81049-4

No. 81049-4

SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON

KELLY L. SHAFER,

Respondent,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Petitioner.

WASHINGTON DEFENSE TRIAL LAWYERS' AMICUS CURIAE MEMORANDUM

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I. IDENTITY OF AMICUS

COMES NOW Washington Defense Trial Lawyers ("WDTL"), an organization of lawyers representing defendants in civil litigation, which appears on occasion as amicus curiae on a pro bono basis, by and through the undersigned, and submits the following brief in support of Petitioner Department of Labor & Industries ("Department"). Amicus WDTL urges this Court to accept review of the published opinion in *Shafer v. Department of Labor & Industries* dated June 11, 2007 and the order dated September 4, 2007 that granted in part the Department's motion for reconsideration.

II. ISSUE PRESENTED FOR REVIEW

The issue in this case is whether a worker's attending physician is a party under RCW 51.52.050 such that a Department closing order fails to become final and binding on any party, and thus remains subject to protest or appeal by the worker, when the order is communicated to the worker when issued but not communicated to the attending physician.

III. SUMMARY OF ARGUMENT

This Court should accept review under RAP 13.4(b)(4) because "the petition involves an issue of substantial public interest that should be determined by the Supreme Court." The Court of Appeals' opinion incorrectly characterizes attending physicians as advocates for injured

workers and raises them to the status of "parties" under RCW 51.52.050. Doing so expands physicians' responsibilities beyond providing medical care and objective professional opinions to guide claim adjudication, and significantly increases the administrative burden on physicians as well as self-insured employers, the Department, and the Board of Industrial Insurance Appeals. Workers who need advocacy with regard to claim adjudication should seek legal representation instead of relying on their attending physicians to advocate for them beyond providing medical opinions.

IV. ARGUMENT

A. Attending Physicians Are a Source of Objective Opinions, Not Advocates for Workers under the Industrial Insurance Act.

The Washington industrial insurance system relies on attending physicians to provide complete and objective information regarding the injured workers in their care. RCW 51.36.060. Physicians must provide employers, the Department, and claimant's representatives with all medical information in their possession or control upon request. *Id.* Workers cannot limit the information disclosed by their physicians to the Department of Labor and Industries; the Legislature abolished the physician-patient privilege in workers' compensation proceedings. RCW 51.04.050.

Attending physicians are crucial in the filing of claims in that certification from an attending health care practitioner must accompany each application for benefits. RCW 51.28.020. In reporting on claim status, a physician must provide his or her opinion regarding the relationship of the claimed condition to the industrial injury or exposure, if any. WAC 296-20-01002. Accordingly, a physician must indicate that a condition is not industrial if that is his or her opinion, regardless of whether the worker shares that view.

Once a claim is filed, all of the attending physician's claim-related duties require the physician's professional evaluation of the worker's condition. None of the physician's duties require that the worker agree with the physician's assessment. Physicians' duties include expediting the vocational rehabilitation process, including providing feedback regarding workers' abilities to perform certain jobs. WAC 296-19A-030. In evaluating workers' abilities, physicians cannot rely on the injured workers' job preferences or subjective assessments of their own capacities but must instead use their professional judgment. *See* WAC 296-20-01002 (Proper and necessary treatment must reflect accepted standards of good practice in the relevant discipline and excludes care delivered for the convenience of the physician or claimant.).

B. Attending Physicians Should Not Be Included as Parties Under RCW 51.52.050.

RCW 51.52.050[1] provides that Department orders must be served on persons affected by them, and the orders must include language notifying recipients of the right to protest and request reconsideration. A person aggrieved by an order, including a physician, may request that the order be reconsidered. *See* WAC 296-20-09701. However, the fact that a worker feels aggrieved by an order does not necessarily mean that the attending physician also considers the order incorrect, and vice versa. This is illustrated by the case at bar, in which the attending physician testified she felt the worker's claim should not have been closed, yet the worker herself received and accepted the closing order without protesting or appealing it.

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[1] RCW 51.52.050 provides in pertinent part:

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 . . . 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: . . .

