No. 55722-3-II 100855-4

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**SUPREME COURT**
**OF THE STATE OF WASHINGTON**

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GERALD R. LONG,

Appellant,

v.

AUTOZONE #3822; and DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON,

Respondents.

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# PETITION FOR REVIEW

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## I. IDENTITY OF PETITIONER

Petitioner Gerald Long asks this Court to accept review of the Court of Appeals decision designated in Part B of this petition.

## II. COURT OF APPEALS DECISION

Division II of the Court of Appeals issued an unpublished decision in Cause No. 55722-3-II on March 22, 2022. A copy of the decision is attached to this petition at A – 001 through 011.

## III. ISSUES PRESENTED FOR REVIEW

Does a questionnaire from the Department of Labor and Industries to an Independent Medical Examiner on the physical restrictions in place tied to a specific order qualify as further investigation and thereby toll the protest or appeal deadline under RCW 51.52.060(3).

Does a health care provider's addendum opinion stating a directly contrary belief to an order within the specified protest or appeal period qualify as a valid request for reconsideration?

Does public policy prevent a Department segregation order from being subject to res judicata when the order was induced via clear misrepresentation committed by an Employer's attorney?

# IV. STATEMENT OF THE CASE

## 1. Mr. Long sustained an industrial injury on June 23, 2018.

On June 28, 2018, Mr. Long filed a claim for an industrial injury to his low back, right hip, groin and right knee sustained while working for AutoZone #3822. CP at 42. A medical chart note indicated Mr. Long's injury occurred when, "I was unloading freight and was passing 2 rotors to someone when my right foot slipped, causing a sharp pain in my lower back, right groin, and right knee. **I then fell to the floor.**" CP at 42. (emphasis added). Physical examination revealed right knee swelling and antalgic gait. CP at 42. A strain of right hip and thigh, strain of right knee, strain of low back, and **contusion of right knee** were diagnosed as casually related to the industrial injury. CP at 42. (emphasis added). Initially, the attending physician on the claim was ARNP Mori Yuki who later left her practice, with her mail returned to the Department as undeliverable. CP at 457. Lack of an attending physician on the claim forced the medical analysis in Mr. Long's claim to be left entirely to the opinions of an independent medical evaluator, Dr. William A. Bulley. CP at 457. As a result, there was no attending provider available to act on Mr. Long's behalf, coordinate medical care, nor receive service and respond to Department orders.

**2. On four separate occasions Dr. Bulley rendered favorable opinions regarding Mr. Long's right knee condition.**

Ten months after the claim was allowed, the Department obtained a medical opinion by Dr. Bulley through an independent medical exam ("IME"). CP at 459. The Department was looking for medical analysis on Mr. Long's accepted conditions of right knee sprain and strain, right hip strain and right knee contusion. CP at 460. Dr. Bulley recommended a right knee MRI. CP at 460. Dr. Bulley indicated that if the MRI was positive, then Mr. Long might benefit from further treatment of the right knee, such as injections or surgery. CP at 460. Dr. Bulley was the only physician Mr. Long was examined by since August 2, 2018. CP at 460. Ultimately, that meant Dr. Bulley was the only physician to ever diagnose or make recommendations regarding Mr. Long's patellar arthritis, and the only medical expert to inform the Department's claim adjudication. CP at 460.

Based upon the IME, the Department issued an order accepting the patellar arthritis of the right knee related to the June 23, 2018 industrial injury. CP at 460. The Employer protested the order stating "typical arthritis of this nature isn't asymptomatic . . . Mr. Long jumped out of helicopters in the military and had shared before he started working for AutoZone that he had bad knees." CP at 461. The Department then held its decision in abeyance. The Department requested an addendum from Dr. Bulley on March 14, 2019 to address the Employer's protest. CP at 461. The very next

day, Dr. Bulley responded to the Department's request and indicated Mr. Long's military activities did not change his opinion on Mr. Long's industrial injury aggravating his right knee patellar arthritis. CP at 462.

### 3. Defense counsel presented a vaguely worded survey to Dr. Bully which misrepresented Mr. Long's work injury.

Four days after Dr. Bulley's reply to the Department, Dr. Bulley was contacted by the Employer's attorney, James Gress. Correspondence from that contact was filed to the Department on April 11, 2019. CP at 462. It appeared that Mr. Gress was able to obtain Dr. Bulley's signature on Employer's misleading questionnaire that consisted of confusing compositions crafted by Mr. Gress. CP at 462. Dr. Bulley was informed by Employer's counsel that Mr. Long's case was not allowed on a final and binding basis. CP at 462. Dr. Bulley was misled to believe that claimant was alleging two separate left knee injuries, only one of which involved a fall. CP at 463. However, Mr. Long was not alleging two separate right knee injuries, and in any event fell on his right knee in both incidents recorded by the Employer. Via misinformation, Employer obtained Dr. Bulley's initial, confused response that Dr. Bulley could no longer state whether the patellar arthritis aggravation and resulting need for treatment was proximately related to the June 23, 2018 industrial injury. CP at 463.

**4. The Department sought further information from Dr. Bully on the same day that it issued denied responsibility for Mr. Long's condition.**

On April 15, 2019, the Department issued a denial of the right knee patellar arthritis. CP at 468. That same day it also requested an addendum regarding work restrictions in light of Dr. Bulley's communications with Employer's counsel. CP at 464, 465. On April 16, 2019, Dr. Bulley responded, and again indicated that the June 26, 2018 industrial injury is the cause of Mr. Long's right knee patellar arthritis aggravation. CP at 466. Ignoring Dr. Bulley's unambiguous and uncontroverted response, on May 20, 2019, the Department sent another addendum request to Dr. Bulley for work restrictions, this time explicitly stating that the right knee patellar arthritis was denied under the claim. CP at 466. The Department thereafter issued a closing order on June 3, 2019. CP at 467.

**5. Mr. Long retained an attorney when the Department failed to consider Dr. Bully's supportive position in his third addendum.**

On June 26, 2019, Mr. Long retained undersigned counsel, who filed a notice of representation and general protest with the Department the same day. This was 73 days after the Department's right knee patellar arthritis segregation order, but within 60 days of the Department's most recent addendum request. Mr. Long's counsel also sent a secure message on September 9, 2019, asserting that the segregated condition was improperly

denied and was protested by Dr. Bulley's third addendum. CP at 468. The Department responded by indicating that the patellar arthritis segregation protest was untimely. CP at 468.

Mr. Long appealed the Department's denial. The Board of Industrial Insurance Appeals then granted Employer's motion for summary judgment. CP at 141. Claimant appealed to Superior Court. CP at 1. The Superior Court upheld the Board's decision and granted Employer's motion for summary judgment. CP at 562. The Court of Appeals later upheld the Superior Court decision. App. 001 – 011.

Appellant now requests this Court grant review and reverse the Court of Appeals decision and find that the Department's segregation order did not become final and binding, because it was suspended by operation of an addendum request; because the April 16, 2019 addendum by Dr. Bulley should be treated as a protest from a "health services provider"; and because it would be fundamentally unfair to apply the doctrine of res judicata to an order induced via clear misrepresentation made by an Employer's counsel.

## V. ARGUMENT

RAP 13.4(b) states that a petition for review will be accepted if the petition involves an issue of substantial public interest that should be determined by the Supreme Court. When determining whether the petition involves an issue of substantial public interest, the Court looks at three

factors: "(1) whether the issue is of public or private nature; (2) whether an authoritative determination is desirable to provide future guidance to public officers; and (3) whether the issue is likely to recur." *Westerman v. Cary*, 125 Wn.2d 277, 286, 892 P.2d 1067 (1994) (quoting *Hart v. Department of Social & Health Servs.*, 111 Wn.2d 445, 445, 759 P.2d 1206 (1988)).

Here, the issue at hand involves public interest in "reducing to a minimum the suffering and economic loss" for injured workers. RCW 51.12.010. This case presents a situation in which, objectively, an injured worker would reasonably believe (s)he had more time to file a protest or appeal because an adjudicative process was still evolving based upon a Department addendum request. Additionally, an IME consultant was performing the same functions of an attending provider, so the IME consultant's expert opinions should be given full consideration. Finally, this case presents a situation where it would be fundamentally unfair to apply the doctrine of res judicata in a manner that would prevent the Department's reconsideration of its segregation order.

Determination of the Department's authority and injured workers' rights will provide useful guidance to Department adjudicators, the Washington State Attorney General's office, and Industrial Appeals Judges at the Board of Industrial Insurance Appeals. Such issues are likely to recur in many workers' compensation claims.

The Court of Appeals misinterpreted the procedural rights of an injured worker to either protest or appeal departmental decisions, either of which fully-preserves the injured worker's rights. The Court of Appeals found that failure to "protest" timely within 60 days therefore prevented Mr. Long's "appeal" rights from being considered within that same 60 days. This is in clear error because the words "protest" and "appeal" are equivalent procedures, and historically, a misdirected filing to either the Board or the Department is simply forwarded to the other. The Court of Appeals "plain language" analysis is logically-incoherent and lead it to disregard that an addendum request made by the Department within the statutory, 60 day, overlapping protest/appeal period fully preserves an injured worker's rights to challenge a Department order. As such, this Court should accept this petition and grant review.

