

No. 49659-3

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

RONALD V. MA'AE, Appellant,

v.

DEPARTMENT OF LABOR & INDUSTRIES
OF THE STATE OF WASHINGTON,

Respondent.

BRIEF OF APPELLANT

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I. ASSIGNMENT OF ERRORS

Ronald Ma'ae assigns error to the following rulings made by the Thurston County Superior Court:

1. WAC 296-4-400 did not exceed the statutory authority of the Department under RCW 34.05.570(2)(c). RCW 51.36.010 gave the Department the authority to amend WAC 296-14-400 to require that only network providers file an application to reopen a claim under RCW 51.32.160. The rule is consistent with the Department's statutory authority. The Department did not exceed its authority under RCW 51.36.010(2)(b) as the preparation and filing of a reopening application encompasses care of a worker.

2. WAC 296-14-400 is not arbitrary and capricious under RCW 34.05.570(2)(c). The rulemaking file reflects that the Department's rulemaking process and outcome was not arbitrary and capricious.

3. WAC 296-14-400 is a valid rule.

II. STATEMENT OF ISSUES

1. Whether the Department exceeded the authority granted to it by the legislature when it promulgated the amendment to WAC 296-14-400 that required that reopening applications only be filed by network providers? (Assignment of Error 1)

2. Whether the Department was arbitrary and capricious when it promulgated the amendment to WAC 296-14-400 that required that reopening applications only be filed by network providers? (Assignment of Error 2).

3. Whether the portion of WAC 296-14-400 which requires that only network providers complete reopening applications is a valid rule? (Assignment of Error 3).

III. PROCEDURAL HISTORY

Ronald V. Ma'ae (hereinafter Mr. Ma'ae) sustained an industrial injury on January 19, 2007. Following the injury, he sought medical attention and filed an application for benefits with the Washington Department of Labor and Industries (hereinafter Department). The Department allowed the claim on February 5, 2007. The Department issued an Order closing the claim on July 24, 2009.

On April 14, 2014, Mr. Ma'ae filed an application to reopen his claim for aggravation of his industrial injury. On September 5, 2014, the Department issued an Order denying the reopening application on the basis that no medical documentation had been provided to the Department. On that same date the Department sent a letter to Mr. Ma'ae advising him that his reopening application had been denied because the doctor listed on his

reopening application, Dr. H. Richard Johnson, was not a member of the Department's provider network. Mr. Ma'ae appealed on September 30, 2014 to the Board of Industrial Insurance Appeals (hereinafter "Board").

The Department filed a Motion for Summary Judgment dated March 6, 2015 arguing that there was no issue of material fact because it was uncontested that Dr. Johnson was not a network provider. The Department further argued that the Board did not have the authority to determine the validity of the rules promulgated by the Department under the authority of the legislature.

Mr. Ma'ae argued that the promulgation of WAC 296-14-400 conflicted with the underlying statute, RCW 51.36.010, and therefore the Department had exceeded its authority when it determined that reopening applications could only be completed by network providers. Mr. Ma'ae also argued that there was an issue of material fact in that he was contending that his industrial injury had become aggravated and he had provided adequate medical documentation to support his claim and, therefore, liberal construction of Title 51 called for his case to be heard on its merits.

Oral arguments were heard by Industrial Appeals Judge Kathleen Stockman (hereinafter IAJ) on April 6, 2015. On June 25, 2015, the IAJ issued her Proposed Decision and Order granting the Department's motion for Summary Judgment, and holding that because Dr. Johnson was not a

member of the provider network he could not complete and file a reopening application pursuant to WAC 296-14-400 and RCW 51.36.010.

Mr. Ma'ae filed a Petition for Judicial Review and Declaratory Judgment with Thurston County Superior Court. Mr. Ma'ae contended that WAC 296-14-400 conflicts with RCW 51.36.010 in that it exceeds the authority granted the Department under the statute and interferes with and impairs his rights under RCW 51.36.010 to seek care from a non-network provider for an initial office or emergency room visit.