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. In an appeal before the board, the appellant shall have the burden of proceeding with the evidence to establish a prima facie case for the relief sought in such appeal . . . . Any such person aggrieved by the decision and order of the board may thereafter appeal to the superior court, as prescribed in this chapter.

Under RCW 51.52.050, a Department order becomes final 60 days from the time it is communicated to the parties. Thus, the statute requires that the order be provided to all affected persons, and affected persons who are aggrieved can protest and request reconsideration, but order finality is based only on communication to the parties. If the Legislature intended order finality to be based on communication of the order to affected persons, it would not have differentiated "affected persons" from "parties." As the Court of Appeals recognized, the goal of statutory construction is to effectuate the plain meaning of the Legislature's words. Slip Op. at 6 (citation omitted). The words used in RCW 51.52.050 clearly differentiate between affected persons, who may protest and request reconsideration, and parties, communication to whom affects order finality.

By allowing attending physicians to protest without making them full parties to a claim, the statute strikes a fair balance between the needs of workers and the financial and administrative burdens of the industrial insurance system on self-insured employers, on agencies and thus taxpayers, and on physicians. It is important to the system that attending physicians have a full opportunity to present their opinions, and the Department and self-insurers are required to provide the physicians with information so that the physicians' opinions will be well-informed.

However, physicians are not directly affected by claims decisions in the way that the Department, employers, and workers are. Thus, while it is important that the Department and/or self-insured employer have the benefit of the attending physicians' opinions regarding adjudicative decisions, the physician's opinion about the correctness of an order does not rise to the same level of importance as the opinions of the worker, the employer, and the Department. Whether or not a physician has received direct notice of a Department order, the finality of the order should rest on communication of that order to the parties affected by it.

Recognition by the Court that attending physicians are not parties within the meaning of RCW 51.52.050 will not deprive the Department or the system of attending physicians' opinions. A worker who disagrees with a Department order and whose disagreement with the order centers on medical issues will likely consult with the attending physician to see whether the physician agrees the order is wrong. For example, a worker undergoing treatment whose claim is closed would naturally check with the attending physician to see whether additional treatment is indeed needed. In doing so, the worker would notify the physician of the Department action regardless of whether the physician has learned of it directly from the Department. If the physician agrees that the Department action is wrong, the worker can bring the physician's opinion to the

Department's attention in support of a protest, regardless of whether the physician protests independently.

The Department is required to notify an attending physician of its orders. However, the Department's failure to do so should not interfere with the finality of an order if the worker and employer have received it and neither has protested or appealed. A worker may find a Department action acceptable in a case in which the attending physician thinks it is incorrect. For example, there may be further treatment available that a worker chooses not to pursue. The physician could protest and could appeal claim closure to the Board even when the worker, the party most directly affected, does not wish to do so. If the physician is a party with status equal to that of the worker, and if the physician "is expected to seek review on their patient's behalf," Slip Op. at 10 as modified on reconsideration, there will at the very least be complications related to communication between workers and physicians, with a commensurate increase in administrative costs.

If the Slip Opinion stands and the attending physician is considered a party within the meaning of RCW 51.52.050, the physician's role in industrial insurance appeals will expand significantly. The other parties will need to ensure that attending physicians are fully informed of claim and appeal status. This will result in a significant administrative burden

on employers, as well as on agencies and thus taxpayers. The other parties will need to provide attending physicians with all the documentation in regard to appeal status and scheduling that are now provided just to workers, employers, and the Department. As parties, physicians will need to participate in discovery, agree to settlements and trial dates, and either appear or waive appearance at Board proceedings, and depositions. The administrative burden on physicians of participating in the industrial insurance system will increase greatly, not least in terms of document management. Even physicians who choose not to participate in litigation will receive initial notices regarding appeals and will have the burden of managing the related documents and notifying the other parties of their nonparticipation.

