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NO. 34757-5-III

IN THE SUPREME COURT OF THE

STATE OF WASHINGTON

JUSTIN M. POLLARD,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON; and KAISER ALUMINUM & CHEMICAL CORP.,

Respondents.

PETITION FOR REVIEW TO THE SUPREME COURT

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I. IDENTITY OF PETITIONER

COMES NOW the Petitioner, Justin M. Pollard, the Appellant below, by and through his attorney, Stephen K. Meyer, of Meyer Thorp, PLLC, pursuant to RAP 13.4, and asks this Court to accept discretionary review of the decision designated in Part II of this petition.

II. DECISION BELOW

Review is sought of *Pollard v. Dep't of Labor & Indus., et al.*, Division III, No.34757-5-III, *unpublished*, March 22, 2018. *See* Appendix A. Appellant's Motion for Reconsideration was denied by order dated May 3, 2018. *See* Appendix B.

III. ISSUE PRESENTED FOR REVIEW

Is an injured worker's reasonable belief that a defense medical examination would be neither fair nor independent, due in large part to the self-insured employer's and Department of Labor and Industries' refusal to authorize a current, local attending physician of the worker's choice, a factor to be considered when adjudicating whether the worker had good cause for refusing to attend a defense examination?

IV. STATEMENT OF THE CASE

During the course of his employment with Kaiser Aluminum and Chemical, a self-insured employer under the Industrial Insurance Act, Justin Pollard sustained an industrial injury to both shoulders on September 23, 2010. CABR, Pollard, 5/28/15, p. 17, lines 18-32, Proposed Decision & Order, p. 3, lines 10-16. He timely filed an

application for benefits and his claim was allowed by order of the Department of Labor and Industries [Department]. His original attending physician under the claim was Jeffrey Pederson, D.O., a general practitioner. Dr. Pederson subsequently referred Mr. Pollard to Tycho Kersten, M.D., orthopedic surgeon, for an orthopedic consultation and treatment as necessary. Ultimately, Mr. Pollard underwent a left rotator cuff repair performed by Dr. Kersten on February 21, 2011. CABR, Pollard, 5/28/15, p. 20, lines 20-23; Proposed Decision & Order, p. 3, lines 17-28. Following surgery, Mr. Pollard continued to see Dr. Kersten, who ordered physical therapy and a follow-up MRI of the left shoulder. Mr. Pollard last saw Dr. Kersten on November 26, 2013. CABR, Pollard, 5/28/15, p. 23, lines 1-12; Proposed Decision & Order, p. 3, lines 20-22. On January 31, 2014, two months after his last office visit with Mr. Pollard, Dr. Kersten advised the self-insured employer that no further curative treatment was recommended and that the worker had sustained permanent impairment. Dr. Kersten recommended that Mr. Pollard's permanent impairment be rated by an independent medical examiner since he did not perform impairment ratings of his patients.

In February 2014, Mr. Pollard moved from Spokane, Washington to Las Vegas, Nevada. CABR, Pollard, 5/28/15, pp. 5-6, lines 19-5. On at least four occasions subsequent to his relocation, Mr. Pollard's attorney

requested that the self-insured employer allow Mr. Pollard to obtain an attending physician in his new geographic area. CABR, Thorp, 5/28/15, pp. 59-61; Proposed Decision & Order, p. 3, lines 29-37. Reasons for the request included Mr. Pollard's ongoing right shoulder symptoms, the need for his depression to be addressed, ongoing return to work issues, as well as the need of a local physician. CABR, Thorp, 5/28/15, pp. 58-61, 87-90. The employer refused each request and instead scheduled and required Mr. Pollard's attendance at a defense medical examination. CABR, Thorp, 5/28/15, pp. 59-61. In response, Mr. Pollard's attorney advised the self-insured employer that he would attend a defense medical examination once his request for a current, local attending physician was granted. CABR 23; Pollard, 5/28/15, p. 41; Thorp, 5/28/15, pp. 73-75. The request was not granted and Mr. Pollard did not attend the scheduled defense examination. CABR, Pollard, 5/13/15, p. 41, lines 11-25; Thorp, 5/28/15, pp. 73-75.

Based upon the self-insured employer's notice to the Department that Mr. Pollard did not appear for its examination, the Department issued an order dated September 5, 2014, suspending the worker's benefits due to his failure to submit to, and/or cooperate with a medical examination. CABR 25; Ex. 2; Ex. 3. A protest of the suspension order was filed September 10, 2014.

Although a hard copy of Mr. Pollard's protest of the suspension order is not contained in the Certified Appeal Board Record, sworn testimony before the Board included a verbatim reading of its content into the record. Specifically, by letter dated September 10, 2014, the worker's attorney advised the Department that:

> The claimant has in fact responded to the employer on several occasions and had told the employer that the claimant would attend an IME in Las Vegas when the claimant's request to see a physician is approved. CABR, Thorp, 5/28/15, pp. 125-26.

In the same letter, the Department was further expressly advised by Mr. Pollard's attorney that:

> My client is available to attend an IME right now in Las Vegas. He is not being non-cooperative. **He does request that the employer authorize his visit to the new physicians in accordance with the law.** CABR, Thorp, 5/28/15, p. 127 (emphasis added).

In addition to Mr. Pollard's letter to the Department dated September 10, 2014, his attorney wrote to the Department on November 12, 2014, at which time she again requested that the Department authorize a change of attending physician and that it further issue an order penalizing the self-insured employer for its refusal to do so. CABR, Guadagnoli, 6/22/15, p. 119; CABR, Jurisdictional History, p. 37.

In response to Mr. Pollard's letter and protest dated September 10, 2014, the Department issued an order dated December 30, 2014, affirming the previous suspension order dated September 5, 2014. CABR, Ex. 4.