Mr. Ma'ae also appealed the IAJ's decision to the Board. On November 23, 2015, the Board reversed and remanded, holding that WAC 296-14-400 was an interpretive rather than a legislative rule, and therefore, not a binding determination by the Department regarding who may file an application to reopen. The Board found that RCW 51.36.010 and RCW 51.32.160 do not limit the authority to file an application to reopen to Department network providers. The Board further found that the reopening application filed by Mr. Ma'ae was a valid application and remanded it to the Department to consider the medical information, including the information received from Dr. Johnson, and to issue a further order allowing or denying the reopening application. The Department appealed that decision to Pierce County Superior Court.

The Department filed a motion to change venue in their appeal of the Board's decision to Pierce County Superior Court to consolidate that case with Mr. Ma'ae's Petition for Judicial Review and Declaratory Judgment in Thurston County Superior Court. Mr. Ma'ae opposed the motion, arguing that the issues were two separate and distinct issues.

The issue before the Pierce County Superior Court was whether the Board was correct in determining that the requirement that reopening applications be completed by network providers in WAC 296-14-400 was an interpretive rule and, therefore, the Board had the discretion to disregard it. Because the Board, as stated in its November 23, 2015 decision, did not have the authority to determine the legality of the Department's legislative rules, any decision made in Pierce County Superior Court would not reach the validity of WAC 296-14-400.

The issue before the Thurston County Superior Court was whether the Department overstepped the authority granted it in RCW 51.36.010 in promulgating WAC 296-14-400? But a determination by the Thurston County Superior Court that the Department had indeed overstepped its bounds in promulgating WAC 296-14-400, would not reach the issue of whether the Board was correct in determining that the rule was interpretive and that the Board had the authority to disregard it.

The Honorable Judge Frank E. Cuthbertson in Pierce County Superior Court denied the Department's Motion for a Change of Venue. Arguments in Thurston County were heard by the Honorable Judge Mary Sue Wilson on September 23, 2016. Judge Wilson found that (1) WAC 296-14-400 did not exceed the statutory authority of the Department under RCW 34.05.570(2)(c), (2) WAC 296-14-400 was not arbitrary and capricious under RCW 34.05.570(2)(c), and (3) that WAC 296-14-400 was a valid rule, and an order was so entered on October 20, 2016. The October 20, 2016 Order and Judgment of the Honorable Mary Sue Wilson underlies the appeal herein.

The Honorable Judge Frank E. Cuthbertson affirmed the Board's decision on December 20, 2016 in Pierce County Superior Court. The Department has appealed that decision to this Court under Cause No. 50130-9. The Board's November 23, 2015 decision, and Pierce County Superior Court's affirmation notwithstanding, Mr. Ma'ae maintains that the requirement in WAC 296-14-400 that reopening applications only be filed by network providers is ultra vires in that it exceeds the scope and intent of the underlying statute RCW 51.36.010 and conflicts with RCW 51.32.160, the statute which sets out the parameters for aggravations of industrial injuries.

IV. INTRODUCTION AND SUMMARY

The Industrial Insurance Act of the State of Washington (Hereinafter “Act”) was enacted in 1911. The Act essentially did away with the common-law system governing the remedy of workers against employers for injuries received in the course of their employment, “finding that due to modern industrial conditions the remedies were economically unwise and unfair.” RCW 51.04.010. The Act is a compromise between employers and their workers. *Dennis v. Dept. of Labor & Indus.*, 109 Wn.2d 467, 469, 745 P.2d 1295 (1987). In exchange for limited liability, the employer pays on some claims that have no common law liability. *Id.* at 469. And in exchange for a lower rate of recovery than he or she could have received in a civil action, the worker is assured of a remedy without having to fight for it. *Id.*

This case arises out of a workplace injury and thus the Act applies by and through RCW Title 51. The Act is remedial in nature and is to be liberally construed in order to achieve its purpose of providing compensation to all covered employees injured in their employment. *Dennis*, 109 Wn.2d at 470; see also RCW 51.12.010; see also *Montoya v. Greenway Aluminum Co.*, 10 Wn. App. 630, 634, 519 P.2d 22 (1974). The Act differs substantially from other administrative laws. It is the product of a compromise between employers and workers through which employers

accepted limited liability for claims that might not have been compensable under the common law, and workers forfeited common law remedies in favor of sure and certain relief. RCW 51.04.010; *Cowlitz Stud Co. v. Clevenger*, 157 Wn.2d 569, 572-573, 141 P.3d 1 (2006). It is important to note that, “the Act was written to provide sure and certain relief to injured workers.” *Dennis*, 109 Wn.2d at 470. “All doubts are to be resolved in favor of the injured worker.” *Id.*

