

NO. 81049-4

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
08 AUG 29 AM 8:13
BY RONALD R. CARPENTER
CLERK

SUPREME COURT OF THE STATE OF WASHINGTON

KELLY L. SHAFER,

Respondent,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Petitioner.

**SUPPLEMENTAL BRIEF OF THE DEPARTMENT OF LABOR
AND INDUSTRIES**

ROBERT M. MCKENNA
Attorney General

JOHN R. WASBERG
Senior Counsel
WSBA No. 6409
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-6039
JAY D. GECK
Deputy Solicitor General
WSBA No. 17916
PO Box 40100
Olympia, WA 98504-0100
(360) 586-2697

ORIGINAL

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ISSUE PRESENTED	2
III.	STATEMENT OF THE CASE.....	3
IV.	ARGUMENT	6
	A. RCW 51.52.050 and .060 Bar A Party From Protesting Or Appealing Sixty Days After The Party Receives Notice, Regardless Of When Other Parties Or Persons Receive Notice.....	6
	B. Shafer’s Argument Is Contrary To The Well-Reasoned Decisions In <i>Wells</i> And <i>Simmerly</i> Under Analogous Appeal Provisions Of The APA And MAR.....	9
	1. The Court of Appeals erroneously construed the role of attending physician.....	10
	2. RCW 51.52.050 and .060 include adequate safeguards	15
	C. A Worker And Other Parties And Persons Should Be Able To Rely On The Finality Of Department And Board Decisions.....	16
	D. Shafer Misplaces Reliance On Division Three’s <i>Ochoa</i> Decision	17
V.	CONCLUSION	20

TABLE OF AUTHORITIES

Cases

<i>Donajowski v. Alpena Power Co.</i> , 596 N.W.2d 574, 584 (Mich. 1999).....	20
<i>In re Estate of Kerr</i> , 134 Wn.2d 328, 949 P.2d 81 (1998).....	8
<i>In re Leibfried</i> , BIIA Dec., 88 2274.....	18, 20
<i>In re Ronald Leibfried</i> , BIIA Dec., 88 2274, 1990 WL 264682, (1990).....	1
<i>Leschner v. Dep't of Labor & Indus.</i> , 27 Wn.2d 911, 185 P.2d 113 (1947).....	12, 13
<i>McDonald v. Dep't of Labor & Indus.</i> , 104 Wn. App. 617, 17 P.3d 1195 (2001).....	18
<i>Ochoa v. Dep't of Labor & Indus.</i> , 100 Wn. App. 878, 999 P.2d 633 (2000), <i>reversed on other grounds</i> , 143 Wn.2d 422 (2001).....	17, 18, 19, 20
<i>Pate v. General Electric Co.</i> , 43 Wn.2d 185, 260 P.2d 901 (1953).....	12
<i>Roth v. Kay</i> , 35 Wn. App. 1, 664 P.2d 1299 (1983).....	12
<i>Seatoma Convalescent Ctr. v. Dep't of Soc. & Health Servs.</i> 82 Wn. App. 495, 919 P.2d 602 (1996).....	12
<i>Shafer v. Dep't of Labor & Indus.</i> , 140 Wn. App. 1, 159 P.3d 473 (2007).....	passim
<i>Simmerly v. McKee</i> , 120 Wn. App. 217, 84 P.3d 919 (2004).....	passim

<i>Wells v. W. Wash. Growth Mgmt. Hgs. Bd.</i> , 100 Wn. App. 657, 997 P.2d 405 (2000).....	passim
<i>Wilbur v. Dep't of Labor & Indus.</i> , 38 Wn. App. 553, 686 P.2d 509 (1984).....	12

Statutes

RCW 34.05.542(2).....	9
RCW 51	15, 16, 18
RCW 51.12.010	17
RCW 51.28.050	11, 13
RCW 51.32.160	passim
RCW 51.52	15
RCW 51.52.050	passim
RCW 51.52.060	passim
RCW 51.52.060(1)(a)	3, 7, 8, 20
RCW 51.52.104	4

