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No. 81049-4

SUPREME COURT
OF THE STATE OF WASHINGTON

KELLY L. SHAFER,

Respondent,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Petitioner.

SHAFER'S SUPPLEMENTAL BRIEF

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A. INTRODUCTION

The Court of Appeals correctly concluded that the Department cannot close an industrial insurance claim without providing notice to the claimant's attending physician. The attending physician is the single most important medical voice in the industrial insurance system generally, whose participation is *required* at every phase of an injured workers claim process specifically. The attending physician is directly affected by a claim closure in several critical respects. As such, he or she must be provided the opportunity to weigh in on the Department's final order before the Department may close a claim.

RCW 51.52.050 requires the Department to send notice of a closing order to the worker's attending physician. Despite the Department's "parade of horrors" argument, this is not an onerous burden, and meeting it will further the important goals of the Industrial Insurance Act: to make sure that workers are properly and fully compensated when they are injured at work.

B. ISSUE PRESENTED FOR REVIEW

Does RCW 51.52.050, which requires the Department to send notice of a final closing order to all persons "affected" by an industrial insurance closing order, mandate that the Department must send the notice to the worker's attending physician?

C. STATEMENT OF THE CASE

The facts of this case are undisputed and have been recited in the briefing and the Court of Appeals' opinion below.

D. ARGUMENT

The Industrial Insurance Act must 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. All doubts as to the meaning of the Act must be resolved in favor of the injured worker. *Clauson v. Dep't of Labor & Indus.*, 130 Wn.2d 580, 584, 925 P.2d 624 (1996).

RCW 51.52.050(1) states: "Whenever the department has made any order, decision, or award, it *shall serve* the worker, beneficiary, employer, or *other person affected thereby*, with a copy thereof. . ." (emphasis added). The Department's obligation is mandatory. *Erection Co. v. Dep't of Labor & Indus.*, 121 Wn.2d 513, 518, 852 P.2d 288 (1993) (use of "shall" is presumptively mandatory).

RCW 51.52.050(2) provides a complementary statutory right of persons aggrieved by Department orders to protest or appeal them. "Whenever the department has taken any action or made any decision relating to any phase of the administration of this title the worker, beneficiary, employer or *other person aggrieved thereby* may request

reconsideration of the department, or may appeal to the board.” (emphasis added). Under RCW 51.52.060(1)(a), there is no question that a physician may protest or appeal a Departmental order.

The Court of Appeals correctly discerned that a physician was entitled to notice of a Departmental order to enable the physician to intelligently determine if a protest or appeal under RCW 51.52.050(2) was merited.

The Department instead offers an absurd interpretation of RCW 51.52.050(1) that ignores the parallel rights/responsibilities of .050(1), .050(2) and .060(1)(a).¹ The notion that notice is required, but that lack of notice has no practical legal effect, renders the notice requirement utterly meaningless.

In this case, liberal construction of RCW 51.52.050 requires consideration of the *purpose* behind requiring the Department to notify persons affected by the closure of an industrial insurance claim. The main purpose of the notice requirement is to give those persons aggrieved the opportunity to protest the closure: RCW 51.52.050 contemplates such protests as being requests for reconsideration.

1. This Case Has *Nothing* to Do With the Obligations of a Claimant to Timely File a BIIA Appeal Once a Claim is Properly Closed. It

¹ In statutory interpretation, this Court gives a sensible interpretation of the statute designed to effectuate legislative intent, eschewing absurd or strained reading of a statute. *State v. Elgin*, 118 Wn.2d 551, 555, 825 P.2d 314 (1992).

assess progress, compare “good days and bad days,” and watch for changes in condition that cannot be seen with a single exam. *Id.*

In their quest to control the provision of medical services to injured workers, other states require workers to “choose” their attending physicians from among a preselected panel of doctors approved by the employer or the state. 5 LARSEN, WORKERS COMPENSATION LAW § 94.02[2] (2001). In fact, the Draft Compensation and Rehabilitation Law created by the Council of State Governments uses this “panel” system, as a “compromise” in the ongoing controversy of free choice versus state control. *Id.*

Washington rejects this panel system, and instead allows workers to choose their own attending physicians to provide covered medical care. RCW 51.36.010; WAC 296-20-065. A worker’s free choice of attending physicians is ongoing throughout the process, and a worker can transfer physicians, with Department approval. WAC 296-20-065. Thus, Washington places greater importance on a successful relationship between the worker and attending physician as part of the overall success of the industrial insurance claims process.