It has been noted that it is not any particular portion of Title 51 that is to be liberally construed. Rather, it is the entire statutory scheme that receives the benefits of liberal construction. Each statutory provision should be read in reference to the whole act. For instance, “We construe related statutes as a whole, trying to give effect to all the language and to harmonize all provisions.” *Guijosa v. Wal-Mart Stores, Inc.*, 101 Wn. App. 777, 792, 6 P.3d 583 (2000), *aff’d*, 144 Wn.2d 907, 32 P.3d 250 (2001).

In *Cockle v. Department of Labor & Industries* the Court observed the “overarching objective” of Title 51 is to reduce to a minimum “the suffering and economic loss arising from injuries and/or death occurring in the course of employment.” *Cockle v. Dept. of Labor & Indus.*, 142 Wn.2d 801, 16 P.3d 583 (2001) (quoting RCW 51.12.010) (Emphasis added). “Also, on a practical level, this Court has recognized that the workers’ compensation system should continue “serv[ing] the goal of swift and

certain relief for injured workers.” *Cockle*, 142 Wn.2d at 822, 16 P.3d 583 (quoting) *Weyerhaeuser Co. v. Tri*, 117 Wn.2d 128, 138, 814 P.2d 629 (1991).

Additionally, “where reasonable minds can differ over what Title 51 provisions mean, in keeping with the legislation’s fundamental purpose, the benefits of the doubt belongs to the injured worker.” *Id.* at 811. *See Clauson v. Dept. of Labor & Indus.*, 130 Wn.2d 580, 586, 925 P.2d 624 (1996); *see also McClelland v. ITT Rayonier Inc.*, 65 Wn. App. 386, 828 P.2d 1138 (1992).

Mr. Ronald V. Ma’ae asserts that the amendment of WAC 296-14-400 which forbade non-network providers from filing reopening applications exceeded the statutory authority granted to the Department under RCW 51.36.010 and/or was arbitrary and capricious. He requests that the Order of Thurston County Superior Court of October 20, 2016 be reversed by finding the amendment that restricted the filing of reopening applications only to members of the provider network was not in line with the intent of the legislature when creating the provider network, and therefore, is not a valid rule.

V. STATEMENT OF FACTS

Mr. Ma'ae sustained an industrial injury on January 19, 2007. (CP 9). Following the injury, he sought medical attention and filed an application for benefits with the Department. (CP 9). The Department allowed the claim on February 5, 2007. (CP 9). The Department issued an Order closing the claim on July 24, 2009. (CP 9). On April 14, 2014, Mr. Ma'ae filed an application to reopen his claim for aggravation of his industrial injury. (CP 9). On September 5, 2014, the Department issued an Order denying the reopening application on the basis that no medical documentation had been provided to the Department. (CP 9). On that same date the Department sent a letter to Mr. Ma'ae advising him that his reopening application had been denied because the doctor listed on his reopening application, Dr. H. Richard Johnson, was not a member of the Department's provider network. (CP 9). Mr. Ma'ae appealed on September 30, 2014 to the Board. (CP 9). The Department filed a Motion for Summary Judgment dated March 6, 2015 arguing that there was no issue of material fact because it was uncontested that Dr. Johnson was not a network provider. (CP 9). The Department further argued that the Board did not have the authority to determine the validity of the rules promulgated by the Department under the authority of the legislature. (CP 9).

Mr. Ma'ae argued that the promulgation of WAC 296-14-400 conflicted with the underlying statute, RCW 51.36.010, and therefore the Department had exceeded its authority when it determined that reopening applications could only be completed by network providers. (CP 9). Mr. Ma'ae also argued that there was an issue of material fact in that he was contending that his industrial injury had become aggravated and he had provided adequate medical documentation to support his claim and, therefore, liberal construction of Title 51 called for his case to be heard on its merits. (CP 9).

Oral arguments were heard by Industrial Appeals Judge Kathleen Stockman (hereinafter IAJ) on April 6, 2015. (CP 32). On June 25, 2015, the IAJ issued her Proposed Decision and Order granting the Department's motion for Summary Judgment, and holding that because Dr. Johnson was not a member of the provider network he could not complete and file a reopening application pursuant to WAC 296-14-400 and RCW 51.36.010. (CP 34).

