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SUPREME COURT OF THE STATE OF WASHINGTON

FREDERICK THYSELL, M.D.,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES
FOR THE STATE OF WASHINGTON,

Respondent.

DEPARTMENT OF LABOR & INDUSTRIES
BRIEF OF RESPONDENT

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I. INTRODUCTION

The Legislature recently created a new system for managing physicians providing care to injured workers: the provider network. Laws of 2011, ch. 6, § 1. No grandfather provisions granting automatic entry to providers under the old system were included; instead, all providers were required to apply to the new system. Providers whose applications are denied may appeal to the Board of Industrial Insurance Appeals (Board), but no authority allows them to treat injured workers during the pendency of their appeals.

Dr. Fred Thysell's application to the provider network was denied due to his history of prescribing high doses of opioids in contravention of Department of Labor and Industries (Department) guidelines. He appealed his denial to the Board. This is not that appeal. While that administrative appeal was pending, he filed the current action, a complaint in superior court, contending that under RCW 51.52.075 he could continue to treat injured workers pending his administrative appeal. The superior court rejected his claim, and Dr. Thysell appealed.

His appeal should be denied. Declaratory relief is unavailable because Dr. Thysell did not first exhaust his administrative remedies. Moreover, his underlying arguments for relief lack merit. The statute Dr. Thysell relies on, RCW 51.52.075, does not apply to application

denials under the new provider network. By its plain language, that statute applies only to the termination of an existing authority to treat, which Dr. Thysell has never had under the new system. Since this statute does not apply to Dr. Thysell's case, it cannot create a constitutionally protected interest as he suggests. Even assuming, *arguendo*, that Dr. Thysell had a constitutionally protected interest, he has not shown that the procedures the Department used when it denied his application violated due process.

II. ASSIGNMENT OF ERROR

The trial court erred in not denying Dr. Thysell's motion for declaratory relief because he failed to exhaust administrative remedies.¹

III. COUNTER STATEMENT OF THE ISSUES

1. Is this declaratory judgment action barred by the exhaustion doctrine when Dr. Thysell's administrative appeal is pending and there is no final Board order appealable under RCW 51.52.110? (Department's Assignment of Error No. 1)

¹ The Department did not cross-appeal because it is prohibited by RAP 3.1: "Only an aggrieved party may seek review by the appellate court." The Department was not aggrieved because the superior court denied declaratory relief. A party is not required to cross-appeal when it seeks no further affirmative relief from the court. *McGowan v. State*, 148 Wn. 2d 278, 287-88, 60 P.3d 67 (2002); RAP 2.4(a); RAP 5.1(d). The Department may argue any ground in support of the superior court's order that is supported by the record. *See McGowan*, 148 Wn. 2d at 288.

2. Does RCW 51.52.075 apply to the denial of an application to treat injured workers when the plain language of the statute covers only the termination of an existing authority to treat injured workers and makes no mention of denials?
3. Does Dr. Thysell have a constitutionally protected interest in treating injured workers when he has never been admitted to the provider network and when the interest in joining the provider network is only an expectancy of entering into a contract?
4. Assuming *arguendo* that Dr. Thysell has a protected constitutional interest in treating injured workers, does the Department's admission process, which provides him with both notice and an opportunity to be heard, and which is followed by a full administrative evidentiary hearing, comport with due process?

A. The Legislature Created The New Provider Network To Improve The Quality Of Care Provided To Injured Workers

The Department's provider network is new. Before its creation in 2011, medical providers needed only a valid clinical license and to complete a short application to treat injured workers. CP 159. Dr. Thysell had a provider number and treated patients under the old system.

In 2011, the Legislature created a new "healthcare provider network to treat injured workers." Laws of 2011, ch. 6, § 1 (codified at

RCW 51.36.010(1)). This change reflected the need to provide injured workers with high quality medical treatment that adhered to occupational health best practices. *Id.* The Legislature found that such care prevents disability, reduces loss of family income, and lowers employers' labor and insurance costs. *Id.*

To participate in the new network, all physicians, regardless of past treating privileges, must first apply by completing the Department's provider application. RCW 51.36.010(2)(c). The Legislature directed the Department to adopt regulations governing who would be admitted to join the network, imposing some mandatory requirements and leaving the rest to the Department's discretion. *Id.* Only providers that have been accepted into the network have the legal and contractual authority to treat and receive reimbursement for providing continuing care to injured workers. RCW 51.36.010(2)(b).

The Department's process of granting treatment privileges only following enrollment is consistent with its statements made during rulemaking. CP 99. The Department made no representation that providers would be permitted to continue to treat while they appealed a denial of their application; in fact, the Department addressed this issue in its Concise Explanatory Statement (CES) when it responded to comments about WAC 296-20-01020, a rule that prohibits payment to providers

before application approval. CP 87. The rule allows for limited provisional enrollment before approval, but outside of that, the Department was clear that “Paying only network providers is fundamental to the network establishment and goals of ensuring quality care by approved providers.” CP 87. The Department also reiterated that the appeal rights that apply to any Department decision, namely those found in RCW 51.52, would apply to any denials or terminations. CP 99.

B. The Department Conducts A Multi-Level Review Process Before Approving Or Denying Any Applications

Since the provider network became effective on January 1, 2013, over 18,000 applications have been reviewed and approved. CP 161. As of November 2013, only 51 applications had been denied. *Id.* Applications to join the network are first considered by the associate medical director. CP 162-63. If, in the associate medical director’s judgment, the applicant lacks merit in some way and requires further review before a denial, the application is sent to an independent peer-review credentialing panel. CP 163. The credentialing panel reviews the application and makes a recommendation to the Department’s medical director, Gary Franklin, M.D., who makes the final determination on those applications. CP 164.

If a decision is made to deny an application, the provider is notified and provided a list of the grounds for the denial. CP 164. The provider then has 60 days to request reconsideration or appeal to the Board. RCW 51.52.050; WAC 296-20-01090. In a reconsideration request, the provider is invited to submit any information and documentation he or she wishes to be considered. CP 164-65. All additional information is reviewed by both a panel of peers and Dr. Franklin. CP 165. A denial following reconsideration becomes the Department's final decision, which may then be appealed to the Board under RCW 51.52.050 and .060.

Only approved network providers can provide continuing care to injured workers. RCW 51.36.010(2)(b). For providers who treated patients under the old system but are denied enrollment in the new system, any existing injured worker patients are notified that they must transfer care, and the Department provides resources to help them transition to a network provider. CP 166.