Court Rules

RAP 5.2(a)	16
------------------	----

Regulations

WAC 296-20-09701.....	14
-----------------------	----

Other Authority

Laws of 2008, ch. 280, § 1.....	2
---------------------------------	---

Appendix

Appendix A - RCW 51.52.050

I. INTRODUCTION

This case started with an ordinary application under RCW 51.32.160 to reopen a closed workers' compensation claim for worsening of condition. There was no dispute Shafer had received a closing order in 2000, along with a permanent partial disability award, and had – for three years – accepted that ruling. Originally recognizing that her claim had been closed since 2000, Shafer asked the Department to reopen the claim in 2003 due to alleged worsening. The Department denied reopening, and Shafer appealed to the Board of Industrial Insurance Appeals.

At the Board, Shafer first alleged that her doctor had not received the 2000 closing order. On this basis, she argued the closing order never became final as to *any* party; thus, the Department and Board lacked jurisdiction to even consider her reopening application. In essence, Shafer asked that her reopening application be treated as a protest of the 2000 closing order—notwithstanding the passage of three years, her use of the 2000 award, and the existence of a statutory process for reopening. Shafer relied on a Board case where a claimant appealed denial of reopening, but then proved that he himself (the claimant) had never received the closing order, and the Board treated the reopening application as a protest of the previously unserved closing order. *In re Ronald Leibfried*, BIIA Dec., 88 2274, 1990 WL 264682, *2-4 (1990) (Significant Decision).

The Board and later the superior court, however, recognized that here Shafer had received the 2000 closing order, and each therefore rejected her argument that it was not final. Furthermore, both the Board and a jury found that under the facts, the Department properly denied reopening. The Court of Appeals reversed by 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],¹ is still timely.” *Shafer v. Dep’t of Labor & Indus.*, 140 Wn. App. 1, 11, 159 P.3d 473 (2007). The Court of Appeals thus held that Shafer could bypass the statute governing reopening closed claims. The Department seeks reversal of the Court of Appeals decision.²

II. ISSUE PRESENTED

RCW 51.52.050³ requires the Department to send its orders to the injured worker, the employer, and any “other person affected” by the order. This subsection also gives notice that an order shall become final 60 days from when it is communicated⁴ and provides that an aggrieved person may file a protest (request for reconsideration) or an appeal. RCW

¹ There has never been a request for reconsideration or appeal by *Dr. Cook*.

² The Court of Appeals did not reach Shafer’s alternative arguments that challenged the jury verdict denying reopening under RCW 51.32.160.

³ The Department cites to pre-2008 RCW 51.52.050. The 2008 Legislature broke the statute into subsections and created stay procedures during administrative appeals. Laws of 2008, ch. 280, § 1. No text relevant here was changed in 2008. Current RCW 51.52.050 and .060 are set forth in Appendix A with relevant text bolded.

⁴ The statute uses the term “communicated,” but it is undisputed that this term means “received.” *Shafer*, 140 Wn. App. at 8, n.16.

51.52.060(1)(a) then provides that a person or party appealing to the Board must file with the Department and Board “within sixty days from the day on which a copy of the order . . . was communicated to such person” (Emphasis added). In October 2000 the Department communicated to Shafer its order closing Shafer’s industrial insurance claim with a disability award, and she did not protest or appeal. The issue presented is:

Where a Department closing order and an award was received by the worker and the employer, and the worker did not file a timely protest or appeal, can the worker claim the closing order was not final years later based on evidence that her attending physician did not receive the closing order? Or, is the worker limited to seeking reopening of the order under RCW 51.32.160?

III. STATEMENT OF THE CASE

On October 19, 2000, the Department closed Shafer’s industrial insurance claim, ending treatment and awarding permanent partial disability benefits. BR 29 (Board decision); BR 98 (Department closing order).⁵ The Department mailed her the order at that time, she received it shortly after it was mailed, she did not timely protest or appeal to the Board at any time, and she accepted the benefit award.