### 1. Protecting injured workers' rights and pursuing the purpose of the Industrial Insurance Act are issues of a public nature.

The fundamental, statutorily-prescribed purpose of the Industrial Insurance Act is to "reduce to a minimum the suffering" of injured workers. RCW 51.12.010. The Act is remedial and "should be liberally construed, with all doubts resolved in favor of the worker." *Simpson Timber Co. v. Wentworth*, 96 Wn. App. 731, 735-36, 981 P.2d 878 (Wash. Ct. App. 1999).

In this claim, Mr. Long, like innumerable injured workers that will follow after him, requires a public determination and clarification of his rights.

*A. The Department tolled Mr. Long's protest period when it sought out further information from Dr. Bully.*

An injured worker's right to request reconsideration of a departmental order arises from RCW 51.52.050. When a departmental order is issued, a worker - or other enumerated parties - may protest or appeal the order within 60 days of receipt. *Id.*; RCW 51.52.060. However, if the Department directs the submission of more evidence or information of any further fact, that period of 60 days is tolled until the Department provides a further order. RCW 51.52.060(3). Despite the Court of Appeals misinterpretation of RCW 51.52.060(3) to solely apply to appeals rather than protests, whereas they are equivalent procedures, any further investigation tolls the appeal deadline and therefore prevents a department order from becoming final and binding.[1]

[1] In a significant Board of Industrial Insurance Appeals case, *In re Clarence Haugen*, the Board analyzed the interplay between RCW 51.52.050, the only statute that explicitly mentions requests for reconsideration (referred to as protests) and RCW 51.52.060 regarding appeals. BIIA Dec., 91 1687 (1991). In *Haugen*, the Board stated: "[i]n interpreting the provisions of RCW 51.52.050 and RCW 51.52.060 we have indicated that requests for reconsideration and notices of appeal should be treated consistently." *Id.* at 3. The Board further explained that prior to 1982 there was no statutory authority for filing protests or requests for reconsideration with the Department. Rather, an informal process had developed and derived authority from RCW 51.52.060. *Id.* at 2 fn.

Here, on April 15, 2019, the Department issued an order segregating Mr. Long's condition of right knee patellar arthritis. CP at 464, 465. On the same date, the Department reached out to Dr. Bully with a request that stated: "in light of your recent correspondence with James L. Gress regarding the condition of patellar arthritis, are there any work restrictions with regard to the injury of 06/23/2018?" CP at 186. This is vague language that could easily confuse an injured worker as to its intent. The request explicitly seeks further information and evidence on an issue directly related to the segregation order issued by the Department - and on the same day the segregation order was issued.

This request for information was not only received by Dr. Bully, who later answered the request indicating that he still believed the condition was explicitly aggravated by the work injury, but also by Mr. Long. Whether the Department workers had a subjective intent to use the survey as a means of continuing to investigate the segregation order or toll the protest period is irrelevant. The relevant question is what the objective observer could interpret from the survey. Mr. Long could have reasonably understood that the Department's request was conducting a further inquiry, as apparently Dr. Bulley also did, and therefore Mr. Long's protest period was statutorily tolled until the Department issued a further determinative order. As such, regardless of Dr. Bully's adequate protest on April 16, 2019 through his

survey response, Mr. Long's request for reconsideration on all standing orders through his notice of representation was also sufficient and timely. Meanwhile, the Department was also required to issue further order once it sought out further facts "concerning" Mr. Gress' misrepresentations.

The Court of Appeals accurately indicated that no case law explicitly addresses what it means for the Department to direct submission of further evidence. App 008. However, the court then cites in part to dicta in *Brakus v. Dep't of Labor & Indus*, 48 Wn.2d, 218, 222, 292 P.2d 865 (1956), and attempts to make the argument that the Department could not have been directing the "submission of further evidence" when it sought clarification on work restrictions from Dr. Bully. RCW 51.52.060(3). They reason that such action does not qualify because seeking that information could not be interpreted as indication that the Department believed it was mistaken as to the cause or extent of Mr. Long's injury. This disregards the plain language of the statute and creates new, unintentional law requiring injured workers to be able to ultimately grasp the Department's meaning from vague requests for information. The navigability of the Industrial Insurance Act and the clarity and directness of the Department of Labor and Industries is an important issue of a public nature which justifies this Court's review.

*B. Dr. Bully's response to the Department's survey directly contradicting the segregation order constitutes a timely protest.*

Within the realm of a Washington state worker's compensation claim, an attending provider is defined as an independently licensed medical professional that is actively treating the injured worker. WAC 296-20-01002. An attending provider in a worker's compensation claim is unique in being entitled to notice of certain decisions. *Shafer v. Dep't of Labor & Indus.*, 166 Wn.2d 710, 213 P.3d 591 (2009). In *Shafer*, the court stated that the person responsible for treating an injured worker must be permitted to participate in the process that can result in closing and act as an advocate. *Id.* Prior to the April 15, 2019 segregation order, Mr. Long had not been treated by his attending provider for over eight months. CP at 460. He had no one to act as an advocate for him. Only Dr. Bulley could potentially fill that role, and the Department treated Dr. Bulley as such at various times.

A health services provider is defined as "any person, firm, corporation, partnership, association, agency, institution or other legal entity providing any kind of services related to the treatment of an industrially injured worker." WAC 296-20-01002. This is very broad language that omits reference to a "treating" relationship.

WAC 296-23-307 delineates some of the reasons that Independent Medical Examinations are requested by the Department or Self-Insured

Employers and includes establishing a diagnosis and outlining a program of treatment. Those are "services" related to the injured worker's treatment.

The question before the Supreme Court is: why is the opinion of an IME provider who is charged with ordering diagnostic tests, providing treatment recommendations, and stating prophylactic restrictions not a "service" related to the injured worker's treatment and health? The Industrial Insurance Act was designed to be liberally construed in favor of injured workers. *See Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 470, 745 P.2d 1295 (1987). In pursuit of that goal, "health services provider" should be liberally defined under the Act. This Court should find that any qualified medical expert performs a health "service" by rendering opinions for consideration by the Department. Dr. Bully should qualify as a health services provider who is able to request reconsideration of a Departmental order, especially where he was acting in place of an attending provider because Mr. Long was without his own doctor. CP at 187.

Even if a more constrained interpretation of health services provider is adopted, Dr. Bulley should still meet the requirement due to his providing consulting "services" repeatedly in Mr. Long's claim. Other consulting physicians who are not IME physicians often play a similar or indistinguishable roll in other claims, validating diagnoses and

recommending treatment courses even if never taking over the injured worker's care responsibilities or the title of "attending provider."

The analysis should be centered on the plain language of the word "service" and recognize that Dr. Bulley did provide health-related "services" in Mr. Long's claim. If Mr. Long's claim is rejected here because the sole medical expert analyst in his case never became a "treating" physician, then the opinions of other consulting physicians can also presumably be rejected. Such a conclusion would degrade the rights of all injured workers and lessen their access to medical care. The Industrial Insurance Act would be eroded and fail to serve its purposes.

RCW 51.52.060(1)(a) explicitly lists who is able to request reconsideration of Department orders. It states that "a worker, beneficiary, employer, health services provider, or other person aggrieved by an order, decision, or award of the department" may request reconsideration of Department decisions. RCW 51.52.060(1)(a). A health services provider, not an attending provider, is listed as a party able to protest or appeal the order. The plain language of RCW 51.52.060(1)(a) is intentionally broad and inclusive. As such, Dr. Bully's response to the Department's survey on work restrictions received less than thirty days after their segregation order where he states that the condition was in fact aggravated by work is a valid and timely protest. Whether Dr. Bully's subjective intent was actually to

protest the order is also irrelevant. *Boyd v. City of Olympia*, 1 Wn.App. 2d 17, 403 P.3d 956 (2017). The contents of his response objectively suffice.

Alternatively, RCW 51.52.060(1)(a) also states that in addition to the parties mentioned above, a "person aggrieved" by a decision may protest or appeal. An aggrieved party is one who's proprietary, pecuniary, or personal right is substantially affected by the Department's determination. *In re Chambers Bay Golf Course,* BIIA Dec. 09 20604 (2010). A doctor has a liberty interest in his professional reputation. *Lawrence v. Dep't of Health,* 133 Wn.App.165, 674, 138 P.3d 124, 128 (2006). Doctors are paid for their expert opinions, so doctors have an intermingled pecuniary and reputational interest in their opinions being duly considered and respected.

In both circumstances, ensuring that the Industrial Insurance Act is liberally construed and that injured workers receive adequate support within their claims, including when diagnoses and care are being directed by an IME physician, are important issues of a public nature and likely to frequently recur.