C. The Department Denied Dr. Thysell's Application To Join The Provider Network Because His Prescription Practices Were Materially Noncompliant With Department Guidelines

Dr. Thysell applied to the network in May 2012. CP 169. His application materials were reviewed by a peer review panel that recommended denial. CP 169. Medical Director Dr. Franklin followed

that recommendation and denied Dr. Thysell's application. CP 169. Specifically, Dr. Franklin denied the application because Dr. Thysell's pattern of prescribing high doses of opioids, without any documentation of sustained or substantial improvement in pain or function, and without consultation from a pain specialist, was in material noncompliance with Department guidelines concerning opioid prescriptions. CP 169, 171; WAC 296-20-01050(3)(j).² Dr. Franklin also determined that Dr. Thysell's practices not only created a risk of harm to injured workers, but in some instances actually harmed injured workers. CP 169, 171; WAC 296-20-01050(1). Opioid use can lead to addiction and overdose, which can cause respiratory arrest and death, and Dr. Thysell had not implemented the safety measures required by Department guidelines, many of which have been in place since 2001. CP 169.

Dr. Thysell sought reconsideration of the Department's decision. CP 169. A second panel reviewed his application and reconsideration materials, and then a third reviewed it after Dr. Thysell submitted additional materials. CP 169. These subsequent panels recommended affirming the denial. CP 170. Because nothing about the reconsideration materials suggested Dr. Thysell intended to bring his practices in line with

² The Department's opioid prescription guidelines are available on its website, and are now generally codified at WAC 296-20-03030 through WAC 296-20-03085 and WAC 296-20-06101

Department guidelines. Dr. Franklin issued a final denial in February 2013. CP 170, 175.

D. Dr. Thysell Appealed His Denial To The Board And Sought Relief Under RCW 51.52.075, Which Was Denied

Dr. Thysell appealed the Department's decision to the Board. He brought a motion before the hearing judge seeking relief under RCW 51.52.075. CP 242. 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 order 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. RCW 51.52.075.

Here, however, the hearing judge determined that Dr. Thysell's authority to treat injured workers expired when the new provider network became effective on January 1, 2013. CP 245. Since no authority to treat existed, no authority was terminated, so no petition by the Department was necessary. CP 245. Dr. Thysell sought interlocutory review of this decision, but review was denied. CP 248; WAC 263-12-115. Dr. Thysell

may petition the full Board for review of this decision after the hearing judge issues the proposed decision and order. RCW 51.52.104.

E. Before The Board Rendered A Final Decision, Dr. Thysell Sought Declaratory Relief In Superior Court, Which Was Denied

While his administrative appeal was still pending, Dr. Thysell filed the present action in superior court. CP 3-12. He sought a declaratory judgment that RCW 51.52.075 required the Department to petition the Board to suspend his eligibility to treat injured workers pending the Board's final decision, just as he had already argued unsuccessfully at the Board, and that the absence of a petition violated due process. CP 27-28, 31-33. The Department argued that declaratory judgment should be denied for failure to exhaust administrative remedies, but if the merits were addressed, then denied because RCW 51.52.075 does not apply to application denials. CP 142-44.

The superior court did not address exhaustion, but ruled that no termination occurred, so RCW 51.52.075 did not apply to Dr. Thysell's appeal. CP 258. It additionally ruled that no due process violation occurred because there was no constitutional interest or vested right to treat injured workers. CP 258-59. Dr. Thysell then appealed.

IV. SUMMARY OF THE ARGUMENT

The Legislature did not provide any grandfather provisions allowing providers under the old system automatic entry into the new system when it reformed how the Department regulates providers of medical care to injured workers. Instead, it required a new application and approval process that creates a contractual relationship between the provider and the Department. Provisional status applied while applications were pending, but nothing allows denied providers to treat injured workers after application denial. RCW 51.52.075, which is inapplicable by its plain language, was not revised to make it applicable to application denials under the new system. Nor does RCW 51.52.075 create a constitutionally protected interest in providing care to injured workers. Even if it somehow created such a protected interest, the Department provided sufficient due process to Dr. Thysell during its application review process.

Regardless of whether RCW 51.52.075 requires a petition showing harm by the Department or creates any constitutionally protected interest, this Court should deny Dr. Thysell's requested relief because he did not exhaust his administrative remedies before turning to the courts. To enable him to judicially challenge the process provided by the Department

and Board outside of the regular administrative appeal process would condone his circumvention of administrative procedures.

V. STANDARD OF REVIEW

Declaratory judgments are subject to the same appellate review as any other final judgment. RCW 7.24.070. Ordinary rules of appellate procedure apply. *Simpson Tacoma Kraft Co. v. Dep't of Ecology*, 119 Wn.2d 640, 646, 835 P.2d 1030 (1992). The statutory construction and constitutional issues involved here are questions of law reviewed de novo. *Williams v. Tilaye*, 174 Wn.2d 57, 61, 272 P.3d 235 (2012). An agency's interpretation of a statute is given great deference when that agency is charged with its administration. *PT Air Watchers v. Dep't of Ecology*, 179 Wn.2d 919, 925, 319 P.2d 23 (2014) (quoting *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 593, 90 P.3d 659 (2004)).

VI. ARGUMENT

A. **The Trial Court Erred In Considering Dr. Thysell's Action Because He Did Not Exhaust His Administrative Remedies**

Dr. Thysell has failed to exhaust administrative remedies and accordingly this Court should not consider his arguments about RCW 51.52.075 until he appeals from a final Board order as provided by RCW 51.52.110. The superior court determined it would consider

Dr. Thysell's request for declaratory relief despite the fact that he was not appealing from a final decision of the Board. CP 258. That determination was in error. The superior court should not have considered the applicability of RCW 51.52.075, an issue considered in the administrative appeal, until a final order was issued by the Board.

Well-settled rules provide that Dr. Thysell must obtain a final agency decision before he may seek judicial review. The exhaustion doctrine requires that a party exhaust all available administrative remedies before seeking relief from superior court. *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 866, 947 P.2d 1208 (1997). This requirement prevents premature interruption of the administrative process, allows development of a factual record, facilitates the exercise of administrative expertise, allows an agency to correct its own errors, and prevents the circumvention of administrative procedures through resort to the courts. *Id.* Courts will not intervene when the relief sought can be obtained through an adequate administrative remedy. *Id.*

This "well-settled rule requiring exhaustion of administrative remedies" applies to Dr. Thysell's action for declaratory relief. *See Ackerley Comm'n, Inc. v. City of Seattle*, 92 Wn.2d 905, 908-09, 602 P.2d 1177 (1979). Where a party has an adequate legal remedy, that party may not use a petition for declaratory relief to bypass the available

administrative appeal process. *Stafne v. Snohomish Cnty.*, 174 Wn.2d 24, 39, 271 P.3d 868 (2012) (citing *Reeder v. King County*, 57 Wn.2d 563, 564, 358 P.2d 810 (1961)).³ Additionally, the Industrial Insurance Act separately requires a party to exhaust administrative remedies before seeking relief in superior court. RCW 51.52.110; *Dils v. Dep't of Labor & Indus.*, 51 Wn. App. 216, 219, 752 P.2d 1357 (1988). While it may take time to obtain a final Board decision subject to superior court review, the possibility of delay is not an excuse for premature resort to the courts. *Spokoiny v. Wash. State Youth Soccer Ass'n*, 128 Wn. App. 794, 802, 117 P.3d 1141 (2005); *Dils*, 51 Wn. App. at 220.