In 2003, Shafer requested reopening, alleging worsening. BR 29-30. *See generally* RCW 51.32.160 (allowing reopening upon proof of

⁵ “BR” refers to the Certified Appeal Board Record.

worsening of disability). After the Department denied reopening, Shafer appealed to the Board and began to argue that the Board (and the Department earlier) lacked jurisdiction to consider reopening her claim, asserting that the 2000 closing order had not yet become final. BR 54. She relied on: (1) RCW 51.52.050, which requires the Department to mail its administrative orders to a worker's attending physician; and (2) an affidavit from Dr. Cook alleging she (Dr. Cook) never received the 2000 closing order, and saying she would have challenged the order had she received it. BR 77-78. The Board's IAJ ruled as a matter of law that Shafer, who herself received a copy of the closing order, could not "stand in her physician's shoes." BR 54. Shafer sought interlocutory Board review (BR 56-100), which the Board denied. BR 105.⁶

The IAJ took evidence on Shafer's claims of worsened, injury-related disability and recommended that the Board affirm the Department's denial of reopening. BR 19-32. Shafer petitioned to the three-member Board, which denied review, adopting the IAJ's proposed decision as its final decision. BR 1-17; *see* RCW 51.52.104.

⁶ The Board rejected Shafer's argument as a matter of law and made no finding whether Dr. Cook did or did not receive a copy of the Department's October 19, 2000 closing order. The evidence is disputed because the order shows 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, however, has no other proof of Dr. Cook's receipt and therefore argues, for the reasons below, that even if Dr. Cook's recollection is accurate, Shafer's protest or appeal is barred by RCW 51.52.050 and .060 as a matter of law.

At superior court, Shafer re-raised her RCW 51.52.050 challenge in briefing. CP 38-39, 59-62. The court implicitly rejected the theory and submitted the case to a jury. The jury affirmed the Board on the fact question of whether any injury-caused disability had worsened since October 19, 2000. CP 164-67; CP 217-19 (judgment).

Shafer raised alternative arguments at the Court of Appeals, including a jurisdictional argument concerning lack of finality.⁷ The Court addressed only finality and held the Department's 2000 closing order never became final. The Court reasoned: (1) Shafer proved that her attending physician never received the Department's mailing of her copy, and (2) the Department closing order could not become final without service on her physician because the order involved a "medical determination." *Shafer*, 140 Wn. App. at 11. The Department moved for reconsideration, which was granted in part to modify the opinion slightly. Citations are to the modified version.

⁷ In its Petition for Review, the Department explained that Division One evidenced a fundamental misunderstanding of the finality of decisions when the Court rejected the then-joint position of the parties that RCW 51.52.050 affects *jurisdiction*. Petition at 16-18, discussing *Shafer*, 140 Wn. App. at 6-7. Shafer's Answer to Petition at 12-13, however, changed her prior position and asserted that no jurisdictional issue is presented, although she does not rely on her new position to justify her failure to appeal the 2000 order. Because of page limits, the Department will not repeat its jurisdiction discussion, and stands by its prior explanation that the finality issue here affects jurisdiction of the Department and Board.

IV. ARGUMENT

A. RCW 51.52.050 and .060 Bar A Party From Protesting Or Appealing Sixty Days After The Party Receives Notice, Regardless Of When Other Parties Or Persons Receive Notice

Shafer argues, and the Court of Appeals agreed, that the 60-day period for protesting or appealing a Department order under RCW 51.52.050 and .060 does not begin to run against *anyone* until the worker and employer, as well as all “other person[s] affected thereby” have all received copies of the Department order as described in RCW 51.52.050. *Shafer*, 140 Wn. App. at 8; Answer to Petition at 1-10. This reading is contrary to the statutory language and should be rejected because it puts an unwarranted cloud on otherwise final Department orders, and thus impairs the interests of workers, employers, and others who must rely on the finality of such orders.

