

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
Aug 14, 2014, 3:36 pm  
BY RONALD R. CARPENTER  
CLERK

E

46647-3-#

RECEIVED BY E-MAIL

bjh

~~S.Ct. No. 89638-1~~

---

SUPREME COURT OF THE STATE OF WASHINGTON

---

FREDERICK THYSELL, M.D., an individual,

*Petitioner,*

vs.

STATE OF WASHINGTON  
DEPARTMENT OF LABOR AND INDUSTRIES

*Respondent.*

---

REPLY BRIEF OF PETITIONER THYSELL

---

Darrell K. Smart  
Smart Connell Childers & Verhulp PS  
P.O. Box 228  
501 N. 2nd St.  
Yakima, WA 98907  
(509) 573-3333

George M. Ahrend  
Ahrend Albrecht PLLC  
16 Basin St. SW  
Ephrata, WA 98823  
(509) 764-9000

Co-Attorneys for Petitioner

 ORIGINAL

amm

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... ii

REPLY INTRODUCTION ..... 1

REPLY STATEMENT OF THE CASE ..... 2

REPLY ARGUMENT ..... 4

    A. Dr. Thysell’s claims are not barred by the doctrine of exhaustion of administrative remedies because there is no adequate remedy to redress denial of his ability to treat existing patients during the pendency of his administrative appeal. .... 4

    B. The court should reject the Department’s arguments regarding the application of RCW 51.52.075. .... 7

CONCLUSION ..... 8

CERTIFICATE OF SERVICE ..... 10

**TABLE OF AUTHORITIES**

**Cases**

*Coast Mgmt. Servs., Inc. v. City of Lakewood*,  
178 Wn. 2d 635, 310 P.3d 804 (2013).....4

**Statutes and Rules**

RCW 51.36.110(2) & (3).....7  
RCW 51.52.050 .....3  
RCW 51.52.050(2)(a) .....7  
RCW 51.52.060(1)(a) .....7  
RCW 51.52.075 .....1  
RCW 51.52.104 .....7  
RCW 51.52.110 .....7  
Title 51 RCW .....7

**Other Authorities**

*Merriam-Webster Online* .....3

## **I. REPLY INTRODUCTION**

In its response brief, the Department of Labor and Industries (Department) consistently equates—and equivocates between—two actions that are not equivalent in fact or law: the Department’s termination of existing relationships between health care providers and their patients, on the one hand; and the Department’s denial of a health care provider’s right to participate in its new provider network, on the other. As a result of the equivocation, the Department’s brief is largely non-responsive.

For his part, Frederick Thysell, M.D., contends that the Department violated RCW 51.52.075 and his due process rights by terminating pre-existing relationships between him and his patients when it denied his right to participate in the new provider network.

In response, the Department contends that the protections of RCW 51.52.075 and due process do not attach to denial of the right to participate in the new provider network, even though these contentions are not disputed by Dr. Thysell.

The Department’s equivocation also pervades its argument based on exhaustion of administrative remedies. Dr. Thysell’s administrative appeal of the denial of his right to participate in the new provider network does not provide any means to redress the termination of his existing patient relationships.

## **II. REPLY STATEMENT OF THE CASE**

The parties agree regarding what happened in this case. Dr. Thysell had pre-existing treatment relationships with a number of injured workers when the Department started implementing its new provider network. The Department denied Dr. Thysell's application to participate in the new provider network, and Dr. Thysell appealed. In the meantime, the Department prohibited the injured workers who were being treated by Dr. Thysell from obtaining any further treatment from him, directed them to obtain further treatment from other providers, and warned them that they would lose their benefits if they did not comply. CP 44.

During the appeal of the denial of Dr. Thysell's eligibility to participate in the new provider network, the Department did not petition for immediate suspension of Dr. Thysell's right to continue treatment of his pre-existing patients (as distinguished from treatment of new patients within the new provider network). Dr. Thysell filed a motion to require the Department to comply with RCW 51.52.075, which precludes suspension of a provider's authority to treat injured workers except upon a motion and order showing good cause that the workers would suffer serious physical or mental harm, but the Board of Industrial Insurance Appeals (BIIA) denied the motion. Dr. Thysell subsequently filed this action for declaratory judgment and other relief.

The parties disagree regarding what should have happened. According to the Department, it acted properly in immediately terminating Dr. Thysell's pre-existing patient relationships at the same time that it denied his right to participate in the new provider network, notwithstanding the pendency of his appeal.<sup>1</sup> According to Dr. Thysell, what should have happened is well-described by the Department as follows:

When a provider appeals from a termination of an existing authority to treat injured workers, the provider retains the authority to treat until the Department's order becomes final, following any appeals. *See* RCW 51.52.050. Essentially, the termination is automatically stayed pending appeal. In such a situation, RCW 51.52.075 allows the Department to petition for an order immediately suspending the authority to treat during an appeal when the Department can show potential harm to injured workers by the provider.