Nor does the Board's general lack of jurisdiction over constitutional issues excuse Dr. Thysell's failure to exhaust his administrative remedies. See *Ackerley*, 92 Wn.2d at 908-09 (explaining that, even in a case where a party wishes to raise a constitutional question, a party seeking declaratory relief must exhaust its administrative remedies before it has standing to seek relief from the courts, in part because administrative remedies may resolve the alleged constitutional claim).

³ In *Ronken v. Board of County Commissioners of Snohomish County*, 89 Wn.2d 304, 310, 572 P.2d 1 (1977), this Court noted that CR 57 provides "[t]he existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate," but it explained that "courts will be circumspect in granting such relief." When such relief is administrative in nature, courts have been consistent in requiring exhaustion rather than allowing declaratory relief. E.g. *Grandmaster Sheng-Yen Lu v. King County*, 110 Wn. App. 92, 105, 38 P.3d 1040 (2002).

The dispositive issue is not whether an administrative agency can consider a constitutionally grounded argument, but whether there is a remedy it can grant that would address the grievance. *See Ackerley*, 92 Wn.2d at 908-09 (citing *Lange v. Woodway*, 79 Wn.2d 45, 48, 483 P.2d 116 (1971)). In this case, the Board could determine (albeit incorrectly) that RCW 51.52.075 applies to Dr. Thysell, thus providing him with relief.

Here, Dr. Thysell appealed the Department's decision to the Board. CP 7. He argued that RCW 51.52.075 should apply to his appeal. CP 244. Industrial appeal judges have the authority to determine the law, including whether RCW 51.52.075 applies, in Board proceedings. RCW 51.52.100. The administrative appeal provides Dr. Thysell with an adequate remedy: his requested relief could have been granted. As it happened, it was denied in an interlocutory order. CP 245, 248. An interlocutory order is not a final decision of the Board subject to appeal. RCW 51.52.110. Dr. Thysell may raise his arguments about RCW 51.52.075 to the Board after the hearing judge issues a proposed decision. RCW 51.52.104. Under the exhaustion doctrine and the Industrial Insurance Act, Dr. Thysell is required to obtain a final administrative decision before asking a superior court to review it. RCW 51.52.110; *Dils*, 51 Wn. App. at 219. Dr. Thysell instead sought a declaratory judgment while his administrative appeal is pending. This

circumvention of the administrative appeal process should not be excused simply because Dr. Thysell is dissatisfied with the administrative decision.

Dr. Thysell provides no justification not complying with exhaustion requirements. He argues that his failure to exhaust is excusable because RCW 51.52.075 does not provide a means for the physician to obtain administrative relief allowing the physician to continue treatment during the pendency of the appeal. Appellant's Br. at 14, n. 6. But Dr. Thysell argued at the Board that he was entitled to treat injured workers and the hearing judge denied his request. Thus, the suggestion that he could not bring the issue before the Board lacks merit. Moreover, contrary to Dr. Thysell's claim that RCW 51.52.075 provides him with an appeal right, it is RCW 51.52.050(2)(a) and .060(1)(a) that grants Dr. Thysell his right to appeal Department decisions to the Board, and he has exercised that right. CP 7. This situation is therefore unlike that provided by Dr. Thysell's citation to *City of Pasco v. Napier*, 109 Wn.2d 769, 775, 755 P.2d 170 (1988), where the relevant statute did not grant the party the right to administratively appeal. See Appellant's Br. at 14, n. 6. Dr. Thysell not only has the right to appeal, but he has appealed.

Dr. Thysell has yet to provide *any* authority that would allow him to treat injured workers after being denied enrollment into the network by the Department, and in direct contravention of legislative reform allowing

only network providers to treat injured workers. RCW 51.52.075 is not the requisite authority, because, as will be explained below, it was the Legislature, not the Department, which created a new system for providers and brought about any change to Dr. Thysell's authority to treat.

B. RCW 51.52.075 Applies Only To Providers With Existing Authority To Treat Injured Workers, Which Dr. Thysell Does Not Have Under The New System

On its face, RCW 51.52.075 applies only to situations in which the Department seeks to terminate a provider's existing authority to treat and bill for treatment. Dr. Thysell, however, argues RCW 51.52.075 also applies to his initial application to join the provider network. Appellant's Br. at 8-9. If this Court chooses to reach that issue, it should reject his argument. RCW 51.52.075 applies only to providers when the Department has issued an order terminating existing authority to provide services:

When a provider files with the board an appeal from an order terminating the provider's authority to provide services related to the treatment of industrially injured workers, the department may petition the board for an order immediately suspending the provider's eligibility to participate as a provider of services to industrially injured workers under this title pending the final disposition of the appeal by the board. The board shall grant the petition if it determines that there is good cause to believe that workers covered under this title may suffer serious physical or mental harm if the petition is not granted. The board shall expedite the hearing of the department's petition under this section.

(Emphasis added). In this case, the Department denied an application for enrollment into the network. The plain language of RCW 51.52.075 limits its applicability to orders of the Department that terminate a provider's authority to treat injured workers. Because Dr. Thysell has never been admitted to the provider network, he had no existing authority to treat injured workers, so the Department's decision to deny his initial application was not a termination under RCW 51.52.075.

Contrary to Dr. Thysell's claims, it is not a matter of semantics to distinguish between denials of applications to join the provider network and terminations of existing authority to treat workers. *Contra* Appellant's Br. at 10. The Legislature has specifically decided to treat the two circumstances differently. *Compare* RCW 51.36.110(2) with RCW 51.36.110(3). And it extends RCW 51.52.075 only to terminations of existing authority by Department order. When the Legislature reformed the provider provisions of the Industrial Insurance Act, it required physicians to apply for a contract to be part of the provider network, RCW 51.36.010. It did not amend RCW 51.52.075 to cover denials of those applications, and RCW 51.52.075 should not be interpreted in a way contrary to its language and to the legislative intent to create a new

network aimed at increasing the quality of health care provided to injured workers.⁴

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⁴ Notably, Dr. Thysell is not challenging the constitutionality of the statute that establishes the new provider network, RCW 51.36.010.

authority to treat injured workers. Because Dr. Thysell has never been admitted to the provider network, he had no existing authority to treat injured workers, so the Department's decision to deny his initial application was not a termination under RCW 51.52.075.

