NO. 44615-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MARIO ARRIAGA,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON,

Respondent.

BRIEF OF RESPONDENT DEPARTMENT OF LABOR & INDUSTRIES

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I. INTRODUCTION

This case arises under RCW Title 51, the Industrial Insurance Act. Mario Arriaga appeals a superior court order that affirmed the Board of Industrial Insurance Appeals' (Board) decision. The Board dismissed, as untimely, Mr. Arriaga's appeal from a 2008 Department order denying responsibility for his degenerative cervical disc condition. The superior court and Board rejected Mr. Arriaga's assertion that the Department order was not communicated to his attending physician, Justin J. Sherfey, D.O.

It is undisputed that Dr. Sherfey actually *received* the order in his office and the order was placed in Mr. Arriaga's medical file. It was Dr. Sherfey's general practice to initial orders after he read them. Although the order was date-stamped and contained within Mr. Arriaga's file, it was not initialed. Because Dr. Sherfey did not initial the October 29, 2008 order contained in Mr. Arriaga's medical file in his possession, Mr. Arriaga argues that the order was not communicated to him.

The Department communicates an order per RCW 51.52.050 and .060 when the order is received by its intended recipient; the law does not require the recipient to read a Department order in order to constitute communication. *Rodriguez v. Dep't of Labor & Indus.*, 85 Wn.2d 949, 540 P.2d 1359 (1975). This promotes the orderly processing of

Department orders, and gives certainty and predictability about the date the order was communicated. Undisputed evidence supports the finding of fact that Dr. Sherfey received the October 29, 2008 order on October 31, 2008, and failed to file a timely appeal from the order. The superior court's findings of fact are supported by substantial evidence, and the findings compel its decision upholding the decision of the Board.

II. COUNTER STATEMENT OF THE ISSUES

1. RCW 51.52.050(1), and .060 require an attending physician to file a protest or appeal within sixty days from the time the order is communicated to the attending physician. Does substantial evidence support the trial court's finding that the order was communicated to Dr. Sherfey in October 2008 when it is undisputed that he received the order at his office and it was incorporated into Mr. Arriaga's medical file shortly after it was mailed by the Department?

2. The Industrial Insurance Act provides finality to decisions of the Department if they are not protested or appealed within sixty days. Does substantial evidence support the trial court's finding that Dr. Sherfey received the order and failed to protest or appeal that order within sixty days?

III. COUNTERSTATEMENT OF THE CASE

A. Mr. Arriaga Had An Industrial Injury And Received Treatment From Dr. Sherfey

While employed at Oakville Forest Products, Mr. Arriaga injured his right upper arm, face, and scalp in December, 2005. BR at 102-03. His claim was allowed by the Department, and Dr. Sherfey became his attending physician. BR at 102-03.[1] Dr. Sherfey first treated Mr. Arriaga for this industrial injury in early January 2006. BR Sherfey at 10. He last saw Mr. Arriaga on September 20, 2010. BR Sherfey at 10. Dr. Sherfey remained his attending physician during the relevant times of this appeal. BR at 103.

B. Dr. Sherfey Maintained Correspondence from the Department in Mr. Arriaga's Medical File And Reviewed Documents Provided To Him

Dr. Sherfey maintained an electronic file for Mr. Arriaga as part of his treatment that contained any documents received from the parties involved in claim, outside studies, including radiographic studies, testing results, and any other medical information. BR Sherfey at 9. He maintained a separate section for correspondence with the Department. BR Sherfey at 22. Dr. Sherfey's practice includes an L&I file department

[1] BR refers to the certified appeal board record provided by the Board. The Department will refer to documents in the administrative record by reference to machine-stamped numbers supplied by the Board, except when reference is to witness testimony, when the Department will give the name of the witness and the page number in the transcript for that witness.

that manages Labor & Industries paperwork, including getting authorizations, coordinating depositions, coordinating independent exams, and reviewing "some of those records." BR Sherfey at 23. The medical records department is more involved with scanning the documents. BR Sherfey at 23. There is no standard protocol in place to determine whether Dr. Sherfey should review a document, "except that typically paperwork that involves a patient is supposed to come across the physician's desk for review." BR Sherfey at 23. Dr. Sherfey agreed that he may not be given all the documents that are specifically addressed to him. BR Sherfey at 27.

As part of his practice, Dr. Sherfey functions as the attending physician for injured workers. BR Sherfey at 8. Accordingly, he is familiar with the rules and regulations of the Department. BR Sherfey at 8. Dr. Sherfey's practice has four doctors and four physician's assistants, and about forty total employees. BR Sherfey at 10-11. Dr. Sherfey routinely received mail from the Department, including letters from the Department asking for information about a patient's conditions and work status. BR Sherfey at 12.