Mr. Ma'ae filed a Petition for Judicial Review and Declaratory Judgment with Thurston County Superior Court. (CP 7). Mr. Ma'ae contended that WAC 296-14-400 conflicts with RCW 51.36.010 in that it exceeds the authority granted the Department under the statute and interferes with and impairs his rights under RCW 51.36.010 to seek care

from a non-network provider for an initial office or emergency room visit. (CP10).

Concurrently, Mr. Ma'ae also appealed the IAJ's decision to the Board. (CP 288). On November 23, 2015, the Board reversed and remanded, holding that WAC 296-14-400 was an interpretive rather than a legislative rule, and therefore, not a binding determination by the Department regarding who may file an application to reopen. (CP 294-295) The Board found that RCW 51.36.010 and RCW 51.32.160 do not limit the authority to file an application to reopen to Department network providers. (CP 293). The Board further found that the reopening application filed by Mr. Ma'ae was a valid application and remanded it to the Department to consider the medical information, including the information received from Dr. Johnson, and to issue a further order allowing or denying the reopening application. (CP 293-294). The Department appealed that decision to Pierce County Superior Court.

Arguments in Thurston County were heard by the Honorable Judge Mary Sue Wilson on September 23, 2016. (CP 335). Judge Wilson found that (1) WAC 296-14-400 did not exceed the statutory authority of the Department under RCW 34.05.570(2)(c), (2) WAC 296-14-400 was not arbitrary and capricious under RCW 34.05.570(2)(c), and (3) that WAC 296-14-400 was a valid rule, and an order was so entered on October 20,

2016. (CP 335-336). The October 20, 2016 Order and Judgment of the Honorable Mary Sue Wilson underlies the appeal herein. (CP 340).

VI. STANDARD OF REVIEW

“The meaning of a statute is a question of law reviewed de novo.” *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wash.2d 1, 9, 43 P.3d 4 (2002). “The court's fundamental objective is to ascertain and carry out the Legislature's intent, and if the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent.” *Id.* at 9-10. “(A) term in a regulation should not be read in isolation but rather within the context of the regulatory and statutory scheme as a whole; statutory provisions must be read in their entirety and construed together, not by piecemeal. *Id.* at 11.

“(T)he plain meaning rule requires courts to consider legislative purposes or policies appearing on the face of the statute as part of the statute's context.” *Id.* at 11. “Reference to a statute's context to determine its plain meaning also includes examining closely related statutes, because legislators enact legislation in light of existing statutes.” *Id.* at 12.

“Administrative agencies do not have the power to promulgate rules that would amend or change legislative enactment.” *Green River Cmty. Coll. v. Higher Educ. Pers. Bd.*, 95 Wash.2d 108, 112, 622 P.2d 826 (1980).

VII. LEGAL AUTHORITY AND ARGUMENT

A.) The amendment of WAC 296-14-400 that forbade non-network providers from filing reopening applications exceeded the statutory authority of the Department under RCW 34.05.570(2)(c) because it conflicts with the intent of the Legislature to provide swift and certain relief to injured workers under Title 51.

“Administrative agencies do not have the power to promulgate rules that would amend or change legislative enactment.” *Green River Cmty. Coll. v. Higher Educ. Pers. Bd.*, 95 Wash.2d 108, 112, 622 P.2d 826 (1980). “If the statutory language is susceptible of two constructions, one of which will carry out the purpose and intent of the legislature and other that will defeat it, the former construction should be adopted. *City of Seattle v. Fontanilla*, 128 Wash.2d 492, 498, 909 P.2d 1294 (1996). *Dep’t of Labor and Indus. v. Gongyin*, 154 Wn.2d 38, 109 P.3d 816 (2005).

The Legislature’s intent in creating the provider network is clear. In the preamble to RCW 51.36.010 it states, “high quality medical treatment and adherence to occupational health best practices can prevent disability and reduce loss of family income for workers, and lower labor and insurance costs for employers. Injured workers deserve high quality medical care in accordance with current health care best practices.” RCW 51.36.010 (2011). Nowhere in stating its intent does the Legislature say that its intent is to restrict access to Title 51.