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⁵ Notably, Dr. Thysell is not challenging the constitutionality of the statute that establishes the new provider network, RCW 51.36.010

1. The revisions to RCW 51.36.010 creating an entirely new network express legislative intent that a provider must first obtain approval to treat injured workers

Because Dr. Thysell has not satisfied network requirements for enrollment, he does not have “authority” to treat injured workers within the meaning of RCW 51.52.075. The Legislature mandated a new system for the medical treatment of injured workers by creating the provider network. To treat injured workers, a provider must first be approved pursuant to RCW 51.36.010. In interpreting RCW 51.36.010 and RCW 51.52.075, the goal is to discern and implement the Legislature’s intent. *See Ellensburg Cement Products, Inc. v. Kittitas Cnty.*, 179 Wn.2d 737, 743, 317 P.3d 1037 (2014). In doing so, the court looks first to the plain meaning of the language of the statutes. *Id.* When determining a statute’s plain meaning, the court considers all related statutes. *Tingey v. Hensch*, 159 Wn.2d 652, 657, 152 P.2d 1020 (2007). If the plain language of the statute is unambiguous, as here, the court’s inquiry is at an end. *Manary v. Anderson*, 176 Wn.2d 342, 352, 292 P.3d 96 (2013).

In this instance, RCW 51.36.010 manifests the Legislature’s intent to improve health outcomes for workers by creating a new system where doctors have to apply and qualify to treat injured workers. The Legislature directed the Department to “establish a health care provider network to treat injured workers.” RCW 51.36.010(1). To participate in

the new network, all physicians, regardless of past treating privileges, must first apply by completing the Department's provider application. RCW 51.36.010(2)(c). "Health care providers shall apply to the network by completing the department's provider application which shall have the force of a contract with the department to treat injured workers." RCW 51.36.010(2)(c). Once the network is established, the Legislature specified that "an injured worker may receive care from a non-network provider only for an initial office or emergency room visit." RCW 51.36.010(2)(b). The Legislature intended that only approved providers treat injured workers, just as it intended to improve the quality of health care provided to injured workers.

Under the revisions to RCW 51.36.010, a provider obtains the authority to treat workers when his or her application to the new network is approved. Because Dr. Thysell has never been approved for the new network, he has not obtained the authority to treat injured workers. The application of RCW 51.52.075 hinges on whether there is authority to treat injured workers. Under its plain language, RCW 51.36.010 does not convey authority to treat injured workers to a provider like Dr. Thysell if the Department has not approved the provider's application to treat injured workers. Dr. Thysell has not provided any authority that the Legislature intended to retain his services when it abolished the old system in favor of

a new one. Nor can he because none exists: such would be antithetical to the creation of a new system.

2. RCW 51.52.075 is not ambiguous and only applies when the Department has issued an order that terminates existing authority to treat workers

The Legislature, through its statutory revisions, determined Dr. Thysell is no longer authorized to treat patients. No order from the Department was required. Under RCW 51.52.075's plain language, the statute is triggered only if there is an appeal from "an *order* terminating the provider's *authority* to provide services " RCW 51.52.075 (emphasis added). As discussed above, under RCW 51.36.010, Dr. Thysell has no existing authority to treat workers. The Legislature ended the system that had previously granted Dr. Thysell that authority. RCW 51.36.010. The Department did not issue, and was not required to issue, a termination order because the Legislature had ended his ability to treat patients under the old system. Therefore, there was not an "order" that terminated Dr. Thysell's "authority" to treat patients, so RCW 51.52.075 does not apply.

Dr. Thysell incorrectly argues that it was the Department, not the Legislature, which ended his ability to treat through a notice to him of his denial into the new network and through its notice to his prior patients of their need to transition care. Appellant's Br. at 9. These notices conveyed

to injured workers that Dr. Thysell was not a network provider, and conveyed to Dr. Thysell that his application had been denied. CP 44, 45. The notices did not terminate his authority to treat under the new system because he never had that authority.

Additionally, as discussed below, by its plain language, RCW 51.52.075 only addresses an order “*terminating* the provider’s authority” and does not cover the *denial* of admission to treat in the provider network.

3. The Industrial Insurance Act consistently distinguishes between application denials and provider terminations

Throughout the Industrial Insurance Act, the Legislature distinguishes between denials of applications to treat injured workers and terminations of the authority to treat workers once a provider is in the provider network. An interpretation of RCW 51.52.075 that included denials would be contrary to the plain language used by the Legislature.

A review of the statutory scheme demonstrates the consistent distinction between an application denial and a termination from the network. It is initially provided for under RCW 51.36.010, where a provider “*shall apply* to the network by completing the department’s provider application.” RCW 51.36.010(2)(c) (emphasis added). It is further illustrated by the use of two distinct subsections in

RCW 51.36.110, the statute that grants the Department oversight of providers. Under the first, the Department may “[a]pprove or deny applications to participate as a provider of services furnished to industrially injured workers.” RCW 51.36.110(2) (emphasis added). In contrast, the subsection following allows the Department to “[t]erminate or suspend eligibility as a provider of services.” RCW 51.36.110(3) (emphasis added). The Legislature’s separate grant of authority for each show that decisions to deny applications are different from decisions to terminate providers.⁶

Dr. Thysell argues that RCW 51.52.075 should be interpreted to allow him to continue to treat injured workers despite the plain language, the legislative reform, and, as will be discussed later, numerous rules which prohibit such a result. He agrees that RCW 51.52.075 was not revised by the Legislature, but his arguments ask this Court to act as if it had been amended to include “application denials” within its purview. *See*

⁶ The distinction between the denial of a new application and the termination of existing authority also is found elsewhere in the statutory scheme. *See, e.g.*, RCW 51.36.010(2)(d) (requiring the development of separate criteria for “removal of a provider from the network”), RCW 51.36.010(6) (authorizing the Department to “remove” or “take other appropriate action regarding a provider’s participation” and again distinguishing between denial and removal with regard to waiting periods for reapplication); RCW 51.36.010(7) (authorizing the Department to “permanently remove” or “take other appropriate action” against a provider who exhibits a “pattern of conduct of low quality care”), RCW 51.36.130 (authorizing the Department to “deny applications of health care providers to participate as a provider of services to injured workers . . . or terminate or suspend providers’ eligibility to participate” for using false, misleading or deceptive advertising)

Appellant's Br. at 11. Courts do not add words to an unambiguous statute when the Legislature has chosen not to include that language. *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003). If the Legislature wanted denials to be included within RCW 51.52.075, it would have revised it. It did not.

