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~~S. Ct. No. 89638-1~~

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SUPREME COURT OF THE STATE OF WASHINGTON

FREDERICK THYSELL, M.D.,

Appellant,

vs.

STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

APPELLANT'S OPENING BRIEF

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 ORIGINAL

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I. INTRODUCTION

Frederick Thysell, M.D., treats injured workers for on-the-job injuries covered by Washington's workers compensation laws. In the midst of ongoing treatment relationships, the Washington State Department of Labor and Industries (Department) notified the injured workers who were his patients that Dr. Thysell cannot continue treatment. The Department directed the workers to transfer their care to new providers, without regard for whether any other providers are available in the areas where they live, and informed the workers that they would lose their benefits if they did not comply. At the same time, the Department notified Dr. Thysell that it would no longer reimburse him for any ongoing treatment of workers under his care, and instructed him to assist in transitioning to care to other providers. Dr. Thysell appealed the termination of the relationships with his existing patients, as well as the right to continue treating injured workers in the future. His appeal remains pending before the Board of Industrial Insurance Appeals (BIIA).

In the meantime, RCW 51.52.075 authorizes health care providers to continue treating injured workers during the pendency of an appeal from an order terminating their authority to provide such treatment, unless the Department files a petition seeking immediate suspension of the provider's eligibility to provide treatment, supported by a showing of good

cause to believe that the injured worker-patient would suffer serious physical or mental harm from continued treatment. The Department has not filed the requisite petition in the underlying BIA proceedings, nor does it contend that serious physical or mental harm would result from Dr. Thysell's continued treatment of his patients.

Instead, the Department argues that RCW 51.52.075 does not apply. In 2011, the Legislature directed the Department to establish a health care provider network. *See* Laws of 2011, ch. 6, § 1 (codified as amended at RCW 51.36.010). The Department characterizes its termination of Dr. Thysell's relationships with his patients as a denial of his right to participate in the network, and suggests that such denial is not equivalent to a termination of authority to provide treatment within the meaning of RCW 51.52.075, even when there is an ongoing treatment relationship. On this basis, the Department refuses to authorize or pay for Dr. Thysell's continued treatment of his patients pending appeal.

This argument is contrary to the Department's prior statements on the subject. When adopting the regulations that implemented the provider network, the Department previously assured health care providers that "[t]he appeal rights that apply to any Department action remain in effect" and the regulations "do not limit this process," specifically including the

“appeal rights contained in RCW 51.52.” *See* Concise Explanatory Statement re: Ch. 296-20 WAC, pp. 5 & 19.¹

Dr. Thysell and other providers unsuccessfully sought declaratory and other relief in the superior court. *See* CP 3-12 (complaint); CP 257-59 (order denying relief). From this decision Dr. Thysell appeals, seeking direct review by this Court. *See* CP 262-70 (notice of appeal); Statement of Grounds for Direct Review, Dec. 24, 2013.²

II. ASSIGNMENT OF ERROR

The superior court erred by denying Dr. Thysell’s motion for declaratory judgment. CP 257-59.³

III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Under circumstances where there is an ongoing treatment relationship between a physician and an injured worker, is the denial of an application to participate in the Department of Labor and Industries’ new Medical Provider Network equivalent to a termination of the provider’s

¹ A copy of the Concise Explanatory Statement is attached to Dr. Thysell’s Statement of Grounds for Direct Review, dated Dec. 24, 2013.

² Dr. Thysell was originally joined by Pablo R. Proaño, M.D., and Larry Lefors, D.O., in seeking direct review. Dr. Proaño’s appeal was dismissed pursuant to a settlement with the Department on March 27, 2014. Dr. Lefors’ appeal was dismissed pursuant to a settlement with the Department on April 29, 2014, and the caption was amended to reflect that Dr. Thysell is the sole remaining appellant.

