NO. 95927-7

SUPREME COURT OF THE STATE OF WASHINGTON

JUSTIN D. POLLARD,

Plaintiff,

v.

DEPARTMENT OF LABOR & INDUSTRIES and KAISER ALUMINUM & CHEMICAL CORP.,

Defendants.

DEPARTMENT OF LABOR & INDUSTRIES ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

The courts have long recognized that RCW 51.32.110 of the Industrial Insurance Act requires a worker to show good cause for failing to participate in an independent medical exam scheduled to determine the worker's medical status. *Garcia v. Dep't of Labor & Indus.*, 86 Wn. App. 748, 752, 939 P.2d 704 (1997); *Romo v. Dep't of Labor & Indus.*, 92 Wn. App. 348, 357, 962 P.2d 844 (1998); *see also* RCW 51.36.070. Justin Pollard cannot refuse to attend an independent medical exam simply because the self-insured employer would not allow him to switch attending providers before the examination. The self-insured employer may have been wrong in denying a change of attending physician, but this does not allow Justin Pollard to engage in self-help by opting out of unrelated claim administration procedures. The Court of Appeals was correct to decline to consider Pollard's request for a new provider as a basis for good cause to refuse to attend the examination.

Pollard has shown no conflict with any case or an issue of substantial public interest. RAP 13.4(b)(1), (2), (4). This Court should deny review.

II. COUNTERSTATEMENT OF THE ISSUE

Review is not warranted here, but if review were accepted, the issue presented would be:

RCW 51.32.110 allows the Department to suspend benefits if a worker fails to attend an independent medical exam without good cause. The independent medical examiner does not consult with the attending physician in rendering an opinion. Is a self-insured employer's refusal to allow a change in attending physicians a valid basis for refusing to attend an independent medical exam when the two processes are unrelated?

III. STATEMENT OF THE CASE

A. Overview of Workers' Compensation Principles

When a worker is injured at work, the worker may file an industrial injury claim for benefits. RCW 51.28.020; RCW 51.32.010. The Department of Labor & Industries administers the state fund to pay for treatment and other benefits. But employers may choose to be self-insured rather than be insured through the state fund. RCW 51.14.010. Self-insured employers manage the claims, and may also ask the Department to issue orders on topics like opening claims, closing claims, and resolving disputes in claim management. RCW 51.32.055, .190; WAC 296-15-420. If a worker disagrees with an action the self-insured employer has taken or with its inaction, the worker may ask the Department to resolve the dispute. RCW 51.32.055(6), .190.

An injured worker receives temporary benefits while the worker is receiving treatment; when the worker's condition becomes "fixed" and stable (i.e., maximum medical improvement), then the Department decides whether the worker should receive either permanent partial disability or

permanent total disability benefits. RCW 51.32.055, .060, .080; WAC 296-20-01002; *Franks v. Dep't of Labor & Indus.*, 35 Wn.2d 763, 766-67, 215 P.2d 416 (1950).

To determine issues like permanent disability, a self-insured employer may schedule an independent medical exam. RCW 51.32.110, .055(4); RCW 51.36.070. Independent medical exams are an important part of determining medical issues in a claim. Self-insured employers use examinations to establish a diagnosis, to outline a program of treatment, to evaluate whether conditions relate to the industrial injury or occupational disease, to determine whether the injury aggravated a pre-existing condition, to establish whether a condition has reached maximum medical improvement, to establish an impairment rating, to evaluate worsening, or to evaluate work restrictions. WAC 296-23-307.

If the worker does not attend the examination, the self-insured employer may ask the Department to reduce, suspend, or deny benefits when a worker is noncooperative with the management of the claim. RCW 51.32.110(1), (2); WAC 296-14-410(1). Before requesting suspension, the self-insured employer must notify the worker that the Department may suspend benefits if the worker did not have good cause to fail to attend the independent medical exam. RCW 51.32.110(2); WAC 296-14-410(4)(a).

The worker then may show good cause for the noncooperation. RCW 51.32.110(2); WAC 296-14-410(4)(b).

B. Pollard Received Treatment for His Shoulder Conditions Until His Treating Physician Opined That Pollard Had Reached Maximum Medical Improvement

Pollard injured his shoulders while working for Kaiser Aluminum & Chemical Corp. CP 44. Pollard underwent treatment for his shoulder conditions, including surgery. AR Pollard, 21-23.[1] Tycho Kersten, MD, Pollard's treating orthopedic surgeon, saw Pollard for his last office visit on November 26, 2013. AR Pollard 23; CP 44.[2] In late January 2014, after reviewing Pollard's MRI and talking with Pollard two weeks earlier by phone, Dr. Kersten advised Kaiser that Pollard's shoulder conditions were medically fixed and stable and no further treatment was necessary. Ex 7; CP 44. Dr. Kersten found that Pollard's clinical findings for his right shoulder were normal and advised that Pollard was ready for a permanent

[1] This brief cites the administrative record (the certified appeal board record) as "AR" followed by the witness name and page number.

