

Received
Washington State Supreme Court

APR 18 2014

Ronald R. Carpenter
Clerk

Case No.: ~~89664-0~~

46327-0-II

SUPREME COURT
FOR THE STATE OF WASHINGTON

LEONARD ALBERT, M.D., PhD, and Jeff Summe, D.O.

Appellants,

v.

STATE OF WASHINGTON, DEPT OF LABOR & INDUSTRIES

Respondent.

REPLY BRIEF OF APPELLANTS

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1. The Department did not file a notice of appeal and is, therefore, precluded from challenging the trial court’s decision not to grant summary judgment based on failure to exhaust administrative remedies.

Failure to cross-appeal an issue generally precludes its review on appeal.¹ RAP 5.1(d) provides that “A party seeking cross review must file a notice of appeal from the judgment within the time provided by 5.2.” Under RAP 5.1(d), a notice of a cross appeal is essential if a respondent seeks affirmative relief as distinguished from urging additional grounds for affirmance.²

In *Robinson v. Khan*,³ the Court held:

As a threshold matter, we refuse to review the Khans' argument that the trial court erred in failing to bar the Robinsons' claim based on the applicable statute of limitations. The Khans not only failed to file their own motion for summary judgment on the issue of the statute of limitations; they also filed no cross-appeal. A notice of cross review is essential if the respondent “seeks affirmative relief as distinguished from the urging of additional grounds for affirmance.” The Khans' effort to have the Robinsons' claim barred by the statute of limitations is a request for affirmative relief. Because they filed no cross appeal, the issue is not properly before this court.

Here, the Department’s effort to have Dr. Albert’s and Dr. Summe’s claims barred by failure to exhaust administrative remedies is a request for

¹ See, e.g., *Tellevik v. Real Prop. Known As 31641 W. Rutherford St.*, 120 Wn.2d 68, 89, 838 P.2d 111, *clarified on denial of reconsideration*, 845 P.2d 1325 (1992).
² *Phillips Bldg. Co. v. An*, 81 Wn.App. 696, 700 n. 3, 915 P.2d 1146 (1996) (citing *Nord v. Phipps*, 18 Wn.App. 262, 266 n. 3, 566 P.2d 1294 (1977)); see also 3 Lewis H. Orland and Karl B. Tegland, *Wash. Prac.* 48 (5th ed. 1998).
³ 89 Wn.App. 418, 420, 948 P.2d 1347 (Div. 1 1998)

1 affirmative relief. See, also *Smoke v. City of Seattle*⁴ which involved a
2 property dispute where the property owners were awarded damages against
3 the city under as state land use statute, but the trial court dismissed claims
4 under 42 U.S.C. § 1983. The city appealed, and the appellate court refused to
5 consider the respondent property owners' arguments that the trial court erred
6 in dismissing the section 1983 claim. Here, the Department did not file a
7 notice of appeal and, therefore, is not entitled to allege error based on failure
8 to exhaust administrative remedies.⁵

11 Moreover, the Department's claim of failure to exhaust administrative
12 remedies is, factually, untrue. In the case of Dr. Summe, for instance, it is
13 undisputed that a final, agreed order was entered by the Board of Industrial
14 Insurance Appeals (BIIA) *reversing the Department decision and admitting*
15 *Dr. Summe into the Provider Network, **exhausting all possible***
16 ***administrative remedies.***⁶ If the Department's argument is to be

20 ⁴ 79 Wn.App. 412, 902 P.2d 678 (Div. 1 1995), rev'd on other grounds, 132 Wn.2d 214, 937
21 P.2d 186 (1997).

22 ⁵ RAP 2.4(a); 15A Wash. Prac., Handbook Civil Procedure sec 85.16 (2013-2014 ed.)