The Legislature is quite clear that it is trying to ensure that workers will be provided with quality treatment for any injuries or disease with which they are afflicted due to their employment. This is especially important in that the worker has no other remedy for industrial accidents or occupational diseases other than through Title 51. Therefore, it is incumbent upon the legislature to ensure quick access to the system, and quality treatment while within the system, because the injured worker has no other choice for resolving their injury/disease.

The legislature signaled its intent to maintain quick access to the workers' compensation system by maintaining an injured worker's right to see non-network providers for an initial office or emergency room visit. As a result a worker, who may be in an emergent situation, does not have to try to locate a network provider in order to get that treatment, and that provider can file the application in order to get the worker into the system as quickly as possible.

The legislature signaled its intent to create a quality medical treatment network for injured workers by creating the provider network as it stated in the body of the Senate Bill 5801 (hereinafter SB5801). (CP 44). However, the intent for quality medical treatment is separate and distinct from the injured worker's right to quick access to the system. The provider network was not intended to restrict an injured worker's access to the

workers' compensation system. If it had been, the legislature would not have amended SB5801 to allow non-network providers to continue to file applications for benefits. (CP 36 & CP 44).

When an injured worker's claim is closed, that worker is no longer a part of the workers' compensation system. If the physical condition proximately caused by the industrial injury has worsened, the worker must apply to regain access to the workers' compensation system. Restricting the filing of a reopening application to only network providers restricts those workers' access to the system, and is, therefore, contrary to the intent of Title 51 as a whole. It is also contrary to the intent of the legislature that amended RCW 51.36.010 to create the provider network to help workers get good medical treatment, but refused to restrict access to the system by maintaining a worker's right to see any provider for an initial visit.

B.) The amendment of WAC 296-14-400 that forbade non-network providers from filing reopening applications exceeded the statutory authority of the Department under RCW 34.05.570(2)(c) because the legislature did not amend the statute that governs aggravation applications, RCW 51.32.160.

“It has been noted that it is not any particular portion of Title 51 that is to be liberally construed. Rather, it is the entire statutory scheme that receives the benefits of liberal construction. Each statutory provision should

be read in reference to the whole act. For instance, “We construe related statutes as a whole, trying to give effect to all the language and to harmonize all provisions.” *Guijosa v. Wal-Mart Stores, Inc.*, 101 Wn. App. 777, 792, 6 P.3d 583 (2000), *aff’d*, 144 Wn.2d 907, 32 P.3d 250 (2001).

RCW 51.32.160 Aggravation, diminution, termination, sets out the parameters for reopening a claim for aggravation of an industrial injury. This statute establishes that a reopening application must be filed within seven years of the date of the first closure of the claim to receive compensation, but that a reopening application for proper and necessary medical services can be made at any time. It explains that the seven-year statute of limitations does not apply if the claim was closed without medical certification, and that the time limitation is ten years for cases where there is a loss of vision or hearing. It also establishes that if the Department does not deny a reopening application within ninety days it will be deemed admitted.

In 1973 when the time limit was changed from five to seven years for filing a reopening application, and ten years for issues with vision or hearing loss, the legislature amended this statute. In 1986, when “closing order” was defined to mean an order based upon medical recommendation, advice or examination the legislature amended this statute. In 1988 when the termination date for filing a reopening application was linked to the date

of the first closing order rather than the date of establishment of compensation, the legislature amended this statute. In 1995 when requirement to mail a copy of the reopening application to the employer was added, the legislature amended this statute. It only makes sense that if the legislature had intended to, once again, change the parameters for filing a reopening application, it would have, once again, amended this statute.

C.) The amendment of WAC 296-14-400 that forbade non-network providers from filing reopening applications exceeded the statutory authority of the Department under RCW 34.05.570(2)(c) because if the legislature had intended to overturn decades of case law upholding liberal construction of reopening applications it would have stated that intent.

“An application to reopen must be in writing, be individual in nature, and give the Department information regarding the reason for the application (*Donati v. Department of Labor & Indus.*, 35 Wn.2d 151, 211 P.2d 503 (1949)), but the Department may not require a worker to submit an application to reopen by using a particular form (WAC 296-14-400). Where worker's physician submitted office notes recommending further treatment, the Department should have treated the same as an application to reopen. *In re Wallace Hansen*, BIIA Dec., 90 1429 (1991).