[2] His family care practitioner Dr. Jeffrey Pederson, DO remained his attending physician listed on the claim, but Dr. Kersten was the primary point of contact for the shoulder conditions and had treated him for more than three years. Ex 2; AR Moyer 97-99.

partial disability rating for his left shoulder. Ex 7; CP 44. AR Herron 36; AR Moyer 93-94.[3]

Pollard relocated to Las Vegas to pursue a dream of playing poker professionally in February 2014. AR Pollard 24, 28. In March 2014, Pollard sought a new orthopedic evaluation at Desert Orthopedics in Nevada. AR Pollard 28. Broadspire—Kaiser's third-party administrator—denied Pollard's request because Dr. Kersten "indicated that he was at maximum medical improvement and wouldn't require further care." AR Herron 32, 34. At that time, Pollard did not ask the Department to resolve the dispute over whether he could obtain a new physician as permitted by RCW 51.32.055(6).

C. Pollard Refused to Attend the Rescheduled Examination Due to Kaiser's Refusal to Assign a New Attending Physician, but He Did Not Ask the Department to Intervene

To determine whether Pollard had a permanent disability, Kaiser decided it needed an independent medical exam. Occupational Health Solutions—a Kaiser service provider—scheduled the examination for May 27, 2014, in Nevada. *See* AR Guadagnoli 107-08; Ex 7; CP 44. It selected

[3] When a treating physician finds maximum medical improvement and requests an examination to rate impairment, the independent medical examiner follows a protocol set forth in rule to provide an impairment rating. WAC 296-23-377(1). If the independent medical examiner disagrees with the finding that the worker has reached maximum medical improvement, the examiner must provide a full report to allow the Department to take further action. WAC 296-23-377(2). This rule provides an additional safeguard for workers to ensure that that their claims are not closed when they have not reached maximum medical improvement.

Aubrey Swartz, MD, a board-certified orthopedic surgeon, from the Department's approved provider list because he was the only Washington-approved orthopedic examiner available to perform an examination in Nevada. AR Moyer 67.

Pollard's attorney told Pollard that if he did not attend the examination that Kaiser would "stop the claim for non-cooperation," but she nonetheless recommended that he refuse to attend. AR Thorp 75. Pollard informed Broadspire on May 22, 2014, that he would not attend the examination because Kaiser had not allowed him a new attending physician in his new place of residence. AR Guadagnoli 108. Pollard again did not raise the issue of Kaiser's decision to not allow a switch in attending physicians with the Department at that time.

Pollard skipped the May 27th exam, and on June 6 Kaiser sent a letter to Pollard's attorney requesting an explanation for his failure to attend the examination. AR Thorp 122-23; AR Guadagnoli 110; Ex 8. Kaiser advised Pollard that a suspension of benefits could occur if Pollard did not demonstrate in writing within 30 days that he had good cause not to attend the independent medical exam. AR Thorp 122; AR Guadagnoli 110. Pollard did not respond, nor did he raise the issue of Kaiser's decision to not allow an attending-physician switch with the Department. AR Guadagnoli 111, 117-18.

D. The Department Suspended Benefits After Kaiser Provided Documentation That Pollard Failed to Show Good Cause for Refusing to Attend the May Independent Medical Exam, and the Board, Trial Court, and Court of Appeals Affirmed

Kaiser asked the Department to issue an order of non-cooperation on August 22, 2014, after Pollard's refusal to attend the independent medical exam. AR Thorp 123; AR Guadagnoli 111. The Department issued an order suspending Pollard's benefits on September 5, 2014, because Pollard failed to attend the May examination. AR Guadagnoli 110; Ex 2, 5.

