NO. 100855-4

SUPREME COURT OF THE STATE OF WASHINGTON

GERALD R. LONG,

Petitioner,

v.

AUTOZONE #3822 and DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON,

Respondents.

ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

I. INTRODUCTION

This case stands for the unremarkable proposition that the plain language of a statute applies. Gerald Long's petition misstates the law on several different levels, and it fails to show an issue of substantial public interest. Long—contrary to the plain language of the statute—tries to import the language of the statute governing deadlines and standards related to notices of appeals to the Board of Industrial Appeals (RCW 51.52.060) into the request for reconsideration statute (RCW 51.52.050). Alternatively, he argues that an independent medical examiner commissioned by the Department of Labor and Industries filed a request for reconsideration on his behalf—but this IME provider was not aggrieved by the Department's decision, and did not otherwise have standing to file a request for reconsideration.

This Court should deny the petition for review.

II. ISSUES

1. Does RCW 51.52.060 apply to protests to the Department about an order when the statute governs only appeals to the Board?

2. Assuming RCW 51.52.060 applies, is an IME provider a "health services provider" under RCW 51.08.185 when the IME provider does not provide treatment to a worker or treatment-related services?

3. Is an IME provider an aggrieved party who can either request reconsideration or appeal when the provider has no stake in the litigation and their role is limited to providing the Department an objective and unbiased report?

III. STATEMENT OF THE CASE

A. Background of Industrial Insurance Laws

If injured, a worker may file an industrial insurance claim with the Department. RCW 51.28.020. The Department then evaluates the claim to provide treatment, wage replacement, and vocational benefits. RCW 51.32.090, .095; former RCW 51.36.010 (2013). The Department may issue orders denying responsibility for a condition as unrelated to the injury. This is called a segregation order in workers' compensation parlance.

To resolve medical issues about causation in a segregation order, former RCW 51.36.070 (2001) allows the Department to commission an IME.[1] Under this statute, if the Department "deems it necessary in order to resolve any medical issue," it may consult with an IME provider. Former RCW 51.36.070 (2001); WAC 296-23-302. Similarly under former RCW 51.32.110 (1997), on request, a worker must "submit himself or herself for medical examination."

IMEs are done at the request of the Department or self-insured employer, not the worker. WAC 296-23-307. By rule, the Department has set out reasons to order an IME:

> Generally, IMEs are ordered for one or more of the following reasons, including, but not limited to:
> (1) Establish a diagnosis;
> (2) Outline a program of treatment;
> (3) Evaluate what, if any, conditions are related to the claimed industrial injury or occupational disease/illness;
> (4) Determine whether an industrial injury or occupational disease/illness has aggravated a

[1] In 2020, the Legislature amended laws relating to independent medical examinations. Laws of 2020, ch. 213. None of those changes are germane here.

> preexisting condition and the extent or duration of that aggravation;
>
> (5) Establish when the accepted industrial injury or occupational disease/illness has reached maximum medical improvement;
>
> (6) Establish an impairment rating;
>
> (7) Evaluate whether the industrial injury or occupational disease/illness has worsened; or
>
> (8) Evaluate the worker's mental and/or physical restrictions as well as the worker's ability to work.

WAC 296-23-307.

If aggrieved by a Department order, a party can either request reconsideration of the order (also known as filing a "protest") under RCW 51.52.050 or appeal to the Board under RCW 51.52.060.

B. Long Did Not Protest the Order That Segregated His Knee Condition From His Claim

Long sustained an industrial injury on June 23, 2018. CP 174. His application for benefits describes that he injured his back, right groin, and right knee when he slipped. CP 162. When Long was lifting a heavy part, he slipped and fell to the ground. CP 175, 253. Long noted that he had swelling, but no discoloration, in his right knee. CP 254.