In fact, as demonstrated below, all three branches of Washington’s government agree that the industrial insurance system relies greatly on – and in fact *requires* – the active participation of the worker’s attending

may not be rendered until the proceedings are concluded and the 30-day appeal deadline has passed. *Id.* Therefore, if an attending physician has not received notice of claim closure, that physician may be in the position of rendering services without compensation.

This case deals solely with *when an order in fact becomes final*, and whether a closing order can properly be considered “final” when notice of it has not been sent to the worker’s attending physician.

2. The Legislative, Executive and Judicial Branches Agree: The Attending Physician is the Authoritative Medical Source Required in Filing, Processing, and Properly Closing an Industrial Insurance Claim

The attending physician is the central medical voice in the industrial insurance claims process, assisting the claimant and the Department from the beginning to the end of the process. An injured worker relies on his or her attending physician; the relationship is one of confidence and trust. 5 LARSEN, WORKERS COMPENSATION LAW § 94.02[2] (2001): The Department also relies on the attending physician: the consistency of treatment of the attending physician allows for a unique medical perspective. WASHINGTON STATE DEPARTMENT OF LABOR & INDUSTRIES, WORKERS’ COMPENSATION MANUAL § F-4 (2006). The attending physician has seen the injured worker over a period of time, can

Relates Solely to Whether a Claim Is Properly Closed Without Notice to the Claimant's Attending Physician

As a threshold matter, it must be clarified that this case is not about whether a physician has a duty to file a notice of appeal, or has a duty to notify a worker of the right to appeal. It is undisputed that the physician is not obligated to file a protest of a Department order or appeal to the board. *Leschner v. Dep't of Labor & Indus.*, 27 Wn.2d 911, 927, 185 P.2d 113 (1947). But a physician is a person who may be aggrieved by an order and may protest or appeal. RCW 51.52.060(1)(a).

Beyond their duties to the claimant and the Department, attending physicians also often have a personal stake in seeing that claims are properly closed. The attorney general has ruled a physician may appeal to the board from an order rejecting the physician's bill for medical aid, Op. Atty. Gen. 1945-46 at 1154, demonstrating that, under some circumstances, a physician is indeed an aggrieved or affected party. There is also the simple reality that once a claim has been closed, the physician is no longer entitled to be paid for services rendered to an injured worker, even if those services were necessary and rendered in the good faith belief that the claim was still open. See WASHINGTON STATE DEPARTMENT OF LABOR & INDUSTRIES, WORKERS' COMPENSATION MANUAL § D-83 (2006). If the worker ultimately prevails at the Board level, treatment still

physician. The attending physician is therefore indispensable in the proper resolution of an industrial insurance case.

a. Legislative Branch

After the worker has selected his or her attending physician as permitted by RCW 51.36.010, that physician must fulfill specific obligations in order to be compensated from the medical aid fund. The Legislature places a duty on the attending physician to inform the injured worker of his or her rights under the Act, and requires physician to "lend all necessary assistance in making this application for compensation and such proof of other matters as required by the rules of the department without charge to the worker." RCW 51.28.020. Thus, the attending physician in law and in fact actively assists the injured worker in the commencement of the claim process. The Department is even required to provide physicians with a manual outlining the procedures to be followed in applications for worker compensation benefits and describing claimants' rights and responsibilities related to claims. *Id.*

After the attending physician assists the worker in filing an application, the physician continues to have active duties throughout the claims process. Treating physicians must comply with rules and regulations promulgated by the Department and must make reports on the condition or treatment of the worker that the Department requests, as well

as reports on any other matters concerning workers under the physician's care. RCW 51.36.060. If a worker has a time loss claim, the attending physician must submit reports to the Department every sixty days. RCW 51.36.060.

b. Executive Branch

The Department puts a premium on the participation of the attending physician in the industrial insurance claims process: Washington Administrative Code rules and Workers' Compensation Manual expand upon Legislative pronouncements regarding an attending physician's role in the industrial insurance system. If a claimant fails to keep scheduled appointments with his or her attending physician, the Department may reduce, suspend, or deny compensation. WAC 296-14-410. In time loss cases, the attending physician must submit reports to the Department every 60 days (WAC 296-20-06101) and notify it when a worker's injury improves from acute to maintenance status. WAC 296-20-03001; WAC 296-20-035. If an unrelated condition is aggravated by, or aggravates, the covered industrial injury, the attending physician must explain to the Department the interrelation between the two injuries. WAC 296-20-055.