Pollard's attorney sent a letter on September 10, 2014, telling the Department for the first time that Pollard had requested a switch of providers and that Kaiser had refused to allow him to do so. AR Thorp 126. The September 10, 2014 letter did not request that the Department take any action, but said that Pollard would attend an independent medical exam if "the claimant's request to see a physician was approved [by the self-insured employer]." AR Thorp 126. The Department treated this letter as a protest to the September 5, 2014 order and, after further consideration, affirmed that order.[4] AR, Ex. 4. Nearly two months after

[4] Although Pollard's references to the rejected exhibits are improper (and should not be considered), the letter accompanying the Department's affirming order shows that the Department declined to consider the separate issue of whether the self-insured employer should authorize an appointment with a new provider because it "is not relevant to him attending an independent medical examination." *See* Pet. 5 (quoting rejected Ex 5).

sending his protest, Pollard's attorney emailed the self-insured employer and again asked for change of attending physician. AR Guadagnoli 111. And for the first time, Pollard's attorney sent the Department a letter asking the Department to take action about a change of providers. AR Guadagnoli 111.[5]

After the Department affirmed the suspension order, Pollard appealed to the Board. There he argued that he had good cause to refuse to attend the examination because Kaiser did not allow him to switch physicians.[6] Rejecting this argument, the industrial appeals judge concluded that Pollard did not show good cause for refusing to attend the independent medical exam. After Pollard petitioned the Board to review the proposed decision, the Board adopted the proposed decision as its decision. AR 5.

The superior court affirmed the Board. CP 37-38. It determined that Pollard did not have good cause to refuse to attend the examination. CP 64.

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[5] This letter is not part of the record, but it was referenced briefly during testimony. The record does not address a penalty request. *Contra* Pet. 4.

[6] Pollard and his attorney testified that they perceived that he would not be treated fairly by Dr. Swartz based on some internet research they did. AR Pollard 5/13/15 at 36; AR Thorp 73-74. Pollard has abandoned this argument. At the Board, Pollard also asked industrial appeals judge to expand the scope of the appeal to encompass a request for a penalty under RCW 51.48.017 against Kaiser for refusing to allow him to change his physician. AR Colloquy 5/13/15 at 7-9. The industrial appeals judge refused to do so. AR Colloquy 5/13/15 at 11-12; AR 20-21. Pollard has also abandoned this argument.

The Court of Appeals affirmed the superior court, concluding that Pollard did not have good cause for refusing to attend the requested independent medical exam. *Pollard v. Dep't of Labor & Indus.*, No. 34757-5-II (March 22, 2018) (slip op.) (unpublished). The Court reasoned that his "right to transfer" was not an issue on appeal because Pollard had not timely disputed the issue with the Department and so it could not be a basis for good cause by itself. *Slip op.* at 1-2. It noted "both the Board and the superior court recognized that the Department was never asked to decide and never did decide whether he had a right to transfer to Desert Orthopedics for treatment that was proper, necessary, and reasonable." *Id.* at 13. It reasoned that Board and the trial court correctly refused "to weigh Mr. Pollard's right to a physician of his choice under RCW 51.36.010(2)(a) because it was not part of the appeal." In concluding this, it relied on the longstanding proposition from *Garcia* and *Romo* that frustration with claims management is not good cause for refusing to attend an independent medical exam. *Id.*

IV. REASONS WHY REVIEW SHOULD BE DENIED

This case does not warrant review under RAP 13.4(b). First, Kaiser's unrelated refusal to switch attending physicians cannot be a basis for refusing to attend an independent medical exam. The Court of Appeals correctly concluded that Pollard failed to show good cause because his

frustration with claims management is not good cause under longstanding precedent. Second, Pollard raises no issue of substantial public interest because the independent medical exam was necessary to adjudicate his claim and he has other remedies to address his unrelated dispute with his self-insured employer. This Court should deny review.

A. Pollard's Request to Change Attending Physicians Is Not a Basis for Refusing to Attend an Independent Medical Exam Under the Long-Standing Good Cause Standards

Pollard has not demonstrated any conflict with this Court's decisions or decisions of the Court of Appeals. A self-insured employer may direct an injured worker to attend an independent medical exam and the Department may reduce, suspend, or deny benefits if the worker refuses to attend the examination. RCW 51.32.110; RCW 51.36.070; WAC 296-14-410; *see also Romo*, 92 Wn. App. at 354.[7] The worker then may show good cause for the noncooperation. RCW 51.32.110(2); WAC 296-14-410(4)(b). A number of factors may show good cause to not attend, including things like the inability to attend the examination because of family and employment responsibilities, inability to travel, physical capacity, and the expectation of a fair and independent medical

[7] Pollard repeatedly mislabels the independent medical exam at issue as a "defense examination." Pet. 1, 3, 10. Under RCW 51.32.110(2), the Department and self-insured employers schedule independent medical exams to adjudicate claims, not to defend parties' positions in litigation as Pollard suggests. WAC 296-23-307.

