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No. _____

Court of Appeals No. 58454-5-I

SUPREME COURT OF THE STATE OF WASHINGTON

KELLY L. SHAFER,

Respondent,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Petitioner.

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**PETITION FOR DISCRETIONARY REVIEW
BY DEPARTMENT OF LABOR AND INDUSTRIES**

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I. IDENTITY OF PETITIONER

The Department of Labor and Industries (Department) asks this Court to accept review of the published opinion in *Shafer v. Department of Labor & Industries* (Slip op. attached - - App. A) dated June 11, 2007 and the order granting in part the Department's motion for reconsideration dated September 4, 2007 (order attached - - App. A).

II. ISSUE PRESENTED FOR REVIEW

RCW 51.52.050 requires the Department to send its orders to the injured worker, the employer, and any "other person affected" by the order. An aggrieved person has 60 days from the date of receipt to file a protest (which is a request for reconsideration) or an appeal to the Board of Industrial Insurance Appeals. In this case, the parties agree that the Department served an order closing Shafer's industrial insurance claim with a disability award in October 2000, and she did not protest or appeal.

In 2003, Shafer applied to reopen her closed claim. The Department denied the application to reopen, and the Board of Industrial Insurance Appeals and a superior court jury each affirmed. The Court of Appeals held, however, that Shafer can still treat the 2000 closing order as not final, making it subject to direct protest or direct appeal.

The issue presented is whether a Department closing order that was contemporaneously communicated to the worker, but was not

communicated to her attending physician, is not final as to the worker and is instead subject to a direct protest or direct appeal.

III. STATEMENT OF THE CASE

A. Nature of the Case

This case started with an ordinary application to reopen a closed claim for worsening of condition per RCW 51.32.160. The worker, and now the Court of Appeals, have bypassed the statute concerning how to reopen closed claims by concluding that the worker's claim was never successfully closed. This issue arose because, while appealing the Department order denying reopening, Shafer discovered evidence that the 2000 closing order had not been received by her attending physician, Dr. Cook. This was the same closing order that Shafer had admittedly received, that she had chosen not to protest or appeal, and that she was attempting to reopen.

Rather than focusing on reopening, Shafer began arguing that the closing order had never become final as to *any* party because Dr. Cook had never received the 2000 Department closing order. Shafer contended that neither the Department nor the Board had jurisdiction to consider her reopening application. Instead, she argued, the 2000 closing order was

still subject to direct protest to the Department or direct appeal to the Board.¹

The superior court, as had the Board, rejected her legal argument that the 2000 closing order was not final. The court impaneled a jury that found the Department had properly denied reopening. The Court of Appeals reversed, but on other grounds, construing the statutes to conclude that the 2000 closing order was not final and that “a request for reconsideration or appeal by Shafer or Dr. Cook [her attending physician], is still timely.” Slip op. at 11.² The Court of Appeals did not address Shafer’s alternative arguments challenging the jury verdict that denied reopening of her claim.

The Department seeks reversal and remand for the Court of Appeals to address the issues Shafer raised challenging the jury verdict.

¹ It appears that Shafer seeks to have her reopening application treated as a protest of the 2000 closing order upon which the Department must act. Where claimants appealing to the Board from the Department’s denial of reopening have proved that *they as claimants* never received the prior Department closing order, the Board’s resolution of the jurisdictional question has been to treat the reopening application as a protest of the earlier closing order and to remand the matter to the Department to act on the protest. *In re Ronald Leibfried*, BIIA Dec., 88 2274, 1990 WL 264682, * 2-4 (1990) (Board-designated Significant Decision). This is the apparent relief that, by analogy, Shafer is seeking. That is, even though the Department order was contemporaneously communicated to Shafer, she is contending that the order did not become final as to anyone (Department, employer, claimant or attending physician), and that, per *Leibfried*, her reopening application therefore served as a timely protest of the closing order.

² But *see* footnote 1. If Shafer’s jurisdictional theory under RCW 51.52.050 is correct, the better resolution of the jurisdictional circumstances here is to treat her reopening application as a protest to the 2000 closing order, and to require that the Department act on the protest. *In re Leibfried*, BIIA Dec. 88 2274. Review should be accepted to make this clarification in the decision even if the ruling by Division One is not otherwise changed.

B. Procedural History

On October 19, 2000, the Department closed Shafer's industrial insurance claim, ending treatment and awarding permanent partial disability benefits. BR 29 (Board decision, page 11, finding of fact 1); BR 98 (Department closing order).³ It is undisputed that the Department mailed her the order at that time, that she received it shortly after it was mailed, and that she did not timely protest or appeal the order to the Board. The 2000 order also reflects that the Department mailed it to the correct address of her attending physician, Dr. Elizabeth Cook. BR 98.

In 2003, Shafer requested reopening of her claim alleging worsening of her disability. BR 29-30. *See* RCW 51.32.160 (allowing reopening upon proof of a worsening of a disability). The Department denied reopening, and Shafer appealed to the Board. BR 30.

Shafer raised a number of issues to the Board's Industrial Appeals Judge, including an argument that the Board (and the Department earlier) lacked jurisdiction to consider reopening her claim, now asserting that the Department's October 19, 2000 order had not yet become final. BR 54. She based her argument on: (1) RCW 51.52.050, which requires that the Department mail its administrative orders to an injured worker's attending physician; and (2) an affidavit (BR 77-78) from Dr. Cook alleging that she

³ "BR" refers to the Certified Appeal Board Record.

had never received the 2000 closing order; Dr. Cook claimed she would have challenged the order had she received it. BR 54-105. To explain, Shafer argued that without an effective closing, the Department could not exercise "jurisdiction" to treat her reopening application as such (notwithstanding that it was originally filed as an application to reopen, and that Shafer had appealed the Department's order refusing to reopen). *See generally* footnotes 1 and 2.

