No. 44615-4-II

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

MARIO ARRIAGA,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON,

Respondent,

APPELLANT'S REPLY BRIEF

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I. ARGUMENT IN RESPONSE TO THE RESPONDENT, DEPARTMENT OF LABOR AND INDUSTRIES

A. Standard of Review and Issue on Appeal

The heart of the issue on appeal is the meaning of "communication" as the term is applied under the Industrial Insurance Act and the case law interpreting the Act. Hence, the issue on appeal is of a legal nature. The Court must determine the legal meaning of "communication" in this context in order to allow the Court to apply the law to the facts to reach a decision.

The Department of Labor and Industries (Department) attempts to reframe the issue on appeal as being a factual issue, and as a result, attempts to change the standard of review from de novo to substantial evidence—a standard considerably more advantageous to the Department in this case. Resp. Brief at 2, 29.

Having tried to reframe the issue, the Department moves on to argue that Mr. Arriaga did not assign error to the Superior Court's Findings of Fact. Resp. Brief at 29. However, in his Assignments of Error, Mr. Arriaga explicitly alleged that "[...] the Department's order dated October 29, 2008, was not communicated [...]." App. Brief at 2. This directly places at issue the Superior Court's findings of fact and

conclusions of law concerning communication of the October 29, 2008 order. Mr. Arriaga's Assignments of Error go on to identify that what is at issue is a misinterpretation of the legal requirement of communication, i.e., a misapplication of the law. *Id.* Moreover, the issue identified in Mr. Arriaga's opening brief following the Assignments of Error was whether the Department's order had been "communicated" and whether it had become "final." App. Brief at 3. Again this clearly places at issue both the factual finding and the legal conclusion of communication of the Department order. Finally, appellate courts have the inherent authority to address issues which are crucial to the case and necessary for a proper decision. *See Falk v. Keene Corp.*, 113 Wn.2d 645, 659, 782 P.2d 974 (1989). Reviewing the briefs of both parties makes it clear that the issue on appeal in this case is a legal one and that both parties' arguments thoroughly address the legal meaning of "communication" and how it applies in this case. For all of these reasons, the Court should address the meaning of "communication" as it is applied under the Industrial Insurance Act and the case law interpreting the Act.

The Court of Appeals' review of the Industrial Insurance 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, affirmed 144 Wn.2d 252, 26 P.3d 903. And more generally, legal questions are

reviewed de novo on appeal. *See Adams v. Great Am. Ins. Co.*, 87 Wn. App. 883, 887, 942 P.2d 1087 (1997); *see also* Resp. Brief at 11. Faced with the legal issue of the proper interpretation of "communication" under the Industrial Insurance Act, de novo review is the standard of review that applies in this case.

B. Much of the Legal Authority Relied upon by the Department Does Not Apply to the Case at Bar.

The Department has relied on several cases and Board decisions to support its position that are not applicable to Mr. Arriaga's case. For example, the Department cites to *Robel v. Highline Public Sch. Dist.*, 65 Wn.2d 477, 478, 398 P.2d 1 (1965). Resp. Brief at 20. This case should not be relied upon because it does not involve the Industrial Insurance Act, and as a result, offers no help concerning how "communication" should be interpreted under the Industrial Insurance Act. The same is true of another case the Department cites but does not discuss, *Beckman v. Dep't of Social & Health Serv.*, 102 Wn. App. 687, 11 P.3d 313 (2000). Resp. Brief at 24.

The Department also cites a number of Board decisions. First of all, only some of the Board's decisions receive designation as *significant* decisions. RCW 51.52.160. Such significant 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). Second, while the Department cites to some significant decisions of the Board, the Department more frequently has cited to non-significant decisions of the Board. Resp. Brief at 23, 24, 25, 26, 27. Because the case law sufficiently defines "communication" under the Industrial Insurance Act (as described below), the Court does not need to look to significant decisions of the Board for additional clarification or authority, and the Court should not look to the decisions of the Board which have not been designated as significant.

C. The Department Misconstrues Mr. Arriaga's Request for Relief and Interpretation of the Case Law Defining "Communication."

The Department claims that Mr. Arriaga is asking the Court to add the requirement that an order actually be read in order for communication to have occurred. *See e.g.* Resp. Brief at 14-15. Mr. Arriaga is not making, and has not made, such a request of the Court. Instead, Mr. Arriaga is simply asking the Court to interpret "communication" and apply it in light of case law interpreting the Industrial Insurance Act. As such, Mr. Arriaga argues that "communication" did not occur in his case because Dr. Sherfey did not "receive" the Department's October 29, 2008 order as those terms are elucidated in *Shafer* and other case law interpreting the Industrial Insurance Act. *See Shafer v. Dep't of Labor and*

Indus., 140 Wn. App. 1, 8, 159 P.3d 473 (2007) citing *Rodriguez v. Dep't of Labor and Indus.*, 85 Wn.2d 949, 951, 540 P.2d 1359 (1975).

