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No. 32287-4-III

SUPREME COURT OF THE STATE OF WASHINGTON

MARIO ARRIAGA,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON,

Respondent,

PETITION FOR REVIEW

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I. IDENTITY OF THE PETITIONER

Comes now the petitioner, Mario Arriaga, Plaintiff below, by and through his attorney of record, Dorian D.N. Whitford of the Law Offices of David B. Vail, Jennifer Cross-Euteneier and Associates, and hereby asks this court to accept review of the Court of Appeals' decision terminating review.

II. DECISION PRESENTED FOR REVIEW

Mr. Arriaga seeks review of Opinion No: 32287-4-III. The Court of Appeals, Division III, filed its opinion on September 30, 2014.

III. ISSUE

Whether the Court of Appeals erred by affirming the Superior Court's decision that the Department of Labor and Industries' October 29, 2008 order was communicated to Mario Arriaga's attending physician Dr. Justin Sherfey more than 60 days prior to the doctor's protest of that order?

IV. STATEMENT OF THE CASE

On or about December 5, 2005, Mario Arriaga was injured while working at Oakville Forest Products, Inc. CABR[1] at 104. He sustained injuries to his right upper extremity, face and scalp. *Id.* Mr. Arriaga filed a claim; it was allowed by the Department of Labor and Industries ("Department"), and Dr. Justin Sherfey, D.O. became his attending

[1] The Certified Appeal Board Record will be cited throughout this Petition as "CABR".

physician under the claim. *Id.* Dr. Sherfey first treated Mr. Arriaga in January of 2006 and has continued to treat him under his claim. Sherfey Dep.[2] at 10.

Dr. Sherfey worked at a clinic with eight total providers, four physicians and four physicians' assistants, and about forty total employees. Sherfey Dep. at 10, 11. He also has a busy, active practice wherein Dr. Sherfey sees about forty to forty-five patients a day on the two to three days a week he is practicing out of his office. Sherfey Dep. at 11.

At his office, Dr. Sherfey maintains an electronic file for his patients, like Mr. Arriaga. Sherfey Dep. at 11. Mr. Arriaga's file contained documents received from parties involved in his workers' compensation claim, as well as outside studies, which included radiographic studies, testing results and other related medical information and forms. Sherfey Dep. at 9-11. The file is organized into sections, such as medical clinic notes, operative reports, special studies, and workers' compensation, where Department correspondence is placed. Sherfey Dep. at 22.

The mail procedure and protocol maintained at Dr. Sherfey's office in October of 2008 consisted of the piece of mail going through the

[2] Citations to the deposition testimony of Dr. Sherfey will be Sherfey Dep. at the specific page being referenced.

medical records department or one of the employees who manages the workers' compensation claims. Sherfey Dep. at 12. Typically, documents that had to do with Dr. Sherfey's patients would be placed in his inbox. Sherfey Dep. at 12. Dr. Sherfey would then review these documents throughout the day and, once reviewed, he would typically initial them. *Id.* He would then place the document in his outbox and once they were verified that he reviewed them, the documents were scanned into the medical record. Sherfey Dep. at 13.

Dr. Sherfey further testified that if these procedures were not followed and the mail was not placed into his inbox, he would not necessarily have been aware of its existence. Sherfey Dep. at 14. As the attending physician, the doctor also testified that he responds to orders issued by the Department with protests or appeals, if it is indicated. Sherfey Dep. at 15.

On May 15, 2008, the Department sent Dr. Sherfey a letter, which was date stamped as received on May 19, 2008, in which it stated that it had not accepted responsibility for a cervical condition. Sherfey Dep. at 24-5. Dr. Sherfey initialed that document indicating he had received and reviewed it and he also dictated a letter in response. Sherfey Dep. at 25.

On October 29, 2008, the Department issued an order which denied responsibility for a cervical disc degeneration condition under Mr.

Arriaga's claim. Sherfey Dep. at 15. While this order was in Dr. Sherfey's electronic file for Mr. Arriaga with a received date stamp of October 31, 2008, the order did not include Dr. Sherfey's initials that he himself had received it and reviewed it. Sherfey Dep. at 14, 17, 18. Dr. Sherfey testified that if he reviewed it, he would have initialed it. Sherfey Dep. at 21.