Treating physicians are also required to follow detailed requirements as to bills for services rendered an injured worker. WAC

296-20-125. Treating physicians are subject to for-cause or random records review by the Department to ensure workers are receiving proper and needed care and to ensure physicians' compliance with the Department's medical aid rules, fee schedules, and policies. WAC 296-20-02010. An attending physician prescribing opioid drugs must cooperate with any Department investigation with respect to possible abuse. WAC 296-20-03003. If the Department or self-insurer has concerns about prescription of such drugs, it can require the attending physician to send a treatment plan. WAC 296-20-03015.

When the Department believes a claim is ready to be closed, the WAC rules and Department manual specifically emphasize the attending physician's participation. A recommendation of claim closure by a Department physician must be sent to the attending physician for comment. WAC 296-20-035. The attending physician may respond comments or a differing opinion. *Id.*

The Department's own policy manual specifies that an attending physician is one of the persons who has the right to protest claim closure, and provides direction to adjudicators on how to handle such protests:

The following list includes recommendations for adjudicators to follow *when responding to protests submitted by aggrieved claimants, employers, physicians, or their representatives...*

WASHINGTON STATE DEPARTMENT OF LABOR & INDUSTRIES, WORKERS' COMPENSATION MANUAL § H-4 (2006).

c. Judicial Branch

This Court has unequivocally stated that to further the Act's purpose of promoting benefits and protecting workers, special consideration must be given to be given the testimony of the worker's attending physician. *Hamilton v. Dep't of Labor & Indus.*, 111 Wn.2d 569, 572-73, 761 P.2d 618 (1988); *Zipp v. Seattle Sch. Dist. No. 1*, 36 Wn. App. 598, 604, 676 P.2d 538, *review denied*, 101 Wn.2d 1023 (1984). The doctrine is grounded in the fact that an attending physician who has cared for and treated an injured worker over a period of time is better qualified to give an opinion as to the worker's disability than a physician who has seen and examined the worker only one or two times. *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 6, 977 P.2d 570 (1999); *Spalding v. Dep't of Labor & Indus.*, 29 Wn.2d 115, 128-29, 186 P.2d 76 (1947).

3. Closure of a Claim Directly Affects an Attending Physician in Concrete and Time-Sensitive Ways, Making It Critical that the Physician Have Timely Notice

The attending physician is not bystander in the claims process, he or she has specific rights and obligations that are affected by claim closure. In fact, under certain circumstances, a claim *may not be closed* without notice to the attending physician of the closing medical report.

WAC 296-15-450(3)-(6). Plainly, this notice is akin to the notice mandated by RCW 51.52.050(1). But even more to the point, the Legislature has identified health services providers as persons who may be “aggrieved by” a final closing order. RCW 51.52.060. This statute implements RCW 51.52.050(2). A medical provider has the right to protest or request reconsideration of a Department decision. RCW 51.52.050(2)(b)(i).

Because the attending physician knows the claimant’s ongoing status best, it is critical that the attending physician provide input at the time of claim closure. WASHINGTON STATE DEPARTMENT OF LABOR & INDUSTRIES, WORKERS’ COMPENSATION MANUAL § H-4 (2006). For example, if some time has passed between a pre-closure evaluation and the actual closure date, the attending physician’s opinion may be out of date and no longer applicable:

Particularly in protests to claim closure, reopening denial, and questions of causal relationship, *the presence of medical opinion near the date of the final order is entered is of extreme importance in defending the determination before the courts.*

Id. (emphasis added). The Department acknowledges that even a two-month old medical opinion may no longer be relevant to the worker’s current status. *Id.*

The Department itself seems to read the rule in the way the Court of Appeals has, at least when it comes to the responsibilities it places on self-insured employers. Self-insured employers *must* send the attending physician notice of the closing order. WAC 296-15-450(5). The physician or the worker may protest, but if neither does, "*it will become final and binding in sixty days, just like a department order.*" WAC 296-15-450(5) (emphasis in original). Presumably, then, the converse should be true: if the physician *does* protest, the order does *not* become final and binding under RCW 51.52.050.

75 years ago, this Court held that a claim was not properly closed by final order, and thus the appeal deadline did not commence, until after the Department had addressed issues raised in an attending physician's written protest. *Taylor v. Dep't of Labor & Indus.*, 175 Wash. 1, 26 P.2d 391 (1933). In *Taylor*, a worker's attending physician wrote a letter to the Department challenging the Department's decision to close a claim. The Department investigated, but concluded three months later that it had made the correct closing decision. The claimant appealed, but the Department argued that the claimant had missed the 60-day deadline. This Court concluded that the claimant in fact had 60 days from the date of the Department's letter rejecting the physician's reasons for protest, and not from the original notification of closure.