The goal of statutory interpretation is to apply to words their ordinary meaning, within the statutory context, and with consideration of the legislative purpose or policies inherent in the statutory scheme. *Dep't of Ecology v. Campbell & Gwim, L.L.C.*, 146 Wn.2d 1, 10-11, 43 P.3d 4 (2002). The Legislature consistently used two different words, deny and terminate, to mean two different things. There is nothing ambiguous about this word choice. To interpret them as being synonymous and thereby granting Dr. Thysell a de facto enrollment into the new system would be contrary to a clear legislative intent that only approved network providers treat injured workers.

4. Interpreting RCW 51.52.075 to apply to denials would be inconsistent with numerous unchallenged rules that prohibit treatment by non-network providers

There is no authority that allows a provider to treat injured workers if that provider is not in the network. Instead, the opposite is true. The enabling statute requires that workers receive treatment only from network providers. RCW 51.36.010(2)(b). Numerous rules implementing the

statute also prohibit paying a non-network provider for treating injured workers:

- “As of January 1, 2013, [medical physicians] must be enrolled in the network with an approved provider agreement to provide and be reimbursed for care to injured workers in Washington state beyond the initial office or emergency room visit.” WAC 296-20-01010(2);
- “The department must approve the health care provider before the health care provider is eligible for payment,” WAC 296-20-015;
- “The department and self-insured employers will not pay for any care to injured workers, other than an initial visit, by a provider whose application has been denied,” WAC 296-20-01050;
- “For services or provider types where the department has established the provider network, the injured worker must select an attending provider from the provider network for all care beyond the initial visit,” WAC 296-20-065.

These rules implement RCW 51.36.010 and govern the provider network, and they prohibit the relief that Dr. Thysell seeks: that is, payment for treatment by a non-network provider. The rules were properly promulgated, and Dr. Thysell does not challenge these rules. See WAC 296-20-01010 to 296-20-01100. Properly promulgated rules have the “force and effect of law.” *Wingert v. Yellow Freight Sys., Inc.*, 146 Wn.2d 841, 848, 50 P.3d 256 (2002) (internal quotations omitted).

The Department’s statements about the network have been consistent with these rules and the enabling statute. Yet Dr. Thysell

argues that “the Department’s interpretation of its own regulations supports application of the statute here.” Appellant’s Br. at 11. He contends statements in rule-making, which also included the passage of WACs 296-20-01010 and 296-20-01050 quoted above, implied that the Department thought that RCW 51.52.075 would apply to denials of applications to join the network, contrary to the plain language of the statute itself. The Department made no such statement. Such a statement would be nonsensical within a rulemaking process that included proposed rules prohibiting such a result. The Department allowed for “provisional enrollment” for doctors pending the decision on the application.⁷ During rulemaking, the Department emphasized that it could not pay doctors before an application was approved, except under the limited circumstances of provisional enrollment:

The Department disagrees with the request to pay for care prior to an approved application. Paying only network providers is fundamental to the network establishment and goals of ensuring quality of care by approved providers. Provisional enrollment and the ability to pay for an initial visit are included to assure timely access for urgent care and firsts visits, plus ongoing treatment if a provider is not currently in the network.

⁷ Initially, provisional enrollment allowed payment for treatment before approval for 60 days so long as an application was pending. WAC 296-20-01020(7). Given the administrative burden of processing thousands of applications, an emergency rule was passed allowing payment for treatment from non-network providers until their application were processed. WSR 13-06-037 (March 1, 2013) (amending WAC 296-20-01020(7)(c)).

CP 87 (Concise Explanatory Statement). Ongoing treatment therefore may be provided only by a network provider, a provisionally enrolled provider, or certain providers where the network membership is not required, such as out-of-state providers.⁸

Throughout the rulemaking process, the Department has never suggested or contemplated that providers whose applications were denied could continue to provide care to injured workers. This would be contrary to the legislative intent behind the revisions to RCW 51.36.010. Instead, the Department stated that the appeal rights “that apply to any Department action remain in effect and contain the process for further appeal.” CP 85 (CES). These appeal rights are contained in RCW 51.52 and remain unaffected. CP 99 (CES). They are required to be printed on every order issued by the Department. RCW 51.52.050(1). Pointing to the chapter that governs appeals is different from promising that a certain section within that chapter will apply to a specific appeal.

With some exceptions not applicable here, the Department’s rules do not allow a non-network provider to treat injured workers. *See* WAC 296-20-01010(2); WAC 296-20-015; WAC 296-20-01050;

⁸ WAC 296-20-01010 defines the scope of the network to include providers located in the state. Out-of-state providers or those whose practice is not included within the scope of the network need not be an approved provider to provide ongoing care. Those providers would still be subject to the “old system” and the requirements of RCW 51.52.075 if the Department issued an order terminating their authority to treat.

WAC 296-20-065. The Department did not say anything inconsistent with these rules in rulemaking. But even assuming it had, as Dr. Thysell argues, the plain language of the adopted rules governs, and he provides no authority that would allow the Department to ignore its own properly-adopted rules. Under those rules, which are authorized by and consistent with RCW 51.36.010, Dr. Thysell may not treat injured workers because he is not a member of the provider network.

5. Liberal interpretation cannot provide Dr. Thysell with a contract that is precluded by statute and rule

Public policy supports interpreting the statutes at issue here in a manner that promotes the Legislature's policy of requiring only qualified network providers to treat injured workers. Dr. Thysell argues that under a liberal interpretation of Industrial Insurance Act he should be able to treat injured workers even though he is not admitted to the provider network. *See* Appellant's Br. at 10. Liberal construction does not apply because the terms of the Industrial Insurance Act are unambiguous here. *See Harris v. Dep't of Labor & Indus.*, 120 Wn.2d 461, 474, 843 P.2d 1056 (1993) (the liberal construction rule does not apply to unambiguous terms in the Industrial Insurance Act).

In any event, the liberal construction rule does not aid Dr. Thysell. The provisions of the Act are 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. Liberal construction means resolving all doubts in favor of the worker. *Harry v. Buse Timber & Sales, Inc.*, 166 Wn.2d 1, 8, 201 P.3d 1011 (2009). RCW 51.12.010 thus encompasses the same commitment to the health and welfare of injured workers as was included by the Legislature in its revisions to RCW 51.36.010(1) and creation of the provider network.