In 2008, the office practice for incoming mail was to electronically scan the hard copy and place the hard copy in Dr. Sherfey's in-box for his review. BR Sherfey at 12. After he reviewed the document, he typically

initialed it. BR Sherfey at 12. Once he verified that he reviewed them, the document would be scanned into the medical record. BR Sherfey at 12-13. He conceded that there have been instances where a piece of mail was placed into the patient's file without his review, but he did could not estimate the frequency. BR Sherfey at 13.

Dr. Sherfey reviewed mail throughout the day: when he had breaks with patients, over lunch, at the end of the day, or the following day. BR Sherfey at 13. He is sure there have been times when mail was placed into the patient's file without him seeing it first. BR Sherfey at 13. Even when a Department document was received by Dr. Sherfey's office, he would not necessarily be aware of that document's existence unless it was either placed into his box or scanned into a patient's file. BR Sherfey at 13-14.

C. Dr. Sherfey Received The Department Order Two Days After It Was Issued

The Department issued an order dated October 29, 2008, that stated in pertinent part: "The Department is not responsible for the condition diagnosed as: cervical disck degenerative [sic], determined by medical evidence to be unrelated to the industrial injury for which this claim was filed." BR at 28. Dr. Sherfey's medical file for Mr. Arriaga

contained a copy of the Department's October 29, 2008 order, date stamped as received on October 31, 2008:

> Q: So we're clear, the Department order that's dated October 29, 2008, does show up in your electronic medical records for Mario Arriaga, correct?
>
> A: Let me search here and verify that with you. (Examining) Sorry, this is just going to take a minute again. So I have this notice. It is scanned between a report from Strategic Consulting Services, which I have initialed and dictated a letter in response dated July 16, 2008. Following this record I have the next dated APF form from January 28, 2009.
>
> Q: So your electronic records reflect that your office did in fact receive the October 29, 2008 record, correct?
>
> A: Correct.
>
> Q: And the date stamp that your medical records office puts on the order indicates that it was received on October 31, 2008, correct?
>
> A: Correct.
>
> Q: So this order from the Department was received and date stamped here in your medical office on October 31, 2008?
>
> A: Correct.

BR Sherfey at 18. The order was in the file between a July 16, 2008 vocational report and a January 28, 2009 Activity Prescription Form. BR Sherfey at 18. Despite being contained in Mr. Arriaga's records since

2008, Dr. Sherfey did not recall reviewing the order until Mr. Arriaga's attorney brought it to his attention nearly two years later. BR Sherfey at 15. Although Dr. Sherfey did not initial the document, Dr. Sherfey also indicated that could not recall whether or not he had reviewed the October 29, 2008 Department order in 2008. BR Sherfey at 14.

Dr. Sherfey indicated that he would protest or appeal orders as indicated. BR Sherfey at 15. Dr. Sherfey indicated that had he reviewed the October 2008 order he would "[l]ikely responded with a letter stating . . . that I felt he needed some additional workup and evaluation in regard to that diagnosis." BR Sherfey at 15. According to Dr. Sherfey, for mail to be communicated to him, as he understood it from his non-legal perspective, "it would have to be appropriately received by the medical records or again our L&I management department. It would then have to be properly routed to me for review. And then after that it would have to be properly inserted into the medical record." *See* BR Sherfey at 16.

On cross-examination, Dr. Sherfey conceded that there were multiple documents from the Department in Mr. Arriaga's file that he had not initialed, including letters addressed directly to him. BR Sherfey at 18-19, 21, 26-27. According to Dr. Sherfey, that means

that the documents "may have been scanned in without my direct visualization." BR Sherfey at 21.

D. The Board Determined That The Protest Was Untimely

This appeal originated from the Department order dated October 29, 2008, that segregated a cervical degenerative disc condition. BR at 28. After being asked to review the order by Mr. Arriaga's attorney, Dr. Sherfey protested the segregation order through a chart note that indicated that he believed that Mr. Arriaga's neck needed to be looked at. BR Sherfey at 15. In December 2010, the Department issued an order declining to reconsider the 2008 order as the protest was untimely. BR at 46.

Mr. Arriaga appealed this order to the Board. BR at 21-28. The only testimony taken in this matter was that of Dr. Sherfey. The industrial appeals judge issued a proposed decision and order finding that the appeal was untimely and dismissing it. BR at 15-19. Mr. Arriaga petitioned for review of that decision, and the Board adopted the dismissal. BR at 1, 5-10.

E. The Superior Court Found The Protest Untimely Because The Doctor Did Not Protest Or Appeal Within 60 Days After Its Receipt

Mr. Arriaga appealed this decision to the Thurston County Superior Court. The superior court affirmed the Board, adopting findings

of fact and conclusions of law consistent with the Board's findings of fact and conclusions of law. CP at 31-33. The superior court found that "Mario Arriaga's attending physician, Dr. Justin J. Sherfey, received a copy of the Department's October 29, 2008 order on October 31, 2008. Dr. Sherfey did not protest or appeal this order within sixty days of its receipt." CP at 32.