Mr. Arriaga was unrepresented until April of 2010. CABR at 45. Dr. Sherfey testified that he did not become aware of the Department's October 29, 2008 order until a conversation with someone from Mr. Arriaga's attorney's office in 2010. Sherfey Dep. at 15. He testified that if he had reviewed the order in October of 2008, he likely would have responded with a letter indicating, as he had in some of the patient's notes, that additional workup and evaluation was needed in regards to the cervical condition. *Id.*

Once aware of the order, Dr. Sherfey submitted a protest to the Department's October 29, 2008 order on December 13, 2010. CABR at 46. In response, the Department issued an order stating it could not reconsider its order dated October 29, 2008 because the protest was not timely. *Id.*

Through his attorney, Mr. Arriaga appealed this Department response order to the Board of Industrial Insurance Appeals ("Board").

The Board granted the appeal to hear evidence on whether Dr. Sherfey's protest to the Department's October 29, 2008 order was timely. CABR at 15, 46. The Board determined that the protest was not timely and dismissed Mr. Arriaga's appeal. CABR at 1, 19.

The Board's decision was then appealed to Thurston County Superior Court. CP[3] 4. Following briefing and oral argument, the Court entered Findings of Fact and Conclusions of Law which affirmed the Board's decision. CP at 31-33. Mr. Arriaga then appealed to The Court of Appeals, Division Two. On April 12, 2014, Division Two transferred Mr. Arriaga's case to Division Three. The Court of Appeals, Division Three affirmed the Superior Court's order. Appendix A1.

Mr. Arriaga now petitions the Supreme Court for review, and requests that the Court of Appeals' opinion be reversed, and this matter be remanded to the Department to consider the attending physician Dr. Sherfey's protest to the Department's October 29, 2008 order.

V. ARGUMENT

The Supreme Court should accept review, pursuant to RAP 13.4(b)(1) and (4). This case involves an opinion of the Court of Appeals dealing with the legal issue and definition of the term "communicated," as it relates to attending physicians, in RCW §§ 51.52.050, 51.52.060, which

[3] Clerk's Papers will be denoted as "CP".

is contrary to the Supreme Court's interpretation of the Industrial Insurance Act under *Shafer v. Department of Labor and Industries*, 166 Wn.2d 710, 213 P.3d 591 (2009). In addition, the Court of Appeals' opinion addresses an issue that has substantial public interest as it relates to injured workers in the State of Washington.

A. THE COURT OF APPEALS' OPINION IS INCONSISTENT WITH THE SUPREME COURT'S DECISION IN SHAFER V. DEPARTMENT OF LABOR AND INDUSTRIES.

The Industrial Insurance Act was established to protect and to provide benefits for injured workers and their beneficiaries. It has been held for many years that the courts and the Board are committed to the rule that the Industrial Insurance Act is remedial in nature and its beneficial purpose should be liberally construed in favor of injured workers. *Wilber v. Dep't of Labor & Indus.*, 61 Wn.2d 439, 446, 378 P.2d 684 (1963); *Hastings v. Dep't of Labor & Indus.*, 24 Wn.2d 1, 163 P.2d 142 (1945); *Nelson v. Dep't of Labor and Indus.*, 9 Wn.2d 621, 115 P.2d 1014 (1941); *Hilding v. Dep't of Labor and Indus.*, 162 Wash. 168, 298 P. 321 (1931). The Industrial Insurance Act is "to 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." RCW § 51.12.010.

In this case, the Court of Appeals has strayed from this policy and construed the term "communicated" in a way that undercuts and conflicts with the Supreme Court's opinion in *Shafer v. Dep't of Labor and Indus.*, 166 Wn.2d 710, 213 P.3d 591 (2009).

In *Shafer*, while holding that a claim is not closed until the attending physician has received a copy of the closing order, the Court focused on the important role that the attending physician plays in a workers' compensation claim. "[Our] holding is justified by the role the attending physician plays in the claims process." *Id.* at 718. The Court further noted that "[a]llowing claim closure without notifying the attending physician would prevent the person primarily responsible for treating the injured worker from participating in the process that can result in closing a worker's claim. A central purpose of the notice requirement is to allow a party aggrieved by the closure order to seek reconsideration by the Department or to appeal the order to the Board." *Id.* at 721.

The Court of Appeals in this case, while acknowledging that Dr. Sherfey did not actually receive the Department's October 29, 2008 order, because of a breakdown in his office procedures, found that the order was communicated on October 31, 2008 such that Dr. Sherfey's protest, when he became aware of the order, was untimely.