Quality medical care for injured workers is contingent on qualified medical personnel. The nature of a provider’s relationship with injured workers necessitates the Legislature ensuring that only qualified network providers treat injured workers. Dr. Thysell argues that the Industrial Insurance Act reduces worker suffering by fostering the relationship between a treating physician and an injured worker, so liberal construction requires his denial to be interpreted as a termination. Appellant’s Br. at 10. None of the statutes Dr. Thysell cites supports his assertion that the Legislature cannot work to increase the quality of medical care by requiring providers to meet standards of care before treating injured workers. The Department agrees that attending physicians are entitled to special consideration in rendering opinions about care (*Hamilton v. Dep’t of Labor & Indus.*, 111 Wn.2d 569, 571, 761 P.2d 618 (1988)), which

underscores how important it is for the new system to function. The Legislature decided that the old system was not adequate to protect injured workers, and thus providers had to apply and meet rigorous standards to treat injured workers. A liberal construction of the Industrial Insurance Act supports fostering that legislative decision.

Moreover, Dr. Thysell does not explain how liberal construction can unilaterally confer to him the benefits of a contract with the Department. *See* RCW 51.36.010 (“Health care providers shall apply to the network by completing the department's provider application which shall have the force of a contract with the department to treat injured workers.”). The Department denied the application so no contract was entered into. There is no language within RCW 51.52.075 that can be liberally construed to create a contractual relationship in direct contravention of RCW 51.36.010, which necessitates an application and approval process as the means of contract creation.

No party alleges the statute is ambiguous. But if it were found to be ambiguous and then liberally construed to reduce the “suffering and economic loss” to injured workers, such construction would support the Department’s interpretation of the statute: RCW 51.52.075 does not apply to application denials. Providers are denied for any number of reasons, but the Legislature’s stated intent was to increase the quality of care

provided to injured workers and thereby reduce suffering and economic loss. RCW 51.36.010(1). Dr. Thysell is a provider who was found to have dangerous and harmful prescribing practices in his treatment of injured workers. CP 169-70. It would be contrary to legislative intent to allow providers who have been denied for such reasons to treat injured workers pending appeal. This interpretation and application of the statutes further the Legislature's purpose in requiring providers to apply to become network providers before treating workers and the Legislature's purpose increasing the quality of medical care. The Court should defer to this interpretation. *See PT Air Watchers*, 179 Wn.2d at 925 (great deference given to administering agency's interpretation of a statute). Dr. Thysell should not be allowed to treat injured workers pending his appeal of a decision finding him ineligible to do so.

C. Dr. Thysell Does Not Have A Constitutionally Protected Interest In Providing Potentially Harmful Care To Injured Workers

The Department has not violated any due process right of Dr. Thysell. His appeal implicates no constitutionally protected interest subject to a due process analysis. Rather, his entire constitutional argument rests on his assertion that RCW 51.52.075 both applies to his appeal and additionally conveys to him a constitutionally protected interest—a "legitimate claim of entitlement" to treat injured workers.

Appellant's Br. at 12. This argument begs the question by assuming the application of RCW 51.52.075. Dr. Thysell provides no other basis for his assertion of a constitutionally protected interest. Therefore, if the Court determines that RCW 51.52.075 does not apply, it need not reach this argument. *Benchmark Land Co v. City of Battleground*, 146 Wn.2d 685, 694, 49 P.3d 860 (2002) (court does not reach constitutional issue if it can decide case on other than constitutional grounds).

While the Court need not reach this argument, if it does, no violation of due process should be found. First, Dr. Thysell does not have a vested right or protected interest in treating injured workers; he simply has the unilateral expectation of a contract for which he was found ineligible. Second, the statute that he relies on is procedural in nature and procedural statutes cannot create separately protected interests. Third, the statute does not limit discretion in such a way as to create a substantive right. Even if it did, that right would only extend to providers already approved to the network; Dr. Thysell is not approved.

- 1. Procedural due process is not implicated because Dr. Thysell does not have a vested right or constitutional interest in a potential contract to treat injured workers**

Dr. Thysell has not demonstrated a legitimate claim of entitlement necessary to allege a deprivation of due process. A party alleging a

deprivation of due process must first establish a legitimate claim of entitlement. *Campos v. Dep't of Labor & Indus.*, 75 Wn. App. 379, 389, 880 P.2d 543 (1994). Legitimate claims of entitlement entail vested liberty or property rights. *Id.* at 389; *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 142, 744 P.2d 1032, 750 P.2d 254 (1988). A vested right must be "something more than a mere expectation based upon an anticipated continuance of the existing law; *it must have become a title, legal or equitable, to the present or future enjoyment of property, a demand, or a legal exemption from a demand by another.*" *Godfrey v. State*, 84 Wn.2d 959, 962, 530 P.2d 630 (1975) (emphasis in original).

Dr. Thysell alleges a protected interest in the physician-patient relationship. Appellant's Br. at 13. Dr. Thysell's previous ability to treat injured workers under the old system did not create either a vested right or a constitutional interest in treating injured workers.⁹ He provides no authority, other than his arguments related to RCW 51.52.075 addressed below, to support this as a protected interest. What Dr. Thysell seeks is the privilege of a contract with the state to provide services to injured workers. RCW 51.36.010(2)(c) (potential providers "shall apply to the network by completing the Department's provider application which shall

⁹ Importantly, injured workers do not have a right to this relationship either: the revisions to RCW 51.36.010 allow an injured worker to see the provider he or she chooses *within* the provider network. RCW 51.36.010(2)(a) and (b).

have the *force of a contract* with the Department to treat injured workers.”) (emphasis added). The desire for or unilateral expectation of a contract is insufficient to create a protected interest. *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972). There is no constitutionally protected interest in treating a subset of patients covered by the Industrial Insurance Act. *See Cohen v. Banc*, 853 F. Supp. 620 (E.D.N.Y. 994) (finding it “well-established that there is no property interest in continued participation in the Medicaid program”) (citing *Conroy v Boston Edison Co.*, 758 F. Supp. 54 (D. Mass. 1991)).

It was in fact the Legislature, not the Department, which ended Dr. Thysell’s ability to treat injured workers when it revised RCW 51.36.010. “[T]he legislative process provides all the process that is due.” *Holbrook, Inc. v. Clark Cnty.*, 112 Wn. App. 354, 365, 49 P.3d 142 (2002) (citing *In re Metcalf*, 92 Wn. App. 165, 176, 963 P.2d 911 (1998)). The Legislature can change the system and such a change does not implicate due process. *See Atkins v. Parker*, 472 U.S. 115, 129-30, 105 S. Ct. 2520, 86 L. Ed. 2d 81 (1985); *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445-46, 36 S. Ct. 141, 60 L. Ed. 372 (1915); *75 Acres, LLC v. Miami-Dade Cnty.*, 338 F.3d 1288, 1294 (11th Cir. 2003); *Hoffman v. City of Warwick*, 909 F.2d 608, 620 (1st Cir. 1990). Since Dr. Thysell’s loss of treatment privileges resulted from legislative

reforms, his argument that he has been denied due process because of those reforms fails.