RCW 51.52.050 addresses service of Department orders, a required notice about finality, and who can seek reconsideration:

Whenever the department has made any order . . . it shall promptly serve the worker, beneficiary, employer, *or other person* affected thereby, with *a* copy thereof by mail *The copy* . . . shall bear . . . a statement . . . that such . . . order . . . 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 . . . or *an* appeal is filed with the board

[T]he worker, beneficiary, employer, or other *person* aggrieved . . . may request reconsideration of the department, or may appeal to the board.

Read in isolation, the use of the singular in the first sentence and plural in the required notice (as demonstrated by the emphasis above), creates a mild ambiguity as to whether the 60-day protest/appeal period starts as to each party or affected person from the date *that particular party or person* receives the Department order, regardless of when or whether another party or affected person receives the order. But RCW 51.52.050 does not stand alone in defining finality.

RCW 51.52.060(1)(a) provides that before a party resorts to the courts, he or she must first timely appeal to the Board, and the statute defines the time limits for such appeals:

“[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. (Emphasis added.)

RCW 51.52.060 is unambiguous in stating that a party or affected person “must” file with the Department and Board “within sixty days from the day on which *a copy of the order . . . was communicated to such person . . .*” (Emphasis added). Confirmation that finality stems from when the order was communicated to each person is found in the very next

sentence concerning a health services provider aggrieved by a Department decision to order repayment. The health services provider's appeal must start "within twenty days from the day on which a copy of the order or decision *was communicated to the health services provider . . .*"

Under this unambiguous language in RCW 51.52.060(1)(a), the deadline *for Shafer* to appeal her closure order was 60 days from the date it "was communicated" *to her*, regardless of when it was communicated to other affected persons. When RCW 51.52.050 is read in light of the clear wording of RCW 51.52.060(1)(a), each person still has his or her own protest or appeal deadline depending on date of receipt. The "communication" starting the 60-day period is specific to each particular appellant. The Court of Appeals erred when it failed to read RCW 51.52.050 and .060 together to achieve a unified and harmonious scheme. *See In re Estate of Kerr*, 134 Wn.2d 328, 336, 949 P.2d 81 (1998).

Shafer explains her contrary result by pointing to the obligation to serve "other affected persons" in RCW 51.52.050. The Department, of course, fully endorses these statutory obligations. But the language of RCW 51.52.050 and .060, read together, precludes her direct protest or appeal of the 2000 order. Once her claim was closed finally as to her, she could reopen it only by meeting the standards of RCW 51.32.160.

B. Shafer's Argument Is Contrary To The Well-Reasoned Decisions In *Wells* And *Simmerly* Under Analogous Appeal Provisions Of The APA And MAR

Division One offered no sound basis for distinguishing its contrary rulings in the analogous cases of *Wells* and *Simmerly*, decided under the Administrative Procedure Act and the Mandatory Arbitration Rules. *Shafer*, 140 Wn. App. at 10-11 (discussing *Wells v. W. Wash. Growth Management Hgs. Bd.*, 100 Wn. App. 657, 997 P.2d 405 (2000) and *Simmerly v. McKee*, 120 Wn. App. 217, 84 P.3d 919 (2004)). *Wells* and *Simmerly* each reached the conclusion that, under the APA and the MAR, respectively, each party is independently responsible for timely appealing an adverse decision within the allowed time after service of the decision on that party. Lack of service on a third party does not relieve 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.

Wells held that under the APA, RCW 34.05.542(2), the period to seek review begins for “an individual petitioner upon service of the final order on that petitioner,” explaining 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 (emphasis added). *Wells* rejected an argument

by a served party that an appeal by another served party was premature and void on grounds that superior court jurisdiction could not be invoked until a third party also received service. *Wells*, 100 Wn. App. at 677-79.

Simmerly 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 whose appeal was untimely argued that the period to invoke superior court jurisdiction did not begin to run until all parties had been served. *Id.* Relying on *Wells*, *Simmerly* rejected this argument. “Once 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. Thus, even though one party was served late, the appellant’s request for a trial was untimely. *Id.*

The time limits for protest or appeal of RCW 51.52.050 and .060 are not distinguishable from the operative language construed in *Wells* and *Simmerly*. As shown next, the lower court’s reasons for distinguishing *Wells* and *Simmerly* were unsound.