The Board's IAJ rejected Shafer's argument in a prehearing ruling. The IAJ ruled as a matter of law that Shafer, who herself had received a copy of the Department's closing order, could not "stand in her physician's shoes." BR 54. Shafer sought interlocutory Board review of the IAJ's ruling (BR 56-100), which was denied. BR 105.⁴

The IAJ then took evidence on Shafer's claims of worsened, injury-related, physical and mental health disability. The IAJ issued a proposed order recommending that the Board affirm the Department's denial of reopening. BR 19-32. Shafer petitioned to the three-member

⁴ Because the Board rejected Shafer's argument as a matter of law, it did not make a finding of fact whether Dr. Cook did or did not receive a copy of the Department's October 19, 2000 closing order. The evidence is disputed on that point. The order on its face reflects that the Department placed a copy of the order in the mail to the correct address for Shafer's attending physician, Dr. Cook. BR 98.

The Department recognizes that, because (1) the Department has no other proof of Dr. Cook's receipt, and (2) Dr. Cook has provided an affidavit explaining why she believes she did not receive a copy of the order, a preponderance of the evidence is that Dr. Cook did not receive a copy, and therefore the Department has simply assumed for argument that Dr. Cook's recollection is accurate. Under the Department's theory, Dr. Cook's receipt is not material.

Board, which denied review, adopting the IAJ's proposed decision as its final decision. BR 1-17; *see* RCW 51.52.104.

Shafer appealed to the King County Superior Court. CP 1-3. She re-raised her RCW 51.52.050 "jurisdictional" challenge in briefing (CP 38-39, 59-62). The Superior Court did not expressly rule on the argument and thus implicitly rejected it. The Superior Court submitted the case to a jury, which agreed with the Board on the fact questions of whether any injury-caused physical or mental health disability had worsened since October 19, 2000. CP 164-67. The Superior Court entered judgment for the Department, affirming its decision not to reopen Shafer's claim. CP 217-19.

Shafer then appealed to the Court of Appeals, CP 220-23, and raised several issues, including her "jurisdictional" argument concerning lack of finality. The Court of Appeals held under RCW 51.52.050 that the Department's October 19, 2000 closing order never became final. The Court reasoned that: (1) Shafer proved that her attending physician never received the Department's mailing of the order; and (2) the Department closing order involved a "medical determination." Slip op. at 4-11. The Department moved for reconsideration. The Court granted the Department's motion in part, revising language not relevant to this Petition, but keeping the core analysis and result.

IV. REASONS WHY REVIEW SHOULD BE GRANTED

This case should be reviewed because it conflicts with prior appellate decisions involving analogous situations. RAP 13.4(b)(1) and (2). First, there is a conflict presented by the Opinion's ruling that a Department order is not final and remains appealable if all parties and affected persons have not received a copy of the order. This reasoning and holding is inconsistent with the Court of Appeals decision in *Wells v. Western Washington Growth Management Hearings Board*, 100 Wn. App. 657, 677-79, 997 P.2d 405 (2000), which rejected that approach to undermining finality of orders under analogous provisions of the Administrative Procedure Act. The Slip Opinion's reasoning and holding are also inconsistent with *Simmerly v. McKee*, 120 Wn. App. 217, 221-23, 84 P.3d 919 (2004), decided under analogous provisions of the Mandatory Arbitration Rules.

The Opinion is also inconsistent with precedent because it discusses the role of attending physicians as if they have a duty to act as legal advocates on behalf of workers at the Department and Board. This putative legal duty would require doctors to file protests or appeals for workers. The Opinion's suggestion that such a duty exists is not supported by the Act and also is inconsistent with a number of precedents from this Court and from the Court of Appeals concerning RCW

51.28.050, the statute setting deadlines for injury and death claims. An attending physician's failure to carry out any statutory responsibility to assist injured workers in claim filing does not relieve *workers* from *their personal responsibility* to timely file claims. The Court of Appeals reached the opposite result, however, relieving workers of responsibility to timely file protests or appeals.

Finally, 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" for two reasons. First, the Opinion will have the certain impact of allowing any party or the Department at any time to raise a question whether an attending physician or other party was served with a closing order or other order. This creates a new and unwarranted basis for litigating about the validity of the order when there had been no timely protest or appeal by any party. This creates uncertainty regarding the finality of settled closing orders. The Slip Opinion also raises an issue of substantial public interest in its postulation of the role and legal duties of attending physicians. The Opinion thus exposes attending physicians to arguments that they should have protested or appealed closing orders on behalf of patients, including exposure to negligence-based lawsuits by patients.

A. Review Should Be Granted To Resolve The Conflict Between The Court Of Appeals Opinion And Prior Decisions Regarding Finality And Jurisdiction To Address Closed Claims

1. The Court of Appeals Opinion conflicts with *Wells* and *Simmerly*

The Slip Opinion tries to distinguish its decision from its rulings in analogous cases under the Administrative Procedure Act (APA) and the Mandatory Arbitration Rules (MAR) in *Wells v. Western Washington Growth Management Hearings Board*, 100 Wn. App. 657, 997 P.2d 405 (2000) and *Simmerly v. McKee*, 120 Wn. App. 217, 84 P.3d 919 (2004). Slip op. at 9-10. *Wells* and *Simmerly* both reached the conclusion that, under the APA and the MAR, each party is independently responsible to timely appeal an adverse decision within the allowed time after service of the decision on the party. Lack of service on a third party has never relieved a party who received the final agency order from the obligation to appeal within the allowed time limit, or have the order become final. *Wells*, 100 Wn. App. at 677-79; *Simmerly*, 120 Wn. App. at 221-23. These cases are not only analogous, they involve a stronger claim for allowing an untimely appeal because in each of those cases it was a party with a stake in the case who had not received the order. In contrast, the Slip Opinion deals with a third party who is not a party at all - - the

attending physician is, at most, involved as an “affected person” under RCW 51.52.050 or .060.

In *Wells*, the Court of Appeals held under RCW 34.05.542(2) that “[o]nce a particular party has received the notice [of the agency’s decision], it is not prejudiced by a requirement that it file a petition for review within 30 days of that notice.” *Wells*, 100 Wn. App. at 678. Accordingly, the *Wells* Court rejected an argument by one served party that an appeal by a second served party was premature and hence void on grounds that the jurisdiction of the superior court could not be invoked until a third party had received service. *Wells*, 100 Wn. App. at 677-79.

