipt in the due course of

mailing as it applies under the Industrial Insurance Act, which resulted in misapplication of the law and prejudicial error in the form of dismissal of Mr. Arriaga's appeal.

## III. ISSUE

Whether the Department's order dated October 29, 2008, was "communicated" and became "final" more than 60 days before Mr. Arriaga's attending physician protested the order.

## IV. STATEMENT OF THE CASE

On October 29, 2008, the Department of Labor and Industries ("the Department") issued an order segregating[1] a cervical disc degenerative condition from Mr. Arriaga's claim. CABR[2] 45, 77. Mr. Arriaga was unrepresented at the time. CABR 77. Mr. Arriaga contends that the October 29, 2008 segregation order was not communicated to his attending physician. CABR 70-75. The Department closed Mr. Arriaga's claim on November 23, 2010. CABR 46, 77.

On December 23, 2010, in response to a chart note submitted by Mr. Arriaga's attending physician as a protest on Mr. Arriaga's behalf, the

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[1] In the parlance of workers' compensation practitioners, Department orders denying coverage for specific conditions are commonly referred to as "segregation orders."
[2] The record of proceedings in a case of this nature is the Certified Appeal Board Record, which will be cited herein as "CABR."

Department issued an order stating that they could not reconsider the October 29, 2008 segregation order because the protest was not timely. CABR 46, 77. On December 27, 2010, the Department affirmed the November 23, 2010 closing order. CABR 46, 77. The claimant, through his attorney appealed both the December 23, 2010 order and the December 27, 2010 order on January 13, 2011. CABR 21, 46, 77.

The Board of Industrial Insurance Appeals ("the Board") accepted review of the appeal concerning the timeliness of the doctor's protest to the segregation order on February 15, 2011. CABR 31, 46. On February 15, 2011, the Department reassumed jurisdiction of Mr. Arriaga's claim to reconsider the December 27, 2010 order which affirmed the closure of the claim.[3] An Industrial Appeals Judge of the Board issued a Proposed Decision and Order on March 23, 2012, that dismissed Mr. Arriaga's appeal, and the Board adopted the Proposed Decision and Order as the Decision and Order of the Board on May 18, 2012.

The Board's decision was then appealed to Thurston County Superior Court and was assigned to Department One, the Honorable Judge Gary R. Tabor. CP 4. Both parties provided trial briefs and presented oral

[3] Thus, the closing of Mr. Arriaga's claim is not at issue in this appeal. Closure of Mr. Arriaga's claim, or affirmance of an order closing his claim, would have been premature while a segregation order under the claim remained on appeal. *In re Betty Wilson*, BIIA Dec., 02,21517 (2004) (It is erroneous as a matter of law for the Department to adjudicate claim closure when adjudication regarding segregation of a condition is pending.).

argument. CP 10-30. Having considered the briefing and argument, on February 15, 2013, the Court entered the Findings of Fact, Conclusions of Law, and Judgment that affirmed the Board's Decision and Order, which held that Mr. Arriaga's appeal was untimely. CP 31-33. As a result, Mr. Arriaga has appealed to the Washington State Court of Appeals, Division Two.

## V. ARGUMENT

### A. Introduction

The Industrial Insurance Act was established to protect and provide benefits for injured workers. It has been held for many years that the courts and the Board are committed to the rule that the Act is remedial in nature and its beneficial purpose should be liberally construed in favor of the beneficiaries. *Wilber v. Dep't of Labor and Indus.*, 61 Wn.2d 439, 446, 378 P.2d 684 (1963); *Hastings v. Dep't of Labor and Indus.*, 24 Wn.2d 1, 163 P.2d 142 (1945); *Nelson v. Dep't of Labor and Indus.*, 9 Wn.2d 621, 115 P.2d 1014 (1941); *Hilding v. Dep't of Labor and Indus.*, 162 Wash. 168, 298 P. 321 (1931). Furthermore, RCW 51.04.010 declares that "sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided regardless of questions of fault." Similarly, RCW 51.12.010 indicates that the Act "shall be liberally construed for the purpose of reducing to a minimum the suffering and

economic loss arising from injuries and/or death occurring in the course of employment." Thus, any doubts that arise when interpreting or applying the Act must be resolved in favor of the worker. *Clauson v. Dep't of Labor and Indus.*, 130 Wn.2d 580, 584, 925 P.2d 624 (1996).

As will be described further below, Mr. Arriaga's attending physician, Dr. Sherfey, did not receive the Department's October 29, 2008 segregation order. While the case law and administrative decisions interpreting the Industrial Insurance Act indicates that in a situation such as this, the October 29, 2008 order cannot be said to have been "communicated" to Dr. Sherfey, should the Court find that there is any question as to the meaning of "communication" as applied to this case under the Act, that question must be resolved in favor of the worker, Mr. Arriaga.