Throughout the history of Title 51, the courts of Washington and the Board of Industrial Insurance Appeals have continually upheld liberal construction of the Industrial Insurance Act in finding that substance carries more weight than form. The issue is not whether an injured worker used a proper form, but whether notice was given to the Department that the worker has sustained an injury or an aggravation of that injury. In 1957 the Board held that a report of accident should have been construed as an application for reopening. *In re John Svicarovich*, BIIA Dec., 08,205 (1957). A couple of years later the Board found that an application to reopen a claim for a prior injury, filed within one year of a new injury, may properly be construed as a claim for that new injury where information concerning the new incident has been supplied to the Department. *In re Stanley Lee*, BIIA Dec., 09,425 (1959).

In determining that only network providers can file reopening applications the Department has effectively overturned over five decades of precedent in workers' compensation law. There is no indication that this was the legislature's intent when it decided to create a provider network to ensure "high quality medical treatment." On the contrary, the fact that the legislature initially considered forcing workers to see network providers for anything to do with workers' compensation, and then changed its mind and created an exception where injured workers could see non-network

providers for an initial visit shows that its intent was to maintain, rather than restrict access to the workers' compensation system.

D.) The amendment of WAC 296-14-400 that forbade non-network providers from filing reopening applications was improper because it was arbitrary and capricious.

“A rule will be declared invalid if it is arbitrary and capricious. RCW 34.05.570(2) (c).” *Washington Independent Telephone Ass'n v. Washington Utilities and Transp. Com'n*, 148 Wn.2d 887, 64 P.3d 606, (2003). “...agency action is arbitrary and capricious if it is willful and unreasoning and taken without regard to the attending facts or circumstances.” *Rios v. Washington Dept. of Labor & Indus.*, 145 Wn.2d 483, 39 P.3d 961, (2002).

There are many times when what was originally thought to be a new injury is later determined to be an aggravation of a previous injury. In this instance the doctor, who is not a member of the provider network, is doing his best to comply with Title 51, and protect his patient's interests by reporting the injury. Sometimes, it takes several months and doctor's visits to determine if something is or is not an aggravation of a previous injury. In this case, if, several months after the doctor's visit, it is determined that the worker suffered an aggravation of an old injury, the injured worker will have to worry about whether the doctor will be paid by the Department or if the injured worker will have to pay out of pocket for that initial visit. But

even more importantly, the injured worker will lose all those benefits between the time he originally applied for the new injury and the time he reapplies for an aggravation using a network provider, even though the worker would have no way of knowing if it was a new injury or an aggravation of an old injury until the determination was made months later by the Department.

The Department has maintained that only the very first visit to a doctor to file an application for benefits is to be considered an “initial visit” that falls within the scope of the exception to the requirement of a provider network doctor. However, the Department has built in many exceptions to that exception. The Department has determined that all services related to a hospitalization directly from the emergency department initial visit are considered as part of the initial visit. So, if a worker ends up in the hospital for a month or two after the initial visit on the day of injury, anyone who treats that worker is considered to be a part of that initial visit, and able to render “treatment” whether that doctor is a member of the provider network or not. The Department goes further to determine that a second visit with the same non-network provider is also considered part of the initial visit when there is no added payment due to the provider for that second visit. Obviously, the consideration in this instance is not whether the doctor meets

the Department standards, but whether or not the Department has to pay for it.

Emergency Room doctors that see the worker only once can file reopening applications if the person comes into the hospital in an emergent situation, but the doctor that a worker may have been seeing for his entire life and knows that persons condition better than anyone else, cannot file that application if not a member of the provider network. Out of state doctors can file reopening applications even though they are not members of the provider network, but in state doctors, over whom the State has much more control, cannot.

The intent behind the amendment to RCW 51.36.010 as stated by the legislature in the body of the statute is to ensure high quality “treatment” of injured workers. In its proposal briefing paper the Department shows its understanding of this concept when it says that the clarifying “initial visit” is to ensure that “ongoing care” is provided by network providers. (CP 155) The Department, however, has created a patchwork of exceptions to when non-network doctors can provide ongoing treatment to an injured worker, yet creates a new barrier to access the workers’ compensation system, which has no effect on ongoing treatment. In its own proposal briefing paper on the amendments to WAC 296-14-400 the Department stated that the

reasoning of using non-network providers for the initial visit eliminates potential access barriers to necessary care and filing a claim for benefits. (CP 156). The Department then goes on to creating those barriers for the filing of reopening applications. This is the very definition of arbitrary and capricious.