1. The Court of Appeals erroneously construed the role of attending physician

The Court of Appeals distinguished *Wells* and *Simmerly* first by reasoning that the attending physician’s role includes a “duty” to file

protests or appeals on behalf of injured workers. *Shafer*, 140 Wn. App. at 11. The opinion apparently assumes that the physician's duty makes the physician an "advocate" for the worker on appeals before the Board (and, presumably, the courts). *Id.*

First, the statutory language of RCW 51.52.050 and .060, as discussed in Part IV.A, is dispositive. These statutes bar the worker's protest or appeal 60 days after communication to the worker, regardless of the role or actions of the attending physician.

Second, assuming for argument the role of attending physician must be assessed, case law contradicts the notion that the physician holds a "duty" to act as "advocate" such that a worker may avoid finality until the physician is served. In substance, the Court of Appeals has equated service on the attending physician as if it were service on the legal representative of a party—a far cry from the physician's role as claimant medical advisor. No court in a century of the Act suggests attending physicians have a duty to file protests and appeals *on behalf of* workers.

A number of cases have addressed an analogous statute, RCW 51.28.050, and reach a contrary result. RCW 51.28.050 sets the time limits for filing claims for industrial injury. Under that statute, an attending physician is assigned limited responsibility to *assist* workers in filing *original* injury claims. However, even when an attending physician

must assist in filing a claim, this Court and others have rejected the notion that the physician's duty to assist can excuse the claimant from personally failing to comply with procedural deadlines in the Act. *See, e.g., Leschner v. Dep't of Labor & Indus.*, 27 Wn.2d 911, 927, 185 P.2d 113 (1947) (worker has sole duty to file own claim, even if doctor mistakenly told worker the doctor had already sent in a claim on worker's behalf).⁸

Leschner and the cases cited in footnote 8 confirm that the statutory directives for physicians are guides for orderly procedure. *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). In any event, as discussed above in Part IV.A, the directives for notifying *physicians* in RCW 51.52.050 and .060 do not excuse a *worker* who did not timely protest or appeal from a closure order served on the worker.

⁸ *See also Pate v. General Electric Co.*, 43 Wn.2d 185, 189-91, 260 P.2d 901 (1953) (in a negligence action by a patient against company doctors for not explaining her workers' compensation claim-filing rights, holding that the sole responsibility for filing a claim is on the worker because "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, 556-57, 686 P.2d 509 (1984) (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 apply for benefits); *cf. Roth v. Kay*, 35 Wn. App. 1, 3-4, 664 P.2d 1299 (1983) (distinguishing *Pate* in a negligence action brought by a patient suing her attending doctor, and finding a qualified tort duty where the doctor's staff expressly promised to send in a report, but recognizing that for workers' compensation purposes, the duty to timely file a claim rests exclusively on the worker).

Admittedly, *Leschner* and the decisions in footnote 8 address the time limit for *filing a claim* under RCW 51.28.050, but logic compels the same result in Shafer's case challenging the time limit for filing her protest or appeal. Whether filing an original claim or filing a protest or appeal, a worker's claim may implicate medical issues. However, the fact that closing orders may implicate medical facts is no reason to infer a responsibility or role for attending physicians such that Shafer's three-year acceptance of the closure order can be ignored. The responsibility to file a claim or an appeal is the worker's alone, unexcused by acts or omissions of the attending physician or others. *See Leschner*, 27 Wn.2d at 922 ("a physician has no statutory power, express or implied, to alter any legal relation between a claimant and the . . . department").