Along with the order dated December 30, 2014, the Department's claim adjudicator drafted a letter the same date in which she explained her rationale for affirming the order suspending Mr. Pollard's benefits. In her letter to Mr. Pollard's attorney, the Department's adjudicator expressly stated:

> After review of the claim file, it has been determined that there was no good cause for Mr. Pollard to not attend his independent medical exam. The issue you have with the third party administrator not authorizing an appointment with a new provider is not relevant to him attending an independent medical exam. These are two separate issues. CABR, Ex. 5.

Although the Industrial Appeals Judge rejected the exhibit on the basis that the adjudicative process was not relevant to the merits of the decision and order, it nonetheless remains part of the file and record on appeal. CABR, Colloquy, 6/22/15, p. 125.

Mr. Pollard thereafter filed a timely Notice of Appeal of the order dated December 30, 2014. CABR, Jurisdictional History, p. 38. The Board of Industrial Insurance Appeals [Board] granted the appeal, finding that it had jurisdiction over the issue of whether the suspension of Mr.

Pollard's benefits was correct, or alternatively whether he had good cause for refusing to attend the medical examination at issue. *Id.*; CABR, p. 40.

Hearings were conducted before the Board. Extensive testimony was presented on the specific issue of whether the absence of a current, local attending physician and the corresponding belief by the claimant that he could not obtain a fair and impartial examination, constitutes good cause for refusing to attend a defense examination. CABR, Proposed Decision & Order, pp. 22-24; Pollard, 5/28/15, pp. 5-7, p. 12, p. 25; Thorp, 5/28/15, pp. 58-62, p. 74, pp. 86-90, pp. 95-96.

The Board issued a Proposed Decision and Order [PD&O] in which it entered Findings of Fact and Conclusions of Law ultimately affirming the order under appeal. CABR, pp. 20-28. At no time did the Industrial Appeals Judge [IAJ] suggest that she was unable to consider the attending physician issue as it relates to Mr. Pollard's claim of good cause. *Id.* Rather, the IAJ reasoned that the denial of an attending physician was not "an enumerated or anticipated basis for good cause refusal to attend a properly scheduled IME." CABR, p. 26.

Mr. Pollard thereafter filed a Petition for Review [PFR] of the PD&O. CABR, pp. 7-13. Although the Board granted the PFR, it subsequently affirmed the PD&O without further comment or analysis. CABR, pp. 3-5.

Mr. Pollard then appealed the Board's decision to Spokane County Superior Court, where a bench trial was held before the Honorable Michael Price. CP 1. Judge Price drafted a memorandum decision on August 12, 2016, in which he concluded that Mr. Pollard had not demonstrated by a preponderance of the evidence that the Board's decision was improper or incorrect. CP 37-38. No rationale or analysis was offered. Findings of Fact and Conclusions of law were subsequently entered. CP 43-48. As with the Board's decision, none of the Findings or Conclusions referenced a jurisdictional inability to address the attending physician issue as it relates to good cause. *Id.* The issue was fully argued and briefed. CP 2-12, 13-27, 28-36.

Mr. Pollard then appealed to the Court of Appeals, Division III, which affirmed the trial court's decision on March 22, 2018. *See* Appendix A. The Court, however, did not address the merits of Mr. Pollard's "good cause" argument, instead concluding that the attending physician issue was not before it. *See* Appendix A.

Explaining its inability to reach the issue of whether the absence of an attending physician constitutes good cause, the Court stated:

> Mr. Pollard did not ask the Department to resolve his and Kaiser's dispute over whether he had a right to transfer treatment to a Las Vegas-based physician of his choice. If he had, the Department states it would have considered the appropriate criteria and issued an

> order deciding the issue. *Br. of Resp't Department at 15.* Such an order and further orders following any protest, appeal and judicial review, would address and resolve the parties' dispute over the reasonableness of Mr. Pollard's request. Such orders would provide us with finding of fact on the facts that are disputed; findings we would then review for substantial evidence. As an appellate court, we do not weigh evidence and do not find facts. *Citations omitted. See* Appendix A, p. 12.

Noting that the Court's decision was premised upon a misunderstanding of the record, and that Mr. Pollard's attorney had twice asked the Department to address the attending physician issue in the context of his "good cause" argument, Mr. Pollard filed a Motion to Reconsider on April 11, 2018. The Motion was denied May 3, 2018. *See* Appendix B.

V. ARGUMENT

The Industrial Insurance Act [IIA], which governs Mr. Pollard's claim, was enacted to provide "sure and certain relief for workers," injured during the course of their employment. RCW 51.040010. The IIA is remedial in nature and shall be liberally construed with doubts resolved in favor of the worker. RCW 51.12.010; *Shafer v. Dep't of Labor & Indus.*, 166 Wn.2d 710, 213 P.3d 591 (2009); *McClelland v. ITT Rayonier*, 65 Wn. App. 386, 828 P.2d 1138 (1992). The underlying purpose of the Act is "to promote benefits and to protect workers." *Clark County v.*

McManus, 185 Wn.2d 466, 472, 372 P.3d 764 (2016) (citing *Hamilton v. Dep't of Labor & Indus.*, 111 Wn.2d 569, 761 P.2d 618 (1988)).

Mr. Pollard's appeal encompasses two aspects of industrial insurance claims that are critically important to the fair and just administration of the IIA as intended. First, whether a worker has good cause for refusing to attend a defense medical examination is vitally important to the extent that the Act's underlying purpose cannot be furthered if a worker's benefits are suspended. A suspension of benefits, although statutorily authorized in certain circumstances, neither promotes benefits nor protects workers. Given the dire consequences a worker could face should his or her benefits be suspended, any practice, procedure, or decision that restricts a worker's ability to demonstrate good cause for properly refusing to attend a defense medical examination should be carefully scrutinized.