The Court of Appeals analysis in this regard goes against the Supreme Court's holding in *Shafer* which requires that an injured worker's attending physician actually receive a Department order before RCW § 51.52.060's 60-day period to appeal begins to run.

Instead of focusing on *Shafer*, a case concerning communication of Department orders to an injured worker's attending physician, the Court of Appeals focused on other cases concerning communication of Department orders to injured workers themselves, namely *Rodriguez v. Dep't of Labor & Indus.*, 85 Wn.2d 949, 540 P.2d 1359 (1975), and *Nafus v. Dep't of Labor & Indus.*, 142 Wash. 48, 251 P. 877 (1927).

These cases are distinguishable from Mr. Arriaga's case. Both Rodriguez and Nafus were aware that the Department had taken some action and both Rodriguez and Nafus actually possessed the Department orders at issue. *Rodriguez v. Dep't of Labor & Indus.*, 85 Wn.2d at 950 (Department warrant cashed); *Nafus, v. Dep't of Labor & Indus.*, 142 Wash. at 49-50 (Department correspondence in his bathrobe). In this case, the concern is not Mr. Arriaga receiving the Department's order, but his attending physician receiving and being aware of an order explicitly dealing with a medical issue.

Moreover, as the testimony of Dr. Sherfey shows, while the Department's October 29, 2008 order was included in Mr. Arriaga's

electronic file, Dr. Sherfey was not aware of its existence until 2010. Sherfey Dep. at 15. Once he became aware of its existence, Dr. Sherfey submitted a protest to the Department. CABR at 46. Although the October 29, 2008 order was date stamped as received on October 31, 2008 in Dr. Sherfey's office, the doctor did not initial it which indicates that he did not receive the order to review in his inbox. Similar to the attending provider in *Shafer*, because Dr. Sherfey did not receive the order, his ability to protest or appeal the order was compromised.

Unlike the claimants in *Rodriguez* and *Nafus*, Dr. Sherfey did not know that the Department had taken some action on October 29, 2008. He knew that action was taken by the Department in May of 2008 when he received and initialed a letter from the Department stating that it had not accepted responsibility for a cervical condition and Dr. Sherfey dictated a response to that letter. Sherfey Dep. at 24-5. However, Dr. Sherfey did not know that the Department had taken some action on October 29, 2008 until 2010 when it was brought to his attention.

Furthermore, this case is not a situation like the Court was worried about in *Nafus*, namely a recipient willfully or negligently not reading the correspondence from the Department that was known to have arrived. Here, Dr. Sherfey did not know that the Department issued its October 29, 2008 order until it was brought to his attention and he protested it. Thus,

because *Shafer* requires an attending physician to receive and have knowledge of a Department action before it can become final and binding, Dr. Sherfey's protest to the October 29, 2008 order is timely and should be addressed on the merits by the Department. The Court of Appeals' opinion holding otherwise must be reversed.

B. THIS CASE INVOLVES A SUBSTANTIAL PUBLIC INTEREST IN INJURED WORKERS BEING ABLE TO RELY ON THEIR ATTENDING PHYSICIANS AS INTEGRAL PARTS OF THE WORKERS' COMPENSATION CLAIMS ADMINISTRATION PROCESS.

This case also involves a substantial public interest that should be decided by the Supreme Court. There is a substantial public interest in having attending physicians' protests considered when they are submitted to the Department concerning orders dealing with medical issues on workers' compensation claims. The *Shafer* Court gave an apt summary of the importance of communication of Department Orders to injured workers' attending physicians in cases such as this case:

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

Shafer, 140 Wn. App. 1, 11, 159 P.3d 473 (2007), aff'd 166 Wn.2d 710, 213 P.3d 591 (2009).

This case serves as an example of how injured workers can suffer injustice by not having their doctor's concerns addressed by the Department. Dr. Sherfey works in a busy office, with 40 employees and seven other providers. His office maintains reasonable procedures for handling the mail and other documents that come into the office pertaining to its patients and injured workers. Because there was some error or breakdown in those reasonable procedures that prevented Dr. Sherfey from knowing about, or being aware of, the Department's October 29, 2008 order, that should not result in injustice to Mr. Arriaga, or similarly situated injured workers in the State of Washington.