AutoZone protested the claim allowance and provided the Department with an incident report from June 24, 2018, which described Long falling while in the restroom and injuring both of his knees during a separate incident the day after the June 23rd work incident. CP 164-67, 268. In his initial presentation for treatment on June 26th, which took place after Long's falls on the 23rd and 24th, there was no mention of the second fall, so it makes sense that his providers attributed all of the conditions to the work incident from the first injury and not the restroom incident. *See* CP 253-59.

On December 5, 2018, William A. Bulley, MD (now deceased) conducted an independent medical examination of Long. CP 174-88. Dr. Bulley's report begins by stating that "Mr. Long is aware that he is being evaluated today at the request of [the] Department of Labor and Industries, and that this evaluation is not for the purpose of rendering treatment or establishing a doctor/patient relationship." CP 174.

Shortly after receiving the report, the Department issued an order accepting patellar arthritis as related to the claim. CP 191. The employer filed a timely protest on January 11, 2019, providing information regarding pre-existing knee complaints on March 12, 2019. CP 192, 195-96. On March 14, 2019, the claims manager sent a letter to Dr. Bulley, asking him if his opinion was the same after reviewing information from the employer that Long had a history of knee complaints. CP 198. Dr. Bulley's first addendum, dated March 15, 2019, stated that his opinion regarding the aggravation of Long's pre-existing right patellar arthritis remained unchanged. CP 199.

In March 2019, Dr. Bulley responded to an inquiry from the employer providing more information regarding the industrial injury and a subsequent injury. CP 200-01. Dr. Bulley sent a second correspondence (referred to as the second addendum) that because Long fell on his knees the day after his industrial injury, he was unable to state that the industrial injury

caused the aggravation of the patellar arthritis or need for treatment. CP 200-01.

On April 15, 2019, the Department then issued an order denying responsibility for the patellar arthritis four days after receiving Dr. Bulley's latest addendum (second). CP 205. RCW 51.52.050 and .060 give a worker 60 days to request reconsideration or appeal to the Board. Long did not protest or appeal within 60 days. He did not file a general protest until June 27, 2019, 73 days after the April 15, 2019 segregation order. Appellant's Br. (AB) 3.

Also on April 15, 2019, the same date the Department issued the segregation order, the claims manager sent Dr. Bulley a letter asking him to set work restrictions given the status of the patellar arthritis:

> Please review your report and the worker's claim file and answer the following question(s): In light of your recent correspondence with James L. Gress regarding the condition of patellar arthritis, are there any work restrictions with regard to the injury of 06/23/2018? If so, please provide them.

> The job of injury job analysis is imaged 12/04/2018 VOC, pages 1-6. Please review the JA and answer[] the questions on page 6.

CP 204.

By report dated April 16, 2019, Dr. Bulley provided a third addendum setting restrictions on Long based on the patellar arthritis:

> Related to the preexisting, aggravated condition of patellar arthritis, there are work restrictions of occasional stair climbing, no running, limited standing of 1 hour, occasional pushing/pulling 50 pounds less than 1 hour, no lifting more than 50 pounds. I do not think that the claimant can stand constantly, but that he can stand frequently with limited lifting of 35 pounds. These limitations are based on an assessment of a knee strain superimposed on preexisting unrelated patellar arthritis and obesity, aggravated by the injury.

CP 206.

The claims manager sent Dr. Bulley another letter on May 20, 2019, asking him to review three job descriptions and to provide comments based on the accepted conditions of the claim, with the patellar arthritis segregated. CP 207. Dr. Bulley's response approved all three jobs without restrictions.

CP 208. The Department then closed the claim on June 3, 2019. CP 402.

Long asked the Department to consider Dr. Bulley's third addendum as a protest to the segregation of patellar arthritis, and the Department declined to do so. CP 403. Because the Department did not receive a valid protest within 60 days of the April 15, 2019 segregation order, the Department determined that the order was final and binding, and not subject to reconsideration. CP 433.

Long appealed to the Board. CP 405. The Board judge, based on a plain reading of RCW 51.52.060(1)(a), and WACs 296-23-302 and 296-23-347, agreed with the Department. CP 70-71. The Board judge noted, "Dr. Bulley is not an aggrieved party. Never was. Never could be." CP 71. Long petitioned the Board for review, which the Board denied. CP 27-28.