examination. *Romo*, 92 Wn. App. at 356 (citing *Bob Edwards*, No. 90 6072, 1992 WL 218711 (Wash Bd. Ind. Ins. App. June 4, 1992)). But a worker's frustration with claims administration does not show good cause to fail to attend an examination. *See Romo*, 92 Wn. App. at 358.[8]

Pollard's request to switch attending physicians is not a basis for refusing to attend an independent medical exam but instead is a disagreement with claims management. The Court of Appeals' refusal to consider his unrelated administrative dispute about the change of physician follows the other decisions addressing the suspension of benefits and is not a basis for review. *See Romo*, 92 Wn. App. at 358; *see Garcia,* 86 Wn. App. at 752.

In *Romo*, the worker refused to submit to a medical examination because in her view the examination was redundant and she believed the Department had failed to provide good cause for requiring the examination. 92 Wn. App. at 351, 359. The court rejected her claims and concluded that it was her burden to show good cause for refusing to attend and that she failed to articulate any other reason than her frustration with the claims process, which was insufficient. *Id.* at 359. Likewise, in *Garcia*,

[8] While the *Pollard* Court declined to recognize the general rule that the courts balances only factors related to the examination itself when considering whether there is good cause for failing to attend, it correctly declined to consider the unrelated switch of providers in its good cause analysis.

the worker articulated two reasons for refusing to attend an independent medical examination, his responsibility to care for his sister's children in Mexico—but not his unavailability to return for the examination—and his frustration with delays in his claim. *Garcia,* 86 Wn. App. at 751-52. The court rejected both and concluded that "his frustration with the Department's delays [does not] support[] the legal conclusion of good cause." *Id.* at 752. For three decades, the Board of Industrial Insurance Appeals has relied on the standards in *Romo* and *Garcia. E.g.*, *Christopher B. Rodriguez,* No. 16 17236 & 16 17237, 2018 WL 3413570, *5 (Wash Bd. Ind. Ins. App. June 19, 2018); *David S. Clay*, No. 10 13138 2012 WL 1374523, *2 (Wash. Bd. Ind. Ins. App. February 1, 2012); *Gail H. Hanson*, No. 04 14071, 2005 WL 1658405, *2 (Wash. Bd. Ind. Ins. App. March 2, 2005).

Here, Pollard's claim amounts to frustration with the claim process because the disputes are unrelated. The dispute about the change of physician is unrelated to the independent medical exam because the independent medical examiner does not consult with the attending physician. *Cf.* WAC 296-23-347 (listing 17 duties of the independent medical examiner' responsibilities and not including communication with the attending physician as a duty). And even if Pollard asked the attending physician to review the report, the attending physician would not do so

until after the examination. Having the report reviewed by an attending physician is a separate issue from having the examination in the first place.

The timing of Pollard's request confirms that these are separate, unrelated issues. Pollard did not raise his request with the Department until months after he failed to attend the independent medical exam. The Department issued an order suspending Pollard's benefits on September 5, 2014, after Kaiser submitted evidence that Pollard failed to attend the medical exam scheduled with Dr. Swartz in May 2014 and then provided no good cause explanation within 30 days. AR Guadagnoli 110; Ex 2, 5. Then, Pollard's attorney sent a letter on September 10, 2014, which told the Department for the first time that Pollard had requested a switch of providers and that Kaiser had refused to allow him to do so. AR Thorp 126. But even at that late time, the September 10, 2014 letter did not request the Department take any action, it simply told the Department that Pollard would attend an independent medical exam if "the claimant's request to see a physician was approved [by the self-insured employer]." AR Thorp 126. Nearly two months after sending his protest to the Department, Pollard's attorney emailed the self-insured employer and once-again asked for a change of attending physician. Pollard's attorney simultaneously sent the Department a letter addressing his request for a

change of providers. AR Guadagnoli 111. This was the first time that Pollard asked the Department to address the switch of attending physicians. And that letter is not part the record because it was not an issue on appeal. Pollard had a separate right to ask the Department to consider whether the self-insured employer should allow him to request a new provider. RCW 51.32.055(6); RCW 51.36.010; WAC 296-20-065. The refusal to allow transfer of an attending physician may aggrieve a worker and the worker may ask the Department to issue an order to resolve a dispute about the transfer. *See* RCW 51.32.055(6), .190.[9] Such an order—either ordering or denying the transfer—could then be appealed to the Board. *See, e.g.*, *Maria Gonzalez*, No. 97 0261, 1998 WL 34076960, *4 (Wash. Bd. Ind. Ins. App. April 7, 1998).