### C. *Applying res judicata to the segregation order of Mr. Long's right knee patellar arthritis would be manifestly unjust.*

Mr. Long should be entitled to challenge the segregation of right knee patellar arthritis in his claim because the Department's 4/15/2019 order works a manifest injustice. There is zero medical expert opinion

denying the causal relationship of his aggravated right knee patellar arthritis or indicating that he does not need definitive care, potentially including surgery. The Department failed to consider the full and complete opinions of Dr. Bulley in context, while a workable justice system cannot tolerate such one-sided focus as was paid by the Department here. An IME opinion cannot be good for the Employer but useless to the worker. Res judicata and collateral estoppel are both equitable doctrines. Washington state courts have been clear that neither doctrine will apply to Department orders where such application would create a manifest injustice. *See Somsak v. Criton Technologies/Health Tecna*, Inc., 113 Wash. App. 84, 92, 52 P.3d 43 (2002) (res judicata will not be applied to department wage orders where the wage order fails to clearly detail the basis of the Department's findings); *Weaver v. City of Everett*, 450 P.3d 177 (2019) (collateral estoppel could not apply to an injured worker's claim because preclusion of the claim "would work an injustice" under the facts presented).

In *Weaver*, this Court explained that res judicata is not to be "applied too rigidly as to defeat the ends of justice, or to work an injustice." 450 P.3d 177 (2019). Yet, here it clearly would. This Court further explained that the application of res judicata within manifestly unjust scenarios would infringe upon the entire purpose of the Industrial Insurance Act. *Id.*

Here, Dr. Bully provided three separate opinions supporting Mr. Long's condition being aggravated by his work injury - his initial report on December 5, 2018; his response to whether Mr. Long's past changed his opinion on March 15, 2019; and his response to the Department's inquiry about work restrictions on April 16, 2019. Only once did Dr. Bully seemingly indicate that he did not believe that Mr. Long's condition was aggravated by his industrial injury, but that was in response to a misleading questionnaire that misrepresented the known facts.[2] It is unjust and improper for the Department to allow an IME physician's opinion to serve the self-interested position of the employer while denying the benefits of that same IME physician's opinion to the injured worker.

**2. An authoritative determination on this matter would provide future guidance to numerous public officers.**

The need to clarify the governance of the Industrial Insurance Act is a matter of continuing and substantial public interest that presents an opportunity to guide the Department and its agents where similar, if not

[2] On March 19, 2019, four days after Dr. Bulley's first favorable addendum, defense counsel obtained and filed an ambiguously phrased, check-box style, self-drafted survey signed by Dr. Bulley. The survey framed the facts as two different injuries, one involving a fall in Employer's bathroom resulting in a knee contusion, and one being a freight-involved slip not involving a fall. In other words, defense counsel materially or fraudulently misrepresented to Dr. Bulley that the freight incident of 6/23/18 did not involve a fall, when in fact it did. Defense counsel manipulated Dr. Bulley to believe that the aggravated right patellar arthritis was from the bathroom-fall incident which caused no injury and no workers' compensation claim. CP at 461.

identical, scenarios are likely to reoccur. *See, e.g., Dunner v. McLaughlin*, 100 Wash.2d 832, 838, 676 P.2d 444 (1984) (law surrounding adult civil commitment needed clarification because the proceedings were a matter of continuing and substantial public interest). Here, an authoritative determination is needed to provide reinforcement of the Industrial Insurance Act, and to remind the Department and the courts the purpose behind the Act— to be liberally applied in the favor of the injured worker.

There are four different times Dr. Bulley provided favorable opinions regarding Mr. Long's patellar arthritis condition. The Department, its claim managers, Industrial Appeals Judges and assistant attorney generals are in need of further guidance to help them understand the weight that should be given to the opinions of an IME physician where no attending provider is present. Further, these various public officers need clarification on the affect the Department's seeking of further action has on tolling orders, the validity of a healthcare provider's protest (even if they are simultaneously an IME opinion provider), and the inapplicability of res judicata in circumstances where an order has been induced via identifiable misrepresentation. Therefore, an authoritative determination on this matter is imperative for all parties and the public more generally.

**3. The issues presented today are highly likely to recur.**

Despite the goal of the Act being to reduce their suffering to a minimum, many workers suffer greatly at the hands of our workers' compensation system. "[T]he guiding principle in construing provisions of the Industrial Insurance Act is that the Act is remedial in nature and is to be liberally construed in order to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker." *Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 470, 745 P.2d 1295 (1987). The Supreme Court has long held that the purpose of the Act is to protect injured workers, and that the process should be approachable and navigable by workers on their own, without necessarily requiring the assistance of an attorney. *See Nelson v. Dept. of Labor Industries*, 9 Wn.2d 621, 629, 115 P.2d 1014 (Wash. 1941).

If the Department's actions in this case are permitted to stand, the language of RCW 51.52.060(3) which expressly tolls the period of time a claimant has for requesting reconsideration in response to further Departmental investigation will become toothless. It is inevitable that the Department will seek information and facts related to issued orders in countless other claims. This Court should grant review and clarify the applicability of RCW 51.52.060(3) to such situations.

In addition to further Departmental investigation, a worker lacking an active attending provider is a recurrent scenario in worker's compensation claims. As discussed, an attending provider plays a unique role in an injured worker' claim process. As well as providing curative treatment, attending physicians often perform other "services" such as by advocating on behalf of their patients to the Department – often by requesting certain treatment for their patient despite multiple Department denials of those treatment "services."

RCW 51.52.060(1)(a) provides that the opinion of [any] "health services provider or other person aggrieved" should be recognized as a protest or appeal. If our workers' compensation system is intended to rush "swift and certain" treatment and benefits to the injured worker, then by implication the utilization of IME physicians admittedly qualifies them as a knowledgeable person. RCW 51.52.060(1)(a) neither expressly includes IME physicians, nor excludes them, so it is for the Supreme Court to clarify if they qualify as a health "services" provider under the inclusive, but vague language of this statute.

The Act is meant to be liberally-construed in favor of the injured worker. This Court should grant review and find that the segregation order from April 15, 2019 was not final and binding because Dr. Bulley was the only active health "services" provider active in the claim, and he clarified

in a timely writing that the Department's segregation order was in error, notwithstanding the manipulations of a cunning defense counsel.

## VI. CONCLUSION

This Court should accept review, reverse the Court of Appeals decision and find that the order dated April 15, 2019 is not final and binding because the Department tolled Mr. Long's conjoined protest/appeal period by seeking further information from Dr. Bully expressly related to its segregation adjudication. Dr. Bulley played a vital role in Mr. Long's claim by impacting the diagnostic and treatment outcomes and providing the only informed medical expert opinion in the file. As such, Dr. Bully is a health service provider and his written addendum opinion also constituted a timely protest. Moreover, applying res judicata to the Department's segregation order would be manifestly unjust given that the only informed expert opinion is that Mr. Long's injury related aggravation of right knee patellar arthritis may require surgery to which he would be entitled under his claim as an incident of his industrial injury.

This document contains 4999 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 20th day of April, 2022.

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Supreme Court No. ____
(Court of Appeals No. 55722-3-II)

GERALD LONG
Appellant,
Vs.
AUTOZONE #3822, and
THE DEPARTMENT OF LABOR & INDUSTRIES OF THE STATE OF WASHINGTON,
Respondents.

CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury to the laws of the State of Washington, declares that on the below date, the documents referenced below were filed and served in the manner indicated.

DOCUMENTS: Appellant's Petition for Discretionary Review;
Certificate of Service

ORIGINAL: *via e-File*

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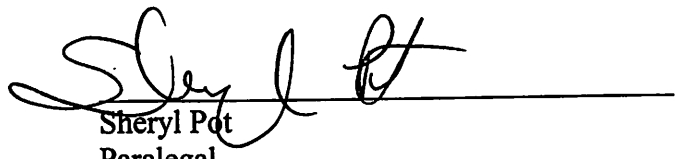

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# APPENDIX

Filed
Washington State
Court of Appeals
Division Two

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# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

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| GERALD R. LONG<br><br>Appellant,<br><br>v.<br><br>AUTOZONE #3822; and DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON,<br><br>Respondents. | No. 55722-3-II<br><br>UNPUBLISHED OPINION |

LEE, C.J.: — Gerald R. Long appeals the superior court's order granting summary judgment and affirming the Board of Industrial Insurance Appeals' (Board) order denying Long's petition for review. Long argues that the superior court erred in granting summary judgment because the Department of Labor and Industries' (Department) request for an independent medical examiner's addendum on work restrictions extended the protest deadline for a Department order. Long also argues that the superior court erred in granting summary judgment because an independent medical examiner's addendum on work restrictions constituted a timely protest of a Department order.

We hold that the superior court did not err in granting summary judgment because an independent medical examiner's opinion on work restrictions did not extend the protest deadline for a Department order and an independent medical examiner's addendum to an original report responding to the Department's request for an opinion on work restrictions did not constitute a

timely protest of a Department order. Accordingly, we affirm the superior court's order granting summary judgment and affirming the Board's order denying Long's petition for review.

## FACTS

### A. INJURY, BENEFITS CLAIM, AND INDEPENDENT MEDICAL EXAMINATION

Long was injured while working for AutoZone on June 23, 2018. Long applied for benefits with the Department of Labor and Industries on June 26. Long's medical documentation form stated that his right foot slipped while he was unloading freight, and he fell to the ground. Long complained of injury to his back, hip and thigh area, and right knee.