The superior court found that neither Mario Arriaga nor Dr. Sherfey filed a timely protest or appeal. CP at 32. As a result, the superior court concluded that Mr. Arriaga's December 13, 2010 protest to the October 29, 2008 Department order was not timely filed per RCW 51.52.050, and that the superior court and Board lacked authority to hear the appeal.[2] CP at 31-33. The superior court therefore dismissed Mr. Arriaga's appeal. CP at 32-33. This appeal follows.

IV. STANDARD OF REVIEW

The first step in seeking review of the Department's decision to deny an untimely protest in a worker's compensation claim is an appeal to the Board. RCW 51.52.060. In the case before the Board, Mr. Arriaga bore the burden to present evidence to show that the Department order had not been communicated to Dr. Sherfey. RCW 51.52.050(2)(a); *see*

[2] Although conclusion of law 2.2 indicates that Mr. Arriaga filed the December 13, 2010 protest, Dr. Sherfey actually filed it, and it has been Mr. Arriaga who has subsequently pursued this appeal. CP at 4-6; BR at 46, 48, 92, 97.

Lightle v. Dep't of Labor & Indus., 68 Wn.2d 507, 510, 413 P.2d 814 (1966).

The superior court reviews a Board decision de novo on the record developed at the Board. RCW 51.52.115. The Board's findings and conclusions are prima facie correct, and the party attacking the Board's decision carries the burden of overcoming that statutory presumption of correctness. RCW 51.52.115; *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999).

This Court's review of the superior court decision is under the ordinary standard for civil cases. RCW 51.52.140; *Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179-81, 210 P.3d 355 (2009). The Court of Appeals reviews the findings of the superior court, not the Board. *See Rogers*, 151 Wn. App. at 179-81.

A party seeking to reverse a trial court's finding of fact must meet a difficult standard. A reviewing court is limited to determining whether there is 'substantial evidence' to support the trial court's findings." *Garrett Freightlines, Inc. v. Dep't of Labor & Indus.*, 45 Wn. App. 335, 340, 725 P.2d 463 (1986). This is because fact-finding is solely within the fact-finder's province. *Johnson v. Dep't of Licensing*, 71 Wn. App. 326, 332, 858 P.2d 1112 (1993). "Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational

person of the truth of the declared premise." *Bering v. Share*, 106 Wn.2d 212, 220, 721 P.2d 918 (1986). Where a party has not assigned error to the findings of fact, the findings are verities on appeal. *Dep't of Labor & Indus. v. Allen*, 100 Wn. App. 526, 530, 997 P.2d 977 (2000).

Legal questions are reviewed de novo. *See Adams v. Great Am. Ins. Co.*, 87 Wn. App. 883, 887, 942 P.2d 1087 (1997) (superior court's legal conclusions reviewed de novo). Although the court may substitute its own judgment for that of the agency regarding issues of law, it gives great weight to the agency's interpretation of the law it administers. *Allen*, 100 Wn. App. at 530.

The rule of liberal construction does not apply to questions of fact. *Ehman v. Dep't of Labor & Indus.*, 33 Wn.2d 584, 595, 206 P.2d 787 (1949); *Hastings v. Dep't of Labor & Industries*, 24 Wn.2d 1, 13, 163 P.2d 142 (1945). Nor does the liberal construction rule dispense with the requirement that the plaintiff must produce competent evidence to prove the facts upon which he relies to substantiate entitlement to the benefits sought. *Ehman*, 33 Wn.2d at 595.

V. SUMMARY OF THE ARGUMENT

Mr. Arriaga asserts that the order was not communicated to his attending physician, despite the order being received in Dr. Sherfey's

medical office and properly placed in Mr. Arriaga's file, because Dr. Sherfey did not initial the order. Mr. Arriaga's assertion is wrong. As Mr. Arriaga himself noted in his brief "*[a]n order is 'communicated' when it has been received.*" App. Br. at 8 (emphasis added) (citing *Shafer v. Dep't of Labor & Indus.*, 166 Wd.2d 710, 717, 213 P.3d 591 (2009)). The Department's order was received by Dr. Sherfey when it was received at his correct mailing address and readily available to him. Mr. Arriaga must fail in his attempt to add new requirements to the definition of "receipt."

Mr. Arriaga's proposed rule of a law would allow a doctor's office to receive mail from the Department, but be able to disclaim responsibility for that receipt of mail if the office procedures are allegedly not followed. This would produce an unworkable system. A party has the responsibility of providing his or her address to the Department, and when an order is received at that address, it is communicated.

Because Dr. Sherfey received the order two days after it was mailed and did not file a protest or appeal within sixty days, the order became final and binding on the parties. The Board and superior court properly dismissed the untimely appeal.