Mr. Arriaga, a non-medically trained injured worker does not know or understand medical issues that relate to his claim. He relies on his attending physician to meet these issues. The injured worker should not bear the harsh result of his attending physician's protest not being considered because of a breakdown in the medical office's mail procedures. This is something that neither he, nor any injured worker has any control over.

Injured workers should not be penalized for relying on their attending physician to advocate on their behalf concerning medical issues.

In this case, Mr. Arriaga reasonably relied on Dr. Sherfey to advocate on his behalf concerning his cervical condition because the doctor had done so in the past. Mr. Arriaga would not know that Dr. Sherfey would not continue to advocate on his behalf concerning this medical condition. Indeed, at every point that Dr. Sherfey was aware that the Department was taking some action concerning Mr. Arriaga's cervical condition, he made the Department aware of his concerns through his letter and protest.

The Department's October 29, 2008 order explicitly concerned a medical issue that falls in the doctor's purview and not in the purview of the injured worker. Sherfey Dep. at 16. It is against public policy and against the underlying purposes of the Industrial Insurance Act to bar an attending physician's protest to a Department order concerning a medical condition when that protest is done within 60-days of the attending physician becoming aware of the order.

Ensuring the Industrial Insurance Act's explicit policy of minimizing suffering and harm arising out of industrial injuries is a substantial public interest. The proper adjudication of workers' compensation claims is a substantial public interest. The proper adjudication of claims requires that the attending physician on a claim be permitted to protest a determination after the physician becomes aware of

it. For these reasons, this Petition should be granted and the Court of Appeals' opinion should be reversed.

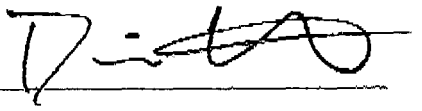
VI. CONCLUSION

Mr. Arriaga respectfully requests that this Petition be accepted and the Court of Appeals' opinion in his case be reversed with this matter being remanded back to the Department to simply consider his attending physician, Dr. Sherfey's protest to the October 29, 2008 order. Lastly, Mr. Arriaga also respectfully requests fees and costs to be awarded pursuant to 51.52.130.

Dated this 29th day of October, 2014.

Respectfully submitted,

VAIL, CROSS-EUTENEIER and ASSOCIATES

By: 

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September 30, 2014

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CASE # 322874
Mario Arriaga v. Department of Labor & Industries
THURSTON COUNTY SUPERIOR COURT No. 122012447

Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file an original and two copies of the motion. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S. Townsley

Renee S. Townsley
Clerk/Administrator

RST:
Enc.

c: E-mail Hon. Gary Tabor

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SEPTEMBER 30, 2014
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

MARIO ARRIAGA, Appellant, v. DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, Respondent.	)	No. 32287-4-III PUBLISHED OPINION

LAWRENCE-BERREY, J. — When a final industrial insurance order, decision, or award is based upon a medical determination, a physician is deemed an interested party. In such a case, the Department of Labor and Industries (Department) must provide notice of the order, decision, or award both to the physician and the claimant. Failure to provide notice tolls the 60-day appeal period. At issue here is whether a segregation order was communicated to a claimant's physician when the physician did not see the order because of a breakdown in mail handling procedures in his office. We hold that the order was communicated to the physician because the Department properly mailed it to the physician's office, and it was actually delivered to the physician's office. We, therefore,

affirm the decision of the trial court, which barred the claimant's untimely appeal of the segregation order.

FACTS

Mario Arriaga injured his right upper arm, face, and scalp while employed at Oakville Forest Products, Inc. The Department allowed a claim for an industrial injury in December 2005. Justin Sherfey, M.D., D.O., an orthopedic surgeon and osteopathic physician who treats injured workers, became Mr. Arriaga's attending physician.

On October 29, 2008, the Department issued an order segregating a cervical disc degenerative condition from Mr. Arriaga's claim. The order stated, "[t]he Department of Labor and Industries is not responsible for the condition diagnosed as: cervical disck [sic] degenerative, determined by medical evidence to be unrelated to the industrial injury for which this claim was filed." Board Record (BR) at 28. It is undisputed that the Department mailed the order to the claimant and also to Dr. Sherfey's office on October 29, 2008. It also is uncontested that Dr. Sherfey's office received a copy of the order on October 31, 2008. However, as will be detailed below, Dr. Sherfey apparently was unaware of the order until 2010.