At the request of the Department, Dr. William Bulley[1] performed an independent medical examination on Long. Dr. Bulley reviewed Long's medical history and physically examined Long. On December 5, Dr. Bulley submitted a report to the Department that included Long's history, Dr. Bulley's notes from the examination, and Dr. Bulley's diagnostic conclusions. Dr. Bulley's report included a disclaimer that

> Mr. Long is aware that he is being evaluated today at the request of [the] Department of Labor and Industries, and that this evaluation is not for the purpose of rendering treatment or establishing a doctor/patient relationship.

Clerk's Papers (CP) at 174.

Also on December 5, Dr. Bulley ordered magnetic resonance imaging (MRI) for Long's right knee. On December 18, based on the MRI results, Dr. Bulley submitted to the Department an addendum to his report. The addendum diagnosed Long's right knee condition as "patellar

[1] Dr. Bulley is now deceased.

arthritis, pre-existing, permanently aggravated, not fixed and stable." CP at 187. The addendum also included the following statement:

> The opinions rendered in this case are mine alone. Any recommendations are given totally independently from the requesting agents. These opinions do not constitute per se a recommendation for specific claims or administrative functions to be made or enforced.

CP at 187.

On December 31, the Department issued an order accepting responsibility for "the condition diagnosed as patellar art[h]ritis of the right knee" as being related to Long's freight incident claim. CP at 191.

B. RECONSIDERATION OF RIGHT KNEE PATELLAR ARTHRITIS

AutoZone protested the Department's decision and provided information about Long previously jumping out of helicopters in the military and complaining about pre-existing conditions in his knees. The Department issued a notice stating that it was reconsidering its order accepting Long's patellar arthritis in the right knee as being related to his freight incident claim.

On March 14, 2019, the Department sent a letter to Dr. Bulley, asking him to review additional information about Long having previously served in the military. Specifically, the Department asked Dr. Bulley whether the additional information changed his opinion regarding the relationship between Long's workplace injury and the patellar arthritis diagnosis. On March 15, Dr. Bulley sent an addendum to the Department, stating that his opinion remained unchanged and reiterating that Long "appears to have had preexisting unrelated knee arthritis, aggravated by his work episode." CP at 199.

On March 19, Dr. Bulley spoke with AutoZone's legal counsel, who provided information about Long being involved in two separate incidents relating to Long's right knee: one involving unloading freight at work on June 23, 2018, and another the next day where Long slipped and fell in the restroom. On March 21, Dr. Bulley signed a letter to the Department, stating that he was "unable to state whether the need for treatment was, in fact, proximately related to the incident involving the freight." CP at 200.

The Department issued an order on April 15 (segregation order) that superseded its previous order allowing Long's claim related to his right knee. The segregation order stated that the Department was not responsible for the patellar arthritis in Long's right knee because the condition was not caused by or aggravated by the workplace injury for which Long's claim was filed. The segregation order also stated that the order would become final in 60 days unless Long filed a written request for reconsideration (protest)[2] with the Department or a written appeal with the Board.

C. ADDENDUM ON WORK RESTRICTIONS

Also on April 15, the Department requested an addendum from Dr. Bulley. The Department's request stated, "In light of your recent correspondence with [AutoZone's legal counsel] regarding the condition of patellar arthritis, are there any work restr[ic]tions with regard to the injury of 06/23/2018? If so, please provide them." CP at 204.

On April 16, Dr. Bulley sent the requested addendum to the Department. Dr. Bulley's addendum stated:

[2] The Department refers to written requests for reconsideration as "protests," as do the parties in their briefing.

> Related to the preexisting, aggravated condition of patellar arthritis. [T]here are work restrictions of occasional stair climbing, no running, limited standing of 1 hour, occasional pushing/pulling 50 pounds less than 1 hour, no lifting more than 50 pounds. I do not think that the claimant can stand constantly, but that he can stand frequently with limited lifting of 35 pounds. These limitations are based on an assessment of a knee strain superimposed on preexisting unrelated patellar arthritis and obesity, aggravated by the injury.

CP at 206. The Department closed Long's claim on June 3.

D. LONG'S PROTEST TO DEPARTMENT

On June 26, 72 days after the Department's segregation order, Long submitted a general protest to any adverse orders issued within the past 60 days. On September 9, Long's attorney sent a message to the Department, arguing that Dr. Bulley's addendum on work restrictions was a timely protest to the Department's segregation order.

The Department replied on September 16, stating that Dr. Bulley's addendum was not a protest because Dr. Bulley did not have the right to protest Department orders. Also on September 16, the Department issued an order declining to review the segregation order because Long had failed to submit a timely protest.

E. APPEAL TO BOARD

Long appealed to the Board. Long again argued that Dr. Bulley's addendum on work restrictions constituted a timely protest to the segregation order.

The Board denied Long's petition for review and concluded that Long did not file a timely protest to the segregation order. The Board also concluded that Dr. Bulley was not an aggrieved party with standing to file a protest to the Department.

C. APPEAL TO SUPERIOR COURT

Long appealed the Board's decision to the Pierce County Superior Court. Long argued that the protest period was extended because the Department was still investigating and that Dr. Bulley's addendum on work restrictions constituted a timely protest. AutoZone filed a motion to dismiss or, in the alternative, motion for summary judgment.

After hearing argument on the motion, the superior court granted AutoZone's motion for summary judgment and affirmed the Board's order denying Long's petition for review. The superior court concluded that the Department had the right to continue to administer open claims, so the Department's request for an addendum on work restrictions did not place its segregation order in abeyance. The superior court also concluded that

> Dr. Bulley as an independent medical examiner is by definition a neutral party and thus is not and cannot be an "other person aggrieved" within the meaning of RCW 51.52.060(1)(a). Dr. Bulley had no personal interest or pecuniary interest in the outcome of the Plaintiff's claim and thus was without standing to file a Protest.

CP at 567.

Long appeals.

## ANALYSIS

A. STANDARD OF REVIEW

When reviewing a decision made under the Industrial Insurance Act, the superior court relies on the certified board record and considers the issues de novo. *White v. Qwest Corp.*, 15 Wn. App. 2d 365, 371, 478 P.3d 96 (2020), *review denied*, 197 Wn.2d 1014 (2021). On appeal, we review the superior court's order, not the Board's order. *Id.* The superior court's order "is subject to the ordinary rules governing civil appeals." *Id.*; RCW 51.52.140.

We review summary judgment orders de novo. *White*, 15 Wn. App. 2d at 371. Summary judgment is proper if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *White*, 15 Wn. App. 2d at 371. A material fact is one upon which the outcome of the litigation depends. *Keck v. Collins*, 184 Wn.2d 358, 370 n.8, 357 P.3d 1080 (2015). Summary judgment is appropriate if reasonable persons could reach only one conclusion from the evidence presented. *Vargas v. Inland Washington*, LLC, 194 Wn.2d 720, 728, 452 P.3d 1205 (2019).[3]

When engaging in statutory interpretation, we review a statute to determine and give effect to the legislature's intent by looking to the plain language of the statute. *Jametsky v. Olsen*, 179 Wn.2d 756, 762, 317 P.3d 1003 (2014). If the statute's meaning is plain on its face, we give effect to that plain meaning. *TracFone Wireless, Inc. v. Dep't of Revenue*, 170 Wn.2d 273, 281, 242 P.3d 810 (2010).

B. EXTENSION OF PROTEST DEADLINE: TOLLING UNDER RCW 51.52.060(3) APPLIES TO APPEALS, NOT PROTESTS

Long argues that the Department extended the protest period for the segregation order by directing the submission of further evidence. We disagree.

Generally, a final order or decision from the Department becomes final sixty days from the date the order is communicated to the parties unless there is a written protest filed with the Department or an appeal filed with the Board. RCW 51.52.050(1).[4] However,

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[3] Because we review summary judgment orders de novo, we do not review the superior court's findings and conclusions. *See White*, 15 Wn. App. 2d at 371.

[4] RCW 51.52.050 was amended in 2019. However, no substantive changes were made affecting this opinion. Therefore, we cite to the current statute.

> [i]f within the time limited for filing a *notice of appeal to the board* from an order, decision, or award of the department, the department directs the submission of further evidence or the investigation of any further fact, the time for *filing the notice of appeal* shall not commence to run until the person has been advised in writing of the final decision of the department in the matter.

RCW 51.52.060(3) (emphasis added).

Here, Long argues that the protest period was extended under RCW 51.52.060(3) by the Department's request for an addendum on work restrictions from Dr. Bulley. But the plain language of RCW 51.52.060(3) extends the time for "filing a notice of appeal to the board," not protesting the Department's order. Therefore, the statute is not a basis for extending the protest period and could not have extended the protest period in Long's case. Accordingly, we hold that the superior court did not err in granting summary judgement because the protest period was not extended.[5]

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[5] We note that even if RCW 51.52.060(3) could have extended the protest period, the Department did not "direct[] the submission of further evidence or the investigation of any further fact" as contemplated by the statute.

There appears to be no case law explicitly addressing what it means for the Department to "direct[] the submission of further evidence or the investigation of any further fact" as contemplated by RCW 51.52.060(3). However, our Supreme Court has acknowledged RCW 51.52.060 as supporting "the right of the department to withdraw a closing order within the appeal period." *Brakus v. Dep't of Labor & Indus.*, 48 Wn.2d 218, 222, 292 P.2d 865 (1956). In that same decision, our Supreme Court recognized the provision about directing submission of further evidence or the investigation of any further fact as a "means of protecting [the Department] if it believed that it had erred or been mistaken as to either the cause or extent" of the worker's injury. *Id.* at 221.