Furthermore, as discussed in the Amicus Washington Defense Trial Lawyers brief supporting review, a physician's role must be independent and different from that of the injured worker. Amicus brief of WDTL at 4-9. Indeed, a physician's position might be at odds with the worker's choice. For example, Dr. Cook states post-hoc that she would have concluded the claim should not be closed, but Shafer expressed no

objection to the closing order, she accepted a disability award, and she confirmed her belief the claim was closed by filing for reopening.⁹

The Department's position does not mean that the attending physician is not authorized to challenge certain orders. As the Court of Appeals noted, WAC 296-20-09701, a Department rule, authorizes a physician to protest a Department closing order. *Shafer*, 140 Wn. App. at 9-10. But such a challenge is brought by a physician in his or her own right as an affected person under RCW 51.52.050 and .060. This does not impose a *duty* to act as advocate for the worker. It is this purported duty as advocate that is the foundation for the Court of Appeals decision that the order is perpetually not final. Notably, even *Shafer* recognizes the defect in Division One's advocate analysis and attempts to re-characterize that analysis as holding merely that the physician *may* protest or appeal. *Shafer* Answer to Petition at 10, 14. However, the fact that the physician has some discretion to protest or appeal is not a reason to infer an exception for a worker's protest or appeal that is otherwise untimely under RCW 51.52.050 and .060.

⁹The role for attending physicians cited by the Court of Appeals could have significant ramifications beyond this case. For example, the Court of Appeals view could be argued as a basis for a tort claim based on how or whether a physician fulfilled his or her duty to protest or appeal Department decisions. Such an expansion of liability could be a disincentive to treat injured workers, frustrating the core purpose of the Act.

The Court of Appeals overstates the responsibilities of an attending physician and thus reaches the wrong conclusion. Case law and the statutory scheme show that the physician acts as a medical provider and medical advisor. Service of orders under RCW 51.52.050 assists the physician in that role, but this does not make an attending physician an advocate with a duty to file protests or appeals on behalf of a patient.

2. RCW 51.52.050 and .060 include adequate safeguards

The lower court's second reason for not following *Wells* and *Simmerly* is its erroneous conclusion that RCW 51.52 lacks "procedural safeguards" for parties who receive late notice of a final order. *Shafer*, 140 Wn. App. at 11. For example, *Wells* and *Simmerly* noted that the APA and MAR provide that the entity receiving a notice of appeal must give notice to the other parties; thus, a party who had not received the order would have notice and opportunity to cross-appeal. *Wells*, 100 Wn. App. at 678; *Simmerly*, 120 Wn. App. at 222.

The Court of Appeals reason is an illusory distinction because RCW 51 equally provides further notices to parties. For example, if the Department issues an 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 mail it to each again. 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,” who can cross-appeal. These procedural safeguards in RCW 51 are substantively the same as the safeguards in the APA and MAR.

If anything, RCW 51 has better safeguards. First, the worker gets 60 days to consider options—twice the time given under the APA and three times that under that MAR. *See also* RAP 5.2(a) (30 days for appeal from superior court). Second, the worker has a substantive right to reopen an injury claim if her condition worsens. RCW 51.32.160. Thus, where (as here) a worker chooses not to appeal a closing order, she may nevertheless obtain additional benefits if her condition worsens.

The lower court erred by suggesting the procedural safeguards of RCW 51 provide a meaningful reason to distinguish *Wells* and *Simmerly*.

C. A Worker And Other Parties And Persons Should Be Able To Rely On The Finality Of Department And Board Decisions

As shown above, the Court of Appeals decision is not supported by the statutes or case law. The most important reason to reverse the decision, however, is that workers, employers, and workers’ compensation insurers should be able to rely on settled decisions. Late challenges require parties to try claims on stale evidence. And late challenges undermine the Department’s actuarial assumptions in setting premiums.

Also, it is also easy to see how a late challenge under Shafer's theory would harm workers and frustrate the remedial purposes of the Act. Most workers will undoubtedly spend a partial disability award in reliance upon a final closing order served on the worker and employer. But, under the Court of Appeals decision, the employer could have second thoughts and file a protest or appeal by locating an "affected party" and offering evidence that the third party did not receive the closing order.