Second, as emphasized in recent decisions, perhaps no relationship is more critical in furthering the Act's purpose than that between an injured worker and his or her attending physician. *See, e.g., Clark County v. McManus*, 185 Wn.2d 466, 472, 372 P.3d 764 (2016); *Shafer v. Dep't of Labor & Indus.*, 166 Wn.2d 710, 213 P.3d 591 (2009). To suggest that the issues of a freely chosen attending physician and good cause are separate, and that the denial of an attending physician of one's choice as guaranteed under the Act has no bearing on an injured worker's resulting belief that a

contemporaneously scheduled defense medical examination would not be fair and independent, frankly defies reason.

A. Review Should be Accepted.

Mr. Pollard's Petition should be granted pursuant to RAP 13.4(b)(1), (2), and (4). The decision below is in conflict with decisions of this Court, as well as other decisions of the Court of Appeals. Further, the issues raised herein are of substantial public interest to the extent they implicate practice and procedures of the Department and self-insured employers that significantly undermine the underlying purpose of the IIA.

B. Issues of Good Cause and the Denial of an Attending Physician of One's Choice are Closely Related.

Mr. Pollard does not contest or otherwise dispute the Department's and self-insured employer's authority under the Act to require a worker's attendance, from time to time, at reasonably scheduled medical examinations. RCW 51.32.110(1). However, any such right is not "unbridled." *Romo v. Dep't of Labor & Indus.*, 92 Wn. App 348, 355, 962 P.2d 844, 848 (1998).

As a limitation upon the Department and self-insured employers in compelling workers' attendance at defense examinations, the Act allows for injured workers to refuse any such examination, without consequence, as long as he or she has good cause for doing so. RCW 51.32.110(2);

Romo v. Dep't of Labor & Indus., 92 Wn. App 348, 355, 962 P.2d 844, 848 (1998).

The question of what constitutes good cause under the statute has been addressed by the Board and courts. In *Romo* the court considered the appeal of an injured worker who refused to attend a defense medical examination based solely upon her assertion that the Department lacked authority to schedule the examination. In affirming the Department's decision to suspend her benefits, the court quoted with approval a significant decision of the Board of Industrial Insurance Appeals:

> Whether good cause exists in a given case will depend on a variety of factors that require balancing from one instance to the next. Among those factors that may be considered are the claimant's physical capacities, sophistication, circumstances of employment, family responsibilities, proven ability or inability to travel, medical treatment and other relevant concerns, not the least of which is the expectation of a fair and independent medical evaluation.
>
> Balanced against this are the interests of the Department and its statutory responsibility to act in attempting to resolve disputes at the first-step administrative level. This may include the need to resolve conflicting medical documentation, the location of willing and qualified physicians, the length of time before a physician is available to perform an examination, and the comparative expense of such. Neither of the above lists are exhaustive. *Romo v. Dep't of Labor & Indus.*, 92 Wn. App 348, 356, 962 P.2d 844, 848 (1998)(quoting *In Re Bob Edwards*, BIIA Dec., 90 6072(1992).

According to Mr. Pollard's sworn testimony, the self-insured employer's repeated refusal to allow a current, conveniently located attending physician resulted in profound mistrust of the claim process and the pending defense medical examination. He had no one to present a competing medical opinion based upon current evidence. He had no one to expertly compare the anticipated defense findings with current examination findings. He had no one, of his choice, to serve as a check and balance against the defense examiner hand-selected by the employer.

The employer's refusal to authorize a transfer of attending physician, while simultaneously demanding that Mr. Pollard submit to a defense examination with an examiner of the employer's choice, resulted in the expectation that the defense medical examination would not be fair and independent. According to the rationale of the court in *Romo*, such a reasonable belief by Mr. Pollard is a factor that must be considered when adjudicating good cause.

Unfortunately, Mr. Pollard's expectation of an unfair and partial examination was not adequately considered by the Board, trial court, or appellate court. Remarkably, the Board's full and complete analysis of the issue is comprised of one sentence. CABR, Proposed Decision & Order, p. 7, lines 13-17. Aside from being inadequate, the Board's analysis as

adopted by the trial court is furthermore erroneous in reasoning that the denial of an attending physician "is not an enumerated or anticipated basis for good cause refusal to attend a properly scheduled IME." *Id.*

As clearly and unequivocally stated by the court in *Romo*, the list of relevant factors to be considered in a "good cause" balancing is not exhaustive. *Romo*, 92 Wn. App. at 356. Consequently, it is immaterial whether the reason given by Mr. Pollard for his refusal to attend the examination is enumerated.

In denying the presence of good cause, neither the Board nor the trial court conducted ***any*** balancing of factors as required in *Romo v. Dep't of Labor & Indus.,*92 Wn. App. 348, 962 P.2d 844 (1998) and *In re Bob Edwards,* BIIA Dec., 90 6072 (1992). In support of his claim of good cause, Mr. Pollard provided extensive and persuasive testimony that he did not believe a defense medical examination would be fair and impartial without a current, local attending physician of his choice. Conversely, the self-insured employer and Department provided absolutely no testimony or evidence establishing that allowing the change of physician would have adversely impacted the proper adjudication of the claim at a first step administrative level. A balancing of the *Edwards* and *Romo* factors, which must be conducted as part of any "good cause" adjudication, quite easily weighs in Mr. Pollard's favor.

It is also important to note that Mr. Pollard is not claiming that mere frustration with the claim adjudication process constitutes good cause. That has never been our contention. Our contention is that the absence of an attending physician produced a belief by Mr. Pollard that the defense examination at issue would be neither fair nor independent. It is further our contention that the decisions in *Clark County v. McManus*, 185 Wn.2d 466, 372 P.3d 764 (2016) and *Shafer v. Dep't of Labor & Indus.*, 166 Wn.2d 710, 213 P.3d 591 (2009), wherein the importance of an attending physician is emphasized in great detail, support the reasonableness of Mr. Pollard's expectation of an unfair and partial exam.