VI. ARGUMENT

A. The Doctor Did Not Protest Or Appeal The Order Within 60 Days Of Its Receipt

1. A Department Order Is Final Unless Appealed Or Protested Within 60 Days

Dr. Sherfey received the Department's October 29, 2008 order on October 31, 2008 and failed to file a timely protest or appeal. BR Sherfey at 17-19. It became a final and binding order. *Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 537, 886 P.2d 189 (1994). RCW 51.52.060 directs the Department to serve its orders, decisions, and awards on "the worker, beneficiary, employer, or other person affected thereby" by mail. The Department is required to include a warning "that such final order, decision, or award shall become final within sixty days from the date the order is communicated to the parties unless" there is a request for reconsideration or appeal. An attending physician may protest or appeal a Department order. *See Shafer*, 166 Wn.2d at 719.

RCW 51.52.060(1)(a) provides in relevant part: "[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); *see also* RCW 51.52.050. The Industrial Insurance Act provides finality to decisions of the Department and an unappealed Department order is res judicata as to the issues encompassed within the terms of the order. *Kingery v. Dep't of Labor & Indus.*, 132 Wn.2d 162, 169, 937 P.2d 565 (1997) (Talmadge, J. concurring); *Marley*, 125 Wn.2d at 537; *Kustura v. Dep't of Labor & Indus.*, 142 Wn. App. 655, 669, 175 P.3d 1117 (2008). Thus, when Dr. Sherfey failed to timely appeal within sixty days, the order became a final and binding order. *Id.* at 537.

2. An Order Is Communicated When It Is Received, Regardless Of Whether The Person Actually Reads The Document

An order is communicated when it is received, and it is received when it is available to its intended recipient, whether or not that person actually reads the document. *Shafer*, 166 Wn.2d at 717; *Rodriguez*, 85 Wn.2d at 952-53; *Nafus v. Dep't of Labor & Indus.*, 142 Wash. 48, 52, 251 Pac. 977 (1927).

The Department's October 29, 2008 order denying responsibility for a cervical condition was received in Dr. Sherfey's office on October 31, 2008. BR Sherfey at 18. The order was available in Mr. Arriaga's medical file. BR Sherfey at 18. Mr. Arriaga would like to add a requirement that "communicate" requires not just that the order was

correctly delivered, but that the intended recipient read the letter. App. Br. at 9-10, 14. The law does not contain such a requirement. *See Nafus*, 142 Wash. at 52.

Mr. Arriaga cites *Shafer* for the proposition that communication requires actual receipt and review by the named recipient rather than "communication" as described by RCW 51.52.060(1)(a) and the case law addressing communication. App. Br. at 11 (citing *Shafer*, 166 Wn.2d at 718). Mr. Arriaga's reliance on *Shafer* is misplaced. The issue in that case was whether the Department had an obligation to send a closing order to the attending physician. *Shafer*, 166 Wn.2d at 712. In *Shafer*, there was no evidence presented that the Department mailed the order to the attending physician, or that Dr. Cook received the order at her office.[3] *Id* at 714. In *Shafer*, the only evidence presented on that issue was a declaration from the attending physician that she did not *receive* the order in question. *Id.* at 714.

The *Shafer* Court held that "because the Department's failure to provide the worker's attending physician a copy of the closure order prevented the physician from appealing the order, the worker's claim is

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[3] In *Shafer*, Dr. Cook's name and address appeared on the closing order, but no evidence was presented that the Department followed its usual mailing procedures to mail that order to Dr. Cook, nor was there any evidence presented that the order had been received in Dr. Cook's office and placed in Ms. Shafer's medical chart. Instead, mailing was presumed. *Shafer*, 166 Wn.2d at 714.

not final until sixty days after the attending physician receives a copy of the order." *Shafer*, 166 Wn.2d at 712. There is no such failure on the part of the Department in Mr. Arriaga's case. The Department's order was provided to Dr. Sherfey at the correct address; he simply does not recall actually reviewing the order. BR Sherfey at 14. *Shafer* did not displace the previous standards set forth in *Rodriguez*, 85 Wn.2d at 951, and *Nafus*, 142 Wash. at 52. *Nafus* remains the controlling case defining communication. In *Nafus*, the worker's claim was initially allowed and he received time loss compensation. *Nafus*, 142 Wash. at 48. Sometime thereafter, the Department received additional medical information, determined that the worker no longer had a compensable condition, and closed his claim. *Id.* at 49. The Department sent an order to that effect to the worker in April 1925. *Id.* at 49. The worker received the letter in the hospital, where he was a patient for an extended stay, and put the order in his robe pocket. *Id.* at 50, 52. The worker testified that he never actually read the letter. *Id.* at 49-50.

In January 1926, the worker appealed his claim closure, and the Department asserted that his appeal was untimely. *Id.* at 51. The worker argued that it could not be final because he had never actually read the order. *Id.* at 51-52. The Court rejected the worker's argument, stating that

his failure to read the document was not controlling in determining communication:

> The fact that the respondent says that he did not read the letter and did not know its contents is not controlling. The Department had done all it was required to do in making "communication" of its decision in closing the claim to the party affected thereby.

Nafus, 142 Wash. 48 at 52.