The Department defines "communication" in the following manner:

> An order is communicated when it is received, and it is received when it is available to its intended recipient [...]. *Shafer*, 166 Wn.2d at 717; *Rodriguez*, 85 Wn.2d at 952-53; *Nafus v. Dep't of Labor & Indus.*, 142 Wash. 48, 52, 251 Pac. 977 (1927).

Resp. Brief at 14. Later in its brief, the Department provides another definition of "communication": "Communication has been achieved when the order is placed into the recipient's possession such that it *could* be read." Resp. Brief at 19 (citation omitted). And yet another iteration of the Department's definition of "communication" is as follows:

> Once the order has been delivered to the correct address for its intended recipient, and the recipient is present such that the mailing is available to review, the order has been communicated. *Shafer*, 166 Wn.2d 710, 717; *Rodriquez*, 85 Wn.2d at 951; *Nafus*, 142 Wash. at 52.

Resp. Brief at 27.

The Department also considers the *Nafus* case, Resp. Brief at 16, in which a Department order was considered communicated to the claimant because it had been placed in his robe pocket, and he knew that it was in his robe pocket. *Nafus*, 142 Wash. at 50, 52. In addition to *Nafus*, the Department cites *Rodriguez*, Resp. Brief at 17, a case in which the

claimant unquestionably received the Department order because it was in his actual possession, but in which the claimant did not read the order because he was illiterate. *Rodriguez*, 85 Wn.2d at 950. Notably though, the Court went on to grant Mr. Rodriguez equitable relief in spite of his untimely appeal because, although he was in possession of the order, he was not able to understand it. *Id.* at 953-54. Hence, because Mr. Rodriguez had no knowledge of the contents of the order, the order was in some sense unavailable to him.

Accepting the Department's interpretation of the case law still leads to the conclusion that the order at issue was not communicated to Dr. Sherfey. Reviewing the aforementioned case law, "communication" is defined in terms of receipt, which in turn, has been defined in terms of knowledge, availability, and possession. Unlike *Nafus* in which the order was in the claimant's robe, the claimant knew it was in his robe, it was available to him, and it was actually in his possession, in Mr. Arriaga's case, the order was not in the pocket of Dr. Sherfey's lab coat, but instead in a non-medical part of Mr. Arriaga's file. That is to say, Dr. Sherfey did not have possession of the order in the sense that Nafus did; Dr. Shefey had no knowledge of the order's existence, and consequently, the order was not available to him.

Like *Rodriguez*, in which the order was practically unavailable to the claimant because he had no way of knowing the contents of the order which was in his possession, in Mr. Arriaga's case, Dr. Sherfey had no knowledge that his office had received the order in question or that the order even existed, and as a result, for all intents and purposes, it was not available to him. Furthermore, the order was not in Dr. Sherfey's possession as the order in *Rodriguez* was. Thus, even interpreting "communication" and "receipt" in light of the cases focused on by the Department, the October 29, 2008 order still cannot be considered to have been communicated to or received by Dr. Sherfey.

This interpretation of "communication" is not merely based on the case law that has defined the term; it is also consistent with the policies of the Industrial Insurance Act that underlie the requirement of communication of Department orders. The *Shafer* Court emphasized the importance of an attending physician having knowledge of the order in question:

> 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 [...]

Shafer v. Dep't of Labor and Indus., 140 Wn. App. 11, 159 P.3d 473 (2007), aff'd 166 Wn.2d 710, 213 P.3d 591 (2009). Therefore, to deny Mr. Arriaga and Dr. Sherfey the opportunity for the merits of their

contention to be heard is not only contrary to the case law, as it has defined "communication," it is also contrary to the legislative intent of the Industrial Insurance Act.

II. 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 now remand the matter to the Department to consider his protest and request for reconsideration of the October 29, 2008 order.

Dated this 27th day of September, 2013.

Respectfully submitted,
VAIL, CROSS & ASSOCIATES

By: _____
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Attorney for Appellant

CERTIFICATE OF MAILING

SIGNED at Tacoma, Washington.

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, hereby certifies that on the 27th day of September, 2013, the document to which this certificate is attached, Appellant's Reply Brief, was placed in the U.S. Mail, postage prepaid, and addressed to Respondent's counsel as follows:

Kay A. Germiat
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P.O. Box 2317
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DATED this 27th day of September, 2013.

LYNN M. VENEGAS, Secretary