In *Simmerly*, the Court of Appeals likewise rejected an argument under the MAR “that the time period for requesting a trial de novo did not commence until the arbitrator perfected filing of his award on all parties . . .” *Simmerly*, 120 Wn. App. at 221. A served party who was untimely in its appeal argued that the time period for invoking the superior court’s jurisdiction did not begin to run until all parties had been served. *Id.* Relying on *Wells*, the *Simmerly* Court rejected this argument and declared that “[o]nce a particular party receives notice, the arbitrator has perfected filing as to that party and there is no prejudice in requiring that party to request de novo review within 20 days.” *Id.* at 222-23. Accordingly, even though one of the parties was served later than the other parties, the

Simmerly Court held that the appellant's request for a trial de novo was untimely. *Id.*

The Slip Opinion gives two unsound reasons for distinguishing *Wells* and *Simmerly*. The first distinction is to assume that the attending physician has a duty to protest or appeal Department orders on behalf of workers. The error of this assumption is addressed in the next subsection, Part IV.A.2, and is inconsistent with cases dealing with the physician's role in assisting with claims.

The second distinction is a conclusion that RCW 51.52 lacks "procedural safeguards" that parallel the provisions in the APA and MAR for parties who receive late notice of a final order. Slip op. at 10. For example, *Wells* and *Simmerly* noted that the APA and MAR provided that the entity receiving a notice of appeal must give notice of the appeal to the other parties; thus, any party who had not received the order would have notice of the appeal and opportunity to cross-appeal. *Wells*, 100 Wn. App. at 678; *Simmerly*, 120 Wn. App. at 222.

But similar procedural safeguards are present in RCW 51.52. If the Department issues an administrative order that for some reason gets lost in the mail on the way to the worker, employer, or attending physician, and one of them files a protest, the Department will issue a further order in response and will mail that order to the worker, employer,

and attending physician. And, if an appeal is filed instead, then under RCW 51.52.060, the Board is required to send copies of its order granting the appeal to the worker, employer, and “interested parties,” which then have a right to cross-appeal the Department order. All others therefore will learn of the Department order, and they can protect their interests. Thus, RCW 51 contains safeguards equivalent to those in the APA and MAR.

2. The Slip Opinion conflicts with workers’ compensation decisions concerning the role of an attending physician

To avoid the finality that RCW 51.52.050 imposes on Shafer for failing to protest or appeal the 2000 closing order, the Slip Opinion relies on a premise that the attending physician’s role includes filing protests or appeals on behalf of injured workers. Slip op. at 8-10. Under the Slip Opinion, an attending physician is described as acting as an “advocate” for the worker on appeals against the Department and before the Board and, presumably, the courts. Slip op. at 10.

The language of the Act does not provide any support for the notion that an attending physician has such a duty or role. Moreover, no other court in a century of Industrial Insurance Act cases has issued a decision which suggests that attending physicians have a duty or role to be an advocate filing on behalf of injured workers. Indeed, the Opinion’s

conclusion to this effect is inconsistent with a long line of cases under RCW 51.28.050, which sets the time limits for filing claims for industrial injury. RCW 51.28.050 places upon an attending physician the responsibility, significantly delineated in case law, to *assist* workers in filing their *original* injury claims.

In sharp contrast to the limited role of assisting under RCW 51.28.050, the Slip Opinion greatly expands the duty and role of the attending physician. But nothing in RCW 51.52.050 assigns the attending physician a duty or role of filing a protest or appeal on the patient's behalf. Indeed, there is no authority for imposing upon the attending physician a responsibility to an injured worker beyond assisting in filing an original claim. But even when an attending physician has the responsibility to assist in filing a claim, the courts have expressly rejected the notion that the physician's duty to assist can excuse the worker or other claimant from who personally fails to comply with the procedural deadlines set forth in the Act. *See, e.g., Leschner v. Dep't of Labor & Indus.*, 27 Wn.2d 911, 927, 185 P.2d 113 (1947).⁵

⁵ *Leschner* holds that in a workers' compensation case that a worker has a duty to file his or her own claim, even if an attending doctor mistakenly told the worker that the doctor had already sent in a claim on the worker's behalf. *See also Pate v. General Electric Co.*, 43 Wn.2d 185, 189-91, 260 P.2d 901 (1953) (declaring in a negligence action by a patient against treating company doctors - - for not explaining her workers' compensation claim-filing rights - - that the sole responsibility for filing a claim is upon the worker, and adding that "silence of the physicians breached no duty, statutory or otherwise, owed to [the worker]"); *Wilbur v. Dep't of Labor & Indus.*, 38 Wn. App. 553,

Leschner and the four cases cited in footnote 5 reflect that the statutory directives for physicians are directory guides for orderly procedure and not mandates. See generally *Seatoma Convalescent Ctr. v. Dep't of Soc. & Health Services*, 82 Wn. App. 495, 513-15, 919 P.2d 602 (1996) (use of word "shall" is not mandatory if the word is used in the context of a statutory guide for orderly procedure intended to be directory only). Furthermore, those directory guides do not relieve workers of their responsibilities to independently pursue their rights.

Finally, while *Leschner* and the four cases cited in footnote 5 address the time limit for *filing a claim* under RCW 51.28.050, logic compels the same result in Shafer's case involving the time limit for *filing her protest or appeal*. In both contexts, the attending physician does not have any enforceable duty, and the responsibility to file is the worker's alone, unexcused by acts or omissions of the attending physician, employer, or other affected person.

The Slip Opinion's conclusion regarding the role of the attending physician characterized the closing order as implicating medical issues.