Long appealed to superior court and employer AutoZone moved for summary judgment. CP 1, 518. The superior court granted summary judgment. CP 568. The superior court

reasoned that the IME was part of administration of the claim. CP 565. And it observed that "Dr. Bulley was a neutral party and at no time did Dr. Bulley enter into a treating relationship with the Plaintiff or otherwise assume responsibility for the Plaintiff's medical care." CP 565. It pointed out that the Department "sought additional information from Dr. Bulley regarding Plaintiff's work restrictions," and Dr. Bulley responded with his April 16, 2019 addendum. CP 566.

The superior court concluded that "Dr. Bulley as an independent medical examiner is by definition a neutral party and thus is not and cannot be an 'other person aggrieved' within the meaning of RCW 51.52.060(1)(a)." CP 567. It further ruled that "Dr. Bulley had no personal interest or pecuniary interest in the outcome of the Plaintiff's claim and thus was without standing to file a Protest and Request for Reconsideration." CP 567. The court also concluded that the Department "has a right to continue to administer open claims and therefore requesting additional information regarding work restrictions from Dr.

Bulley did not place the Department's April 15, 2019, order in abeyance pursuant to RCW 51.52.060(3)." CP 568. Finally, the court completed its analysis that because Dr. Bulley lacked standing to protest and because Long did not file a protest within the 60-day appeal window, the April 2019 segregation order was final and binding and entitled to res judicata effect. CP 568.

The Court of Appeals affirmed. It ruled that RCW 51.52.060 did not apply to this case because the statute governs notices of appeal, not a request for reconsideration, and otherwise found Long's arguments unpersuasive. *Long v. Autozone #3822*, No. 55722-3-II, slip op. 8, 10-11 (Mar. 22, 2022).

IV. ARGUMENT

RCW 51.52.050 and .060 require a worker to protest a Department order or appeal a Department order within 60 days of the order if the worker wishes to contest the order. Failure to appeal the order results in a final order that may not later be

challenged even if the decision is incorrect. *Marley v. Dep't of Lab. & Indus.*, 125 Wn.2d 533, 538, 886 P.2d 189 (1994). Long concedes that he did not protest within 60 days of the order. Pet. 8. Instead, he claims that an independent medical examiner provider, who provided a neutral report to the Department, protested the order when he filed a Department-requested addendum to the report about a different topic (work restrictions) than the contested order (segregation). But his claim that Dr. Bulley protested the segregation order is precluded by Dr. Bulley's lack of standing as an IME provider to protest. Similarly, Long's arguments about RCW 51.52.060's tolling and appeal provisions fail.

The plain language of RCW 51.52.050 and .060 provide no relief for Long. Long claims there is an issue of substantial public interest based on (1) the canon of liberal construction for ambiguous industrial insurance statutes (RCW 51.12.010); (2) the belief that because the Department was adjudicating the case after the segregation order was decided, that this left the

right to protest open after 60 days of the order; (3) an argument that an independent medical examiner had standing to protest an order; (4) an issue about res judicata, not raised at the Court of Appeals; and (5) an argument that requests for reconsideration and appeals to the Board have equivalent procedures. Pet. 10-11. None of the claims show an issue of substantial public interest because they are based on a fundamental misunderstanding of the statutes governing requests for reconsideration (RCW 51.52.050) and notices of appeal to the Board (RCW 51.52.060), as well as the law of standing.

A. RCW 51.52.060's Tolling Provision Is Neither Applicable nor Demonstrated

No statute tolled Long's duty to file a timely protest, and Long's reliance on RCW 51.52.060's tolling provisions is misplaced. While RCW 51.52.060 tolls Board appeal periods in limited circumstances, those provisions do not apply to a protest under RCW 51.52.050, and in any event, the Department did not take the action it would need to take to

trigger the tolling provisions when it did not direct the parties to submit further evidence. So Long is incorrect in arguing that the statute of limitations was tolled under RCW 51.52.060. AB 2.