23 ⁶ The Order on Agreement of Parties dated March 5, 2014 (App. A-11), was not available for submission
24 to the trial court. Under RAP 9.11: "The appellate court may direct that additional evidence on the
25 merits of the case be taken before the decision of a case on review if: (1) additional proof of facts is
26 needed to fairly resolve the issues on review, (2) the additional evidence would probably change the
27 decision being reviewed, (3) it is equitable to excuse a party's failure to present the evidence to the trial
28 court, (4) the remedy available to a party through postjudgment motions in the trial court is inadequate
29 or unnecessarily expensive, (5) the appellate court remedy of granting a new trial is inadequate or
unnecessarily expensive, and (6) it would be inequitable to decide the case solely on the evidence
already taken in the trial court." Appellants believe the question of exhaustion of administrative
remedies "begs the question" of the damages inflicted upon them by the unauthorized, unreviewed
enforcement of the Department's preliminary determination. The fact that an initial determination
holding Appellants ineligible was entered without hearing or review was, in the case of Dr. Summe,
erroneous demonstrates the very infirmity of the Department's position that it may act without review
– and without accountability for injuries inflicted on Appellants and others similarly situated.

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considered, then Appellants Albert and Summe ask that the above-referenced administrative adjudicative order be considered under RAP 9.10 or evidence of same be taken under RAP 9.11 to demonstrate exhaustion of remedies.

More to the point, as the record below reflects, the administrative procedures available before the BIIA were limited and would never have addressed the harm caused by the Department's actions *pending Board review*, which is at the heart of this appeal. The precipitous, unreviewed decision to deprive Appellants of their relationships with patients and eligibility to treat injured workers resulted in immediate, irreparable harm.

The question before this Court is whether this conduct may occur without accountability or consequence despite its violation of statute and in light of the substantive and procedural Constitutional issues protected by and implicit within the statutorily mandated process for review of initial Department determinations. The claimed failure to exhaust of administrative remedies is not relevant to the issue presented to this Court simply because such remedies (whether or not exhausted; they *were* exhausted) could never have afforded any remedy to Appellants for injuries inflicted by the Department *pending review by the BIIA*. Nor, as the record below reflects, would the BIIA ever address Constitutional issues now properly before this Court.

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2. The Department’s decision to deny Appellants’ eligibility to continue treating injured worker patients was communicated to patients and the National Practitioner Database as though the decision was a final order.

The Department argues that the Superior Court should not have considered the applicability of RCW 51.52.075 absent a final order from the Board of Industrial Insurance Appeals.⁷ This ignores the fact that the Department treats its own unilateral decision to deny membership as if it was a final order. The Department communicated its own unreviewed, initial decision to the Appellants’ patients and the National Practitioner Database before any appeal to the independent BIIA.

Further, the Department argues that its procedures and the administrative process limit the risk of erroneous deprivation.⁸ That is contradicted by the fact that Dr. Summe was admitted to the network⁹ after the Department sent an “URGENT” letter to his patients that “this provider cannot continue to treat your worker’s compensation injury”¹⁰ and after the Department notified the National Practitioner Database. The notification to the National Practitioner Database stated that the provider “Does not meet credentialing requirements”, that the length of action is “indefinite” and that the subject was not to be reinstated.¹¹

⁷ Resp. Br. at 10.
⁸ Id., at 31.
⁹ A-11 (attached)
¹⁰ A-3; CP 27 – 28
¹¹ A-9; CP 31-32

1 The final order from the BIIA admitting Dr. Summe into the network
2 under any theory concludes the administrative review process and exhausts
3 all remedies. It also highlights the flaw in the Department's argument which
4 has permitted the harm to Drs. Albert and Summe -- the gravamen of this
5 appeal to the Court. The Department cannot take back the letters sent to
6 patients or the report sent to the NPDB – patients, providers, insurers and the
7 general public cannot be expected to “unring a bell already rung.”¹²
8

9 The Department contends, apparently, that there is *no remedy* for its
10 summary denial of doctors from the New Network, notwithstanding its dire
11 consequences. It is the Department's contention that it may summarily,
12 without review, right or wrong, end Appellants' decades of caring for injured
13 workers and patient relationships during the pendency of appeal without
14 consequence or accountability that implicates both procedural and
15 substantive Constitutional issues. Due process and liberty and property
16 interests are implicated.
17

18 Dr. Summe, like Dr. Albert, was victimized by the unreviewed,
19 unilateral actions of the Department enforcing its preliminary orders *pending*
20 *review* by the BIIA. According to the final bill report for RCW 51.52.075,
21 the Department order is not final until BIIA review:
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23 Background: If the Department of Labor and Industries (L&I)
24 suspends a provider's eligibility to provide services to industrially
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29 ¹² *State v. Craig*, 82 Wn.2d 777, 789, 514 P.2d 151 (1973) [“The jurors could not be expected to unring a bell already rung.”]