Mr. Arriaga sought legal help with his claim in April 2010. The Department closed Mr. Arriaga's claim on November 23, 2010. In December 2010, someone from

Mr. Arriaga's attorney's office contacted Dr. Sherfey about Mr. Arriaga's claim. After discovering the segregation order, Dr. Sherfey protested on Mr. Arriaga's behalf. The Department affirmed the order, stating that it would not reconsider it because the protest was untimely. Mr. Arriaga appealed to the Board of Industrial Insurance Appeals (Board), which granted the appeal to review the timeliness of Dr. Sherfey's protest.

In his deposition, Dr. Sherfey explained that he functions as the attending physician for injured workers and is, therefore, familiar with the rules and regulations of the Department. His office has about 40 employees and he sees 40 to 45 patients per day. Dr. Sherfey's practice includes a department that manages paperwork, including getting authorizations, coordinating depositions, coordinating independent exams, and reviewing "some of those records." Sherfey Dep. at 23. As to his intraoffice mail handling procedures, Dr. Sherfey explained, "[t]ypically we have a protocol in place that either a hard copy is placed in a mailbox for me or I receive an electronic notification of a new document that I then either have to initial on the hard copy or I have to electronically sign in the medical record." Sherfey Dep. at 12. Dr. Sherfey stated that he reviewed mail throughout the day, but admitted that he is not necessarily given all the documents that are addressed to him.

Dr. Sherfey testified that for mail to be "communicated" to him, "[i]t would have to be appropriately received by the medical records or again our L & I management department. It would then have to be properly routed to me for review. . . . [A]fter that it would have to be properly inserted into the medical record." Sherfey Dep. at 16. Dr. Sherfey conceded that some documents are scanned without his "direct visualization." Sherfey Dep. at 21. He stated that a person in the medical records department decides whether a document is sufficiently important for his review. He explained, "[w]e have no standard protocol in place, except typically paperwork that involves the patient is supposed to come across the physician's desk." Sherfey Dep. at 23.

Somewhere in this process, the October 29 order never made it to Dr. Sherfey's desk. Dr. Sherfey explained that he had not initialed it, which suggested to him that he had not reviewed it. Although the order had been in Mr. Arriaga's file since 2008, Dr. Sherfey could not recall reviewing it until nearly two years later when Mr. Arriaga's attorney brought it to his attention. He stated that if he had reviewed the order in 2008, he "[l]ikely" would have responded with a letter indicating an additional evaluation was needed in regard to the diagnosis. Sherfey Dep. at 15.

Mr. Arriaga ultimately appealed the order in January 2011. However, the Department refused to reconsider the order "because the protest was not received within

the 60 day time limitation" of RCW 51.52.060(1)(a). BR at 24. The Board accepted review of the appeal concerning the timeliness of Dr. Sherfey's protest of the segregation order. Upon review, it also dismissed the appeal as untimely, finding:

> [Mr. Arriaga's] attending physician acknowledges that he did not protest the October 29, 2008 Notice of Decision within 60 days of the date it was communicated to his medical office, as he was unaware of the existence of the document until sometime in 2010. The timely filing of a protest or appeal is a statutorily imposed jurisdictional limitation upon every claimant's ability to get relief from a Department order and upon the Board's authority to hear an appeal. There is simply no legal precedent for excusing Mr. Arriaga from performing his statutory duty to file a timely protest or appeal. The result does not change even though he relied upon his attending physician to monitor correspondence from the Department of Labor & Industries.

BR at 18.

Mr. Arriaga appealed to the Thurston County Superior Court, which also dismissed his appeal as untimely, finding that Dr. Sherfey received a copy of the Department's order on October 31, 2008, and that he did not protest the order within 60 days of its receipt. In its oral ruling, the court stated, "[m]y take on this is that the statute that requires communication was met when this order was clearly conveyed to the physician's office." Report of Proceedings (RP) at 18. It elaborated:

> It is my take that "communication" means that it was received as addressed, that is to the physician. If the Department had misaddressed this, if there had been some showing that a postal worker was not delivering the mail and threw it all in the back of a station wagon . . . that might be a different

> situation, but it is clear that it was time stamped two days after it was mailed. It was received.

RP at 19.

Mr. Arriaga appeals.