RCW 51.52.060(3) provides that

> 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.

(Emphasis added.)

On its face, this statute does not apply here because it only governs appeals "to the Board." RCW 51.52.060(1). This case involves whether Dr. Bulley's addendum was a request for reconsideration—a protest—to the Department under RCW 51.52.050, so RCW 51.52.060(3) is not implicated.

Long provides no valid reason why RCW 51.52.060(3) is implicated. Long argues that "[d]espite the Court of Appeals misinterpretation of RCW 51.52.060(3) to solely apply to

appeals rather than protests, whereas they are equivalent procedures[.]" Pet. 12. It is true that both statutes provide a method to challenge an order, but usage of different language in two statutory provisions demonstrates a difference in legislative intent. *Guillen v. Contreras*, 169 Wn.2d 769, 776, 238 P.3d 1168 (2010). And contrary to Long's assumption, the statutes unambiguously provide for different procedures.

Even if the statute applies, the Department did not "direct the submission of further evidence" as Long argues. *See* AB 7. The statutory language plainly calls for the submission of evidence related to the order at issue in the notice of appeal: "If within the time limited for filing a notice of appeal to the board *from an order* . . . 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." RCW 51.52.060(3) (emphasis added).

Here the adjudication was about work restrictions, not segregation:

> Please review your report and the worker's claim file and answer the following questions(s): In light of your recent correspondence with James L. Gress regarding the condition of patellar arthritis, are there any work restrictions with regard to the injury of 06/23/2018? If so, please provide them.
>
> The job of injury job analysis is imaged 12/04/2018 VOC, pages 1-6. Please review the JA and answer[] the questions on page 6.

CP 204.

This doesn't implicate RCW 51.52.060, nor is it vague language to confuse a worker. *Contra* Pet. 13.

B. The Health Services Provider Provision in the Notice of Appeal Statute, RCW 51.52.060 Doesn't Apply to Proceedings Under RCW 51.52.050

Again, raising the failing argument that RCW 51.52.060 applies, Long claims that Dr. Bulley was a "health service provider" under RCW 51.52.060(1)(a) and so could request reconsideration. Pet. 17. But, as explained above, RCW 51.52.060 doesn't apply to proceedings under RCW 51.52.050. Long doesn't deny that he didn't file an appeal with the Board, admitting that he seeks application of the reconsideration statute. *E.g.*, Pet. 8.

In any event, IME providers are not health services providers. A "health care provider" is "any person, firm, corporation, partnership, association, agency, institution, or other legal entity providing any kind of services related to the *treatment* of an industrially injured worker." RCW 51.08.095 (emphasis added). Long argues that the "question before the Supreme Court is: why is the opinion of an IME provider who is charged with ordering diagnostic tests, providing treatment recommendations, and stating prophylactic restrictions not a 'service' related to the injured worker's treatment and health?" Pet. 16. But doctors that provide independent medical reports don't treat injured workers and are defined as "independent medical examination (IME) provider[s]" because they do not provide treatment to workers. *See* WAC 296-23-302. Under this rule, IME providers do not provide treatment or related services to workers. Rather they are providing an objective evaluation of the worker's condition for medical-legal reasons:

> Independent medical examination (IME) - An objective medical-legal examination requested (by the department or self-insurer) to establish medical findings, opinions, and conclusions about a worker's physical condition. These examinations may only be conducted by department-approved examiners.

WAC 296-23-302. And showing that there is no treatment relationship between the worker and the IME provider is the fact that an IME provider cannot offer to provide treatment services to a worker:

> May an independent medical examination (IME) provider offer to provide ongoing treatment to the worker?
>
> No. However, if a worker voluntarily approaches an IME provider who has previously examined the worker and asks to be treated by that provider, the provider can treat the worker. The provider must document that the worker was aware of other treatment options.