The Court reaffirmed this position in *Rodriguez*. *Rodriguez*, 85 Wn.2d at 952-53. In *Rodriguez*, the Department mailed an order closing his claim to the worker in October 1971, including a warrant for a permanent partial disability award. *Id.* at 950. The worker received the order and cashed the check. *Id.* The worker spoke only Spanish and was illiterate in both Spanish and English: he relied on the services of an interpreter, who was in the hospital when he received the letter. *Id.* The worker moved to Texas from November 1971 through April 1972, when he moved back to Washington. *Id.* It was then that he took the order to his interpreter and learned that his claim had been closed. *Id.* He filed his appeal from the October 1971 order in May 1972. *Id.* at 950.

Citing to *Nafus*, the court concluded that "communication" means receipt of the order by the worker:

> [W]e are satisfied the word 'communicated' contained in RCW 51.52.060 requires only that a copy of the order be *received* by the workman. Since appellant's notice of

> appeal was not filed within sixty days of the receipt of the closing order, the notice of appeal was not timely.

Rodriguez, 85 Wn.2d 949 at 953-54 (emphasis added).

Although the *Rodriguez* court granted equitable relief on the basis that the worker was illiterate and therefore unable to comprehend the order as written, the main holding regarding communication remains. *Id.* Dr. Sherfey has no such impediment to his ability to comprehend the order, and so the order was communicated when it arrived in his office. *See Shafer*, 166 Wn.2d at 717 (The term 'communicated' as used in the statute means that the order, decision, or award is received by the respective party.); *Kaiser Aluminum & Chem. Corp. v. Dep't of Labor & Indus.*, 57 Wn. App. 886, 889, 790 P.2d 1254 (1990) (order is communicated upon receipt).

In *Kaiser Aluminum*, the self-insured employer contended that its third-party administrator had filed timely protests to the order allowing a claim. *Kaiser*, 57 Wn. App. at 888. The parties agreed that Kaiser received the September 9, 1985 claim allowance order no later than September 23, 1985, per the date stamp on Kaiser's file copy of the order. *Id.* at 889. The court reiterated that an order is communicated upon receipt. *Id.* In Mr. Arriaga's case, as in *Kaiser*, receipt of the

Department's order is confirmed by the date stamp on the recipient's copy of the order.

No court has imposed the additional requirements that the intended recipient must both physically receive and read the order. To the contrary, the courts have consistently noted that it is enough that the order was received at the correct address, and whether the recipient actually reads the order is irrelevant. *See Nafus*, 142 Wash. 48 at 52; *Rodriguez*, 85 Wn.2d 949 at 953-54. Communication has been achieved when the order is placed into the recipient's possession such that it *could* be read. *E.g.*, *In re David Herring*, BIIA Dec. 57,831 & 57,830, 1981 WL 375943, at *2 (1981) (finding mailing must be to correct address to constitute communication).

That is certainly the situation for Mr. Arriaga. Dr. Sherfey received the October 2008 order at his business address two days after the order was mailed, and the order was placed in the correct patient's file. BR Sherfey at 18. That Dr. Sherfey either did not read it or does not recall reading the order is irrelevant. BR Sherfey at 14, 21. The order was communicated by the Department and received by Dr. Sherfey at his office, and no protest or appeal was filed within sixty days of its receipt. Neither Mr. Arriaga nor Dr. Sherfey may now challenge the order, which is final and binding on all parties. *Marley*, 125 Wn.2d at 537.

3. Mr. Arriaga May Not Rely On A Breakdown In The Doctor's Office Procedures To Excuse The Failure To Timely Appeal From A Properly Delivered Order

Mr. Arriaga essentially argues that because the doctor's mailing handling system was allegedly not done correctly, this means the order was not communicated. This would allow a party to claim the benefit of an error in handling the mail once it was received. In *Robel*, an elementary school teacher whose contract was not renewed for the next year challenged the sufficiency of the service of the notice of non-renewal. *Robel v. Highline Public Sch. Dist.*, 65 Wn.2d 477, 478, 398 P.2d 1(1965). The letter was mailed on March 28, 1962, by certified mail, with a return receipt requested. *Robel*, 65 Wn.2d at 479. After attempted delivery at her home address was unsuccessful, the mail carrier left a "Mail Arrival Notice" that said the teacher could either call for or request delivery of the letter. *Id.* at 479. She did not, and on April 23, 1962, the letter was returned to the school district. *Id.* A second non-renewal notice was sent certified mail on April 10, 1962, with the same result; the letter was returned to the sender on April 25, 1962. *Id.* at 479-80. The teacher acknowledged receiving at least one of the notices left by the mail carrier, but did not explain her failure to call for or request delivery of either non-renewal letter. *Id.* at 480. The *Robel* court agreed with the trial court that the non-renewal notice had been timely and properly given and knowingly

or negligently ignored, and that the teacher failed to timely protest the non-renewal. *Robel*, 65 Wn.2d at 480. The court noted that an intended recipient could not be allowed to ignore customary and established methods of delivery. *Id.* at 483. This principle was consistent with a number of cases that held that one who is responsible for an error may not benefit from it. *Id.* at 484 (citations omitted). In Mr. Arriaga's case, the Department delivered the segregation order to the correct address for Dr. Sherfey; any failings in his in-office mail handling system must be laid at the feet of Dr. Sherfey, and neither he nor Mr. Arriaga may toll the time to file a protest or appeal based on that failing.