As such, the *Romo* decision dictates that the denial of an attending physician, to the extent that it results in an expectation by the worker that a defense examination will be neither fair nor impartial, is a relevant factor that must be considered as part of any "good cause" balancing. Quite simply, the denial of an attending physician is not separate from a "good cause" balancing if the denial produces an expectation of unfairness or partiality.

Finally, although it is also our contention that the denial of a fundamental right under the Act denotes the type of harassment recognized in *Romo* as providing an injured worker with good cause, such a finding is not necessary in the present case. Irrespective of the violation

of Mr. Pollard's "right" to an attending physician of his choice, which clearly remained in effect pursuant to RCW 51.36.010(4), the resulting absence of a current, local attending physician produced a belief by Mr. Pollard that the defense medical examination would not be fair and independent. It is therefore a factor that must be considered in any "good cause" balancing. To date, no such balancing has occurred.

C. The Absence of an Attending Physician of One's Choice is Closely Tied to Expectations of Fairness.

The right of an injured worker to choose his or her attending physician under the Industrial Insurance Act is fundamental. RCW 51.36.010. Indeed, the ability of an injured worker to freely choose an attending physician is critically important to ensuring that the underlying purpose of the Act is promoted.

RCW 51.36.010(2)(a) provides that:

> Upon the occurrence of any injury to a worker entitled to compensation under the provisions of this title, he or she shall receive proper and necessary medical and surgical services at the hands of a physician or licensed advanced registered nurse practitioner of his or her own choice, if conveniently located, except as provided in (b) of this subsection, and proper and necessary hospital care and services during the period of his or her disability from such injury.

The duration of a worker's right to an attending physician of his or her choice depends upon the nature and extent of disability. In cases of

permanent partial disability, the right extends either to the date at which a permanent partial disability award is made or the date monthly allowances cease if the worker has already returned to work. RCW 51.36.010(4). In cases of temporary disability, including cases where loss of earning power benefits are paid, the right to an attending physician of one's choice extends to the date at which monthly allowances cease. *Id.*

In the present case, none of the applicable events listed in RCW 51.36.010(4), which would otherwise terminate a worker's right to a freely chosen attending physician, had yet occurred at the time Mr. Pollard's benefits were suspended. His right to choose a conveniently located attending physician near his residence in Las Vegas, Nevada, remained.

This Court has consistently recognized the crucial role played by an attending physician in industrial insurance claims. For example, in concluding that the closure of an injured worker's claim cannot become final and binding unless a copy of the closing order is served upon the attending physician by the Department, this Court in *Shafer v. Dep't of Lab. & Indus.*, 166 Wn.2d 710, 213 P.3d 591 (2009), explained that it is "abundantly clear that a worker's attending physician plays an important role" under the Industrial Insurance Act. *Shafer*, 166 Wn.2d at 720.

This Court in *Shafer* further emphasized that although an attending physician plays an "intricate" role throughout the entire claim process, he or she "is a ***critical*** component to the final resolution of claims." *Id.* (emphasis added).

The analysis in *Shafer* is directly applicable to Mr. Pollard's appeal. Just as an attending physician is "critical" to final claim resolution, so too is it essential that an injured worker have an attending physician when compelled to attend defense medical examinations. Indeed, to the extent that defense medical examinations are used to adjudicate medical issues that can result in claim closure, it would be directly contrary to the holding and rationale of *Shafer* to conclude that an attending physician is not necessary during the defense medical examination process.

Confirming the importance of an attending physician in this context, this Court recently held that the *Hamilton* instruction, advising a jury that it should give special consideration to the testimony of an attending physician, is mandatory in cases where an attending physician has testified. *Clark County v. McManus*, 185 Wn.2d 466, 372 P.3d 764 (2016); *Hamilton v. Dep't of Labor & Indus.*, 111 Wn.2d 569, 761 P.2d 618 (1988).

Rejecting arguments by the self-insured employer and Department that the *Hamilton* instruction was either optional or an inappropriate comment upon the evidence, this Court reasoned that instructing a jury regarding the special consideration to be afforded an attending physician is based on "long-standing policy surrounding workers' compensation cases." *McManus*, 185 Wn.2d at 476. Indeed, giving special consideration to the opinion of an attending physician "supports the purpose of the Act, which is to promote benefits and to protect workers." *McManus*, 185 Wn.2d at 472 (citing *Hamilton v. Dep't of Labor & Indus.*, 111 Wn.2d 569, 761 P.2d 618 (1988)).

Pursuant to the decisions in *Shafer* and *McManus*, as well as long-standing policy, the role of an attending physician is critical. As a result, Mr. Pollard's belief that the defense medical examination at issue would have been neither fair nor independent without an attending physician of his choice, is perfectly reasonable.

D. The Court of Appeals' Refusal to Address the Attending Physician Issue as it Relates to Good Cause is Factually and Legally Erroneous.

Contrary to the decision below, the attending physician issue as it relates to good cause was properly before the court. The Department was twice notified by Mr. Pollard of the attending physician issue and twice asked to resolve the dispute. By virtue of its decision and order dated

December 30, 2014, the attending physician issue as it relates to good cause was expressly considered and adjudicated by the Department. The issue was fully and completely litigated by the parties before the Board and superior court. Consequently, the issue of whether Mr. Pollard had good cause for refusing to attend a defense examination due to the absence of a current, local attending physician, and the resulting belief that a defense medical examination would be neither fair nor impartial, was squarely before the appellate court. *Lenk v. Dep't of Labor & Indus.*, 3 Wn. App. 977, 478 P.2d 761 (1970); *Brakus v. Dep't of Labor & Indus.*, 48 Wn.2d 218, 292 P.2d 865 (1956).