Here, the Department issued a segregation order stating that the Department was not responsible for Long's right knee patellar arthritis because the condition was not caused by or aggravated by the workplace injury for which Long's claim was filed. The Department then asked for Dr. Bulley's opinion on work restrictions. The Department's request for an opinion on work restrictions cannot reasonably be interpreted as an indication that the Department believed it was mistaken as to the cause or extent of Long's injury, nor can it be interpreted as the Department

C. WORK RESTRICTIONS ADDENDUM

Long argues that Dr. Bulley's April 16 addendum on work restrictions constituted a timely protest of the Department's April 15 segregation order because Dr. Bulley had standing to protest the segregation order as an aggrieved person or as a health services provider.[6] We disagree.

1. Aggrieved Person—Reputational Interest

After the Department makes a decision, "the worker, beneficiary, employer, or other person aggrieved" may request that the Department reconsider the decision. RCW 51.52.050(2)(a). An aggrieved person must "have a proprietary, pecuniary, or personal right which is substantially affected by the Department's determination." *In re Chambers Bay Golf Course*, No. 09 20604, 2010 WL 5882060, at *3 (Wash. Bd. of Indus. Ins. Appeals Dec. 7, 2010). Physicians have a

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withdrawing the segregation order. Therefore, the Department did not direct the submission of further evidence of the investigation of any further fact as contemplated by RCW 51.52.060(3). Because the Department did not direct the submission of further evidence or the investigation of any further fact, no deadline was extended under RCW 51.52.060(3).

[6] While Long attempts to characterize Dr. Bulley's addendum on work restrictions as a protest, it was not. To constitute a protest, a communication "must reasonably put the Department on notice that the worker is taking issue with some department decision." *Boyd v. City of Olympia*, 1 Wn. App. 2d 17, 30, 403 P.3d 956 (2017), *review denied*, 190 Wn.2d 1004 (2018). In making this determination, we consider the content of the communication itself and the relevant information that was in the possession of the Department at the time of the communication. *Id.* at 30-31.

Here, even if Dr. Bulley, who was an independent medical examiner, had standing to protest the Department's segregation order, Dr. Bulley's addendum on Long's work restrictions does not constitute a protest. In the addendum, Dr. Bulley provided a list of work restrictions in response to the Department's request to opine on work restrictions, not causation. And the Department had previously received communications from Dr. Bulley stating that he was "unable to state whether the need for treatment was, in fact, proximately related to the incident involving the freight." CP at 200. These communications would not reasonably put the Department on notice that Dr. Bulley was taking issue with the segregation order by submitting his work restrictions addendum.

protected liberty interest in their professional reputations. *Lawrence v. Dep't of Health*, 133 Wn. App. 665, 674, 138 P.3d 124 (2006).

Long argues that Dr. Bulley was aggrieved because he suffered reputational injury from the Department's decision. But nothing in the record shows that the Department's decision to not take responsibility for the patellar arthritis in Long's right knee affected Dr. Bulley's professional reputation. Because the record does not show that the Department's segregation order substantially affected Dr. Bulley's professional reputation or any other rights, he is not a person aggrieved within the meaning of RCW 51.52.050(2)(a). *See Chambers Bay Golf Course*, 2010 WL 5882060 at *3 (a "person aggrieved" must have a proprietary, pecuniary, or personal right which is substantially affected by the Department's decision). Therefore, Dr. Bulley's reputational interest did not provide him with standing to protest the segregation order.

2. Health Services Provider

Long also argues that Dr. Bulley was a "health services provider" who could file a protest under RCW 51.52.060(1)(a). RCW 51.52.060(1)(a) provides that

> a worker, beneficiary, employer, health services provider, or other person aggrieved by an order, decision, or award of the department must, before he or she appeals to the courts, file with the board and the director, . . . within sixty days from the day on which a copy of the order, decision, or award was communicated to such person, a notice of appeal to the board.

The plain language in RCW 51.52.060(1)(a) clearly states that before an appeal to the courts can be made, there must first be a notice of appeal filed with the Board. The statute does not pertain to the filing of protests to the Department. Therefore, even assuming without deciding whether Dr. Bulley was a "health services provider" within the meaning of RCW 51.52.060(1)(a), the statute does not provide Dr. Bulley with the ability to protest Department's orders. Accordingly,

we hold that the superior court did not err in granting summary judgment because Dr. Bulley did not have standing to protest the segregation order.[7]

Because the protest period was not extended and Dr. Bulley's addendum on work restrictions did not constitute a protest, the superior court did not err in granting summary judgment because no timely protest was filed. Accordingly, we affirm the superior court's order granting summary judgment and affirming the Board's order denying Long's petition for review.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

, C.J.

I[illegible], C.J.

We concur:

Glasgow, J.

Price, J.

[7] Long argues that, for public policy reasons, this court should hold that Dr. Bulley had standing to protest the segregation order. Indeed, all doubts with respect to the interpretation of the Industrial Insurance Act are to be resolved in favor of injured workers. *Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 470, 745 P.2d 1295 (1987). But here, there are no doubts with respect to the interpretation of the Act. The plain language of the relevant statute precludes this court from holding that Dr. Bulley had standing to protest the segregation order. Therefore, we do not address Long's public policy arguments.

# RCW 51.12.010

## Employments included—Declaration of policy.

There is a hazard in all employment and it is the purpose of this title to embrace all employments which are within the legislative jurisdiction of the state.

This title 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.

[ **1972 ex.s. c 43 § 6; 1971 ex.s. c 289 § 2; 1961 c 23 § 51.12.010.** Prior: **1959 c 55 § 1; 1955 c 74 § 2;** prior: (i) 1947 c 281 § 1, part; 1943 c 210 § 1, part; 1939 c 41 § 1, part; 1937 c 211 § 1, part; 1927 c 310 § 1, part; 1921 c 182 § 1, part; 1919 c 131 § 1, part; 1911 c 74 § 2, part; Rem. Supp. 1947 § 7674, part. (ii) 1923 c 128 § 1, part; RRS § 7674a, part.]

# RCW 51.52.050

## Service of departmental action—Demand for repayment—Orders amending benefits—Reconsideration or appeal.

(1) Whenever the department has made any order, decision, or award, it shall promptly serve the worker, beneficiary, employer, or other person affected thereby, with a copy thereof by mail, or if the worker, beneficiary, employer, or other person affected thereby chooses, the department may send correspondence and other legal notices by secure electronic means except for orders communicating the closure of a claim. In the event the department has made an order communicating the closure of a claim of a self-insured employer, the self-insured employer may serve the department order provided the self-insured employer does so using a separate, secure, and verifiable nonelectronic means of delivery and includes the department prescribed notice explaining the contents of the order and any protest or appeal rights. The service by the self-insured employer is a communication for the purposes of filing an appeal under RCW **51.52.060**. Persons who choose to receive correspondence and other legal notices electronically shall be provided information to assist them in ensuring all electronic documents and communications are received. Correspondence and notices must be addressed to such a person at his or her last known postal or electronic address as shown by the records of the department. Correspondence and notices sent electronically are considered received on the date sent by the department. The copy, in case the same is a final order, decision, or award, shall bear on the same side of the same page on which is found the amount of the award, a statement, set in black faced type of at least ten point body or size, that such final order, decision, or award shall become final within sixty days from the date the order is communicated to the parties unless a written request for reconsideration is filed with the department of labor and industries, Olympia, or an appeal is filed with the board of industrial insurance appeals, Olympia. However, a department order or decision making demand, whether with or without penalty, for repayment of sums paid to a provider of medical, dental, vocational, or other health services rendered to an industrially injured worker, shall state that such order or decision shall become final within twenty days from the date the order or decision is communicated to the parties unless a written request for reconsideration is filed with the department of labor and industries, Olympia, or an appeal is filed with the board of industrial insurance appeals, Olympia.

(2)(a) Whenever the department has taken any action or made any decision relating to any phase of the administration of this title the worker, beneficiary, employer, or other person aggrieved thereby may request reconsideration of the department, or may appeal to the board. In an appeal before the board, the appellant shall have the burden of proceeding with the evidence to establish a prima facie case for the relief sought in such appeal.

(b) An order by the department awarding benefits shall become effective and benefits due on the date issued. Subject to (b)(i) and (ii) of this subsection, if the department order is appealed the order shall not be stayed pending a final decision on the merits unless ordered by the board. Upon issuance of the order granting the appeal, the board will provide the worker with notice concerning the potential of an overpayment of benefits paid pending the outcome of the appeal and the requirements for interest on unpaid benefits pursuant to RCW **51.52.135**. A worker may request that benefits cease pending appeal at any time following the employer's motion for stay or the board's order granting appeal. The request must be submitted in writing to the employer, the board, and the department. Any employer may move for a stay of the order on appeal, in whole or in part. The motion must be filed within fifteen days of the order granting appeal. The board shall conduct an expedited review of the claim file provided by the department as it existed on the date of the department order. The board shall issue a final decision within twenty-five days of the filing of the motion for stay or the order granting appeal, whichever is later. The board's final decision may be appealed to superior court in accordance with RCW **51.52.110**. The board shall grant a motion to stay if the moving party demonstrates that it is more likely than not to prevail on the facts as they existed at the time of the order on appeal. The board shall not consider the likelihood of recoupment

of benefits as a basis to grant or deny a motion to stay. If a self-insured employer prevails on the merits, any benefits paid may be recouped pursuant to RCW **51.32.240**.