### B. Standard of Review

Jurisdiction of the Superior Court on review of a decision of the Board is appellate only, and it can only decide matters decided by the administrative tribunal. *Shufeldt v. Dep't of Labor and Indus.*, 57 Wn.2d 758, 359 P.2d 495 (1961). Review by the Court of Appeals is limited to an examination of the record 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. *Rogers v. Dep't of Labor and Indus.*, 151 Wn. App. 174, 210 P.3d 355 (2009).

Relief from a decision of the Board is proper when it has erroneously interpreted or applied the law, the order is not supported by substantial evidence, or it is arbitrary or capricious. *Mt. Baker Roofing, Inc. v. Dep't of Labor and Indus.*, 146 Wn. App. 429, 191 P.3d 65 (2008), amended on reconsideration.

The Department is charged with administering the Industrial Insurance Act, so the Court of Appeals affords substantial weight to the Department's interpretation of the Act but the Court of Appeals may nonetheless substitute its judgment for the Department's because its review of the Act is de novo. *McIndoe v. Dep't of Labor and Indus.*, 100 Wn. App. 64, 995 P.2d 616 (2000), review granted 141 Wn.2d 1025, 11 P.3d 826, aff'd 144 Wn.2d 252, 26 P.3d 903.

### C. The Department's October 29, 2008 segregation order had not become final prior to Dr. Sherfey's protest because the order had not been communicated to Dr. Sherfey because he had not received the order.

Pursuant to RCW 51.52.050, an aggrieved party may appeal an adverse, determinative order from the Department by filing a protest and request for reconsideration with the Department or by filing an appeal with the Board. Such request for reconsideration or appeal must be filed

within 60 days of when the order was "communicated." RCW 51.52.050, .060. An order is "communicated" when it has been received. *Shafer v. Dep't of Labor and Indus.*, 166 Wn.2d 710, 717, 213 P.3d 591 (2009). If no request for reconsideration or appeal is filed within 60 days of communication, the order becomes final. *Id.*

Department orders involving a medical decision must be communicated not only to the injured worker, but also to the injured worker's attending physician. *Shafer*, 140 Wn. App. 1, 11, 159 P.3d 473 (2007), aff'd 166 Wn.2d 710, 213 P.3d 591 (2009). "[P]hysicians are expected to request immediate reconsideration when they believe the Department has taken inappropriate action regarding the injured worker [...]." *Shafer*, 140 Wn. App. at 9, aff'd 166 Wn.2d 710, 213 P.3d 591 (2009). In order for an attending physician to take such action, Department orders that concern medical issues must be communicated to the attending physician; once made aware of a medical determination in an injured worker's case, the attending physician may then appeal Department orders if he or she disagrees with them. *Shafer*, 166 Wn.2d at 721. Hence, "when a final order, decision, or award is based upon a medical determination [...] the order does not become final until 60 days after the doctor has received it." *Shafer*, 140 Wn. App. at 11, aff'd 166 Wn.2d 710, 213 P.3d 591 (2009).

The *Shafer* Court gave an apt summary of the importance of communication of Department orders to injured workers' attending physicians in cases such as Mr. Arriaga's:

> The legislature expects the attending physician to serve as a medical advocate for the injured worker and as a fulcrum in the agency's evaluation of the claim. The Department implements this expectation by advising physicians they have the right and the duty to seek review on their patients' behalf. The physician cannot decide whether to appeal unless the physician knows of the order. Failure to ensure that the physician learns of the order therefore deprives both the worker and the agency of the voice of the physician, just at the critical point of finalizing a determination of the worker's future medical condition.

*Shafer*, 140 Wn. App. 11, 159 P.3d 473 (2007), aff'd 166 Wn.2d 710, 213 P.3d 591 (2009).

Because the October 29, 2008 segregation order in Mr. Arriaga's case involved a medical determination that a certain cervical condition was not related to his industrial injury, the order could not become final until 60 days after it had been communicated not only to Mr. Arriaga, but also to his attending physician, Dr. Sherfey.

As a result, the Court's inquiry must be whether the October 29, 2008 order was "communicated" to Dr. Sherfey. Here, the evidence shows that communication did not occur 61 or more days prior to the protest. Dr. Sherfey testified that he works in an office of approximately 40 employees. 11/29/11 Tr. p. 11. In order to verify that he has received a

piece of mail at the office, he has a standard procedure in place: he always either initials the physical document, or when in electronic form, electronically signs the document. 11/29/11 Tr. p. 12, 13, 21. Dr. Sherfey had not initialed the October 29, 2008 order. 11/29/11 Tr. p. 15. In light of his standard procedures concerning receipt of mail, this strongly suggests that Dr. Sherfey did not receive the order.