556-57, 686 P.2d 509 (1984) (holding that a worker was not excused from the requirement for timely filing a claim where his attending physician's staff failed to follow through on a promise to timely file an application for benefits); *Roth v. Kay*, 35 Wn. App. 1, 3-4, 664 P.2d 1299 (1983) (attempting to distinguish *Pate* in a negligence action brought by a patient suing her attending doctor, and finding a qualified duty -- for torts law purposes -- for the office of an attending doctor to follow through where the doctor's staff expressly promised to send in a report; the *Roth* Court recognizes, however, that for workers' compensation eligibility purposes, the duty to timely file a claim rests exclusively upon the worker).

Slip op. at 7-10. This fails to distinguish the cases decided under the claim-filing provision in RCW 51.28.050. Filing of claims and filing of protests and appeals both, in part, implicate medical issues. The fact that closing orders turn, at least in part, on a consideration of medical questions does not provide a basis to transfer the responsibility to protest or appeal a closing order from injured workers to their attending physicians.

The Slip Opinion has therefore relied on a duty for attending physicians that was not previously recognized in law. The ruling promises to generate litigation regarding that putative legal duty in future workers' compensation cases, and possibly in other contexts. *See* Part IV.B, below. Review should be granted to examine whether the Court of Appeals has mischaracterized the duty of attending physicians and to decide if failing to serve the attending physician overrides the plain language of RCW 51.52.050 barring Shafer from challenging the finality of her closing order.

3. The Slip Opinion conflicts with precedent showing that the time limit for appeal under RCW 51.52.050 is jurisdictional

The Slip Opinion begins with a fundamental misunderstanding of the finality of decisions by rejecting the joint position of both parties that RCW 51.52.050 affects jurisdiction. Slip op. at 5. This is an important point because the statutory time limit for protest or appeal is jurisdictional.

The Slip Opinion thus not only errs in how it resolves the statutory interpretation, as shown above, it also does so by ignoring how this affects jurisdiction of the Department and Board.

The Slip Opinion cites *Marley v. Department of Labor and Industries*, 125 Wn.2d 533, 539, 886 P.2d 189 (1994), to support its conclusion that the jurisdictional inquiry ends with asking if this is the “type of controversy” that the Department may address. Slip op. at 5. *Marley* did recognize the Department’s broad original subject matter jurisdiction to administer workers’ compensation claims. But *Marley* also recognized that a party’s failure to timely appeal a Department order renders the order final for all parties, *including the Department*. *Marley*, 125 Wn.2d at 537. As a result, *Marley* recognized that the Department does not have *jurisdiction* to issue an order inconsistent with its own prior unappealed decision. *Id.*

Notably, three years after *Marley*, this Court reaffirmed this point in *Kingery v. Department of Labor and Industries*, 132 Wn.2d 162, 170-73, 937 P.2d 565 (1997). The *Kingery* Court divided on whether equity could be invoked to relieve Ms. Kingery from the jurisdictional requirement to timely protest or appeal an adverse decision under RCW 51.52.050 and 51.52.060. But none of the three *Kingery* opinions disputed the analysis in the plurality opinion explaining that the Department’s

authority to set aside its own orders is a matter of the jurisdiction of the Department (and thus jurisdiction of the Board and courts if the Board or a court attempts review of unappealed Department orders). *Id.* at 170-73 (citing a legion of cases spanning over the past half-century).

This point is illustrated by *Perry v. Department of Labor and Industries*, 48 Wn.2d 205, 292 P.2d 366 (1956), cited with approval in *Marley*, 125 Wn.2d at 537-38. The Department issued a July 29, 1952, order closing Perry's claim and awarding permanent partial disability. *Id.* at 206. Perry filed no appeal, but three-and-a-half months later, the Department ordered Perry's claim "reopened to pay additional unspecified disability." *Id.* After the claimant appealed to the Board and superior court, this Court reversed the second Department order and held that, because there had been no show of worsening and no submission to the Department of an application to reopen (or any timely appeal), the Department, Board, and courts all lacked "*jurisdiction*" to address the merits of the original, July 29, 1952, Department order:

[T]he department had no right, on its own motion, to reopen the claim in the absence of a showing of aggravation . . . The order of November 13th contained no decision or award from which an appeal could be taken. *Neither the department nor the claimant could stipulate jurisdiction in the board to consider the abortive appeal.*

No appeal was taken from the order of July 29th. *The board was therefore without jurisdiction to have those*

matters relitigated. It follows that the *superior court was likewise without jurisdiction* to entertain an appeal from the action of the board. *Smith v. Dep't of Labor & Indus.*, 1 Wn.2d 305, 95 P.2d 1031 (1939).

Id. at 209-10 (Emphasis added).

Here, as in *Perry*, the Department issued a closing order. When the parties have been served with a Department closing order and do not protest or appeal, then the Department, the Board, and the courts lack generally lose jurisdiction to address the legal correctness of the closing order. *Perry*, 48 Wn.2d at 209-10.⁶

Accordingly, assuming for argument that Department closing orders are not final until 60 days after being communicated to the workers' attending physicians, the issue should be addressed in terms of the Department's retention of *jurisdiction* to hear a protest or receive an appeal. That is necessary to maintain consistency and avoid confusion in light of settled case law.

⁶ See also *Rust v. Western Wash. State College*, 11 Wn. App. 410, 415, 523 P.2d 204 (1974) ("The 10-day provision contained in RCW 28B.19.110 . . . is mandatory and *jurisdictional* - - a conclusion analogically supported by . . . *Lewis v. Dep't of Labor & Indus.*, 46 Wn.2d 391, 281 P.2d 837 (1955)") (emphasis added); *Lewis*, 46 Wn.2d at 397 (Board's appellate jurisdiction was not invoked where no timely appeal was filed as required under RCW 51.52.060); *Fay v. Northwest Airlines, Inc.*, 115 Wn.2d 194, 201, 796 P.2d 412 (1990) ([Under RCW 51.52.110,] "in order to *invoke the jurisdiction* of the superior court a party appealing a decision of the Board of Industrial Insurance Appeals must file and serve notice of the appeal on the Director and the Board within 30 days after receiving notification of the Board's decision.") (emphasis added); *Hanquet v. Dep't of Labor & Indus.*, 75 Wn. App. 657, 663-66, 879 P.2d 326 (1994) (characterizing Board and superior court scope-of-review questions as "jurisdictional" ones).