(i) If upon reconsideration requested by a worker or medical provider, the department has ordered an increase in a permanent partial disability award from the amount reflected in an earlier order, the award reflected in the earlier order shall not be stayed pending a final decision on the merits. However, the increase is stayed without further action by the board pending a final decision on the merits.

(ii) If any party appeals an order establishing a worker's wages or the compensation rate at which a worker will be paid temporary or permanent total disability or loss of earning power benefits, the worker shall receive payment pending a final decision on the merits based on the following:

(A) When the employer is self-insured, the wage calculation or compensation rate the employer most recently submitted to the department; or

(B) When the employer is insured through the state fund, the highest wage amount or compensation rate uncontested by the parties.

Payment of benefits or consideration of wages at a rate that is higher than that specified in (b)(ii)(A) or (B) of this subsection is stayed without further action by the board pending a final decision on the merits.

(c) In an appeal from an order of the department that alleges willful misrepresentation, the department or self-insured employer shall initially introduce all evidence in its case in chief. Any such person aggrieved by the decision and order of the board may thereafter appeal to the superior court, as prescribed in this chapter.

[ **2019 c 190 § 1; 2011 c 290 § 9; 2008 c 280 § 1; 2004 c 243 § 8; 1987 c 151 § 1; 1986 c 200 § 10; 1985 c 315 § 9; 1982 c 109 § 4; 1977 ex.s. c 350 § 75; 1975 1st ex.s. c 58 § 1; 1961 c 23 § 51.52.050.** Prior: **1957 c 70 § 55; 1951 c 225 § 5**; prior: (i) 1947 c 281 § 1, part; 1943 c 210 § 1, part; 1939 c 41 § 1, part; 1937 c 211 § 1, part; 1927 c 310 § 1, part; 1921 c 182 § 1, part; 1919 c 131 § 1, part; 1911 c 74 § 2, part; Rem. Supp. 1947 § 7674, part. (ii) 1947 c 247 § 1, part; 1911 c 74 § 20, part; Rem. Supp. 1947 § 7676e, part. (iii) 1949 c 219 § 6, part; 1943 c 280 § 1, part; 1931 c 90 § 1, part; 1929 c 132 § 6, part; 1927 c 310 § 8, part; 1911 c 74 § 20, part; Rem. Supp. 1949 § 7697, part. (iv) 1923 c 136 § 7, part; 1921 c 182 § 10, part; 1917 c 29 § 3, part; RRS § 7712, part. (v) **1917 c 29 § 11**; RRS § 7720. (vi) 1939 c 50 § 1, part; 1927 c 310 § 9, part; 1921 c 182 § 12, part; 1919 c 129 § 5, part; 1917 c 28 § 15, part; RRS § 7724, part.]

## NOTES:

**Application—2008 c 280:** "This act applies to orders issued on or after June 12, 2008." [ **2008 c 280 § 7.**]

**Adoption of rules—2004 c 243:** See note following RCW **51.08.177**.

# RCW 51.52.060

## Notice of appeal—Time—Cross-appeal—Departmental options.

(1)(a) Except as otherwise specifically provided in this section, a worker, beneficiary, employer, health services provider, or other person aggrieved by an order, decision, or award of the department must, before he or she appeals to the courts, file with the board and the director, by mail or personally, within sixty days from the day on which a copy of the order, decision, or award was communicated to such person, a notice of appeal to the board. However, a health services provider or other person aggrieved by a department order or decision making demand, whether with or without penalty, solely for repayment of sums paid to a provider of medical, dental, vocational, or other health services rendered to an industrially injured worker must, before he or she appeals to the courts, file with the board and the director, by mail or personally, within twenty days from the day on which a copy of the order or decision was communicated to the health services provider upon whom the department order or decision was served, a notice of appeal to the board.

(b) Failure to file a notice of appeal with both the board and the department shall not be grounds for denying the appeal if the notice of appeal is filed with either the board or the department.

(2) Within ten days of the date on which an appeal has been granted by the board, the board shall notify the other interested parties to the appeal of the receipt of the appeal and shall forward a copy of the notice of appeal to the other interested parties. Within twenty days of the receipt of such notice of the board, the worker or the employer may file with the board a cross-appeal from the order of the department from which the original appeal was taken.

(3) If within the time limited for filing a notice of appeal to the board from an order, decision, or award of the department, the department directs the submission of further evidence or the investigation of any further fact, the time for filing the notice of appeal shall not commence to run until the person has been advised in writing of the final decision of the department in the matter. In the event the department directs the submission of further evidence or the investigation of any further fact, as provided in this section, the department shall render a final order, decision, or award within ninety days from the date further submission of evidence or investigation of further fact is ordered which time period may be extended by the department for good cause stated in writing to all interested parties for an additional ninety days.

(4) The department, either within the time limited for appeal, or within thirty days after receiving a notice of appeal, may:

(a) Modify, reverse, or change any order, decision, or award; or

(b)(i) Except as provided in (b)(ii) of this subsection, hold an order, decision, or award in abeyance for a period of ninety days which time period may be extended by the department for good cause stated in writing to all interested parties for an additional ninety days pending further investigation in light of the allegations of the notice of appeal; or

(ii) Hold an order, decision, or award issued under RCW **51.32.160** in abeyance for a period not to exceed ninety days from the date of receipt of an application under RCW **51.32.160**. The department may extend the ninety-day time period for an additional sixty days for good cause.

For purposes of this subsection, good cause includes delay that results from conduct of the claimant that is subject to sanction under RCW **51.32.110**.

The board shall deny the appeal upon the issuance of an order under (b)(i) or (ii) of this subsection holding an earlier order, decision, or award in abeyance, without prejudice to the appellant's right to appeal from any subsequent determinative order issued by the department.

This subsection (4)(b) does not apply to applications deemed granted under RCW **51.32.160**.

(5) An employer shall have the right to appeal an application deemed granted under RCW **51.32.160** on the same basis as any other application adjudicated pursuant to that section.

(6) A provision of this section shall not be deemed to change, alter, or modify the practice or procedure of the department for the payment of awards pending appeal.

[ 1995 c 253 § 1; 1995 c 199 § 7; 1986 c 200 § 11; 1977 ex.s. c 350 § 76; 1975 1st ex.s. c 58 § 2; 1963 c 148 § 1; 1961 c 274 § 8; 1961 c 23 § 51.52.060. Prior: 1957 c 70 § 56; 1951 c 225 § 6; prior: 1949 c 219 §§ 1, part, 6, part; 1947 c 246 § 1, part; 1943 c 280 § 1, part; 1931 c 90 § 1, part; 1929 c 132 §§ 2, part, 6, part; 1927 c 310 §§ 4, part, 8, part; 1923 c 136 § 2, part; 1919 c 134 § 4, part; 1917 c 28 § 1, part; 1913 c 148 § 1, part; 1911 c 74 §§ 5, part, 20, part; Rem Supp. 1949 §§ 7679, part, 7697, part.]

## NOTES:

**Reviser's note:** This section was amended by 1995 c 199 § 7 and by 1995 c 253 § 1, each without reference to the other. Both amendments are incorporated in the publication of this section pursuant to RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

**Severability—1995 c 199:** See note following RCW 51.12.120.

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PDF **WAC 296-20-01002**

## Definitions.

**Acceptance, accepted condition:** Determination by a qualified representative of the department or self-insurer that reimbursement for the diagnosis and curative or rehabilitative treatment of a claimant's medical condition is the responsibility of the department or self-insurer. The condition being accepted must be specified by one or more diagnosis codes from the current edition of the International Classification of Diseases, Clinically Modified (ICD-CM).

**Appointing authority:** For the evidence-based prescription drug program, the appointing authority shall mean the following people acting jointly: The director of the health care authority and the director of the department of labor and industries.

**Attendant care:** Those proper and necessary personal care services provided to maintain the worker in his or her residence. Refer to WAC **296-23-246** for more information.

**Attending provider:** For these rules, means a person licensed to independently practice one or more of the following professions: Medicine and surgery; osteopathic medicine and surgery; chiropractic; naturopathic physician; podiatry; dentistry; optometry; and advanced registered nurse practitioner. An attending provider actively treats an injured or ill worker.

**Attending provider report:** This type of report may also be referred to as a "60 day" or "special" report. The following information must be included in this type of report. Also, additional information may be requested by the department as needed.

(1) The condition(s) diagnosed including the current federally adopted ICD-CM codes and the objective and subjective findings.

(2) Their relationship, if any, to the industrial injury or exposure.

(3) Outline of proposed treatment program, its length, components, and expected prognosis including an estimate of when treatment should be concluded and condition(s) stable. An estimated return to work date should be included. The probability, if any, of permanent partial disability resulting from industrial conditions should be noted.