In addition, Dr. Sherfey testified that the fact that his office receives a piece of mail does not guarantee that it gets communicated to him. 11/29/11 Tr. p. 16. Dr. Sherfey went on to testify that if the October 29, 2008 order had been communicated to him, he would have protested it—just as he had protested prior Department orders in Mr. Arriaga's case—because he felt Mr. Arriaga needed further evaluation (which is an opinion that Dr. Sherfey states is evidenced in his chart notes concerning Mr. Arriaga). 11/29/11 Tr. p. 15. Dr. Sherfey had an established course of conduct with respect to Mr. Arriaga's Labor and Industries claim. The sudden deviation from his course of conduct, i.e. the absence of a protest from Dr. Sherfey, also strongly suggests that he had not received the October 29, 2008 order.

Considering all of this evidence leads to the conclusion that Dr. Sherfey never received the October 29, 2008 order; it had not been

communicated to him. *See generally Shafer*, 166 Wn.2d 710, 213 P.3d 591 (2009). The Court in *Shafer* defined "communication" in terms of receipt. *Shafer*, 166 Wn.2d at 718. While the order was received at the building in which Dr. Sherfey worked, the doctor himself cannot be said to have received the order. As a result, it was not communicated to him. *See generally Shafer*, 166 Wn.2d 710.

Because the October 29, 2008 order was not communicated to Dr. Sherfey, it had not become final. *Id.* Hence, the 60-day appeal period had not yet begun to toll. *Id.* Therefore, Dr. Sherfey's December 13, 2010 protest and request for reconsideration of the October 29, 2008 order on behalf of Mr. Arriaga was not, and in fact could not have been, untimely. Consequently, this matter should now be remanded to the Department to consider the protest and request for reconsideration of the October 29, 2008 order.

**D. The presumption of receipt in the due course of mailing was rebutted by Dr. Sherfey's testimony.**

The presumption of receipt in the due course of mailing is rebuttable and can be overcome by the surrounding circumstances. As our Supreme Court stated in *Gibson v. House*, 81 Wash. 102, 109, 142 P. 464 (1914), "though the mailing of a letter is prima facie evidence that it was received, this court has distinctly held that it is nothing more, and that it

will have but little weight against positive testimony that the letter was not received." *Id.* (internal citations omitted).

Moreover, the Board has considered these principles in the context of the Industrial Insurance Act on a number of occasions in its significant decisions[4]. For example, in *In Re: Dorena R. Hirschman*, BIIA Dec., 09,17130 (2010), the Board determined that while a Department order was properly mailed to Ms. Hirschman's house, the order was not communicated to her until she returned home from vacation several weeks later and actually received the order. Analogizing to Mr. Arriaga's case, although the order was mailed to Dr. Sherfey's office, communication was not complete until Dr. Sherfey actually learned of and received the order, a substantial amount of time after it had arrived at his office.

Similarly, in *In Re: Edward Morgan*, BIIA Dec., 9,667 (1959), communication based upon the presumption of mailing was overcome. Here mail from the Department was sent to the injured worker at his permanent mailing address which was distinct from his residential address. The mailing address was a mail depot service for loggers and fishermen who moved around but wanted a definite mailing address. Mr. Morgan

[4] RCW 51.52.160: The board shall publish and index its significant decisions and make them available to the public at reasonable cost. These decisions are properly considered by courts as persuasive authority, but these are not binding authority. *See, e.g. Rogers v. Dep't of Labor and Indus.*, 151 Wn. App. 174, 210 P.3d 355 (2009).

claimed he did not receive the Department order at issue. Although properly mailed to Mr. Morgan, and presumably received at the mail depot, the Board agreed that he did not receive this order and thus there was no communication of the Department order. The Board reasoned that since Mr. Morgan had taken prior orders he received to his attorney and protested them to the Department, he likely would have done the same with the order at issue. The Board felt this was not a situation where there was deliberate or negligent disregarding or failure to read a Department order properly mailed to avoid communication, and that it would be both unjust and contrary to legislative intent to charge notice to Mr. Morgan under the circumstances.

As in Mr. Morgan's case, in this case it would be equally unjust to Mr. Arriaga and contrary to legislative intent to hold that the Department order of October 29, 2008 had been communicated to Dr. Sherfey simply because it was received in his office on October 31, 2008. Dr. Sherfey has a very active practice in which he sees forty to forty-five patients a day in the two to three days a week he is practicing in his office. 11/29/11 Tr. p. 11. He is also part of a larger office with seven other medical providers and around forty total employees. 11/29/11 Tr. p. 10-11. Mail for all eight providers comes to the same place, and as a result, Dr. Sherfey has

procedures in place for making sure that mail for him concerning his patients is actually received by him. 11/29/11 Tr. p. 11-12.