The decision below effectively denied Mr. Pollard the opportunity to have his claim of good cause fully addressed. Aside from the fact that the decision's rationale in refusing to address the attending physician issue as it relates to good cause was based upon a misstatement of the record, the appellate court's approach would result in piecemeal litigation, which should be avoided in industrial insurance appeals. *Lenk v. Dep't of Labor & Indus.*, 3 Wn. App. 977, 478 P.2d 761(1970). More troubling, however, is the fact that it would deny injured workers the opportunity to effectively and fully appeal orders suspending their benefits by unduly restricting analysis of pertinent factors, such as the denial of an attending physician, giving rise to good cause.

VI. CONCLUSION

Mr. Pollard's belief that the defense medical examination at issue would not have been fair or independent is a factor that must be weighed when adjudicating whether he had good cause for refusing to attend a defense medical examination. Given the absence of a current, local attending physician of his choice, coupled with the important role to be served by such a physician, his belief was both fact-based and reasonable.

Conversely, no legitimate countervailing interest has been identified to weigh against Mr. Pollard's interest in a fair and independent examination.

To the extent that the decision below failed to follow the procedure and balancing of factors as adopted in *Romo*, and considering further the decision's failure to recognize the significant role served by an attending physician of one's choice in the context of defense medical examinations and their consequences, it is respectfully requested that Mr. Pollard's Petition for Review be granted.

RESPECTFULLY SUBMITTED this 4th day of June, 2018.

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

JUSTIN POLLARD Appellant vs. DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON; and KAISER ALUMINUM & CHEMICAL CORP., Respondents.	No. 34757-5-III CERTIFICATE OF SERVICE

I certify that I served a copy of the appellant's Petition for Review, on all parties or their counsel of record via U.S. Mail, postage prepaid, and emailed, on the date below as follows:

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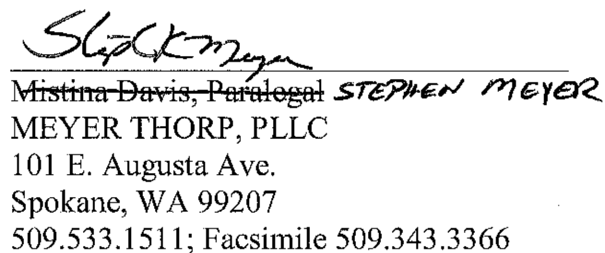
I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 4th day of June, 2018.



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APPENDIX A

FILED
MARCH 22, 2018
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

JUSTIN M. POLLARD,	)	
	)	No. 34757-5-III
Appellant,	)	
	)	
v.	)	
	)	
DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON; and KAISER ALUMINUM & CHEMICAL CORP.,	)	UNPUBLISHED OPINION
	)	
Respondents.	)	

SIDDOWAY, J. — The Department of Labor and Industries suspended Justin Pollard's worker's compensation benefits at the request of his self-insured employer, Kaiser Aluminum and Chemical Corporation, after Mr. Pollard refused to attend an independent medical examination (IME) scheduled by Kaiser. Following his unsuccessful appeal to the Board of Industrial Insurance Appeals and the superior court, Mr. Pollard asks us to find that he had good cause for refusing to attend the IME and to reverse.

His argument is predicated on his having been denied his right to transfer treatment to a new attending physician of his choice. The Board and the superior court correctly recognized that he never submitted the claimed denial of that right to the

Department for decision, however. The fact that he was frustrated by a claim management dispute with Kaiser was an issue on appeal. But his asserted right to the transfer was not. We affirm.

FACTS AND PROCEDURAL BACKGROUND[1]

In September 2010, while employed by Kaiser, Justin Pollard suffered a workplace injury when he attempted to toss an oversized metal sheet. A workers' compensation claim was allowed for bilateral shoulder conditions.

Mr. Pollard received physical therapy and on February 21, 2011, underwent rotator cuff surgery on his left shoulder performed by Dr. Tycho Kersten, an orthopedic surgeon. Mr. Pollard had been referred to Dr. Kersten by Dr. Jeffrey Pedersen, his family physician.

Mr. Pollard was last seen by Dr. Kersten on November 26, 2013. On January 14, 2014, Dr. Kersten spoke by phone with Mr. Pollard about his review of an MRI[2] of the left shoulder, telling Mr. Pollard that he did not recommend further surgery but only a continuation of conservative treatment. On January 31, 2014, Dr. Kersten reported to Kaiser that he recommended no further curative treatment, and that Mr. Pollard's condition was medically fixed with a permanent impairment. Dr. Kersten does not

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[1] The administrative record (AR) provided by the Board was not consecutively paginated. It exists in our record in PDF (portable document format) form. For citation purposes, we will rely on the PDF's electronic page numbers.

[2] Magnetic resonance imaging.

perform permanent impairment ratings and indicated to Kaiser that someone else should be engaged to perform an IME and arrive at the impairment rating needed to close the claim.

Based on Dr. Kersten's report, Kaiser scheduled an IME for Mr. Pollard in Spokane, notifying Mr. Pollard's lawyer that the IME was scheduled with Dr. David Bauer for March 28, 2014.[3] Kaiser was notified by Mr. Pollard's lawyer about a week before the examination date that Mr. Pollard had moved, now resided in Las Vegas, and would not appear for an IME in Spokane. Although Kaiser originally took the position it would pay for Mr. Pollard's travel to Spokane and expected him to keep the appointment, it later relented and identified a physician who could perform the IME in Henderson, Nevada, which is 30 minutes from Mr. Pollard's home.