This result illustrates that Shafer's construction of the statutes on protest or appeal is not compelled by RCW 51.12.010 (the rule of liberal construction favoring injured workers). *See Shafer*, 140 Wn. App. at 7; Answer to Petition at 14. Any construction that undermines finality can equally cause workers, employers, the Department, or any other stakeholders in workers' compensation claims to lose the benefit of otherwise-final orders.¹⁰

D. Shafer Misplaces Reliance On Division Three's *Ochoa* Decision

During oral argument at the Court of Appeals, Shafer argued for the first time that her theory is supported by *Ochoa v. Department of Labor & Industries*, 100 Wn. App. 878, 999 P.2d 633 (2000), *reversed on*

¹⁰ Shafer has also argued that this case can be resolved by concluding that notice provisions should be construed strictly against the person required to give notice. Answer to Petition at 6-7. The Court should reject Shafer's argument, first, because the cases she cites - - and none the Department could find - - do not support her proposition, and second, because RCW 51.52.050 and .060 allow the Court to resolve this case without resort to generalities.

other grounds, 143 Wn.2d 422, 20 P.3d 939 (2001) (holding claimant was not within RCW 51 exclusion of jockeys). Answer at 5-6. Shafer's reliance on dicta in the reversed *Ochoa* opinion is misplaced.

In *Ochoa*, a race track was identified as "employer" in a Department order allowing a claim. 100 Wn. App. at 880. The race track timely protested to the Department, explaining both that it was not the employer, and that, in any event, the claim should be rejected per an RCW 51 exclusion. *Id.* at 880. By law, the protest automatically vacated the allowance order, requiring the Department to issue a further order allowing or rejecting the claim and determining the claimant's employer. See *In re Leibfried*, BIIA Dec., 88 2274, at 4 ("The filing of the protest automatically set the [protested] order aside . . ."); *McDonald v. Dep't of Labor & Indus.*, 104 Wn. App. 617, 623-24, 17 P.3d 1195 (2001) (a protest vacates, supersedes, and makes irrelevant a protested order, and thus requires that the Department enter a new order). The Department then found *Ochoa* had a different employer, but rejected the claim based on an exclusion for jockeys in RCW 51. *Ochoa*, 100 Wn. App. at 880.

Division Three (but not this court) addressed *Ochoa's* theory that the portion of the original Department order allowing his claim was res judicata. *Ochoa* claimed the race track had protested only the employer-responsibility part of the order, but that the allowance part of the order was

intact. 100 Wn. App. at 882. Division Three resoundingly rejected his “contention that a protested order may have some *partial* final effect.” *Id.* at 882. It also noted that the race track had challenged allowance of the claim, so the facts did not support his partial-protest theory. *Id.* at 882.

Shafer relies on *Ochoa* dicta that “because the [allowance] order was not ‘communicated’ to the [actual] employer, it did not become final and thus had no effect.” *Id.* at 881-82. This dicta, theorizing on finality in the *hypothetical* circumstance where no timely protest would be filed but one party would not receive the order, is an overstatement and should not be followed. *Wells* and *Simmerly* supply the correct reading of RCW 51.52.050 and .060—an original allowance order would be final for those who received it and did not protest or appeal (although if timely protested or appealed by any party, all parties are subject to the protest or appeal).

Moreover, *Ochoa* offers a more specific basis for its conclusion by holding that the race track’s timely protest of a Department allowance order automatically triggers withdrawal and issuance of a new order subject to protest or appeal by all parties. The statement cited by Shafer is not a sound precedent for analyzing RCW 51.52.050 and .060, nor does it

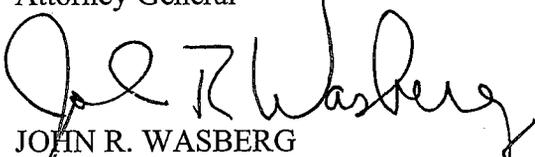
provide a basis for bypassing the sound reasoning of *Wells* and *Simmerly*.¹¹

V. CONCLUSION

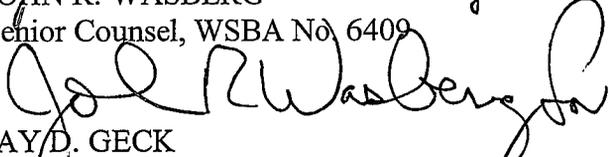
The Department respectfully requests reversal of the Court of Appeals Opinion and remand to the Court of Appeals to address the other issues that Shafer has raised in her appeal of denial of reopening.¹²

Respectfully submitted this 28th day of August, 2008.