ANALYSIS

The issue before us is whether the trial court erred in concluding that the October 29, 2008, order was "communicated" to Dr. Sherfey's office when it was properly addressed and received by his office.

Standard of Review

Washington's Industrial Insurance Act (IIA), Title 51 RCW, includes judicial review provisions that are specific to workers' compensation claims. *Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179, 210 P.3d 355 (2009). In particular, the IIA provides that the judicial review of a decision by the Board is de novo, but is limited to the evidence and testimony presented to the Board. RCW 51.52.115; *Rabey v. Dep't of Labor & Indus.*, 101 Wn. App. 390, 393, 3 P.3d 217, *review granted*, 142 Wn.2d 1007, 16 P.3d 1266 (2000). The superior court presumes the Board's findings and conclusions are "prima facie correct." RCW 51.52.115. We review the findings of the superior court's decision de novo to determine whether substantial evidence supports them and whether its conclusions of law flow from the findings. *Rogers*, 151 Wn. App. at 180 (quoting

Watson v. Dep't of Labor & Indus., 133 Wn. App. 903, 909, 138 P.3d 177 (2006)).

RCW 51.52.060 and "Communicated"

Mr. Arriaga argues that even though Dr. Sherfey's office received the order on October 31, 2008, the order was not "communicated" within the meaning of RCW 51.52.060 due to a breakdown in mail handling procedures, which resulted in the order being placed in Mr. Arriaga's file without Dr. Sherfey's knowledge. Mr. Arriaga contends the word "communicated" denotes actual possession and availability, and that because Dr. Sherfey did not have knowledge of the order's existence in October 2008, it was not available to him. Citing Board decisions, Mr. Arriaga contends it would be "unjust to Mr. Arriaga and contrary to legislative intent to hold that the Department order of October 29, 2008 had been communicated to Dr. Sherfey simply because it was received in his office on October 31, 2008." Br. of Appellant at 13. Accordingly, Mr. Arriaga contends the 60-day period to appeal under RCW 51.52.060 was tolled until Dr. Sherfey actually was aware of the order's existence.

The Department counters that an order or letter is "communicated" under RCW 51.52.060 when it is received and that Dr. Sherfey received the order when it was delivered to his correct mailing address. It contends that a breakdown in office procedures or communication does not excuse an untimely appeal, and that it is

incumbent upon a party or agency to ensure that it has a system in place regarding distribution of its mail. It also contends Mr. Arriaga's proposal would produce an unworkable system: "Mr. Arriaga's proposed rule of a law would allow a doctor's office to receive mail from the Department, but be able to disclaim responsibility for that receipt of mail if the office procedures are allegedly not followed." Resp't's Br. at 12. According to the Department, "[a] party has the responsibility of providing his or her address to the Department, and when an order is received at that address, it is communicated." Resp't's Br. at 12.

In his reply brief, Mr. Arriaga maintains that even if we apply the Department's interpretation of "receipt," which it defines in terms of possession and availability, there is still no evidence that Dr. Sherfey received the order. He argues that "Dr. Sherfey had no knowledge that his office had received the order in question or that the order even existed, and as a result, for all intents and purposes, it was not available to him." Appellant's Reply Br. at 7.

Washington's IIA provides injured workers a swift, certain, no fault remedy that is primarily enforced in an administrative process that the act establishes. RCW 51.04.010; *Kingery v. Dep't of Labor & Indus.*, 132 Wn.2d 162, 168-69, 937 P.2d 565 (1997). The IIA generally provides finality to Department decisions. *Kingery*, 132 Wn.2d at 169.

RCW 51.52.050(1) directs the Department to serve its orders, decisions, and awards on "the worker, beneficiary, employer, or other person affected thereby" by mail. When an order, decision, or award is based upon a medical determination, the attending physician is deemed an interested party who, in addition to the claimant, is entitled to receive the order, decision, or award. *Shafer v. Dep't of Labor & Indus.*, 140 Wn. App. 1, 11, 159 P.3d 473 (2007), *aff'd*, 166 Wn.2d 710, 213 P.3d 591 (2009).

The time for appeal of a Department order is specified in RCW 51.52.060(1)(a) as follows:

> [A party] . . . or other person aggrieved by an order . . . 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.