Mr. Arriaga asserts that Dr. Sherfey's situation is similar to that of a person who is away from home when the mail is delivered, and so cannot be said to have received the mail until he returns home and collects the mail. App. Br. at 12 (citing *In re Dorena Hirschman*, BIIA Dec., 09 17130, 2010 WL 5677047 (2010)). However, there is no testimony that Dr. Sherfey was away from his office for any period of time in late October 2008. Indeed, it was nearly two years between the time the order was received and Mr. Arriaga's attorneys apparently highlighted the issuance of the order that was in Mr. Arriaga's medical chart. *See* BR Sherfey at 14-15. Dr. Sherfey was treating Mr. Arriaga regularly

during that time period, and the order was available to him at anytime he chose to review Mr. Arriaga's chart. *See* BR Sherfey at 10; BR at 103.

Mr. Arriaga also cites to *In re Edward Morgan*, BIIA Dec., 9667 1959 WL 60086 (1959), for the proposition that the presumption of mailing can be refuted. App. Br. at 12. Presumption of mailing is not the issue here. In any case, the facts are not analogous. The worker worked in the timber industry and kept a permanent mailing address separate from his physical location, which changed according to his work. *Morgan*, 1959 WL 60086, at *2. While off work due to an industrial injury, the worker continued to maintain his permanent mailing address, separate from his living address, but checked daily for his mail at his permanent mailing address. *Id.* at *2. Although the worker testified that he had received other communications from the Department, he did not receive the closing order. *Id.* His testimony therefore rebutted the presumption of receipt on which the Department relied. *Id.* The Board went on to note that this was not a case in which the intended recipient "deliberately or negligently disregards or fails to read a communication delivered to his residence," and who thus may be charged with knowledge or notice thereof. *Id.* at *3.

The order in question for Mr. Arriaga was, in fact, delivered to the correct address and actually received there. BR Sherfey at 18.

Presumption of mailing is not an issue, because it is undisputed that the mailing was complete with its receipt in his office—indeed, it was date-stamped and scanned into the medical records. BR Sherfey at 18. Once the order was received in his office, the matter was entirely within the internal control of Dr. Sherfey's medical practice.

The Board addressed a similar mailing situation in *In re Jerry Winchester*, Dckt. No. 91 3537, 1993 WL 139659 (Wash. Bd. Ind. Ins. Appeals 1993). In that case, the issue was when a proposed decision and order from the Board was received by the Attorney General's Office in order to determine whether its petition for review was timely filed. *Winchester*, 1993 WL 139659 at *1. The Board determined that the date of receipt was the initial receipt by Consolidated Mailing Services, which stamps the green domestic return receipt cards and accepts all further responsibility for the mail as far as the U.S. Postal Service is concerned. *Id.* at *3. "Receipt" was not two days later when the mail was received by the branch office in which the assigned assistant attorney general was located, and so his petition for review was untimely. *Id.* at *3. In reaching its decision, the Board emphasized that communication should not be left to a "confusing mail-handling procedure[]" and communication occurred when there was actual receipt of the order by the Attorney General's Office:

> To conclude that communication did not occur until the Proposed Decision and Order was actually received by the branch office would be to unnecessarily compartmentalize an organization like the Attorney General's Office, thereby confusing mail-handling procedures, thus depriving this Board (and perhaps other organizations and individuals) of any knowledge as to when a particular document could be considered received.

Winchester, 1993 WL 139659 at *3. Although this decision did not involve communication under RCW 51.52.060(1)(a), it provides an analogous fact pattern addressing what impact, if any, internal mail-handling procedures have on the date a communication is "received." A break-down in office procedures does not excuse an untimely appeal. *In re Robert Wiyrick*, Dckt. No. 01 11323 & 01 12028, 2003 WL 25828990 (Wash. Bd. Ind. Ins. Appeal 2003) (failure to file a timely appeal or petition for review due to a breakdown of office procedures is not considered excusable neglect); *see also Beckman v. Dep't of Social & Health Serv.*, 102 Wn. App. 687, 11 P.3d 313 (2000) (negligence in ensuring that documents were timely routed to responsible persons did not justify failure to timely appeal).