ROBERT M. MCKENNA
Attorney General



JOHN R. WASBERG
Senior Counsel, WSBA No. 6409



JAY D. GECK
Deputy Solicitor General, WSBA No. 17916

¹¹ Shafer argues that the Legislature “acquiesce[d]” in the *Ochoa* dicta and that the statement was not addressed by the Supreme Court in its reversal. She cites no evidence of actual Legislative consideration of this statement in *Ochoa*. Moreover, Legislative acquiescence is an unsound tool for statutory construction when the statement in appellate discussion involves dicta. See, e.g., *Donajowski v. Alpena Power Co.*, 596 N.W.2d 574, 584 (Mich. 1999) (“We think it presumptuous to bind the Legislature to that which we do not even bind ourselves.”)

¹² Assuming for argument that RCW 51.52.050 can somehow be read in isolation from the express language of RCW 51.52.060(1)(a), *but see* discussion above in Part IV.A, the Court of Appeals was unclear about how the Department or Board should proceed. A reasonable procedure would be to treat a reopening application as a protest to the 2000 closing order, and to remand for the Department act on the protest. *In re Leibfried*, BIIA Dec. 88 2274. Such a process ensures a Department decision on the protest is made, which ensures that any other affected party or person can fairly seek review.

APPENDIX A

APPENDIX A

RCW 51.52.050 (this is the statute as amended in 2008, but the 2008 amendment did not revise any of the language - - in bold below - - that is pertinent to the *Shafer* appeal and is now codified in subsection (1) and subsection (2)(a))

(1) 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. However, 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.

(2)(a) 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.

(b) An order by the department awarding benefits shall become effective and benefits due on the date issued. Subject to (b)(i) and (ii) of this subsection, if the department order is appealed the order shall not be stayed pending a final decision on the merits unless ordered by the board. Upon issuance of the order granting the appeal, the board will provide the worker with notice concerning the potential of an overpayment of benefits paid pending the outcome of the appeal and the requirements for interest on unpaid benefits pursuant to RCW 51.52.135. A worker may request that benefits cease pending appeal at any time following the employer's motion for stay or the board's order granting appeal. The request must be submitted in writing to the employer, the board, and the department. Any employer may move for a stay of the order on appeal, in whole or in part. The motion must be filed within fifteen days of the order granting appeal. The board shall conduct an expedited review of the claim file provided by the department as it existed on the date of the department order. The board shall issue a final decision within twenty-five days of the filing of the motion for stay or the order granting appeal,

whichever is later. The board's final decision may be appealed to superior court in accordance with RCW 51.52.110. The board shall grant a motion to stay if the moving party demonstrates that it is more likely than not to prevail on the facts as they existed at the time of the order on appeal. The board shall not consider the likelihood of recoupment of benefits as a basis to grant or deny a motion to stay. If a self-insured employer prevails on the merits, any benefits paid may be recouped pursuant to RCW 51.32.240.

(i) If upon reconsideration requested by a worker or medical provider, the department has ordered an increase in a permanent partial disability award from the amount reflected in an earlier order, the award reflected in the earlier order shall not be stayed pending a final decision on the merits. However, the increase is stayed without further action by the board pending a final decision on the merits.

(ii) If any party appeals an order establishing a worker's wages or the compensation rate at which a worker will be paid temporary or permanent total disability or loss of earning power benefits, the worker shall receive payment pending a final decision on the merits based on the following:

(A) When the employer is self-insured, the wage calculation or compensation rate the employer most recently submitted to the department; or

(B) When the employer is insured through the state fund, the highest wage amount or compensation rate uncontested by the parties.

Payment of benefits or consideration of wages at a rate that is higher than that specified in (b)(ii)(A) or (B) of this subsection is stayed without further action by the board pending a final decision on the merits.

(c) 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.