Resp. Br., at 8.

The Department never did petition for an order immediately suspending Dr. Thysell's authority to treat his existing patients, nor did it make the requisite showing that his patients would suffer serious physical or mental harm. Nonetheless, the Department contends—unfairly—that it denied Dr. Thysell's right to participate in the new provider network on grounds that he had a history of prescribing high doses of opioids. Resp.

---

<sup>1</sup> The Department objects to use of forms of the word "termination" because it is used in RCW 51.52.075, but the usage conforms to the ordinary meaning of the word. *See Merriam-Webster Online, s.v. "termination."*

Br., at 1; he was “materially noncompliant with Department guidelines,” *id.* at 6-7; and he posed a danger to his patients, *id.* at 7. The Court should not accept these assertions at face value when the Department has deprived Dr. Thysell of the forum and opportunity to meaningfully address them.

### III. REPLY ARGUMENT

**A. Dr. Thysell’s claims are not barred by the doctrine of exhaustion of administrative remedies because there is no adequate remedy to redress denial of his ability to treat existing patients during the pendency of his administrative appeal.**

The Department leads with an argument regarding exhaustion of administrative remedies. *See* Resp. Br., at 11-16. The parties do not disagree with “the general rule that when an adequate administrative remedy is provided, it must be exhausted before the courts will intervene.” *Coast Mgmt. Servs., Inc. v. City of Lakewood*, 178 Wn. 2d 635, 641, 310 P.3d 804 (2013); *accord* Resp. Br., at 12-13. The disagreement centers on the question of whether there is an adequate administrative remedy to enforce RCW 51.52.075 under the circumstances of this case.

The purposes of the exhaustion requirement are to: “(1) insure against premature interruption of the administrative process; (2) allow the agency to develop the necessary factual background on which to base a decision; (3) allow exercise of agency expertise in its area; (4) provide for

a more efficient process; and (5) protect the administrative agency's autonomy by allowing it to correct its own errors and insuring that individuals were not encouraged to ignore its procedures by resorting to the courts." *Coast Mgmt*, 178 Wn. 2d at 642 (quotation omitted). In keeping with these purposes, the test for the adequacy of administrative remedies is whether the relief sought can be obtained through the administrative remedy in question. *See id.* at 642 & 645.

Here the relief sought cannot be obtained through available administrative remedies. RCW 51.52.075 prohibits the Department from unilaterally terminating a provider's authority to continue treating his or her patients. Instead, the statute requires the Department to file a motion and obtain an order based on good cause to believe that continued treatment of existing patients would cause serious physical or mental harm to the patients. In the absence of such a motion and order, Dr. Thysell seeks to be allowed to continue treating his existing patients pending the outcome of his appeal of the denial of his right to participate in the Department's new provider network. There is no administrative remedy to compel the Department to file the necessary motion or obtain the necessary order, nor is there any administrative remedy for Dr. Thysell to otherwise continue treating his existing patients on an interlocutory basis, pending the outcome of his appeal.

The Department seems to acknowledge that the provisions of RCW 51.52.075 operate on an interlocutory basis. *See* Resp. Br., at 14. Accordingly, denial of this interlocutory relief cannot be redressed by further administrative proceedings or review of such administrative proceedings. Once the administrative proceedings have been concluded, the question of interlocutory relief during the pendency of those proceedings would be moot. In this sense, Dr. Thysell's appeal of the denial of his right to participate in the Department's new provider network is not an adequate remedy for termination of his right to treat existing patients during the pendency of the appeal, and the Department's citation to statutes authorizing administrative appeals are beside the point. *See* Resp. Br., at 14-15 (citing RCW 51.52.050(2)(a), 51.52.060(1)(a), 51.52.104 & 51.52.110).

The purposes of the exhaustion requirement are not served in this case. The question of whether the Department can terminate Dr. Thysell's ability to treat his patients during the pendency of his administrative appeal will not interrupt the administrative appeal or create any inefficiencies. No factual material needs to be developed, as the sole operative fact is undisputed: The Department terminated Dr. Thysell's existing treatment relationship with his patients without the motion and order required by RCW 51.52.075. There is no issue of agency expertise

in question, and it does not infringe on the agency's ultimate authority to resolve the appeal, subject to court review.

**B. The court should reject the Department's arguments regarding the application of RCW 51.52.075.**

The Department notes that the Industrial Insurance Act (IIA), Title 51 RCW, distinguishes between *denial of an application* to participate as a provider of services to injured workers, and *termination of eligibility* to participate as a provider of services to injured workers. *See* Resp. Br., at 17 & 24 (citing RCW 51.36.110(2) & (3)). However, this does not answer the question presented by this case, which involves simultaneous denial of Dr. Thysell's application to participate in the Department's new provider network and termination of his eligibility to treat his existing injured-worker patients. Even if RCW 51.52.075 does not apply to the denial of Dr. Thysell's right to participate in the new provider network, it is triggered by the termination of his existing patient relationships.