WAC 296-23-357.[2]

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[2] By rule, an IME provider is responsible to, inter alia, "[c]onduct an examination that is unbiased, sound and sufficient to achieve the purpose and reason the examination was requested." WAC 296-23-347(2)(i). And the IME provider has to "[r]eview the purpose of the examination and the

Long argues for a liberal interpretation of health "service" provider. Pet. 16, 22-23. But liberal interpretation only applies to ambiguous statutes. *Harris v. Dep't of Lab. & Indus*., 120 Wn.2d 461, 474, 843 P.2d 1056 (1993), and there is no ambiguous statute here. The statutes unambiguously provide that an IME provider's role is to provide a report based on an independent examination, and that IMEs do not and cannot treat workers, as would be required for them to be health services providers under RCW 51.08.095.

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questions to be answered in the examination report." WAC 296-23-347(1)(d). WAC 296-23-347 lists 18 duties of the examiner and none require the examiner to provide treatment or advocacy on the workers' behalf. The rule directs review of the medical examiner's handbook, which provides that examiners are to provide "unbiased, objective examinations and ratings to help us administer claims effectively and fairly." WAC 296-23-347(1)(a). All of these rules demonstrate that an IME provider is in its own category under RCW Title 51 and not that of a health service provider that is oriented to treatment services. *See* RCW 51.08.095.

C. IME Providers Are Not Aggrieved by Department Orders

The request for reconsideration statute also doesn't provide that Dr. Bulley could protest the order. Long argues that Dr. Bulley was also an aggrieved party under RCW 51.52.050(2)(a). But a party must be aggrieved in order to protest or appeal. *In re Chambers Bay Golf Course*, No. 09 20604, 2010 WL 5882060, *2 (Bd. Indus. Ins. Appeals Dec. 7, 2010). In *Chambers Bay*, the Board stated that, "to be a 'person aggrieved' by a decision of the Department, as that term is used in RCW 51.52.050 and RCW 51.52.060, requires that the person have a proprietary, pecuniary, or personal right which is substantially affected by the Department's determination." *Chambers Bay*, 2010 WL 5882060 at *2. This is consistent with case law from other contexts. *See, e.g.*, *State v. Taylor*, 150 Wn. 2d 599, 603, 80 P.3d 605 (2003) ("We have defined 'aggrieved party' as one whose personal right or pecuniary interests have been affected.").

An IME provider has no interest in the outcome of a worker's compensation claim. Although Long argues that "[d]octors are paid for their expert opinions, so doctors have an intermingled pecuniary and reputational interest in their opinions being duly considered and respected," he shows no interest. Pet. 18. There is no money issue, and Long has made no showing that Dr. Bulley's reputation was affected by the order, nor is it plausible that Dr. Bulley submitted the report in an attempt to defend his honor rather than because the Department asked him for additional information regarding Long's ability to work. As an IME provider, he would know that his opinions are for consultative purposes only and that the Department is not required to rely on them.

D. Long's Remaining Argument Should Be Disregarded Because He Didn't Raise It Below

Long argues that operation of res judicata would operate as a manifest injustice. Pet. 18-19. This argument should be disregarded because he didn't raise it below. *See* AB 1-15. In any event, Long had the opportunity to appeal from the

segregation order, but he didn't. Nor does he claim that he did not understand what the segregation order did or show any reason why he could not have filed his own timely protest from the decision. This is hardly unjust.

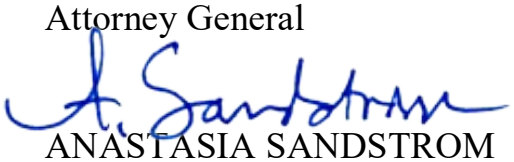
V. CONCLUSION

This Court should deny the petition.

This document contains 3,577 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 12th day of December, 2022.

ROBERT W. FERGUSON
Attorney General



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SUPREME COURT
STATE OF WASHINGTON

GERALD R. LONG, Petitioner, v. AUTOZONE #3822 and DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, Respondent.	CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, she caused to be served the Department's Answer to Petition for Review and this Certificate of Service in the below described manner:

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