2. RCW 51.52.075 is a procedural statute that does not create a separate protected interest

RCW 51.52.075 does not create a separate protected interest. While state statutes or regulations can create due process liberty interests where none would otherwise have existed, this has not occurred here.¹⁰ First, the statute in question is a procedural statute that does not impose substantive requirements. *See In re Cashaw*, 123 Wn.2d 138, 140, 866 P.2d 8 (1994). It allows the Department *may* petition for an order, but only when it has already issued an order that terminates a provider's authority to treat, and then it requires the Board to hear the matter in an expedited manner. RCW 51.52.075. "Procedural laws do not create liberty interests; only substantive laws can create those interests." *Id.* at 145 (citing *Olim v. Wakinekona*, 461 U.S. 238, 250, 130 S. Ct. 1741, 1748, 75 L. Ed. 2d 813 (1983)). Process is not an end in itself; rather, its purpose is to protect an individual's legitimate claim of entitlement to a substantive interest. *Id.* at 145. If a procedural statute is not followed, the

¹⁰ Dr. Thysell has not identified whether he is alleging a liberty or property interest. *See* Appellant's Br. at 13. The analysis is largely the same *Conrad v Univ of Wash*, 119 Wn.2d 519, 529, 834 P.2d 17 (1992).

remedy is not to find a violation of due process, but rather, to remand to the Board to follow the procedure. *Id.* at 150.¹¹

3. RCW 51.52.075 does not limit discretion to require mandatory results, so no substantive interest is created

RCW 51.52.075 does not create a substantive interest because it does not limit discretion to require a mandatory result. To create a protected substantive interest, the state law must place limitations on official discretion. *Olm*, 461 U.S. at 249. To limit official discretion, the law must contain “substantive predicates” to the exercise of discretion and also include “specific directives to the decision maker that if the regulations’ substantive predicates are present, a particular outcome must follow.” *Cashaw*, 123 Wn.2d at 144. Thus, “laws that dictate particular decisions given particular facts can create liberty interests, but laws granting a significant degree of discretion cannot.” *Id.* Statutes that merely create a procedure do not create liberty interests. *Id.* at 146 (citing *Olm*, 61 U.S. at 250).

In this case, nothing in RCW 51.52.075 creates a property or liberty interest in treating injured workers. On its face, RCW 51.52.075 only creates a procedure by which the Department may seek suspension of

¹¹ Dr. Thysell’s requested relief is for judgment that the Department violated due process by not petitioning under RCW 51.52.075, and he argues he should therefore be allowed to treat injured workers during his appeal. This is not the proper relief: if the Court were to determine that RCW 51.52.075 applies, this case should be remanded to the Board for such a petition.

a physician's existing authority to treat injured workers when the termination of that authority has been appealed; it does not create a substantive right to treat injured workers pending appeal in that situation or any other. The "substantive predicates" for admission that create the right to treat injured workers were left up to the Department to adopt. *See* RCW 51.36.010(2)(c); WAC 296-20-01030; WAC 296-20-01050. As such, RCW 51.52.075 does not create a liberty interest. *Cashaw*, 123 Wn.2d at 144.

Even if this Court were to find that RCW 51.52.075 creates a protected interest, the predicates for applying RCW 51.52.075 have not been met here: Dr. Thysell (1) has no authority to treat (2) that was terminated by order of the Department.

D. Assuming That Dr. Thysell Has A Protected Interest In Treating Injured Workers, The Department's Procedures Comport With Due Process

The Department does not concede that Dr. Thysell has identified any cognizable constitutional interest that can serve as the threshold predicate for his due process claim. Even if Dr. Thysell could show a constitutionally protected interest, separate from RCW 51.52.075, to treat injured workers, the Department already provided him with adequate due process. The "pre-deprivation" process the Department used in considering his application comports with due process because it afforded

him both notice and an opportunity to be heard at a meaningful time and in a meaningful manner.

Due process is a flexible concept and calls for such procedural protections as the particular situation demands. *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972). In reviewing a procedural due process claim, courts balance (1) the private interest that will be affected; (2) the risk of erroneous deprivation of that interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that substitute or additional procedural requirements would entail. *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 903, 47 L. Ed. 2d 18 (1976).

It is unclear what relief Dr. Thysell requests based on his claim of a violation of due process. See Appellant's Br. at 13. His claim of a violation of due process pursuant to *Mathews* suggests a problem with the Department's application review process and suggests the attendant Board appeal procedures are insufficient: "A claim to a pre-deprivation hearing as a matter of constitutional right rests on the proposition that full relief cannot be obtained at a post-deprivation hearing." *Mathews*, 424 U.S. at 331. If this Court were to find further procedure was due, the remedy

would be to remand to the Department for a more extensive “pre-deprivation” process. But review of the *Mathews* factors shows that the Department’s procedures comported with due process.

1. Dr. Thysell’s interest in treating injured workers is limited

The nature of any interest of Dr. Thysell’s is limited, and as such, the Court should not weigh it heavily. Dr. Thysell provides no authority for his contention that he has a protected interest in the physician-patient relationship beyond his arguments related to RCW 51.52.075. *See* Appellant’s Br. at 13. For the sake of argument, the Department will assume Dr. Thysell has such an interest in treating injured workers. The first factor a court considers in determining whether the procedures employed comport with due process is the nature of the private interest at stake. *Mathews*, 424 U.S. at 335. The degree of the potential deprivation is a factor considered in assessing the validity of an administrative decision-making process. *Id* at 342.

Here, the degree of potential deprivation is small: it relates to a limited subset of patients Dr. Thysell seeks to treat for a limited duration of care. Nothing precludes Dr. Thysell from having a primary care relationship with anyone. He maintains his professional license and can practice accordingly. This is rather unlike the situation in *Mathews*, where

the disability recipient's likely sole means of support was terminated. *See Mathews*, 424 U.S. at 342 (conceding the hardship imposed by an erroneous termination of disability benefits may be significant yet not requiring a pre-deprivation evidentiary hearing). Moreover, the interest itself is merely an unilateral hope that a contract may be granted; as such it is a limited interest. Accordingly, applying the first *Mathews* factor to this case, Dr. Thysell's private interest is limited.

2. The Department's procedures and the subsequent administrative process limit the risk of erroneous deprivation

The Department's multi-level review process, including multiple independent peer review panels, sufficiently limits the risk of erroneous deprivation. This process satisfies the second *Mathews* factor, which requires consideration of the risk of erroneous deprivation through the pre-deprivation procedures used, and the probable value, if any, of additional or substitute procedural safeguards. *Mathews*, 424 U.S. at 335. The pre-deprivation process does not have to include a full evidentiary hearing to satisfy this standard. *Mathews*, 424 U.S. at 343. The essential principle of due process is the right to notice and a meaningful opportunity to respond. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546, 105 S. Ct. 1487 (1985). There is no requirement that this opportunity be in person; the opportunity to respond in writing may be sufficient. *Id.* The Department's

application review process, reconsideration process with the ability to respond in writing and submit additional materials, the availability of a subsequent separate administrative appeal and full judicial review are sufficient safeguards to protect physicians from the risk of erroneous deprivation.