(4) If the worker has not returned to work, the attending doctor should indicate whether a vocational assessment will be necessary to evaluate the worker's ability to return to work and why.

(5) If the worker has not returned to work, a doctor's estimate of physical capacities should be included with the report. If further information regarding physical capacities is needed or required, a performance-based physical capacities evaluation can be requested. Performance-based physical capacities evaluations should be conducted by a licensed occupational therapist or a licensed physical therapist. Performance-based physical capacities evaluations may also be conducted by other qualified professionals who provided performance-based physical capacities evaluations to the department prior to May 20, 1987, and who have received written approval to continue supplying this service based on formal department review of their qualifications.

**Authorization:** Notification by a qualified representative of the department or self-insurer that specific proper and necessary treatment, services, or equipment provided for the diagnosis and curative or rehabilitative treatment of an accepted condition will be reimbursed by the department or self-insurer.

**Average wholesale price (AWP):** A pharmacy reimbursement formula by which the pharmacist is reimbursed for the cost of the product plus a mark-up. The AWP is an industry benchmark which is developed independently by companies that specifically monitor drug pricing.

**Baseline price (BLP):** Is derived by calculating the mean average for all NDC's (National Drug Code) in a specific product group, determining the standard deviation, and calculating a new mean average using all prices within one standard deviation of the original mean average. "Baseline price" is a drug pricing mechanism developed and updated by First Data Bank.

**Bundled codes:** When a bundled code is covered, payment for them is subsumed by the payment for the codes or services to which they are incident. (An example is a telephone call from a hospital nurse regarding care of a patient. This service is not separately payable because it is included in the payment for other services such as hospital visits.) Bundled codes and services are identified in the fee schedules.

**By report:** BR (by report) in the value column of the fee schedules indicates that the value of this service is to be determined by report (BR) because the service is too unusual, variable or new to be assigned a unit value. The report shall provide an adequate definition or description of the services or procedures that explain why the services or procedures (e.g., operative, medical, radiological, laboratory, pathology, or other similar service report) are too unusual, variable, or complex to be assigned a relative value unit, using any of the following as indicated:

(1) Diagnosis;

(2) Size, location and number of lesion(s) or procedure(s) where appropriate;

(3) Surgical procedure(s) and supplementary procedure(s);

(4) Whenever possible, list the nearest similar procedure by number according to the fee schedules;

(5) Estimated follow-up;

(6) Operative time;

(7) Describe in detail any service rendered and billed using an "unlisted" procedure code.

The department or self-insurer may adjust BR procedures when such action is indicated.

**Chart notes:** This type of documentation may also be referred to as "office" or "progress" notes. Providers must maintain charts and records in order to support and justify the services provided. "Chart" means a compendium of medical records on an individual patient. "Record" means dated reports supporting bills submitted to the department or self-insurer for medical services provided in an office, nursing facility, hospital, outpatient, emergency room, or other place of service. Records of service shall be entered in a chronological order by the practitioner who rendered the service. For reimbursement purposes, such records shall be legible, and shall include, but are not limited to:

(1) Date(s) of service;

(2) Patient's name and date of birth;

(3) Claim number;

(4) Name and title of the person performing the service;

(5) Chief complaint or reason for each visit;

(6) Pertinent medical history;

(7) Pertinent findings on examination;

(8) Medications and/or equipment/supplies prescribed or provided;

(9) Description of treatment (when applicable);

(10) Recommendations for additional treatments, procedures, or consultations;

(11) X-rays, tests, and results; and

(12) Plan of treatment/care/outcome.

**Consultation examination report:** The following information must be included in this type of report. Additional information may be requested by the department as needed.

(1) A detailed history to establish:

(a) The type and severity of the industrial injury or occupational disease.

(b) The patient's previous physical and mental health.

(c) Any social and emotional factors which may effect recovery.

(2) A comparison history between history provided by attending doctor and injured worker, must be provided with exam.

(3) A detailed physical examination concerning all systems affected by the industrial accident.

(4) A general physical examination sufficient to demonstrate any preexisting impairments of function or concurrent condition.

(5) A complete diagnosis of all pathological conditions including the current federally adopted ICD-CM codes found to be listed:

(a) Due solely to injury.

(b) Preexisting condition aggravated by the injury and the extent of aggravation.

(c) Other medical conditions neither related to nor aggravated by the injury but which may retard recovery.

(d) Coexisting disease (arthritis, congenital deformities, heart disease, etc.).

(6) Conclusions must include:

(a) Type of treatment recommended for each pathological condition and the probable duration of treatment.

(b) Expected degree of recovery from the industrial condition.

(c) Probability, if any, of permanent disability resulting from the industrial condition.

(d) Probability of returning to work.

(7) Reports of necessary, reasonable X-ray and laboratory studies to establish or confirm the diagnosis when indicated.

**Doctor or attending doctor:** For these rules, means a person licensed to independently practice one or more of the following professions: Medicine and surgery; osteopathic medicine and surgery; chiropractic; naturopathic physician; podiatry; dentistry; optometry. An attending doctor is a treating doctor.

Only those persons so licensed may sign report of accident forms, the provider's initial report, and certify time loss compensation; however, physician assistants (PAs) also may sign these forms pursuant to WAC **296-20-01501** (PAs may be "treating providers" pursuant to the definition contained in WAC 296-20-01002); and ARNPs may also sign these forms pursuant to WAC **296-23-241** (ARNPs may be "attending providers" consistent with the definition contained in WAC 296-20-01002).

**Emergent hospital admission:** Placement of the worker in an acute care hospital for treatment of a work related medical condition of an unforeseen or rapidly progressing nature which if not treated in an inpatient setting, is likely to jeopardize the workers health or treatment outcome.

**Endorsing practitioner:** A practitioner who has notified the health care authority that he or she agrees to allow therapeutic interchange.

**Fatal:** When the attending doctor has reason to believe a worker has died as a result of an industrial injury or exposure, the doctor should notify the nearest department service location or the self-insurer immediately. Often an autopsy is required by the department or self-insurer. If so, it will be authorized by the service location manager or the self-insurer. Benefits payable include burial stipend and monthly payments to the surviving spouse and/or dependents.

**Fee schedules or maximum fee schedule(s):** The fee schedules consist of, but are not limited to, the following:

(1) Health Care Common Procedure Coding System Level I and II Codes, descriptions and modifiers that describe medical and other services, supplies and materials.

(2) Codes, descriptions and modifiers developed by the department.

(3) Relative value units (RVUs), calculated or assigned dollar values, percent-of-allowed-charges (POACs), or diagnostic related groups (DRGs), that set the maximum allowable fee for services rendered.

(4) Billing instructions or policies relating to the submission of bills by providers and the payment of bills by the department or self-insurer.

(5) Average wholesale price (AWP), baseline price (BLP), and policies related to the purchase of medications.

**Health services provider or provider:** For these rules means any person, firm, corporation, partnership, association, agency, institution, or other legal entity providing any kind of services related to the treatment of an industrially injured worker. It includes, but is not limited to, hospitals, medical doctors, dentists, chiropractors, vocational rehabilitation counselors, osteopathic physicians, pharmacists,

podiatrists, physical therapists, occupational therapists, massage therapists, psychologists, naturopathic physicians, and durable medical equipment dealers.

**Home nursing:** Those nursing services that are proper and necessary to maintain the worker in his or her residence. These services must be provided through an agency licensed, certified or registered to provide home care, home health or hospice services. Refer to WAC **296-20-091** for more information.

**Independent or separate procedure:** Certain of the fee schedule's listed procedures are commonly carried out as an integral part of a total service, and as such do not warrant a separate charge. When such a procedure is carried out as a separate entity, not immediately related to other services, the indicated value for "independent procedure" is applicable.

**Initial prescription drugs:** Any drug prescribed for an alleged industrial injury or occupational disease during the initial visit.

**Initial visit:** The first visit to a health care provider during which the *Report of Industrial Injury or Occupational Disease* is completed and the worker files a claim for workers compensation.

**Medical aid rules:** The Washington Administrative Codes (WACs) that contain the administrative rules for medical and other services rendered to workers.

**Modified work status:** The worker is not able to return to their previous work, but is physically capable of carrying out work of a lighter nature. Workers should be urged to return to modified work as soon as reasonable as such work is frequently beneficial for body conditioning and regaining self confidence.

Under RCW **51.32.090**, when the employer has modified work available for the worker, the employer must furnish the doctor and the worker with a statement describing the available work in terms that will enable the doctor to relate the physical activities of the job to the worker's physical limitations and capabilities. The doctor shall then determine whether the worker is physically able to perform the work described. The employer may not increase the physical requirements of the job without requesting the opinion of the doctor as to the worker's ability to perform such additional work. If after a trial period of reemployment the worker is unable to continue with such work, the worker's time loss compensation will be resumed upon certification by the attending doctor.

If the employer has no modified work available, the department should be notified immediately, so vocational assessment can be conducted to determine whether the worker will require assistance in returning to work.

**Nonemergent (elective) hospital admission:** Placement of the worker in an acute care hospital for medical treatment of an accepted condition which may be safely scheduled in advance without jeopardizing the worker's health or treatment outcome.