The Department agrees that workers might be entitled to change attending physicians after a relocation, but Pollard has not appealed an order denying a transfer. The issue below, and here, is whether Pollard had good cause for failing to attend the independent medical exam. The Court of Appeals correctly declined Pollard's attempt to repurpose the self-insured employer's refusal to switch attending physicians as good cause for declining to participate in a rating examination by claiming that it

[9] If the Department refused to issue an order, the claimant could seek mandamus compelling the Department to enter an order. *Dils v. Dep't of Labor & Indus.*, 51 Wn. App. 216, 220, 752 P.2d 1357 (1988).

created a "profound mistrust of the claim process and the pending [examination]." Pet. 12. The Court correctly recognized that it should not consider whether the Department should have ordered Kaiser to allow Pollard to switch providers because the Department did not address that question in its orders and therefore it was outside the scope of review under well-established case law. *Slip op.* at 12-13 (citing *Hanquet v. Dep't of Labor & Indus.*, 75 Wn. App. 657, 661-62, 879 P.2d 326 (1994)).

The Department correctly treated the September 10, 2014 letter as a protest of the September 5, 2014 order and affirmed that order after further consideration. AR, Ex. 4. The dispute raised to the Department only after it had suspended his benefits is not part of this appeal and not a basis for this Court to take review.

B. No Issue of Substantial Public Interest Is Created by Requiring a Claimant to Attend an Independent Medical Exam That Was Necessary for Claim Administration Even Though the Claimant Disagreed with an Unrelated Claim Decision

In order to show good cause, Pollard had to show that the balancing of his individual circumstances outweighed the interests of the self-insured employer and Department in the examination to overturn the suspension of his workers' compensation benefits. *See Romo*, 92 Wn. App. at 356-57. There is no issue of substantial public interest raised by the Court of Appeals refusing to allow Pollard to repurpose his

disagreement with Kaiser's refusal to transfer attending physicians into the good cause analysis for three main reasons.

First, the record below established that the examination was necessary for the administration of the claim. AR Herron 22. After three years of treatment, including surgery, his doctor concluded treatment. AR Pollard 5/13/15 at 21-23; Ex 7. Pollard's doctor told Kaiser that Pollard had reached maximum medical improvement and needed a permanent partial disability rating. CP 44; AR Herron 30-31, 34. That is why Kaiser scheduled the examination, so a doctor could perform the rating. Pollard has not denied that the self-insured employer could schedule an independent medical exam to determine the level of impairment in his shoulder. *See* Pet 10.

Second, the Court of Appeals ruling is consistent with the role of the attending physician under Washington case law. *Contra* Pet 9-10. Nothing about declining to consider the separate administrative dispute related to Pollard's request to change of attending physicians in the good cause analysis undermines this Court's recognition that the attending physician's medical opinion must be given special consideration in an appeal. *Cf. Clark County v. McManus*, 185 Wn.2d 466, 472, 372, 372 P.3d 764 (2016) (requiring a jury instruction that an attending physician's opinion must be given special consideration by the jury); *Shafer v. Dep't*

of Labor & Indus., 166 Wn.2d 710, 213 P.3d 591 (2009) (service of a closing order must be provided to the attending physician). Pollard's longstanding treating physician found he reached maximum medical improvement and requested a rating examination to help determine permanent partial disability. Ex 7; CP 44. Pollard should have sought an appealable order from the Department addressing the switching-attending-physician issue rather than trying to bootstrap his administrative dispute to the appeal of his suspension of benefits.

Finally, Pollard is wrong that the suspension of benefits provisions do not advance the purposes of the Industrial Insurance Act. Pet. 9. Provisions that ensure timely administration of workers' compensation claims—such as the suspension of benefits when a worker refuses to cooperate with claim administration—facilitate resolving claims, which improve outcomes for workers and reduce costs to both employers and employees alike. Such provisions promote the "sure and certain relief" the Act seeks to ensure. *See* RCW 51.04.010. Because the provisions promote the purposes of the Act, the Court of Appeals' application of these provisions to the facts of this case are not a basis for granting review.

V. CONCLUSION

The Court should not grant review because the Court of Appeals' decision implicates none of the RAP 13.4(b) reasons for review. The

Court of Appeals correctly declined to allow Pollard to refashion his unrelated dispute with Kaiser into good cause. This Court should deny review.

RESPECTFULLY SUBMITTED this 6th day of August, 2018.

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