1 Injured workers and the provider appeals the suspension order to the
2 Board of Industrial Insurance Appeals (BIIA), **L&I's suspension**
3 **order is stayed pending the outcome of the appeal.** As a result of
4 the stay, the provider can continue to provide workers' compensation
health services.

5 Summary: If a provider of services related to the treatment of
6 industrially injured workers appeals to the BIIA an order
7 issued by L&I suspending the provider's authority to provide
8 services, L&I may petition the BIIA for an order immediately
9 suspending the provider's eligibility to participate as a
10 provider of services in workers' compensation cases. The
11 BIIA must grant the petition if there is good cause to believe
12 the workers subject to the workers' compensation laws may
13 suffer serious physical or mental harm if the suspension is not
14 granted. BIIA must expedite the hearing of L&I's petition.¹³

15 This legislative history bears not only upon the genesis of RCW
16 51.52.075, but provides the filter through which the entire statutory
17 framework must be viewed. Determinations by the Department are
18 preliminary, subject to review by the BIIA, and the Department may not, as
19 occurred here, arrogate to itself the power to shatter careers without review.
20 The balance that inheres in RCW 51.52.075 contemplates that the
21 practitioner's right to continue in practice as a healthcare provider may be
22 weighed against the public interest, yet will *not* yield to that public interest,
23 absent a successful petition by the Department and a finding by the
24 independent BIIA "that there is good cause to believe that workers covered
25 under this title may suffer serious physical or mental harm if the petition is
26 not granted." RCW 51.52.075.

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29 ¹³ A-4; CP 114 [Final Bill Report, 2004 Reg. Sess. S.B. 6428] Emphasis added.

1 Here, even *by their own terms* as set forth in the denial letters,¹⁴ the
2 Department decisions were not final until sixty days had elapsed: yet, the
3 Department proceeded to contact patients thirty days after the notice and
4 make reports to the National Practitioner Database, irreparably damaging
5 both Dr. Summe and Dr. Albert before its own order was declared “final.”
6 Thus, this situation presents not only an unprecedented arrogation of power
7 by an administrative agency violative of both statutory mandates and the
8 prerogatives of the BIIA, its review body, but a chaotic process with none of
9 the characteristics of fair play expected by a free people.
10

11 The question before the Court is whether the Department has
12 unchecked authority to enforce its career-shattering orders pending appeal
13 free of accountability or consequence. RCW 51.52.075 and its Legislative
14 History suggest that it was never intended to have such power – this is
15 explicit in RCW 51.52.075 which requires a BIIA finding to justify
16 termination, but it is also implicit in the understanding that Department’s
17 unilateral orders are not final pending review by the independent BIIA.
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19 The notion advanced by the Department is that creation of a “new”
20 network of providers (i) grants the Department unprecedented plenary
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27 ¹⁴ A-7: CP 29-30 [“This decision will become final 60 days after you receive this notice unless
28 a written request for reconsideration is filed with the Department of Labor and Industries or an
29 appeal is filed with the Board of Industrial Insurance Appeals. ... The department must notify
any injured workers where you continue to be listed as the attending provider, 30 days after
this notice to you, so that the injured worker has adequate time to find and transfer to a network
provider.”]

1 authority to summarily terminate the eligibility of any doctor without review;
2 (ii) requires neither the authority of the BIIA pursuant to petition: (iii) nor
3 any finding by the BIIA that injured workers would otherwise “suffer serious
4 physical or mental harm.” This contradicts the Department’s own statements
5 on the impact of the New Network.
6

7 The Department’s Concise Explanatory Statement (CES),¹⁵ addressed
8 concerns regarding appeal rights:
9

10 There are several opportunities for appeal or review of a
11 decision. The rule includes a process for a provider to request
12 reconsideration of a decision using timelines that are common
13 for review of most Department decisions. The appeal rights
14 that apply to any Department action remain in effect and
15 contain the process for further appeal. These rules do not limit
this process. Clarifying language has been added to be
explicit that the current appeal process applies.¹⁶

16 The Department’s CES¹⁷ specifically stated that RCW 51.52 appeal rights are
17 unaffected by the regulations regarding implementation of the new network:
18

19 The Department has consistently indicated and been advised
20 that other statutory provisions, namely appeal rights contained
21 in RCW 51.52[,][sic] remain unaffected. The Department
22 agrees to clarify explicitly that health care provider network
23 decisions, such as denial or removal, are appealable under
24 RCW 51.52.