Similarly, when a party provides an address to the Department where mail can be received, receipt at that address constitutes communication. *See In re Dan Johnson*, Dckt. No. 96 3380 & 96 3381, 1997 WL 255500, at *3 (Wash. Bd. Ind. Ins. App. 1997). In *Johnson*, the

worker lived in a trailer home on his mother's property. *Johnson*, 1997 WL 255500, at *2. She would pick up the mail from her mail box and put mail for the worker behind the answering machine or on the counter. *Id.* at *2. The worker checked for his mail almost daily. *Id.* The Department mailed the orders at issue on March 5 and 7, 1996, but did not receive the worker's protest to those orders until May 13, 1996. *Id.* at *1. The worker tried to explain his late appeal by arguing that the orders on appeal were not "received" until they were placed in his hands, not when they were delivered to his mother. *Id.* at *2. The Board rejected his contention, noting that the Department met the requirement that it mail orders to the injured worker at his last known address per Department records. *Id.* at *2. The worker controlled the mailing address he chose, selected his mother's address, and thus gave control over the method and manner of mail collection and distribution to his mother, a competent adult who understood English and who otherwise was a person of suitable age and discretion. *Id.* at *2. The Board concluded that the orders were properly communicated to the claimant, they were available to him in the usual and customary location, and he failed to timely protest or appeal within 60 days of their receipt. *Id.* at *3. Similarly, in *In re Everardo Barrera*, Dckt. No. 12 11095, 2013 WL 3185960 (Wash. Bd. Ind. Ins. App. 2013), the worker gave his father-in-law's address for

his mail, and he could not argue that it was not communicated to him when it was delivered to that address.

It should be noted that Dr. Sherfey testified that the fact that his office receives a piece of mail does not guarantee that it gets communicated to him. App. Br. at 10 (citing BR Sherfey at 16). This means that the rule of law that Mr. Arriaga proposes is that a doctor's office is permitted to not have all mail given to the doctor, and such a circumstance is non-communication under RCW 51.52.060 even though it is undisputed that the office received the order. Such a rule of law is unworkable. When a party designates a place of mailing, and delegates responsibility to another to open the mail, the order is communicated upon receipt of that mail at the office. *See Nafus*, 142 Wash. at 52; *Rodriguez*, 85 Wn.2d at 948-949; *Winchester*, 1993 WL 139659, at *3; *Johnson,* 1997 WL 255500, at *2. It is incumbent upon the party to ensure that he or she has systems in place regarding that mail.

Mr. Arriaga may not rely on a breakdown in Dr. Sherfey's office procedures to excuse the failure to file a timely appeal from a properly delivered order. Once the Department caused the order to be delivered to the correct address, subsequent failures in the communication process do not toll the statutory deadlines. *See Nafus*, 142 Wash. at 52;

Rodriguez, 85 Wn.2d at 948-949; *Winchester*, 1993 WL 139659. *3; *Johnson*, 1997 WL 255500, *3.

B. Liberal Construction In Favor Of Providing Benefits To Workers Does Not Require The New Requirement of Reading By The Attending Physician

Mr. Arriaga implies that this Court should liberally construe the Industrial Insurance Act to grant the relief he requests. App. Br. at 22-23. Liberal construction does not apply in this matter because this case does not involve the construction of an ambiguous statute. *Harris v. Dep't of Labor & Indus.*, 120 Wn.2d 461, 472 n.7, 474, 843 P.2d 1056 (1993) (Only if the statute is ambiguous would we be able to employ a liberal construction to it for the benefit of the injured worker.). Nor does it apply to issues of fact. *Ehman*, 33 Wn.2d at 595. In any event, it also does not apply because well-established case law sets the standard for communication and receipt of orders from the Department. Once the order has been delivered to the correct address for its intended recipient, and the recipient is present such that the mailing is available to review, the order has been communicated. *Shafer*, 166 Wn.2d 710, 717; *Rodriguez*, 85 Wn.2d at 951; *Nafus*, 142 Wash. at 52.

Department orders that are not timely protested or appealed are entitled to the same res judicata effect as court orders. *Marley*, 125 Wn.2d at 537-38. Res judicata serves the dual purposes of protecting all litigants

from the burden of litigation and promoting judicial economy. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326, 99 S. Ct. 645, 649, 58 L. Ed .2d 552 (1979).

Liberal construction principles do not dictate the result Mr. Arriaga advocates here, because the principles of res judicata apply equally to all parties, including the Department and employers, in workers' compensation cases and do not favor any particular party. *See Kingery*, 132 Wn.2d at 170 (unappealed decision by the Department is "final and binding on all parties . . .") (Talmadge, J., concurring).

It makes no sense to apply principles of law regarding finality of orders one way in a certain procedural context to produce a result favoring a claimant and another way in an otherwise identical procedural context to avoid producing a result adverse to a different claimant. Such an inconsistent, purely result-oriented approach has no support under liberal construction principles. If an order is not "communicated" unless a attending physician actually reads it, the same principle would apply to an employer. Such a rule would significantly undercut the finality of orders because an appealing party could come back months or, as here, years after the fact and challenge an order that the parties have relied on. In the case of an injured worker, this could result in reversal of significant benefits and sizeable overpayments. It is patently inconsistent with the

Industrial Insurance Act's defining purpose of providing "sure and certain relief" to injured workers.