In the meantime, Mr. Pollard's lawyer told him to look for an orthopedic specialist in Las Vegas. In March and May 2014, Mr. Pollard's lawyer asked that Kaiser transfer Mr. Pollard's care to Desert Orthopedics, a clinic in Las Vegas selected by Mr. Pollard. The requests were denied. Mr. Pollard did not appeal denial of the transfer authorization to the Department.

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[3] To fulfill its claim management responsibilities as a self-insurer, Kaiser relies on a third-party administrator (Broadspire) that works, in turn, with a company providing nurse and other case management services (Occupational Health Solutions). For simplicity, we refer to Kaiser's agents acting on its behalf as "Kaiser."

On April 22 and May 1, 2014, Kaiser mailed letters to Mr. Pollard informing him that it had scheduled an IME with Dr. Aubrey Swartz in Henderson on May 27, 2014. Five days before the scheduled appointment, Mr. Pollard's lawyer notified Kaiser that Mr. Pollard would not attend because Kaiser had not authorized his examination by a new physician in Las Vegas. Mr. Pollard did not attend the IME.

On June 6, 2014, Kaiser sent a letter to Mr. Pollard's lawyer asking for an explanation why Mr. Pollard failed to attend the IME on May 27. The letter informed Mr. Pollard that his industrial insurance benefits could be suspended if no written explanation demonstrating "good cause" for failing to attend the examination was provided within 30 days. Clerk's Papers (CP) at 62-63.

Receiving no response from Mr. Pollard, Kaiser asked the Department for authorization to suspend his benefits. On September 5, 2014, the Department entered such an order and notified Mr. Pollard that his benefits were being suspended for failure to attend the IME. Mr. Pollard timely protested the suspension, which was affirmed by the Department. Mr. Pollard appealed to the Board of Industrial Insurance Appeals.

In the hearing before an industrial appeals judge (IAJ), Mr. Pollard asked that the scope of the appeal be enlarged to include his request for a penalty against Kaiser for refusing to allow Mr. Pollard to change physicians. Mr. Pollard had allegedly requested a

penalty in his protest,[4] and he argued to the IAJ that by failing to address his request the Department had implicitly denied it. The IAJ declined to expand the scope of the appeal. Mr. Pollard did not seek a further order from the Department addressing his request for a penalty nor does he assign error on appeal to the IAJ's ruling on the scope of his appeal.

Following the hearing, the IAJ issued a proposed decision and order that affirmed the suspension of Mr. Pollard's benefits. In response to a petition for review filed by Mr. Pollard, the Board affirmed, adopting the IAJ's proposed decision and order as its own. Judicial review by the superior court resulted in a further affirmance of the suspension of benefits. Mr. Pollard appeals.

ANALYSIS

Title 51 RCW requires an injured worker to submit to an IME requested by the worker's self-insured employer. RCW 51.32.110(1). If the worker refuses to submit to such an examination, the self-insurer, with approval of the Department and notice to the worker, may suspend further action on the worker's claim. It may also deny compensation for the period in which the refusal to submit to the IME continues, "PROVIDED," as relevant here, "That the . . . self-insurer shall not [suspend action or deny compensation] if a worker has good cause for refusing to submit to . . . any examination." RCW 51.32.110(2).

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[4] Mr. Pollard's protest is not a part of the record on appeal.

In *Romo v. Department of Labor & Industries*, this court approved a balancing test for making the "good cause" determination that had been announced by the Board several years earlier, holding that "'whether good cause exists in a given case will depend on a variety of factors that require balancing from one instance to the next.'" 92 Wn. App. 348, 356, 962 P.2d 844 (1998) (quoting *In re Edwards*, No. 90 6072, at 2 (Wash. Bd. Indus. Ins. Appeals June 4, 1992), http://www.biia.wa.gov/SDPDF/906072.pdf). Continuing to quote *Edwards*, *Romo* identified relevant factors:

> "Among those factors that may be considered are the claimant's physical capacities, sophistication, circumstances of employment, family responsibilities, proven ability or inability to travel, medical treatment and other relevant concerns, not the least of which is the expectation of a fair and independent medical evaluation.
>
> Balanced against this are the interests of the Department and its statutory responsibility to act in attempting to resolve disputes at the first-step administrative level. This may include the need to resolve conflicting medical documentation, the location of willing and qualified physicians, the length of time before a physician is available to perform an examination, and the comparative expense of such. Neither of the above lists of factors are exhaustive."

Id. (quoting *Edwards*, No. 90 6072, at 2-3). *Romo* also held, quoting this court's earlier decision in *Garcia v. Department of Labor and Industries*, that a worker's frustration with delays in management of his claim would not support the legal conclusion of good cause. *Romo*, 92 Wn. App. at 355 (quoting *Garcia*, 86 Wn. App. 748, 752, 939 P.2d 704 (1997)).

Judicial review of decisions of the Board is not governed by the administrative procedure act. Instead, Title 51 RCW generally applies "the practice in civil cases" to appeals, and expressly provides that "[a]ppeal shall lie from the judgment of the superior court as in other civil cases." RCW 51.52.140. Accordingly, we review the superior court's decision, not the Board's. *Dep't of Labor & Indus. v. Slaugh*, 177 Wn. App. 439, 444, 312 P.3d 676 (2013); RCW 51.52.110.

Whether a worker has good cause to refuse to attend an IME is a mixed question of fact and law. *Garcia*, 86 Wn. App. at 751. We first review whether substantial evidence supports the superior court's factual findings and then determine, de novo, whether those factual findings support the superior court's legal conclusion that a worker did not have good cause. *Young v. Dep't of Labor & Indus.*, 81 Wn. App. 123, 128, 913 P.2d 402 (1996); *Garcia*, 86 Wn. App. at 751. The burden is on a worker to demonstrate good cause for not appearing for a medical examination requested by a self-insured employer. RCW 51.32.110(2); *Andersen v. Dep't of Labor & Indus.*, 93 Wn. App. 60, 61, 967 P.2d 11 (1998).