Applications to join the provider network are subjected to a multi-level review process. CP 161-65. Before any decision, Dr. Thysell's application was considered by (1) an internal Department reviewer; (2) the associate medical director; (3) a separate and independent panel of peer reviewers; and finally by (4) the medical director, a senior clinician. CP 161-65. When the initial decision was made to deny his application, Dr. Thysell was provided with the administrative citations underlying the denial. CP 164. He was invited to request reconsideration of the decision and to provide any information and documentation he found relevant. CP 164; WAC 296-20-01090. Dr. Thysell sought reconsideration, and a second panel reviewed his application. CP 169. After two of his patients and one of his colleagues submitted additional materials, his application and reconsideration materials were reviewed by a third panel. CP 169. Both of these subsequent panels recommended denial, and Dr. Franklin followed that recommendation. CP 169-70.

Further, the post-deprivation review process fully safeguards Dr. Thysell's interest before any decision is final.¹² Upon affirmation of Dr. Franklin's final denial determination, Dr. Thysell had the right to appeal to the Board. RCW 51.52.050, .060; WAC 296-20-01090(4). At the Board, he has been afforded a hearing before an unbiased tribunal. RCW 51.52.010; WAC 263-12-091. As part of that hearing, he has enjoyed the full panoply of procedural safeguards: both the rules of civil procedure and the rules of evidence apply in hearings before the Board. WAC 263-12-115(4); WAC 263-12-125. He has had the opportunity to present witnesses, cross-examine witnesses against his enrollment, and to receive a written decision based on the hearing record. RCW 51.52.100; WAC 263-12-135; WAC 263-12-140. If dissatisfied with the industrial appeals judge's decision, Dr. Thysell may seek review by the full Board. RCW 51.52.104; WAC 263-12-145. If he remains aggrieved by the Board's decision, he may further appeal to the superior court, the Court of Appeals, and the Supreme Court. RCW 51.52.050; WAC 296-20-01090(4). Given these procedural protections, Dr. Thysell has been protected against erroneous deprivation.

¹² In reviewing what formality and procedures are required of a pre-deprivation hearing, the court also considers the nature of and existence of post-termination procedures. *Loudermill*, 470 U.S. at 546-48 (finding a pre-termination opportunity to respond coupled with a post-termination administrative procedure sufficient); *Mathews*, 424 U.S. at 349 (granting substantial weight to administrators of program when right to evidentiary hearing and judicial review follow before decision becomes final).

3. The Department has a significant interest in protecting injured workers

The Department's interest in protecting injured workers is more significant than Dr. Thysell's limited interest in treating a subset of patients. The third *Mathews* factor considers the public's interest in both maintaining the current administrative procedures and any other societal costs associated with requiring a pre-deprivation evidentiary hearing. *Mathews*, 424 U.S. at 335, 347. The Department's interest, and therefore the public's interest, is defined by statute: it has an interest in improving the quality of medical treatment received by injured workers, preventing disability and reducing loss of family income for workers, and lowering labor and insurance costs for employers. *See* RCW 51.36.010(1). In contrast to Dr. Thysell's limited interest in gaining access to the provider network, the public's interest is broad and substantial.

The provider network was created as remedial legislation. *See* Laws of 2011, ch. 6, § 1. To ensure that injured workers receive high quality medical care, the Legislature determined greater controls were needed over which providers would be permitted to treat injured workers, and it directed the Department to create rigorous new standards for admission to the network. RCW 51.36.010(1), (2)(c), (10). The Department must now apply those standards to determine who is approved

to participate as a provider of services furnished to industrially injured workers. RCW 51.36.110(2).

For its part, in compliance with the Legislature's directives, the Department undertook a two-year, multi-million dollar project to set up the provider network that consisted of hiring staff, forming an advisory group, developing and adopting regulations, purchasing and changing information technology, and processing applications. CP 160. The application review process is already extensive and no deficiencies have been identified. As of November 2013, the Department had accepted over 18,000 providers into the provider network. CP 169. The Department has denied only 51 applications. CP 169. Not all of these individuals have appealed to the Board, but all have the right to a hearing on the denial of their application.

The state has a strong interest in ensuring the health and safety of injured workers. As mandated by the Legislature, the Department has acted to protect that interest by establishing a provider network, implemented with appropriate standards and meaningful procedural safeguards that satisfy all constitutional due process requirements.

Thus, if this Court does decide that Dr. Thysell has a protected interest, it should also decide that the Department's procedures, especially when coupled with the opportunity for administrative and judicial review,

provided all the process that was due. *See Loudermill*, 470 U.S. at 546-48; *Mathews*, 424 U.S. at 349. Such a result protects Dr. Thysell's rights while allowing the Department to effectuate the directive of the Legislature to increase the quality of care provided to injured workers.

VII. CONCLUSION

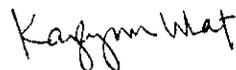
Dr. Thysell did not exhaust his administrative remedies before seeking judicial relief in circumvention of the exhaustion doctrine. The Department therefore asks this Court to affirm denial of the declaratory judgment action on this ground.

In the alternative, the Department asks this Court to affirm the superior court's denial of declaratory relief because RCW 51.52.075 does not apply. The Legislature has required all physicians who wish to be paid under the workers' compensation system for treating injured workers to apply to the provider network. A denial of such an application does not trigger the additional procedures under RCW 51.52.075, which only applies to terminations of existing authority to provide services. The

revised statute, RCW 51.36.010, and numerous unchallenged rules prohibit the relief that Dr. Thysell requests: non-network providers may not treat injured workers. Finally, Dr. Thysell has not shown he has a protected interest nor has he demonstrated a violation of due process in the consideration and denial of his application.

RESPECTFULLY SUBMITTED this 5th day of June, 2014.

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NO. 89638-1

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SUPREME COURT OF THE STATE OF WASHINGTON

FREDERICK THYSELL, M.D.,

Appellant,

v.

STATE OF WASHINGTON
DEPARTMENT OF LABOR
AND INDUSTRIES.

Respondent.

DECLARATION OF
MAILING

DATED at Tumwater, Washington:

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I mailed the Department's Brief of Respondent and this Declaration of Mailing to the parties on record by depositing a postage prepaid envelope in the U.S. mail addressed as follows and via email:

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DATED this 5th day of June, 2014.



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Attached for filing is the Department's Brief of Respondent and Declaration of Mailing.

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