B. This Case Presents An Issue Of Substantial Public Interest In Its Ramifications For Both Workers' Compensation Law And Torts Law

The issue here is one of "substantial public interest" because the Court of Appeals Opinion has far-reaching ramifications for workers' compensation law in Washington. The decision undermines res judicata that attaches to final orders and adjudications, defeating the dual purposes of promoting judicial economy and protecting litigants from the burden of litigation. *See generally Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 322, 99 S. Ct. 645, 649, 58 L. Ed. 2d 552 (1979). Numerous workers, employers, and industrial insurance services providers throughout Washington face a new theory that could cause them to lose the benefit of settled Department decisions. Claims could be appealed or protested based on now-stale evidence. The Department's actuarial assumptions in setting premiums will be frustrated. These likely effects of the Court of Appeals decision make the issue one of substantial public interest that this Court should review.⁷

The other concern of substantial public interest lies in the Opinion's creation of a legal advocacy role for attending physicians. Such

⁷ The Court of Appeals Opinion relies on RCW 51.12.010's rule of liberal construction favoring injured workers in statutory construction. Slip op. at 6. But undermining finality can cause workers, just like other types of participants in workers' compensation cases, to lose the benefit of otherwise-final orders. Accordingly, while there is an illusion that liberal construction supports worker in light of the facts of this particular case, it is not logical to invoke this rule of statutory construction in this context.

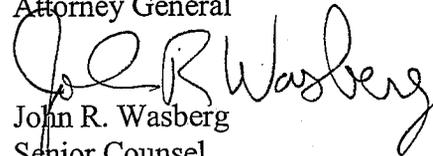
an interpretation of RCW 51.52.050 likely will trigger negligence-based lawsuits by workers who claim their doctors should have reviewed a Department decision and should have protested or appealed the decision.

V. CONCLUSION

The Department respectfully requests review and reversal of the Court of Appeals Opinion and remand to the Court of Appeals to address the other issues that Shafer has raised in her appeal.

Respectfully submitted this 1st day of October, 2007.

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

KELLY L. SHAFER,)	No. 58454-5-1
)	
Appellant,)	
)	
v.)	
)	
DEPARTMENT OF LABOR AND)	PUBLISHED OPINION
INDUSTRIES OF THE STATE OF)	
WASHINGTON,)	
)	
Respondent.)	FILED: June 11, 2007

ELLINGTON, J. We must decide whether an order closing an industrial insurance claim becomes final where the order is based upon the opinion of a physician hired by the Department of Labor and Industries, and the closure is not communicated to the worker's treating physician. We hold that under the circumstances here, the order is not final.

BACKGROUND

Kelly Shafer worked as a waitress at AMF Sports World. In October 1998, she heard her back "snap or crack" as she lifted a keg of beer.¹ Her back pain increased during the following months, and her physician referred her to Dr. Elizabeth Cook, a physician certified in physical medicine and rehabilitation with a subspecialty in

¹ Report of Proceedings (RP) (Apr. 14, 2004) at 9.

musculoskeletal problems, particularly spinal problems. Dr. Cook was "very certain" that Shafer's work accident caused her back pain.² Dr. Cook treated Shafer regularly from March 1999 through November 1999, and again in 2000. With Dr. Cook's assistance, Shafer filed a workers' compensation claim with the Department of Labor and Industries (the Department). The Department approved the claim, but authorized only some of the treatments recommended by Dr. Cook.

On behalf of the Department, Dr. Kenneth Briggs also examined Shafer. After his second examination, in July 2000, Dr. Briggs concluded that Shafer's condition was "fixed and stable," such that no further treatment was available that would improve her condition.³

Dr. Cook had received notice of other events in Shafer's claim, and had filed reports on Shafer's behalf. She did not, however, receive a copy of Dr. Briggs' report, despite Department policy that all independent medical examination reports are sent automatically to the treating physician. When the Department asked Dr. Cook to evaluate Dr. Briggs' report, she replied that she had never seen it. She also informed the Department that she did not consider Shafer's condition fixed and stable. The Department still did not send her a copy of Dr. Briggs' report.

Two months later, on October 19, 2000, in reliance upon Dr. Briggs' report, the Department closed Shafer's claim. Shafer received a copy of the order, but Dr. Cook did not. Shafer did not request reconsideration or file an appeal with the Bureau of Industrial Insurance Appeals (BIIA). Dr. Cook later attested that had she been aware of

² *Id.* at 66.

³ RP (Apr. 29, 2004) at 23.

the decision to close Shafer's claim, she would have requested reconsideration because she did not believe Shafer's condition was fixed and stable.

After the claim was closed, Shafer stopped seeing Dr. Cook because she could not afford the treatments. Two-and-a-half years later, in March 2003, she returned complaining of worsening back pain. Based upon review of an MRI, Dr. Cook recommended that Shafer apply to reopen her claim on the grounds that her condition had deteriorated after the claim was closed.

The Department denied the application, finding that Shafer's condition had not objectively worsened. Dr. Cook timely requested reconsideration. The Department affirmed. Shafer timely appealed. Proceedings before the BIIA stretched on for a year.

In a telephonic hearing before an industrial appeals judge in January 2004, Shafer contended that the October 2000 closing order never became final, because Dr. Cook had not received a copy. The industrial appeals judge rejected that argument in an interlocutory order. Eventually the BIIA found that Schafer's condition had not objectively worsened after her claim was closed in October 2000.

Shafer appealed to superior court. She again contended that the closing order had never become final, but nothing in the record suggests any ruling was made. The case was tried to a jury, which found that the BIIA correctly decided that Shafer's condition had not objectively worsened.

Shafer appeals. She first contends that the order closing her claim was never final. She also argues that substantial evidence does not support the jury's finding on her petition to reopen the claim, and that the trial court abused its discretion when it ordered a CR 35 mental examination at the Department's behest.