25 What did the Department mean when it enacted the New Network without
26 “affecting” appeal rights? It meant that doctors with longstanding
27 relationships and careers built around care of injured workers could not be

28 ¹⁵ A-6; CP 122 [at 5]

29 ¹⁶ Emphasis added.

¹⁷ A-6; CP 136 [at 19]

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summarily terminated by creation of a New Network without review by the BIIA.

3. Drs. Albert and Summe met the minimum standards for enrollment into the network and should have been accepted absent a BIIA order per RCW 51.52.075.

RCW 51.36.010(1) states:

[T]he department shall establish minimum standards for providers who treat workers from both state fund and self-insured employers. The department shall establish a health care provider network to treat injured workers, and shall accept providers into the network who meet those minimum standards.¹⁸

According to WAC 296-20-01020(5)

Providers who meet the minimum provider network standards, have not been identified for further review, and are in compliance with department rules and policies, **will be approved for enrollment into the network.**¹⁹

Therefore, approval for enrollment into the network is mandated unless the Department can demonstrate the provider fails to meet those minimum standards.²⁰

Here, Dr. Albert and Dr. Summe met the minimum standards because their respective denial letters did not cite as a basis for denial WAC 296-20-01050(3)(a) [“The provider fails to meet minimum health care provider network standards”].²¹

Thus, according to RCW 51.36.010(1), the Department must accept Dr. Albert into

¹⁸ Emphasis added.

¹⁹ Emphasis added.

²⁰ See, e.g. *Sargent v. Seattle Police Dept.*, 179 Wn.2d 376, 314 P.3d 1093, 1097 (2013) [“Disclosure is therefore mandated unless the agency can demonstrate proper application of a statutory exemption to the specific requested information; the agency bears the burden of proof.”]

²¹ Resp. Br. at 5 (fn. 1) and at 6 (fn. 2); CP 29

1 the network or prove, by “clear and convincing evidence”,²² that he does not “meet
2 those minimum standards.” As discussed above, Dr. Summe has since been admitted
3 to the New Network because the Department’s initial decision was based on
4 inadmissible evidence.²³

6 **4. The Department’s application of New Network rules and interpretation
7 of RCW 51.52.075 would render that statute moot.**

8 This Court need not reach the Constitutional issues if it determines that the
9 Department’s failure to comply with RCW 51.52.075 was in error. Dr. Albert and Dr.
10 Summe contend that the statutory framework comports with standards of fair play and
11 due process only if RCW 51.52.075 is given its promised effect and appellate remedies
12 are unimpaired as promised by the Department.
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15 The issue is whether or not the Department needed to secure an order from
16 the BIIA before terminating these providers. RCW 51.52.075 provides that the
17 Department “may petition the board for an order immediately suspending the
18 provider’s eligibility to participate” and that “The board shall grant the petition if it
19 determines that there is good cause to believe that workers covered under this title
20 may suffer *serious physical or mental harm* if the petition is not granted.”²⁴
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27 ²² *Nguyen v. State*, 144 Wn.2d 516, 518, 29 P.3d 689 (2001) [“The issue here is whether the
28 Due Process Clause of the United States Constitution requires proof by clear and convincing
29 evidence in a medical disciplinary proceeding. We hold due process requires no less, reverse
and remand.”]

²³ A-11

²⁴ Emphasis added.

1 The Department argues that RCW 51.52.075 is only applicable to remove
2 approved network providers.²⁵ However, the Department's rules expressly provide it
3 can deny a provider's initial application when it unilaterally determines there is a risk
4 of harm.²⁶ WAC 296-20-01050(3) states:

6 The department may deny a provider application during credentialing
7 or recredentialing based on the provider's professional qualifications
8 and practice history including ... (t) A finding of risk of harm
9 pursuant to WAC 296-20-01100.²⁷

10 WAC 296-20-01100 states:

11 (1) It is the intent of the department, through authority granted by
12 RCW 51.36.010 to protect workers from physical or psychiatric harm
13 by identifying, and taking appropriate action, including removal of
14 providers from the statewide network, when:

15 (a) There is harm; **and**

16 (b) There is a pattern(s) of low quality care; **and**

17 (c) The harm is related to the pattern(s) of low quality care.

