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No. 81049-4

SUPREME COURT
OF THE STATE OF WASHINGTON

81049-4

KELLY L. SHAFER,

Respondent,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Petitioner.

FILED
APR 10 2008

CLERK OF SUPREME COURT
STATE OF WASHINGTON

SHAFER'S
ANSWER TO WASHINGTON DEFENSE TRIAL LAWYERS'
AMICUS CURIAE MEMORANDUM

Philip A. Talmadge, WSBA #6973
Sidney Tribe, WSBA #33160
Talmadge/Fitzpatrick
18010 Southcenter Parkway
Tukwila, WA 98188-4630
(206) 574-6661

Jennifer M. Cross-Euteneier, WSBA #28560
David B. Vail,
Jennifer Cross-Euteneier & Associates
819 Martin Luther King Jr. Way
Tacoma, WA 98415-0707
(253) 383-8770
Attorneys for Respondent Kelly L. Shafer

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A. INTRODUCTION

Amicus curiae Washington Defense Trial Lawyers (WDTL) claims that this case merits review under RAP 13.4(b)(4). It does not.

There is no public interest at stake here, as required by RAP 13.4(b)(4). The Court of Appeals' opinion does not transform an attending physician into a "party" in the common law sense. It only affirms an attending physician's status as a person entitled to notice, who has the right to protest improper claim closure under RCW 51.52.050.¹ The opinion does not require physicians to litigate industrial insurance appeals, or confer any additional duty on physicians to advocate for injured workers beyond what the statutes and regulations already require. This Court should deny the Department's petition for review.

B. ARGUMENT WHY REVIEW OF THE DEPARTMENT'S PETITION SHOULD NOT BE ACCEPTED

The Court of Appeals' decision in this case merely requires the Department to timely notify an injured worker's attending physician before it closes an industrial insurance claim.

WDTL acknowledges that attending physicians have a right to protest claim closure. WDTL memorandum at 4. WDTL also acknowledges that attending physicians are "affected persons" under

¹ The relevant text of RCW 51.52.050 is reproduced in the Appendix.

RCW 51.52.050. Yet WDTL would render the notice provision a nullity by allowing closure orders to become final after 60 days *even if the Department failed in its duty to provide notice to the attending physician.* WDTL memorandum at 5. WDTL claims that the Department's reading of the statute "strikes a fair balance" between the needs of workers and the "administrative burdens of the industrial insurance system on self-insured employers, on agencies, and on taxpayers, and on physicians." *Id.* However, the "burdens" WDTL seeks to avoid are illusory.

WDTL recites the many "burdens" to the industrial insurance system that it claims will occur if the Court of Appeals opinion is upheld. WDTL claims that "other parties will need to ensure that physicians are fully informed of claim and appeal status." *Id.* at 7. It claims that physicians will "need to participate in discovery, agree to settlements and trial dates...appear or waive appearance at Board proceedings, and depositions." *Id.*

There is not one iota of legal or factual support for WDTL's claims. The Court of Appeals' application of RCW 51.52.050 does not convert attending physicians into full-fledged litigants in the industrial insurance appeals process. Nothing in Title 51 RCW so states. WDTL's argument is fantasy. RCW 51.52.050 is precise: it simply provides the physicians notice and opportunity to protest claim closure, as other

statutes and regulations already allow. The flaw in WDTL's position lies in the conflation of two distinct concepts: the common law notion of a "party" to litigation, and the statutory meaning of the term "parties" in RCW 51.52.050. As the Court of Appeals observed, and WDTL concedes at page 4 of its memorandum, a physician is a "person aggrieved" by an order closing an industrial insurance claim. WAC 296-20-09701.² That is the sense in which the attending physician is a "party" under RCW 51.52.050.

The Court of Appeals' opinion is confined to interpreting that statute and it interpreted the statute correctly. RCW 51.52.050 does not, as WDTL claims, require attending physicians to participate in discovery, agree to settlements, or take on any other responsibility of litigation.

WDTL also contends that failure to notify an attending physician will not deprive the Department of the benefit of that physician's medical opinion, because the injured worker "will likely" consult the physician to see if the Department's decision is proper. WDTL memorandum at 6. This is *pure speculation*, and ignores the crucial role an attending physician plays in the proper administration of industrial insurance claims, particularly for unsophisticated injured workers.

² The relevant portion of WAC 296-20-09701 is reprinted in the Appendix.

WDTL also claims that the Department should not be required to give notice to attending physicians because “they are not well situated to serve as advocates for workers in their care.” WDTL memorandum at 9. However, if attending physicians’ input into closure decisions is not vitally important to the proper disposition of industrial insurance claims, why did the Legislature enact RCW 51.52.050 and the Department promulgate a regulation specifically urging physicians to challenge improper Department actions? The Court of Appeals recognized this fact, emphasizing a physician’s important role in its opinion. Op. at 9-10.³

The IIA also recognizes the key role of treating physicians in handling claims of injured workers. See RCW 51.28.020 (attending physician often assists worker to initiate claim with Department, has authority to file claim on worker’s behalf); RCW 51.36.060 (physician must report on worker’s condition at Department’s request). Therefore, it is eminently sensible to treat them as “parties” for the limited purpose of RCW 51.52.050. This will ensure that they receive timely notice and have the chance to protest before the closing order becomes final.