ANALYSIS

If the closing order never became final, that issue is dispositive. We therefore address it first.

The Department argues Shafer waived this argument by failing to raise it in her petition for review before the BIIA. Although the issue was argued in proceedings before the industrial appeals judge, the Department is correct that Shafer did not expressly raise it in her petition to the Board. RCW 51.52.104 requires that a petition for review “set forth in detail the grounds therefor and the party or parties filing the same shall be deemed to have waived all objections or irregularities not specifically set forth therein.” Shafer’s petition sought Board review of all interlocutory orders, but this is technically not enough to satisfy RCW 51.52.104. But neither did the Department timely object, as required by RAP 2.5(a), when Shafer raised the argument before the superior court.⁴ The issue has been fully briefed by both parties, here and below. We elect to resolve it pursuant to our inherent power to address issues necessary to a proper decision.⁵

⁴ RAP 2.5(a) (“The appellate court may refuse to review any claim of error which was not raised in the trial court.”).

⁵ Roberson v. Perez, 156 Wn.2d 33, 39, 123 P.3d 844 (2005) (appellate court’s refusal to review issues not raised below is discretionary); Belnap v. Boeing Co., 64 Wn. App. 212, 223 n.6, 823 P.2d 528 (1992) (court elected to address issue crucial to case not raised in petition for review before BIIA).

As a threshold matter, we disagree with the parties about the nature of the argument. Shafer contends that because Dr. Cook did not receive a copy of the closing order, it never became final, and thus the BIIA lacked "jurisdiction" over her subsequent application to reopen the claim.⁶ The Department responds that the fact Dr. Cook never received the closing order "is not a jurisdictional defect and does not relieve an injured worker of the [statutory] requirement [to file] a protest or appeal within 60 days of the worker's receipt of the Department order."⁷

Jurisdiction is not the issue here. "A tribunal lacks subject matter jurisdiction when it attempts to decide a type of controversy over which it has no authority to adjudicate. The focus must be on the words 'type of controversy.'"⁸ A determination to close a claim or to deny an application to reopen a claim falls squarely within the Department's authority to decide claims for workers' compensation⁹ and the BIIA's authority to review Department actions.¹⁰ The Department had jurisdiction over the claim, and the BIIA had jurisdiction to review its decisions.

This is properly a question of statutory interpretation. We must decide whether the legislature intended to require the Department to notify the claimant's treating physician before finally closing a claim.

⁶ App. Br. at 27.

⁷ Resp. Br. at 33.

⁸ Marley v. Dep't of Labor & Indus., 125 Wn.2d 533, 539, 886 P.2d 189 (1994) (citation omitted).

⁹ See Marley, 125 Wn.2d at 540 (citing RCW 51.04.020 and Abraham v. Dep't of Labor and Indus., 178 Wash. 160, 163, 34 P.2d 457 (1934)).

¹⁰ RCW 51.52.050 ("Whenever the department has taken any action or made any decision relating to any phase of the administration of this title the worker, employer, or other person aggrieved thereby . . . may appeal to the board.").

In interpreting statutes, we first attempt to effectuate the plain meaning of the words used by the legislature.¹¹ We examine each provision in relation to other provisions and seek a consistent construction of the whole.¹² The Industrial Insurance Act, Title 51 RCW, is "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."¹³ All doubts as to the meaning of the Act are resolved in favor of the injured employee.¹⁴

RCW 51.52.050 sets forth the requirements for notice, finality, and appeal of Department orders:

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 *[S]uch 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.^[15]

¹¹ Advanced Silicon v. Grant County, 156 Wn.2d 84, 89, 124 P.3d 294 (2005).

¹² Id.

¹³ RCW 51.12.010.

¹⁴ Clauson v. Dep't of Labor & Indus., 130 Wn.2d 580, 584, 925 P.2d 624 (1996).

¹⁵ (Emphasis added.)

An order is “communicated” upon receipt.¹⁶ An order not communicated to a party does not become final, and the party is not subject to the 60-day limitation for requesting reconsideration or filing an appeal.¹⁷

Shafer contends that because Dr. Cook is a “person affected” by the closing order who should have received a copy of the order, and a “person aggrieved thereby” who had the right to appeal, Dr. Cook must also be a “party” to whom the order must be communicated before finality can ensue. The Department concedes Dr. Cook is a “person affected” and should have received a copy of the closing order. But the Department argues its failure to provide her with a copy had no effect upon finality, because the treating physician is not a party, and only parties must receive copies before an order becomes final.

Neither argument is fully persuasive. The legislature chose different terms for different sections of the statute, presumably for a reason, and meeting two designations does not necessarily mean the third is satisfied. It is, however, suggestive of legislative intent. The Department’s assertion that the physician is not a party begs the question, which is whether the legislature intended treating physicians to receive a copy of a claimant’s closing order when the order is based on an independent medical examination before the order can become final—in which case, the legislature included the physician in the “party” category for that purpose.

¹⁶ Rodriguez v. Dep’t of Labor & Indus., 85 Wn.2d 949, 951, 540 P.2d 1359 (1975).

¹⁷ Haugen v. Dep’t of Labor & Indus., 183 Wash. 398, 401, 48 P.2d 565 (1935). See also In re Leibfried, Docket No. 88 2274, Bd. of Indus. Ins. Appeals (Dec. 7, 1990) (where claimant had not received order closing claim, application to reopen claim filed six months later should be construed as timely protest of decision to close claim).

Where a statute is ambiguous, we may look for guidance to related statutes and to the interpretation of the agency having expertise in the subject.¹⁸ Those resources here are revealing.

RCW 51.28.020 imposes upon treating physicians an express duty to inform injured workers of their rights under the Act and to assist them in applying for compensation.¹⁹ Further, the statute expressly authorizes physicians to file applications on their patients' behalves.²⁰ Physicians are also required to submit treatment reports at the Department's request.²¹

Under the Department's implementing regulations, physicians have a duty to request immediate reconsideration when they believe the Department has taken inappropriate action regarding the injured worker:

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*

....