**Physician or attending physician (AP):** For these rules, means any person licensed to perform one or more of the following professions: Medicine and surgery; or osteopathic medicine and surgery. An AP is a treating physician.

**Practitioner or licensed health care provider:** For these rules, means any person defined as a "doctor" under these rules, or licensed to practice one or more of the following professions: Audiology; physical therapy; occupational therapy; pharmacy; prosthetics; orthotics; psychology; nursing; advanced registered nurse practitioners (ARNPs); certified medical physician assistants or osteopathic physician assistants; and massage therapy.

**Preferred drug:** A drug selected by the appointing authority for inclusion in the Washington preferred drug list and designated for coverage by applicable state agencies or a drug selected for coverage by applicable state agencies.

**Preferred drug list:** Washington preferred drug list or "WPDL" is the list of drugs selected by the appointing authority to be used by applicable state agencies as the basis for the purchase of drugs in state purchased health care programs.

**Proper and necessary:**

(1) The department or self-insurer pays for proper and necessary health care services that are related to the diagnosis and treatment of an accepted condition.

(2) Under the Industrial Insurance Act, "proper and necessary" refers to those health care services which are:

(a) Reflective of accepted standards of good practice, within the scope of practice of the provider's license or certification;

(b) Curative or rehabilitative. Care must be of a type to cure the effects of a work-related injury or illness, or it must be rehabilitative. Curative treatment produces permanent changes, which eliminate or lessen the clinical effects of an accepted condition. Rehabilitative treatment allows an injured or ill worker to regain functional activity in the presence of an interfering accepted condition. Curative and rehabilitative care produce long-term changes;

(c) Not delivered primarily for the convenience of the claimant, the claimant's attending doctor, or any other provider; and

(d) Provided at the least cost and in the least intensive setting of care consistent with the other provisions of this definition.

(3) The department or self-insurer stops payment for health care services once a worker reaches a state of maximum medical improvement. Maximum medical improvement occurs when no fundamental or marked change in an accepted condition can be expected, with or without treatment. Maximum medical improvement may be present though there may be fluctuations in levels of pain and function. A worker's condition may have reached maximum medical improvement though it might be expected to improve or deteriorate with the passage of time. Once a worker's condition has reached maximum medical improvement, treatment that results only in temporary or transient changes is not proper and necessary. "Maximum medical improvement" is equivalent to "fixed and stable."

(4) In no case shall services which are inappropriate to the accepted condition or which present hazards in excess of the expected medical benefits be considered proper and necessary. Services that are controversial, obsolete, investigational or experimental are presumed not to be proper and necessary, and shall be authorized only as provided in WAC **296-20-03002**(6) and **296-20-02850**.

**Refill:** The continuation of therapy with the same drug, including the renewal of a previous prescription or adjustments in dosage.

**Regular work status:** The injured worker is physically capable of returning to his/her regular work. It is the duty of the attending doctor to notify the worker and the department or self-insurer, as the case may be, of the specific date of release to return to regular work. Compensation will be terminated on the release date. Further treatment can be allowed as requested by the attending doctor if the condition is not stationary and such treatment is needed and otherwise in order.

**Temporary partial disability:** Partial time loss compensation may be paid when the worker can return to work on a limited basis or return to a lesser paying job is necessitated by the accepted injury or condition. The worker must have a reduction in wages of more than five percent before consideration of partial time loss can be made. No partial time loss compensation can be paid after the worker's condition is stationary. **All time loss compensation must be certified by the attending doctor based on objective findings.**

**Termination of treatment:** When treatment is no longer required and/or the industrial condition is stabilized, a report indicating the date of stabilization should be submitted to the department or self-insurer. This is necessary to initiate closure of the industrial claim. The patient may require continued treatment for conditions not related to the industrial condition; however, financial responsibility for such care must be the patient's.

**Therapeutic interchange:** To dispense a preferred drug in place of a prescribed nonpreferred drug within the same therapeutic class listed on the Washington preferred drug list.

**Total permanent disability:** Loss of both legs or arms, or one leg and one arm, total loss of eyesight, paralysis or other condition permanently incapacitating the worker from performing any work at any gainful employment. When the attending doctor feels a worker may be totally and permanently disabled, the attending doctor should communicate this information immediately to the department or self-insurer. A vocational evaluation and an independent rating of disability may be arranged by the

department prior to a determination as to total permanent disability. Coverage for treatment does not usually continue after the date an injured worker is placed on pension.

**Total temporary disability:** Full-time loss compensation will be paid when the worker is unable to return to any type of reasonably continuous gainful employment as a direct result of an accepted industrial injury or exposure.

**Treating provider:** For these rules, means a person licensed to practice one or more of the following professions: Medicine and surgery; osteopathic medicine and surgery; chiropractic; naturopathic physician; podiatry; dentistry; optometry; advanced registered nurse practitioner (ARNP); and certified medical physician assistants or osteopathic physician assistants. A treating provider actively treats an injured or ill worker.

**Unusual or unlisted procedure:** Value of unlisted services or procedures should be substantiated "by report" (BR).

**Utilization review:** The assessment of a claimant's medical care to assure that it is proper and necessary and of good quality. This assessment typically considers the appropriateness of the place of care, level of care, and the duration, frequency or quantity of services provided in relation to the accepted condition being treated.

[Statutory Authority: RCW **51.04.020** and **51.04.030**. WSR 17-16-133, § 296-20-01002, filed 8/1/17, effective 9/1/17; WSR 15-17-104, § 296-20-01002, filed 8/18/15, effective 10/1/15. Statutory Authority: RCW **51.04.020**, **51.04.030**, and Title **51** RCW. WSR 08-24-047, § 296-20-01002, filed 11/25/08, effective 12/26/08. Statutory Authority: 2007 c 263, RCW **51.04.020** and **51.04.030**. WSR 08-04-095, § 296-20-01002, filed 2/5/08, effective 2/22/08. Statutory Authority: RCW **51.04.020**, **51.04.030** and 2007 c 134. WSR 08-02-021, § 296-20-01002, filed 12/21/07, effective 1/21/08. Statutory Authority: RCW **51.04.020**, **51.04.030**. WSR 07-17-167, § 296-20-01002, filed 8/22/07, effective 9/22/07. Statutory Authority: 2004 c 65 and 2004 c 163. WSR 04-22-085, § 296-20-01002, filed 11/2/04, effective 12/15/04. Statutory Authority: RCW **51.04.020**, **70.14.050**. WSR 04-08-040, § 296-20-01002, filed 3/30/04, effective 5/1/04. Statutory Authority: RCW **51.04.020**. WSR 03-21-069, § 296-20-01002, filed 10/14/03, effective 12/1/03. Statutory Authority: RCW **51.04.010**, **51.04.020**, **51.04.030**, **51.32.080**, **51.32.110**, **51.32.112**, **51.36.060**. WSR 02-21-105, § 296-20-01002, filed 10/22/02, effective 12/1/02. Statutory Authority: RCW **51.04.020**, **51.04.030**, **51.32.060**, **51.32.072**, and **7.68.070**. WSR 01-18-041, § 296-20-01002, filed 8/29/01, effective 10/1/01. Statutory Authority: RCW **51.04.020** and **51.04.030**. WSR 00-01-039, § 296-20-01002, filed 12/7/99, effective 1/8/00. Statutory Authority: RCW **51.04.030**, **70.14.050** and **51.04.020**(4). WSR 95-16-031, § 296-20-01002, filed 7/21/95, effective 8/22/95. Statutory Authority: RCW **51.04.020**, **51.04.030** and 1993 c 159. WSR 93-16-072, § 296-20-01002, filed 8/1/93, effective 9/1/93. Statutory Authority: RCW **51.04.020**(4) and **51.04.030**. WSR 92-24-066, § 296-20-01002, filed 12/1/92, effective 1/1/93; WSR 92-05-041, § 296-20-01002, filed 2/13/92, effective 3/15/92. Statutory Authority: RCW **51.04.020**. WSR 90-14-009, § 296-20-01002, filed 6/25/90, effective 8/1/90. Statutory Authority: RCW **51.04.020**(4) and **51.04.030**. WSR 90-04-057, § 296-20-01002, filed 2/2/90, effective 3/5/90; WSR 87-24-050 (Order 87-23), § 296-20-01002, filed 11/30/87, effective 1/1/88; WSR 86-20-074 (Order 86-36), § 296-20-01002, filed 10/1/86, effective 11/1/86; WSR 83-24-016 (Order 83-35), § 296-20-01002, filed 11/30/83, effective 1/1/84; WSR 83-16-066 (Order 83-23), § 296-20-01002, filed 8/2/83. Statutory Authority: RCW **51.04.020**(4), **51.04.030**, and **51.16.120**(3). WSR 81-24-041 (Order 81-28), § 296-20-01002, filed 11/30/81, effective 1/1/82; WSR 81-01-100 (Order 80-29), § 296-20-01002, filed 12/23/80, effective 3/1/81.]

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| **Appellate Court Case Number:** | 55722-3 |
| **Appellate Court Case Title:** | Gerald R. Long, Appellant v Autozone, et al, Respondent |
| **Superior Court Case Number:** | 20-2-07128-1 |

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