(Emphasis added.) If a party fails to appeal within the 60-day time limit, the claim is deemed "res judicata on the issues the order encompassed, and '[t]he failure to appeal an order . . . turns the order into a final adjudication, precluding any reargument of the same claim.'" *Kustura v. Dep't of Labor & Indus.*, 142 Wn. App. 655, 669, 175 P.3d 1117 (2008) (footnote omitted) (quoting *Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 538, 886 P.2d 189 (1994)), *aff'd*, 169 Wn.2d 81, 233 P.3d 853 (2010).

It is well settled under Washington law that an order is "communicated" to a party within the meaning of RCW 51.52.060 upon receipt. *Kaiser Aluminum & Chem. Corp. v. Dep't of Labor & Indus.*, 57 Wn. App. 886, 889, 790 P.2d 1254 (1990); *Rodriguez v. Dep't of Labor & Indus.*, 85 Wn.2d 949, 952-53, 540 P.2d 1359 (1975). Our Supreme Court discussed the meaning of "communicated" under the IIA in *Nafus v. Department of Labor and Industries*, 142 Wash. 48, 251 P. 877 (1927). In that case, the worker's claim was initially allowed, but later closed after the Department concluded the worker's condition was not due to the work accident. *Id.* at 48-49. The Department notified the worker by sending a letter to him in April 1925. *Id.* at 49. The worker received the letter in the hospital, where he was a patient for an extended stay, and put the order in his robe pocket without reading it. *Id.* at 49-50. He later stated that "[o]ne of the nurses opened [the letter], but she did not tell me what it contained. I was in no condition to concern myself with the contents of the letter." *Id.* at 50.

In January 1926, the worker appealed the claim closure, asserting he had not received notice because he had not read the letter. *Id.* at 51. The Department responded that the appeal was untimely. The court concluded the order had been communicated under the IIA, reasoning:

> The fact that the respondent says that he did not read the letter and did not know its contents is not controlling. The department had done all it was required to do in making "communication" of its decision in closing the claim to the party affected thereby. There is no evidence from which it would be found that the respondent was not competent to understand the nature of the communication at the time.

Id. at 52.

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

Rodriguez also supports our conclusion. In that case, a worker was injured on the job and timely filed his claim. *Rodriguez*, 85 Wn.2d at 949-50. The Department initially granted his claim, but subsequently sent the worker a letter closing his claim. *Id.* at 950. The worker could speak only in Spanish, and could not read or write in either Spanish or English. *Id.* The worker did not timely appeal the Department's order closing his claim. The Supreme Court reiterated the rule that, "the word 'communicated' contained in RCW 51.52.060 requires only that a copy of the order be *received* by the workman." *Rodriguez*, 85 Wn.2d at 952-53 (emphasis added). Although the *Rodriguez* court ultimately granted equitable relief based on the worker's illiteracy, it made a point to distinguish *Nafus*, which involved "a mere failure or refusal to read a letter from the

department" from a case where "extreme illiteracy" rendered the claimant virtually incompetent. *Rodriguez*, 85 Wn.2d at 954.

Despite this well-settled precedent, Mr. Arriaga cites *Shafer*, 140 Wn. App. at 11, and Board decisions in his attempt to broaden the rule. In *Shafer*, the court stated:

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

Id. We interpret the above language as justification for requiring the Department to provide the worker's physician copies of certain orders, decisions, or awards. We do not interpret it as changing prior Supreme Court precedent, which does *not* require a party to have actually read the properly addressed and delivered order.

Citing *In re: Dorena R. Hirschman*, No. 09 17130 (Wash. Bd. of Indus. Ins. Appeals May 7, 2010) and *In re: Edward S. Morgan*, No. 9667 (Wash. Bd. of Indus. Ins. Appeals Aug. 25, 1959), Mr. Arriaga contends that "communication [is] not complete" until a recipient has actual knowledge of the order. Br. of Appellant at 12. Board decisions are not binding precedent for this court; however, we may give substantial

weight to an agency's interpretation of the laws it is charged to enforce. *Lynn v. Dep't of Labor & Indus.*, 130 Wn. App. 829, 836, 125 P.3d 202 (2005); *Jensen v. Dep't of Ecology*, 102 Wn.2d 109, 113, 685 P.2d 1068 (1984).