Next, the Department contends that the protections of RCW 51.52.075 are premised upon existing authority to treat injured workers, and that denial of Dr. Thysell's application to participate in the new provider network deprived him of the requisite authority. *See* Resp. Br., at 20-23. This argument is unavailing because the language of the statute provides that it is applicable upon "appeal from an order terminating the

provider's authority" to treat injured workers. RCW 51.52.075. In other words, the protections of the statute are applicable as long as the authority of the provider is subject to dispute. Here, the denial of Dr. Thysell's application to participate in the new provider network is contested and subject to appeal. Because his authority to treat injured workers is still subject to dispute, he is entitled to the protections of RCW 51.52.075.

Lastly, the Department argues that applying the protections of RCW 51.52.075 to termination of existing patient relationships would be "inconsistent" with rules prohibiting treatment by non-network providers. Again, this argument assumes that Dr. Thysell had no authority to treat his existing patients and that the question of whether Dr. Thysell has authority has been definitively resolved against him, even though the denial of his right to participate in the Department's new provider network is still subject to appeal. Because these assumptions are unwarranted, the argument based upon them should be rejected.<sup>2</sup>

#### IV. CONCLUSION

For the reasons stated in Dr. Thysell's opening brief and the foregoing reply, the Court should reverse the decision of the superior

---

<sup>2</sup> For the most part, both parties' due process arguments hinge upon the (in)applicability of RCW 51.52.075. *See* Resp. Br., at 32-46. The Department recognizes that a statute can create a protected substantive interest, if it limits official discretion. *See id.* at 37. RCW 51.52.075 limits official discretion by preventing the Department from unilaterally terminating existing patient relationships during the pendency of an appeal, in the absence of a motion and order establishing a risk of serious physical or mental harm.

court, enter declaratory judgment that the Department's conduct in this case violates RCW 51.52.075 and due process, and allow Dr. Thysell to continue to treat his existing injured-worker patients pending the appeal of the denial of his right to participate in the Department's new provider network.

Respectfully submitted this 14th day of August, 2014.

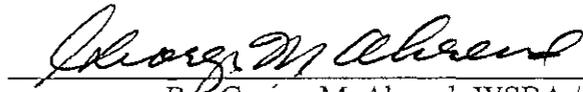
SMART CONNELL CHILDERS & VERHULP PS



*DK* By: Darrell K. Smart, WSBA #15500

and

AHREND ALBRECHT PLLC



By: George M. Ahrend, WSBA #25160

Co-Attorneys for Dr. Thysell

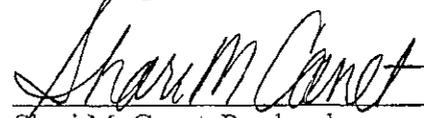
**CERTIFICATE OF SERVICE**

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

On August 14, 2014, I served the document to which this is annexed by email and First Class Mail, postage prepaid, as follows:

Kaylynn What, Asst. Atty. Gen.  
Attorney General of Washington  
Labor & Industries Division  
PO Box 40121  
Olympia, WA 98504-0121  
Email: [kaylynnw@atg.wa.gov](mailto:kaylynnw@atg.wa.gov)

Signed on August 14, 2014 at Ephrata, Washington.

  
\_\_\_\_\_  
Shari M. Canet, Paralegal

## OFFICE RECEPTIONIST, CLERK

---

**To:** Shari Canet  
**Cc:** Kaylynn What, Darrell Smart; George Ahrend  
**Subject:** RE. Thysell v DLI (Case No. 89902-9)

Received 8/14/14

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

**From:** Shari Canet [mailto:scanet@trialappeallaw.com]  
**Sent:** Thursday, August 14, 2014 3:35 PM  
**To:** OFFICE RECEPTIONIST, CLERK  
**Cc:** Kaylynn What; Darrell Smart; George Ahrend  
**Subject:** Thysell v. DLI (Case No. 89902-9)

Please accept for filing the attached Reply Brief of Petitioner Thysell. Thank you.

--

Shari M. Canet, Paralegal  
Ahrend Albrecht PLLC  
16 Basin Street S.W.  
Ephrata, WA 98823  
(509) 764-9000  
Fax (509) 464-6290  
Website: <http://www.trialappeallaw.com/>



The information contained in this email transmission and any attachments is CONFIDENTIAL. Anyone other than the intended recipient is prohibited from reading, copying, or distributing this transmission and any attachments. If you are not the intended recipient, please notify the sender immediately by calling (509) 764-9000.