Dr. Sherfey described his procedures for the receipt of mail in his office. Once mail comes in, if it concerns one of his patients, staff would place it in his inbox, he would review it, initial it, and then put it in an outbox where it would be taken and scanned into the appropriate medical record. 11/29/11 Tr. p. 12-13, 23. Dr. Sherfey even acknowledged he would not be aware of correspondence from the Department if that mail was not placed in his box (to be reviewed and initialed) and scanned into the system. 11/29/11 Tr. p. 14. Although date stamped as received by his office on October 31, 2008, Dr. Sherfey testified that he had not initialed the October 29, 2008 order, indicating that he had not received the order to review it. 11/29/11 Tr. p. 14, 15, 17.

Dr. Sherfey testified that he first became aware of the October 29, 2008 order during a conversation with Mr. Arriaga's recently acquired legal representative's office in 2010. 11/29/11 Tr. p. 15; CABR at 45. He testified that if he had reviewed the October 29, 2008 order he likely would have responded to it as he had done in the past. 11/29/11 Tr. p. 15. Dr. Sherfey was referring to a Department letter dated May 15, 2008 which stated the Department had not accepted responsibility for a cervical

condition, which he initialed indicating that he received the document, and he dictated a letter in response. 11/29/11 Tr. p. 25. Finally, Dr. Sherfey noted that his chart notes are kept separate in the patient's medical file from things like correspondence from the Department. 11/29/11 Tr. p. 22. This indicates that even though Dr. Sherfey's office received the October 29, 2008 order, he himself may not otherwise have received it in the absence of his procedures being followed. After he became aware of the Department's order of October 29, 2008, Dr. Sherfey protested and requested reconsideration of that determination on December 13, 2010. CABR at 46. Hence, Dr. Sherfey's testimony as well as the surrounding circumstances constitute the type of positive testimony and evidence contemplated by the Court to overcome the presumption of receipt in the due course of the mails. *Gibson*, 81 Wash. at 109.

Analogous to the situation in Mr. Morgan's case, had Dr. Sherfey actually received the Department's October 29, 2008 order on or around October 31, 2008, he would have protested the Department's determination like he had previously done concerning Mr. Arriaga's cervical issues and as he did in December 2010 after he became aware of the Department's action. The absence of action in Mr. Arriaga's case, like the absence of action in Mr. Morgan's case, suggests that the October 29, 2008 order was not communicated to Dr. Sherfey.

Dr. Sherfey works in a busy and large medical office with lots of mail coming through the door. Reasonable procedures were put in place to ensure that mail regarding his patients would properly be received by the doctor himself. To deny Mr. Arriaga and Dr. Sherfey the opportunity for the merits of their contention to be heard is contrary to the legislative intent of the Industrial Insurance Act and is an example of form over substance. Dr. Sherfey clearly disagreed with the Department's determination, and once he was aware of it, he protested the determination.

The great weight of the evidence in the record supports Mr. Arriaga's position that although Dr. Sherfey's office may have received the Department order dated October 29, 2008, the doctor himself had not received it, and thus it had not been properly communicated to him. As a result, the order's 60-day appeal period had not started to run, making Dr. Sherfey's December 13, 2010 protest to the order timely. Consequently, Mr. Arriaga's claim must now be remanded to the Department to consider the protest and request for reconsideration of its October 29, 2008 order.

## VI. CONCLUSION

Mr. Arriaga respectfully requests that the Court reverse the Superior Court's affirmance of the Board's Decision and Order, which

dismissed his January 13, 2011 appeal of the Department's December 23, 2010 order, which denied reconsideration of the Department's October 29, 2008 segregation order, and remand the matter to the Department to consider the protest and request for reconsideration of its October 29, 2008 order and further administer the claim according to the law and facts.

Mr. Arriaga further requests attorney's fees pursuant to RCW 51.52.130.

Dated this 2nd day of July, 2013.

Respectfully submitted,
VAIL, CROSS-EUTENEIER &
ASSOCIATES

By: Eric A. Holte
ERIC A. HOLTE, WSBA No. 44475
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify under penalty of perjury that I mailed this day the document referenced below to the following, postage paid:

COURT NO.: 44615-4-II

APPELLANT: Mario Arriaga

RESPONDENTS: Dept. of L & I

DOCUMENT: Appellant's Opening Brief

ORIGINAL TO: Court of Appeals, Division II (Messenger)
950 Broadway, #300, M/S TB-06
Tacoma, WA 98402-4427

COPIES TO: Kay Germiat
Assistant Attorney General
P.O. Box 2317
Tacoma, WA 98401

Mario Arriaga
132 Pier Rd. #A
Chehalis, WA 98532-8702



DATED this 2nd day of July, 2013.

Lynn M. Venegas
LYNN M. VENEGAS, Secretary