In *Hirschman*, the Department mailed a copy of an order to Ms. Hirschman's house while she was on vacation. Her employer argued that the order was communicated to Ms. Hirschman, regardless of whether she was home to receive and read it. The Department disagreed with the employer, concluding that the order was not communicated to Ms. Hirschman until she returned from her trip. We decline to follow *Hirschman* because it conflicts with *Nafus* and *Rodriguez*, which look to whether the mailing was properly addressed and delivered.[1]

Regardless, there was no testimony that Dr. Sherfey was out of town for any period of time during October 2008. In fact, it was nearly two years between the time the order was received in his office and Mr. Arriaga's attorneys notified Dr. Sherfey of the order. The record also shows that Dr. Sherfey was treating Mr. Arriaga regularly during that time and that the order was available to him at any time he chose to review Mr. Arriaga's chart. A breakdown in office mail handling protocol is not analogous to a recipient being out of town when a Department order is delivered.

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[1] Although we decline to follow *Hirschman*, we note that *Rodriguez* allows courts

Morgan is also inapposite. In that case, the claimant worked in the timber industry and kept a separate address from his physical location, which changed according to his work. While off work due to an industrial injury, the worker continued to maintain his permanent mailing address and checked his mail daily. Although the claimant testified that he had received other communications from the Department at his permanent mailing address, he stated he did not receive the closing order at issue in the case. Assuming that the evidence was "sufficient to give rise to the presumption of receipt by the addressee in due course of mails," the Board found these circumstances were sufficient to overcome the presumption. *Morgan*, No. 9667 (Wash. Bd. of Indus. Ins. Appeals). Noting the proposition that mailing a letter is prima facie evidence of receipt, the court then noted:

> Although a claimant who deliberately or negligently disregards or fails to read a communication delivered to his residence may well be charged with knowledge or notice thereof, the claimant in this case called for his mail each day and, in our opinion, it would be manifestly unjust and contrary to the legislative intent to charge him with notice of an order he did not receive based solely on a presumption of its receipt at a "mail depot."

Id.

In contrast to *Morgan*, the "presumption of receipt" is not at issue here. This presumption arises once proper mailing of an item is established. *Scheeler v. Emp't Sec. Dep't*, 122 Wn. App. 484, 489, 93 P.3d 965 (2004). Here, it is not disputed that the

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to equitably toll the 60-day period under appropriate circumstances.

Department mailed the letter to Dr. Sherfey's office and that it was received in the office on October 31, 2008. In fact, the letter was date stamped and scanned into the records. There is no evidence that due to an error in mailing, he did not receive the order. Any failure in Dr. Sherfey's actual receipt of the order was due to the breakdown of his office procedures, not a defect in the Department's mailing.

A more analogous Board case is *In re: Robert A. Wiyrick*, Nos. 01 11323 & 01 12028 (Wash. Bd. of Indus. Ins. Appeals Aug. 26, 2003). In that case, the claimant's attorney improperly noted the time for extension in which to file a petition for review. The issue before the Board was whether the subsequent failure to file a timely motion was due to excusable neglect. The Board was clear in its decision: "[*t*]*he breakdown of office procedures or secretarial error, which results in claimant's failure to file a timely petition for review, cannot be considered excusable neglect.*" *Id.* (emphasis added).

The same reasoning applies here. Dr. Sherfey's office received the Department order on October 31, 2008. The delay in Dr. Sherfey's actual knowledge of the order was due to an intraoffice mail delivery breakdown, which is not excusable neglect or a basis for tolling the statutory deadline. Mr. Arriaga suggests that we liberally construe the statute to grant the relief he requests. However, liberal construction does not apply here because the statute in question is not ambiguous. *Harris v. Dep't of Labor & Indus.*, 120

Wn.2d 461, 472 n.7, 474, 843 P.2d 1056 (1993). Accordingly, the trial court did not err in concluding that Mr. Arriaga's appeal was untimely.

We affirm.

Lawrence-Berrey, J.

WE CONCUR:

Korsmo, J.

Siddoway, C.J.

A2

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. 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.

[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.

A3

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.

CERTIFICATE OF MAILING

SIGNED at Tacoma, Washington.

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, hereby certifies that on the 29th day of October, 2014, the document to which this certificate is attached, Petition For Review, was placed in the U.S. Mail, postage prepaid, and addressed to Respondent's counsel as follows:

Kay A. Germiat
Assistant Attorney General
P.O. Box 2317
Tacoma, WA 98401

DATED this 29th day of October, 2014.

LYNN M. VENEGAS, Secretary