The dispositive issue in this appeal is whether Mr. Pollard's asserted right to transfer his care to a new attending physician of his choice is a factor that could and should have been weighed in determining whether he had good cause to refuse to attend the IME. The Department argues that it is not, contending that "the two issues are independent from each other as an independent medical examiner does not consult with

the attending physician." Br. of Resp't Department at 1.[5] The Department contends that whether good cause exists depends on a balance of only factors that are related to the examination itself. *Id.*

We are not prepared to adopt that view. But we do conclude that Mr. Pollard's argument on this critical issue is predicated on his asserted right to transfer treatment—an asserted right that was disputed and that he never asked the Department to resolve. The Board and the superior court did not fail to weigh his right to a transfer of treatment, as Mr. Pollard contends. Instead, they recognized, correctly, that whether he had a right to a transfer was not before them on appeal.

Mr. Pollard and Kaiser dispute whether Mr. Pollard's request for transfer to a new attending physician was reasonable—a dispute that Mr. Pollard never asked the Department to resolve

RCW 51.36.010(2)(a) provides that a worker entitled to compensation under Title 51 RCW shall receive "proper and necessary medical and surgical services at the hands of a physician or licensed advanced registered nurse practitioner of his or her own choice, if conveniently located, except as provided in (b) of this subsection."[6] "Proper and

[5] Elsewhere the Department and Kaiser have argued that the report provided by an independent medical examiner is only evidence, subject to challenge by the worker, and is given no special consideration. It is only the testimony of an attending physician that is entitled to special consideration by the trier of fact. *Clark County v. McManus*, 185 Wn.2d 466, 475-77, 372 P.3d 764 (2016).

[6] Paragraph (b) of the subsection limits workers' choice of practitioner to network providers for the most part, once a provider network is established in the worker's geographic area. RCW 51.36.010(2)(b).

necessary medical and surgical services" has been defined to mean health care services that are

> (a) Reflective of accepted standards of good practice, within the scope of practice of the provider's license or certification;
>
> (b) Curative or rehabilitative. . . ;
>
> (c) Not delivered primarily for the convenience of the claimant, the claimant's attending doctor, or any other provider; and
>
> (d) Provided at the least cost and in the least intensive setting of care consistent with the other provisions of this definition.

WAC 296-20-01002 (*cited with approval in Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 182, 210 P.3d 355 (2009)).

Turning to Department regulations, WAC 296-20-065 identifies seven exceptions to a worker's free choice of treating provider and reads a further "reasonableness" requirement into RCW 51.36.010(2). The regulation states that, apart from the seven exceptions, "no *reasonable* request for transfer to a network provider will be denied." WAC 296-20-065 (emphasis added). In *In Re: Maria Gonzalez*, designated as a "significant decision" by the Board,[7] the Board held that "the mere fact that [the worker] was unhappy with [her doctor], who had performed the surgery and said that she was ready to go back to work, is not sufficient for a transfer of her care to another physician";

[7] The Board publishes its significant decisions and makes them available to the public. "These decisions are nonbinding, but persuasive authority for this court." *O'Keefe v. Dep't of Labor & Indus.*, 126 Wn. App. 760, 766, 109 P.3d 484 (2005).

elsewhere, the Board found that Ms. Gonzalez's request to authorize the transfer of her care "was not reasonable, and authorization of the transfer by the Department was inappropriate." No. 97 0261, at 7-8, 11 (Wash. Bd. Indus. Ins. Appeals Apr. 7, 1998), http://www.biia.wa.gov/SDPDF/970261.pdf.

Mr. Pollard's position is that because he no longer lived in Spokane he had a right to transfer his care to a physician in Las Vegas, and Kaiser's refusal to authorize the transfer of care constituted good cause to refuse to submit to an IME.[8] He points out that his request for a transfer of physicians was not subject to any of the regulatory exceptions provided by WAC 296-20-065. He contends it was proper, necessary, and reasonable

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[8] Before the Department and the Board, Mr. Pollard also argued that his fear that Drs. Bauer and Swartz would not conduct a fair IME constituted good cause for refusing to attend. But in petitioning for review and on appeal, he treats his concern about the IME's fairness as evidence relevant to his reasonable need to transfer to a new attending physician rather than as independently-sufficient "good cause." *See, e.g.*, CP at 3 (Pl.'s Trial Br. at 2) ("Issue" identification) *and* Court of Appeals oral argument, *Pollard v. Dep't of Labor & Indus.*, No. 34757-5-III (Dec. 7, 2017), at 9 min., 38 sec. to 9 min., 50 sec. (on file with the court) ("[H]e did not have an expectation of a fair independent medical exam. And it's *because* he did not have an attending physician of his own choice, which was his statutory entitlement." (Emphasis added)).

If Mr. Pollard's concern that the IME would not be fair and independent remains an issue, we still affirm the superior court. The IAJ excluded anecdotal hearsay critical of Dr. Swartz, and that ruling is not challenged on appeal. The IAJ found that "Dr. Swartz is an unknown examiner" who "has never been used by Kaiser to perform an IME" and "[t]here is no evidence in the record that he is unfair and/or biased toward Mr. Pollard in particular or injured workers in general." AR at 28-29. The superior court concluded that the Board's decision was "correct" and "affirmed [it] in all respects." CP at 41. Substantial evidence supports the IAJ's findings that Mr. Pollard failed to present admissible evidence that Dr. Swartz could not be expected to perform a fair and independent medical examination.

because he needed to be evaluated for injury to his right shoulder and an injury-caused worsening of his depression, and needed a continuing relationship with a physician who could help him navigate the claim adjudication process and explain IME report results.