Physicians are not compensated for advocacy. They do not have the direct communication with injured workers the way attorneys do. For instance, when an attorney appears for a worker at any stage of the proceedings, the worker receives his or her mail through the attorney's office. This greatly increases the probability that the worker and attorney will both be aware of and able to communicate regarding any claim-related action. The physician-patient relationship is dissimilar. Certainly, in many cases, physician and patient see each other often and discuss Department actions regarding claims. However, patients can end their

relationships with doctors simply by failing to follow up or by starting to see a new physician. Patients have the right to choose their physicians, and they may not notify a prior attending physician that they have changed health care providers. Moreover, a physician often does not have complete medical records or a complete understanding of the status of a condition or its history, due to the fact that workers often treat with several different physicians simultaneously. As a result, attending physicians are able to provide their objective medical opinions based on the information they have but they are not well situated to serve as advocates for workers in their care.

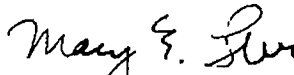
The Slip Opinion subjects physicians to greatly increased administrative burdens while also increasing the cost of the industrial insurance system for taxpayers and self-insured employers. This is likely to increase the difficulty of attracting high quality medical practitioners to participate in the system, thereby decreasing the medical care options for injured workers. Furthermore, the additional cost far outweighs the extent physicians will be more fully informed of claim-related developments. The Supreme Court should accept review to determine this issue of substantial public interest.

V. CONCLUSION

Amicus Curiae Washington Defense Trial Lawyers respectfully request this Court accept review of the Court of Appeals' Opinion in the above-captioned case, and reverse as to the issues addressed herein.

Respectfully submitted this 4th day of March, 2008.

EIMS & FLYNN P.S.



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APPENDIX

WAC 296-20-01002 in pertinent part:

. . . .

Attending doctor report: This type of report may also be referred to as a "60 day" or "special" report. The following information must be included in this type of report. Also, additional information may be requested by the department as needed.

(1) The condition(s) diagnosed including ICD-9-CM codes and the objective and subjective findings.

(2) Their relationship, if any, to the industrial injury or exposure.

(3) Outline of proposed treatment program, its length, components, and expected prognosis including an estimate of when treatment should be concluded and condition(s) stable. An estimated return to work date should be included. The probability, if any, of permanent partial disability resulting from industrial conditions should be noted.

(4) If the worker has not returned to work, the attending doctor should indicate whether a vocational assessment will be necessary to evaluate the worker's ability to return to work and why.

(5) If the worker has not returned to work, a doctor's estimate of physical capacities should be included with the report. If further information regarding physical capacities is needed or required, a performance-based physical capacities evaluation can be requested. Performance-based physical capacities evaluations should be conducted by a licensed occupational therapist or a licensed physical therapist. Performance-based physical capacities evaluations may also be conducted by other qualified professionals who provided performance-based physical capacities evaluations to the department prior to May 20, 1987, and who have received written approval to continue supplying this service based on formal department review of their qualifications.

. . . .

Proper and necessary:

(1) The department or self-insurer pays for proper and necessary health

care services that are related to the diagnosis and treatment of an accepted condition.

(2) Under the Industrial Insurance Act, "proper and necessary" refers to those health care services which are:

(a) Reflective of accepted standards of good practice, within the scope of practice of the provider's license or certification;

(b) Curative or rehabilitative. Care must be of a type to cure the effects of a work-related injury or illness, or it must be rehabilitative. Curative treatment produces permanent changes, which eliminate or lessen the clinical effects of an accepted condition. Rehabilitative treatment allows an injured or ill worker to regain functional activity in the presence of an interfering accepted condition. Curative and rehabilitative care produce long-term changes;

(c) Not delivered primarily for the convenience of the claimant, the claimant's attending doctor, or any other provider; and

(d) Provided at the least cost and in the least intensive setting of care consistent with the other provisions of this definition.

. . . .

Regular work status: The injured worker is physically capable of returning to his/her regular work. It is the duty of the attending doctor to notify the worker and the department or self-insurer, as the case may be, of the specific date of release to return to regular work. Compensation will be terminated on the release date. Further treatment can be allowed as requested by the attending doctor if the condition is not stationary and such treatment is needed and otherwise in order.

Temporary partial disability: Partial time loss compensation may be paid when the worker can return to work on a limited basis or return to a lesser paying job is necessitated by the accepted injury or condition. The worker must have a reduction in wages of more than five percent before consideration of partial time loss can be made. No partial time loss compensation can be paid after the worker's condition is stationary. **All time loss compensation must be certified by the attending doctor based on objective findings.**