WDTL also claims that the Court of Appeals opinion will create other administrative burdens to the industrial insurance system, including

³ WAC 296-20-09701 has been in place since 1981. The Legislature has not seen fit to reject it, acquiescing in the Department’s understanding of the physician’s role. *Soprani v. Polygon Apartment Partners*, 137 Wn.2d 319, 327 n.3, 971 P.2d 500 (1999).

a dubious contention that requiring notice to physicians under RCW 51.52.050 will discourage high quality medical practitioners from participating in the system. WDTL memorandum at 9.

There is *nothing* in the record to support WDTL's bald assertions. No studies, expert testimony, affidavits or other evidence appears to support WDTL's contentions. In fact, the very logic of these claims is belied by WDTL's own argument. On one hand, WDTL acknowledges that the Department is already "required to notify an attending physician of its orders." WDTL memorandum at 7. Yet in the next paragraph, WDTL claims that *enforcing* the requirement to notify physicians will result in "unprecedented" expansion of a physician's role in industrial insurance appeals. If WDTL's predictions about administrative burdens were correct, they should already have come true. They have not.

C. CONCLUSION

There is simply no legal or evidentiary support for WDTL's assertions. The Court of Appeals opinion in this case properly interprets RCW 51.52.050. There is no threat to the public interest, and the Department's petition for review should be rejected.

DATED this 10th day of April, 2008.

Respectfully submitted,



Philip A. Talmadge, WSBA #6973
Sidney Tribe, WSBA #33160
Talmadge/Fitzpatrick
18010 Southcenter Parkway
Tukwila, WA 98188
(206) 574-6661

Jennifer M. Cross-Euteneier, WSBA #28560
David B. Vail, Jennifer
Cross-Euteneier & Associates
819 Martin Luther King Jr. Way
Tacoma, WA 98415-0707
(253) 383-8770
Attorneys for Respondent Kelly L. Shafer

APPENDIX

RCW 51.52.050:

Whenever the department has made any order, decision, or award, it shall promptly serve the worker, beneficiary, employer, or other person affected thereby, with a copy thereof by mail, which shall be addressed to such person at his or her last known address as shown by the records of the department. The copy, in case the same is a final order, decision, or award, shall bear on the same side of the same page on which is found the amount of the award, a statement, set in black faced type of at least ten point body or size, that such final order, decision, or award shall become final within sixty days from the date the order is communicated to the parties unless a written request for reconsideration is filed with the department of labor and industries, Olympia, or an appeal is filed with the board of industrial insurance appeals, Olympia: PROVIDED, That a department order or decision making demand, whether with or without penalty, for repayment of sums paid to a provider of medical, dental, vocational, or other health services rendered to an industrially injured worker, shall state that such order or decision shall become final within twenty days from the date the order or decision is communicated to the parties unless a written request for reconsideration is filed with the department of labor and industries, Olympia, or an appeal is filed with the board of industrial insurance appeals, Olympia.

WAC 296-20-09701:

On occasion, a claim may be closed prematurely or in error or other adjudication action may be taken, which may seem inappropriate to the doctor or injured worker. When this occurs the attending doctor should submit immediately in writing his request for reconsideration of the adjudication action....”

DECLARATION OF SERVICE

On said day below I deposited in the U.S. mail a true and accurate copy of the following document: Shafer's Answer to WDTL's Amicus Curiae Memorandum in Supreme Court Cause No. 81049-4 to:

John R. Wasberg, Senior Counsel
Office of the Attorney General
Labor & Industries Division
800 5th Avenue, Suite 2000
MS TB-14
Seattle, WA 98104-3188

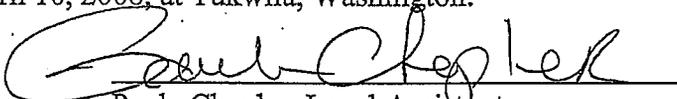
Corey Endres
David B. Vail & Jennifer Cross-Euteneier
& Associates, PLLC
PO Box 5707
Tacoma, WA 98415

Dilek F. Aral-Still
Attorney General's Office
PO Box 2317
Tacoma, WA 98401-2317

Original sent by email for filing with:
Washington Supreme Court
Clerk's Office
Olympia, WA

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: April 10, 2008, at Tukwila, Washington.



Paula Chapler, Legal Assistant
Talmadge/Fitzpatrick

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From: Paula Chapler [mailto:paula@talmadgelg.com]
Sent: Thursday, April 10, 2008 3:24 PM
To: OFFICE RECEPTIONIST, CLERK
Subject: Shafer v. Dept. of Labor & Industries

Dear Sir or Madam:

Per Mr. Talmadge's request, attached please find Shafer's Answer to Washington Defense Trial Lawyers' Amicus Curiae Memorandum for the following case.

Case Name: Kelly L. Shafer v. Dept. of Labor & Industries
Cause No. 81049-4
Attorney: Philip A. Talmadge, WSBA #6973
Talmadge/Fitzpatrick
18010 Southcenter Parkway
Tukwila, WA 98188
(206) 574-6661

Sincerely,

Paula Chapler
Legal Assistant
Talmadge/Fitzpatrick