But whether the transfer of treatment was necessary and reasonable was disputed, as were the underlying facts. At the administrative hearing, Kaiser's nurse case manager assigned to Mr. Pollard's claim testified that Mr. Pollard's medical records indicated he was being treated for depression *before* his workplace injury, the records reflected no worsening of his depression caused by the injury, and they indicated that Dr. Kersten had evaluated Mr. Pollard's right shoulder and found it to be essentially normal. Kaiser contends that Dr. Kersten, an orthopedic surgeon of Mr. Pollard's choice who had treated him for almost three years, remained available, and because he concluded that Mr. Pollard's condition was medically fixed and stable with no further treatment required, transfer to a Las Vegas-based physician was unnecessary. Kaiser suggests that the real reason Mr. Pollard wanted to transfer to a new attending physician was because Dr. Kersten concluded his claim was ready for closure, which would terminate Mr. Pollard's benefits.

Under Title 51 RCW, "[w]here a dispute arises from the handling of any claim before the condition of the injured worker becomes fixed, the worker . . . may request the department to resolve the dispute." RCW 51.32.055(6). The statute provides that the Department shall resolve the dispute by issuing an order in accordance with RCW

51.52.050. *Id.* Such an order may then be appealed. RCW 51.52.050(2)(a). If the Department fails to act, a party can seek a writ of mandamus and is, in fact, required to do so as part of its exhaustion of remedies. *Dils v. Dep't of Labor & Indus.*, 51 Wn. App. 216, 220, 752 P.2d 1357 (1988).

Mr. Pollard did not ask the Department to resolve his and Kaiser's dispute over whether he had a right to transfer treatment to a Las Vegas-based physician of his choice. If he had, the Department states it would have considered the appropriate criteria and issued an order deciding the issue. Br. of Resp't Department at 15. Such an order, and further orders following any protest, appeal and judicial review, would address and resolve the parties' dispute over the reasonableness of Mr. Pollard's request. Such orders would provide us with findings of fact on the facts that are disputed; findings we would then review for substantial evidence. As an appellate court, we do not weigh evidence and do not find facts. *State v. Bennett*, 180 Wn. App. 484, 489, 322 P.3d 815 (2014) (citing *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575, 343 P.2d 183 (1959)).

Title 51 RCW provides that a party appealing a decision of the Board to the superior court may raise "only such issues of law or fact . . . as were properly included in the notice of appeal to the board, or in the complete record of the proceedings before the board." RCW 51.52.115. The jurisdiction of both the Board and the superior court are limited to reviewing matters that were properly before the Department and actually

decided by it. *Hanquet v. Dep't of Labor & Indus.*, 75 Wn. App. 657, 663, 879 P.2d 326 (1994) (citing cases).

The two issues that Mr. Pollard identifies on appeal *presume* that his right to transfer treatment to Desert Orthopedics was before the Board and superior court and should have been weighed.[9] He faults the Board and the superior court for failing to place his right to treatment by Desert Orthopedics on his side of the *Romo* balance scale in deciding the issue of "good cause." But both the Board and the superior court recognized that the Department was never asked to decide and never did decide whether he had a right to transfer to Desert Orthopedics for treatment that was proper, necessary, and reasonable. They did not weigh Mr. Pollard's right to a physician of his choice under RCW 51.36.010(2)(a) because it was not part of the appeal.

Mr. Pollard's frustration with the treatment transfer dispute with Kaiser was in evidence. It was a basis for argument on appeal. But as this court affirmed in *Romo*, frustration with claims management is not good cause for refusing to attend an IME. 92 Wn. App. at 355 (citing *Garcia*, 86 Wn. App. at 752).

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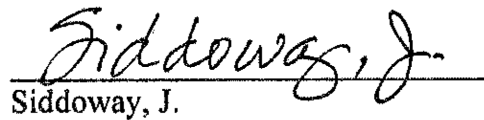
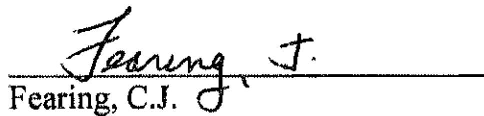
[9] The first issue identified by Mr. Pollard asks whether, given his circumstances, he "retain[ed] the right to choose a conveniently located attending physician." Br. of Appellant at 3. His second issue presumes he was denied his statutory right to a conveniently located attending physician and asks whether that constitutes good cause for refusing to attend an IME. *Id.* at 4.

Affirmed.[10]

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.


Siddoway, J.

WE CONCUR:


Fearing, C.J.

Korsmo, J.

[10] Because he is unsuccessful on appeal, we deny Mr. Pollard's request for an award of attorney fees.

APPENDIX B

FILED
May 3, 2018
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

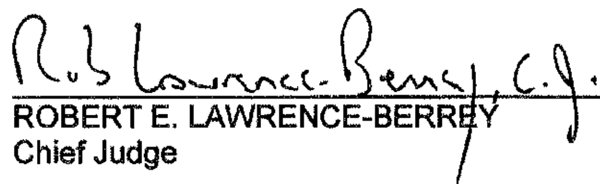
JUSTIN M. POLLARD, Appellant, v. DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON; and KAISER ALUMINUM & CHEMICAL CORP., Respondents.	)	No. 34757-5-III ORDER DENYING MOTION FOR RECONSIDERATION

THE COURT has considered Appellant's motion for reconsideration and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of March 22, 2018, is hereby denied.

PANEL: Judges Siddoway, Korsmo, Fearing

FOR THE COURT:



ROBERT E. LAWRENCE-BERREY
Chief Judge

MEYER THORP ATTORNEYS AT LAW, PLLC

June 04, 2018 - 5:20 PM

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