C. Substantial Evidence Supports The Superior Court's Finding That Dr. Sherfey Received The Department's October 29, 2008 Order On October 31, 2008, And That Dr. Sherfey Did Not Protest Or Appeal That Order Within Sixty Days Of Its Receipt

Mr. Arriaga does not assign error to any of the superior court's findings of fact. App. Br. at 2-3. Unchallenged findings are verities on appeal. *Allen*, 100 Wn. App. at 530; *In re Estate of Lint*, 135 Wn.2d 518, 531-33, 957 P.2d 755 (1998) (if an appellant does not assign error to specific findings of fact and "present the court with argument as to why specific findings of the trial court are not supported by the evidence .. . . ," the findings are verities on appeal). Despite failing to challenge any specific findings of fact, Mr. Arriaga asserts that the superior court misapplied the law regarding communication and receipt. *See* App. Br. at 2. Because Mr. Arriaga did not assign error to any specific finding of the trial court, he cannot dispute the trial court's finding that "Mario Arriaga's attending physician Dr. Justin J. Sherfey received a copy of the Department's October 29, 2008 order on October 31, 2008[,]" or that "Dr. Sherfey did not protest or appeal this order within 60 days of its receipt." CP at 31-33.

While the findings of the trial court are verities, Mr. Arriaga apparently attempts to reverse the standard of review here, arguing that "the great weight of the evidence in the record supports Mr. Arriaga's position that although Dr. Sherfey's office may have received the Department order dated October 29, 2008, the doctor himself had not received it, and thus it had not been properly communicated to him." App. Br. at 16. However, that is not the correct standard of review here. As the Department is the prevailing party, the Court reviews the evidence to see if the substantial evidence supports the superior court's decision in favor of the Department. *Garrett Freightlines*, 45 Wn. App. at 340. Under the substantial evidence standard of review, the court will not reweigh the evidence. *Fox v. Dep't of Ret. Sys.*, 154 Wn. App. 517, 527, 225 P.3d 1018 (2009). The Court of Appeals views the evidence and all reasonable inferences from the evidence in the light most favorable to the prevailing party. *Korst v. McMahon*, 136 Wn. App. 202, 206, 148 P.3d 1081 (2006). "Where there is substantial evidence, we will not substitute our judgment for that of the trial court even though we might have resolved a factual dispute differently." *Id.* at 206.

Here, the question is whether the trial court was correct when it found that the order had been communicated to Dr. Sherfey. CP at 32-33. Dr. Sherfey concedes that the Department's order was received in his

office two days after it was mailed, and placed in Mr. Arriaga's medical chart. BR Sherfey at 18.

Indeed, even assuming arguendo that this Court should apply this new standard requiring that an aggrieved party actually read an order before it is communicated for the purposes of finality, Mr. Arriaga fails to provide sufficient evidence to show that Dr. Sherfey did not review the order. Dr. Sherfey indicated that he did not recall reviewing the order. He then testified to two pieces of evidence that suggested to him that he did not review it: it was not initialed; and, had he known about the letter he would have "*likely*" responded with a letter seeking some additional workup and evaluation regarding the cervical degenerative disk disease. BR Sherfey at 15. To the first point, the records show that any number of documents contained in Mr. Arriaga's file, including letters directed to Dr. Sherfey for action, were not initialed. BR Sherfey at 18-19, 26-27. Indeed, the very order denying reconsideration issued after Dr. Sherfey protested the segregation order at issue here was not initialed. BR Sherfey at 26.

Dr. Sherfey's speculative response to the second point is unhelpful, particularly in light of the fact that he was actively treating Mr. Arriaga afterwards and at no point challenged the Department about that issue

until more than a year and a half later when approached by Mr. Arriaga's counsel. *See* BR Sherfey at 15; BR at 45-46, 103.

The substantial evidence shows that the order was contained within Mr. Arriaga's medical records and had been communicated to Dr. Sherfey two days after its issuance on October 29, 2008. Dr. Sherfey did not protest or appeal that order until December 2010. BR at 46. Because the protest was well after the sixty-day limit prescribed by RCW 51.52.060(1)(a), the order is final and binding and dismissal of Mr. Arriaga's appeal should be affirmed.

II. CONCLUSION

The Department requests that this Court affirm the superior court decision affirming the decision of the Board.

RESPECTFULLY SUBMITTED this 30 day of August, 2013.

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COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON

MARIO ARRIAGA Appellant, v. DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, Respondent.	DECLARATION OF MAILING

DATED at Tacoma, Washington:

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I mailed the Department's Brief to counsel for all parties on the record by depositing a postage prepaid envelope in the U.S. mail addressed as follows:

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DATED this 30th day of August, 2013.

TRACY LANE-PATTON
Legal Assistant