All requests for reconsideration must be received by the department or self-insurer within sixty days from date of the order and notice of closure. Request for reconsideration of other department or self-

¹⁸ Dep't of Ecology v. Theodoratus, 135 Wn.2d 582, 589, 957 P.2d 1241 (1998) (administering agency's interpretation of statutes entitled to "great weight" if the statutes are ambiguous).

¹⁹ RCW 51.28.020 ("The physician . . . shall inform the injured worker of his or her rights under this title and 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.").

²⁰ Id. ("If the application required by this section is filed on behalf of the worker by the physician, . . . the physician . . . may transmit the application to the department electronically using facsimile mail.").

²¹ RCW 51.36.060.

insurer orders or actions must be made in writing by *either the doctor or the injured worker* within sixty days of the date of the action or order.^[22]

Likewise, the Department's "Attending Doctor's Handbook," citing RCW 51.52.050, instructs physicians, "[i]f you or your patient disagree with a decision . . . *you* have the right to protest or appeal within 60 days of the date *you receive* notification of the department's decision."²³

Thus, according to the Department, the treating physician is authorized (and indeed urged) to take steps on behalf of the injured worker that normally are available only to a claimant.

In its brief, the Department does not address the regulations or the handbook. Rather, it encourages us to follow the analyses of Wells v. Western Washington Growth Management Hearings Board²⁴ and Simmerly v. McKee.²⁵ The Wells court held that under the Administrative Procedures Act (APA), an agency's failure to serve its final order on all parties to a multiparty appeal did not relieve parties who did receive the order from the 30-day deadline for appeal.²⁶ The Simmerly court held that under the Mandatory Arbitration Rules (MAR), the time period for an individual party to request a trial de novo commences when the arbitrator perfects filing of the award with respect to that party, not when filing is perfected with respect to all parties.²⁷

²² WAC 296-20-09701 (emphasis added).

²³ DEP'T OF LABOR AND INDUS., ATTENDING DOCTOR'S HANDBOOK 30 (2005) (emphasis added).

²⁴ 100 Wn. App. 657, 997 P.2d 405 (2000).

²⁵ 120 Wn. App. 217, 84 P.3d 919 (2004).

²⁶ Wells, 100 Wn. App. at 678.

²⁷ Simmerly, 120 Wn. App. at 222-23.

But these cases are not helpful. They interpret the APA and the MAR, schemes entirely distinct from the Industrial Insurance Act which do not contemplate that a nonlitigant will have a right or duty to appeal on behalf of another. Further, in each case the court relied upon procedural safeguards ensuring that no party would be prejudiced by late receipt of the final order.²⁸ Assuming the physician is a party, the same safeguards are not present here.

Rather, we are guided by the statute and regulations. In the Industrial Insurance Act, the legislature has carved out roles and rights for nonlitigants. The legislature expects the treating physician to serve as a medical advocate for the injured worker and as a fulcrum in the agency's evaluation of the claim. The Department implements this expectation by advising physicians they have the right and the duty to seek review on their patients' behalf. The physician cannot decide whether to appeal unless the physician knows of the order. Failure to ensure that the physician learns of the order therefore deprives both the worker and the agency of the voice of the physician, just at the critical point of finalizing a determination of the worker's future medical condition.

We conclude that when a final order, decision, or award is based upon a medical determination, the legislature considers the treating physician to be an interested party.²⁹ In such cases, the order does not become final until 60 days after the doctor has received it.

²⁸ *Id.* at 222; *Wells*, 100 Wn. App. at 678–69.

²⁹ We confine our holding to those orders based upon an assessment of the worker's medical condition. We do not address whether the physician is a party for purposes of other types of orders.

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The October 19, 2000 order closing Shafer's claim never became final. A request for reconsideration or appeal, by Shafer or Dr. Cook, is still timely.

Given our disposition, we need not reach Shafer's other assignments of error. She is entitled to her attorney fees.³⁰

Reversed and remanded.

Edenfor, J.

WE CONCUR:

Becker, J.

Grosse, J.

³⁰ RCW 51.52.130; Brand v. Department of Labor & Indus., 139 Wn.2d 659, 674, 989 P.2d 1111 (1999).

ORDERED that the phrase "have a duty to" on page 8 is changed to "are expected to" and the phrase "and the duty to" on page 10 is changed to "and are expected to."

Further reconsideration is denied.

Dated this 4th day of September 2007.

[Signature]
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APPENDIX B

APPENDIX B - - STATUTES

RCW 34.05.542

Subject to other requirements of this chapter or of another statute:

(1) A petition for judicial review of a rule may be filed at any time, except as limited by RCW 34.05.375.

(2) A petition for judicial review of an order shall be filed with the court and served on the agency, the office of the attorney general, and all parties of record within thirty days after service of the final order.

(3) A petition for judicial review of agency action other than the adoption of a rule or the entry of an order is not timely unless filed with the court and served on the agency, the office of the attorney general, and all other parties of record within thirty days after the agency action, but the time is extended during any period that the petitioner did not know and was under no duty to discover or could not reasonably have discovered that the agency had taken the action or that the agency action had a sufficient effect to confer standing upon the petitioner to obtain judicial review under this chapter.

(4) Service of the petition on the agency shall be by delivery of a copy of the petition to the office of the director, or other chief administrative officer or chairperson of the agency, at the principal office of the agency. Service of a copy by mail upon the other parties of record and the office of the attorney general shall be deemed complete upon deposit in the United States mail, as evidenced by the postmark.

(5) Failure to timely serve a petition on the office of the attorney general is not grounds for dismissal of the petition.

(6) For purposes of this section, service upon the attorney of record of any agency or party of record constitutes service upon the agency or party of record.

RCW 51.12.010

There is a hazard in all employment and it is the purpose of this title to embrace all employments which are within the legislative jurisdiction of the state.

This title shall 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 51.28.050

No application shall be valid or claim thereunder enforceable unless filed within one year after the day upon which the injury occurred or the rights of dependents or beneficiaries accrued, except as provided in RCW 51.28.055 and RCW 51.28.025(5).