18

19 **Harm** is defined as (intended or unintended) physical or psychiatric
20 injury resulting from, or contributed to, by health care services that
21 result in the need for additional monitoring, treatment or
22 hospitalization or that worsens the condition(s), increases disability,
23 or causes death. Harm includes increased, chronic, or prolonged pain
24 or decreased function²⁸

25 Dr. Albert and Dr. Summe respective denial letters did not cite WAC 296-20-
26 01050(3)(t) as a basis for denial. There was no finding of any risk of harm.

27 Consequently, based on the Department's interpretation and implementation
28 of its rules, there would never be the need to go to the independent BIIA for an

29 ²⁵ Resp. Br. at 22-23

²⁶ WAC 296-20-01050(3)(t); WAC 296-20-01100

²⁷ Emphasis added.

²⁸ Emphasis added.

1 “order immediately suspending the provider’s eligibility to participate”²⁹ based on
2 any alleged risk of harm. In other words, the Department interpretations, if given the
3 effect advocated by the Department, would eviscerate RCW 51.52.075 and overrule
4 the Legislature.
5

6 **5. The Department’s claim that Drs. Albert’s and Summe’s professional**
7 **licenses and liberty and property interests in the professional practices**
8 **are not at risk ignores the notices sent to patients and the National**
9 **Practitioner’s Database.**

10 The Department argues that “Here, Dr. Albert’s and Dr. Summe’s
11 professional licenses are not at risk.”³⁰ This ignores the fact that the Department sent
12 notices 30 days after the denial letter to clients who are injured workers entitled
13 “Urgent Action Required” that the doctors will no longer be eligible for coverage.³¹
14 Further, the Department sent notice of the application denial to the National
15 Practitioner Data Base stating that the physician “does not meet Dept. credentialing
16 requirements”; noting the length of action is “indefinite”; and that the physician will
17 not automatically be reinstated.³² This resulted in immediate disruption in
18 Appellants’ practices, their ability to treat and be compensated for treatment of
19 injured worker patients constituting a substantial portion of their practices, and
20 interfering with their physician-patient relationships.
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28 ²⁹ RCW 51.52.075

³⁰ Resp. Br. at 31

29 ³¹ A-3; CP 6-7; CP 26-27

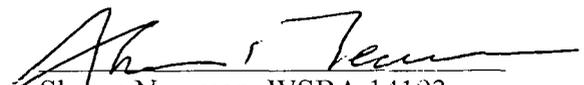
³² A-9; CP 7; 22; 30-31

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Dated: 4/18/14


Randolph I. Gordon, WSBA 8435
Attorney for Plaintiff Dr. Summe

Dated: 4/18/14


Shawn Newman, WSBA 14193
Attorney for Plaintiff Dr. Albert

APPENDIX

A-11

In re

**Jeff L. Summe, D.O.
Order on Agreement
of Parties**

Received
Washington State Supreme Court

APR 18 2014

Ronald R. Carpenter
Clerk

Case No.: 89664-0

SUPREME COURT
FOR THE STATE OF WASHINGTON

LEONARD ALBERT, M.D., PhD, and Jeff Summe, D.O.

Appellants,

v.

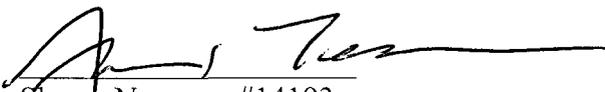
STATE OF WASHINGTON, DEPT OF LABOR & INDUSTRIES

Respondent.

DECLARATION OF SERVICE OF APPELLANTS' REPLY BRIEF

I declare under penalty of perjury under the laws of the State of Washington that I personally delivered the Appellants' Reply Brief to:
Attorney for Respondent: Michael J. Throgmorton, Office of the Attorney General, DLI Division, 7141 Clearwater Dr., S.W., Olympia, WA 98504-0121.

Date: 4/18/14
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