Taylor vividly demonstrates that the attending physician plays a critical role in the claim closure process, and should be allowed an opportunity to object when he or she feels a claim is being closed improperly.

Amicus Washington Defense Trial Lawyer's Association (WDTLA) argues that notice to the attending physician is not necessary because workers will naturally consult their attending physicians if they feel the closure is medically improper. Br. of Amicus WDTLA at 6. WDTLA's supposition is without support in the record in this case and does not fulfill the BIIA's purpose of protecting and compensating injured workers.

An injured worker may not have the medical knowledge to understand that his or her claim is being closed in error. The attending physician is in the best position to know this fact, and a claim should not be considered to be properly closed without notice of the impending closure being sent to the best person to identify any ongoing medical problems.

If sixty days passes without notice to the physician, the opportunity to protest is forever lost. Holding that a claim is not closed until notice is sent to the attending physician, an affected person, is the Legislature's simple and elegant solution to this potentially pernicious problem. To rule

that a claim can be closed without notice to the attending physician would leave a huge gap in the industrial insurance process and thwart the Legislature's intent to have claims properly processed from beginning to end.

The Department's central policy justifications for arguing that attending physicians are not entitled to notice is that the "new theory" would provoke a spate of "stale" claims. PFR of Dep't at 19.

The Department's concerns do not outweigh its obligations to comply with the statute. First, there is no evidence that a spate of cases will suddenly be revived by the Court of Appeals' interpretation of RCW 51.52.050. The rule that a closing order is not final unless notice is given to all affected parties will only affect finality of previously resolved cases under very limited circumstances, if: (1) a party actually believes that the claim was closed improperly; (2) there is credible evidence that notice was not provided to the attending physician or other affected party; (3) the equitable doctrine of laches does not apply.²

In focusing its concern about claims long past, the Department ignores the importance of enforcing the requirement of notice to attending physicians in *future* cases, which will best protect the rights of injured

² If a claim is truly "stale" courts can always apply laches to conclude that the complaining party should have acted sooner. For example, the Department could point

workers going forward. If there are a handful of prior cases that will have to be reevaluated, that burden is greatly outweighed by the substantial benefit to the workers' compensation system of providing timely notice of closure to attending physicians, and refusing to consider orders final unless that statutory requirement is met.

4 Shafer Is Entitled to an Award of Attorney Fees at Trial and On Appeal

If the BIIA's decision and order are reversed or modified on appeal to the superior court or this Court and additional relief is granted to a worker, the court must fix a reasonable attorney fee for the worker's attorney. RCW 51.52.130. This statute encompasses fees in both the superior and appellate courts when both courts review the matter. *Brand v. Dep't of Labor & Indus.*, 139 Wn.2d 659, 674, 989 P.2d 1111 (1999); *Hi-Way Fuel Co. v. Estate of Allyn*, 128 Wn. App. 351, 363-64, 115 P.3d 1031 (2005). Shafer is entitled to compensation for the worsening of her conditions proximately caused by her industrial injury that occurred after the Department closed her claim. The BIIA's decision and order affirming the Department's order denying Shafer's reopening application, and the judgment on the jury verdict, should be reversed. Shafer is entitled to an

out that the attending physician should have acted as soon as he or she realized that the claim was no longer active.

award of attorney fees in both this Court and the superior court pursuant to RCW 51.16.130 and RAP 18.1.

E. CONCLUSION

The attending physician plays an indispensable role in the industrial insurance process. The Department says that the physician must be intimately involved every step of the way, but then claims that notice to the physician is not required when it comes to the most final and irrevocable decision in the claims process: closure.

The Department's position is contrary to the express language of RCW 51.52.050, is illogical, and contravenes every other position held by all three branches of Washington's government, including the Department's own rules and regulations. That is why the Court of Appeals rejected the Department's position below, and that is why this Court should definitively state that attending physicians are entitled to notice of the Department's closing orders before they are considered final. This Court should affirm the ruling of the Court of Appeals.

DATED this ___ day of August, 2008.

Respectfully submitted,



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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 Supplemental Brief in Supreme Court Cause No. 81049-4 to:

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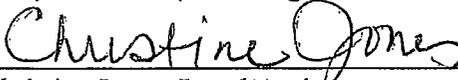
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: August 28, 2008, at Tukwila, Washington.



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