RCW 51.32.160

1)(a) If aggravation, diminution, or termination of disability takes place, the director may, upon the application of the beneficiary, made within seven years from the date the first closing order becomes final, or at any time upon his or her own motion, readjust the rate of compensation in accordance with the rules in this section provided for the same, or in a proper case terminate the payment: PROVIDED, That the director may, upon application of the worker made at any time, provide proper and necessary medical and surgical services as authorized under RCW 51.36.010. The department shall promptly mail a copy of the application to the employer at the employer's last known address as shown by the records of the department.

(b) "Closing order" as used in this section means an order based on factors which include medical recommendation, advice, or examination.

(c) Applications for benefits where the claim has been closed without medical recommendation, advice, or examination are not subject to the seven year limitation of this section. The preceding sentence shall not apply to any closing order issued prior to July 1, 1981. First closing orders issued between July 1, 1981, and July 1, 1985, shall, for the purposes of this section only, be deemed issued on July 1, 1985. The time limitation of this section shall be ten years in claims involving loss of vision or function of the eyes.

(d) If an order denying an application to reopen filed on or after July 1, 1988, is not issued within ninety days of receipt of such application by the self-insured employer or the department, such application shall be deemed granted. However, for good cause, the department may extend the time for making the final determination on the application for an additional sixty days.

(2) If a worker receiving a pension for total disability returns to gainful employment for wages, the director may suspend or terminate the rate of compensation established for the disability without producing medical evidence that shows that a diminution of the disability has occurred.

(3) No act done or ordered to be done by the director, or the department prior to the signing and filing in the matter of a written order for such readjustment shall be grounds for such readjustment.

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.

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: PROVIDED, That in an appeal from an order of the department that alleges willful misrepresentation, the department or self-insured employer shall initially introduce all evidence in its case in chief. Any such person aggrieved by the decision and order of the board may thereafter appeal to the superior court, as prescribed in this chapter.

RCW 51.52.060

(1)(a) Except as otherwise specifically provided in this section, a worker, beneficiary, employer, health services provider, or other person aggrieved by an order, decision, or award of the department must, before he or she appeals to the courts, file with the board and the director, by mail or personally, within sixty days from the day on which a copy of the order, decision, or award was communicated to such person, a notice of appeal to the board. However, a health services provider or other person aggrieved by a department order or decision making demand, whether with or without penalty, solely for repayment of sums paid to a provider of medical, dental, vocational, or other health services rendered to an industrially injured worker must, before he or she appeals to the courts, file with the board and the director, by mail or personally, within twenty days from the day on which a copy of the order or decision was communicated to the health services provider upon whom the department order or decision was served, a notice of appeal to the board.

(b) Failure to file a notice of appeal with both the board and the department shall not be grounds for denying the appeal if the notice of appeal is filed with either the board or the department.

(2) Within ten days of the date on which an appeal has been granted by the board, the board shall notify the other interested parties to the appeal of the receipt of the appeal and shall forward a copy of the notice of appeal to the other interested parties. Within twenty days of the receipt of such notice of the board, the worker or the employer may file with the board a cross-appeal from the order of the department from which the original appeal was taken.

(3) If within the time limited for filing a notice of appeal to the board from an order, decision, or award of the department, the department directs the submission of further evidence or the investigation of any further fact, the time for filing the notice of appeal shall not commence to run until the person has been advised in writing of the final decision of the department in the matter. In the event the department directs the submission of further evidence or the investigation of any further fact, as provided in this section, the department shall render a final

order, decision, or award within ninety days from the date further submission of evidence or investigation of further fact is ordered which time period may be extended by the department for good cause stated in writing to all interested parties for an additional ninety days.

(4) The department, either within the time limited for appeal, or within thirty days after receiving a notice of appeal, may:

(a) Modify, reverse, or change any order, decision, or award; or

(b)(i) Except as provided in (b)(ii) of this subsection, hold an order, decision, or award in abeyance for a period of ninety days which time period may be extended by the department for good cause stated in writing to all interested parties for an additional ninety days pending further investigation in light of the allegations of the notice of appeal; or

(ii) Hold an order, decision, or award issued under RCW 51.32.160 in abeyance for a period not to exceed ninety days from the date of receipt of an application under RCW 51.32.160. The department may extend the ninety-day time period for an additional sixty days for good cause.

For purposes of this subsection, good cause includes delay that results from conduct of the claimant that is subject to sanction under RCW 51.32.110.

The board shall deny the appeal upon the issuance of an order under (b)(i) or (ii) of this subsection holding an earlier order, decision, or award in abeyance, without prejudice to the appellant's right to appeal from any subsequent determinative order issued by the department.

This subsection (4)(b) does not apply to applications deemed granted under RCW 51.32.160.

(5) An employer shall have the right to appeal an application deemed granted under RCW 51.32.160 on the same basis as any other application adjudicated pursuant to that section.

(6) A provision of this section shall not be deemed to change, alter, or modify the practice or procedure of the department for the payment of awards pending appeal.

RCW 51.52.104

After all evidence has been presented at hearings conducted by an industrial appeals judge, who shall be an active or judicial member of the Washington state bar association, the industrial appeals judge shall enter a proposed or recommended decision and order which shall be in writing and shall contain findings and conclusions as to each contested issue of fact and law, as well as the order based thereon. The industrial appeals judge shall file the signed original of the proposed decision and order with the board, and copies thereof shall be mailed by the board to each party to the appeal and to each party's attorney or representative of record. Within twenty days, or such further time as the board may allow on written application of a party, filed within said twenty days from the date of communication of the proposed decision and order to the parties or their attorneys or representatives of record, any party may file with the board a written petition for review of the same. Filing of a petition for review is perfected by mailing or

personally delivering the petition to the board's offices in Olympia. Such petition for review shall set forth in detail the grounds therefor and the party or parties filing the same shall be deemed to have waived all objections or irregularities not specifically set forth therein.