VII. REQUEST FOR ATTORNEYS' FEES AND EXPENSES

Mr. Ma'ae requests attorneys' fees and expenses on this appeal pursuant to RCW 4.84.010, RCW 4.84.030, and RAP 18.1

RCW 4.84.010 states: there shall be allowed to the prevailing party upon the judgment certain sums for the prevailing party's expenses in the action, which allowances are termed costs, including, in addition to costs otherwise authorized by law, the following expenses:

(1) Filing fees; ... (5) Reasonable expenses, exclusive of attorneys' fees, incurred in obtaining reports and records, which are admitted into evidence at trial or in mandatory arbitration in superior or district court, including but not limited to medical records, tax records, personnel records, insurance reports, employment and wage records, police reports, school records, bank records, and legal files; ... (6) Statutory attorney and witness

fees”

RCW 4.84.010.

RCW 4.84.030 states: “In any action in the superior court of Washington the prevailing party shall be entitled to his or her costs and disbursements.”

Rule 18.1 of the Rules of Appellate Procedure provides that if “applicable law grants to a party the right to recover reasonable attorney fees or expenses on review, the party must request the fees or expenses provided in this rule, unless a statute specifies that the request is to be directed to the trial court.” RAP 18.1.

Should he prevail in this appeal, Mr. Ma’ae is entitled to attorneys’ fees and expenses pursuant to these authorities.

VIII. CONCLUSION

For the reasons stated above, Mr. Ma’ae respectfully requests that the Court reverse the trial court’s October 20, 2016 order and rule that the Department incorrectly promulgated the WAC 296-14-400 requirement that only network providers can file reopening applications under Title 51 because it exceeded the statutory authority granted it by RCW 51.36.010,

and/or the action was arbitrary and capricious under RCW 34.05.570(2)(c) and reverse and remand for the Department of Labor and Industries to take all proper and necessary actions consistent with the Court's findings and conclusions.

Respectfully submitted this 26th day of April, 2017.

TACOMA INJURY LAW GROUP, INC., P.S.

A handwritten signature in black ink, appearing to read "Isabel A. M. Cole", written over a horizontal line.

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Attorney for Appellant, Ronald V. Ma'ae

TACOMA INJURY LAW GROUP INC PS
April 26, 2017 - 2:56 PM
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Case Name: Ronald Ma'ae v. Department of Labor and Industries

Court of Appeals Case Number: 49659-3

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No. 49659-3

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

RONALD V. MA'AE, Appellant,

v.

DEPARTMENT OF LABOR & INDUSTRIES
OF THE STATE OF WASHINGTON,

Respondent.

AFFIDAVIT OF SERVICE BY MAIL

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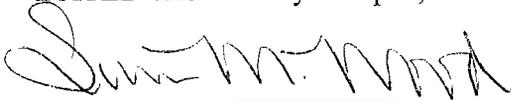
Attorney for Appellant, Ronald V. Ma'ae

STATE OF WASHINGTON)
) ss.
COUNTY OF PIERCE)

SARA M. WOOD, being first duly sworn on oath, deposes and says:
That she is a Legal Assistant employed by TACOMA INJURY LAW
GROUP, INC., P.S., Attorneys for Appellant/Plaintiff in the above-
entitled matter, and that on the 26th day of April, she caused to be served,
by E-File, Email, Fax, Legal Messenger, Certified Mail, or First Class
Mail, as indicated, Brief of Appellant to the following:

Sarah Reyneveld, AAG
Office of the Attorney General (via First Class Mail
800 Fifth Avenue, Suite 2000 & Fax 206-587-7717)
Seattle, WA 98104-3188

DATED this 26th day of April, 2017.


Sara M. Wood, Legal Assistant
Tacoma Injury Law Group, Inc., P.S.

SUBSCRIBED AND SWORN to before me this 26th day of April, 2017.




NOTARY PUBLIC in and for the
State of Washington, residing at
Tacoma. My Commission
expires 11-18-17.

TACOMA INJURY LAW GROUP INC PS
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