³ To the extent required by RAP 10.3(g), this assignment of error encompasses what the superior court describes as a “finding,” on summary proceedings, that “[t]he Department of Labor and Industries has not issued any order ‘terminating’ [Dr. Thysell’s] authority to treat and to bill for treatment of injured workers in Washington within the meaning of RCW 51.52.075.” CP 258 (¶ 1.3).

authority to treat these injured workers, thereby triggering the protection of RCW 51.52.075 pending appeal?

2. Does Dr. Thysell have a liberty or property interest in his ongoing patient relationships, and, if so, does due process require the Department to comply with RCW 51.52.074, or otherwise require a pre-termination showing of good cause to terminate those relationships?

IV. STATEMENT OF THE CASE

Dr. Thysell has been licensed to practice medicine in the State of Washington for approximately 25 years. He obtained his medical degree from Hahnemann University School of Medicine, and completed his residency at Los Angeles County-University of Southern California Medical Center. CP 35 (Thysell Decl., ¶¶ 2-3). After working for many years in emergency medicine, he started working in several clinics in Central Washington, where a substantial portion of his patients are injured workers. CP 36-38 (Thysell Decl., ¶¶ 9-16).

In early 2013, the Department started setting up its new Medical Provider Network, in accordance with Laws of 2011, ch. 6, § 1. *See* Ch. 296-20 WAC (implementing regulations). Dr. Thysell applied to participate in the network, as required by the Department. However, his initial application and subsequent request for reconsideration was denied.

He appealed these decisions to the BIIA. CP 37-39 (Thysell Decl., ¶¶ 12-26).

In the meantime, the Department sent a form letter to Dr. Thysell's patients, emblazoned with a bold-faced header announcing "Urgent Action Required." CP 44. The letter prohibited the workers from obtaining further treatment from Dr. Thysell:

Your current provider, Frederick J. Thysell, MD is not enrolled in Labor & Industries' new Medical Provider Network. This provider cannot continue to treat your workers' compensation injury, effective February 25, 2013.

CP 44 (emphasis & brackets added). The letter directed the workers to obtain further treatment from other health care providers:

If you need additional treatment for your workers' compensation injury, you must transfer your care to a network provider Contact new providers to make sure they will accept you as a patient, and make an appointment Once you have an appointment with a provider who has agreed to treat you, request a transfer to the new provider at www.TransferCare.Lni.wa.gov.

CP 44 (emphasis & ellipses added). The letter warned the workers that they could lose their benefits if they did not comply:

Failure to transfer to a network provider within 30 days could disrupt benefits such as time-loss compensation and medical services.

CP 44 (emphasis added).

About the same time, the Department denied Dr. Thysell's application to participate in the new Medical Provider Network, and

notified him that it would no longer authorize or reimburse him for any ongoing treatment of injured workers under his care. CP 45. The Department further instructed him that “[y]ou will need to assist any injured or ill worker you are currently treating in transitioning to a network provider.” CP 45 (brackets added). The effective date of the Department’s notice to Dr. Thysell was February 25, 2013, the same date as the notice to patients.

When the Department’s implementing regulations for the new Medical Provider Network were originally published for comment, several commentators expressed concerns “regarding due process for providers who are rejected or terminated from the network.” Concise Explanatory Statement, p. 19. In response, the Department reassured them that:

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

Id. Among the provisions of the cited chapter, RCW 51.52.075 provides:

When a provider files with the board an appeal from an order terminating the provider's authority to provide services related to the treatment of industrially injured workers, the department may petition the board for an order immediately suspending the provider's eligibility to participate as a provider of services to industrially injured workers under this title pending the final disposition of the appeal by the board. The board shall grant the petition if it

determines that there is good cause to believe that workers covered under this title may suffer serious physical or mental harm if the petition is not granted. The board shall expedite the hearing of the department's petition under this section.

In Dr. Thysell's case, the Department did not petition the BIIA for an immediate suspension of his eligibility to provide treatment to his patients, nor did it attempt to make any showing that the patients would suffer serious physical or mental harm. Nonetheless, the Department has refused to allow Dr. Thysell to continue treatment, reasoning that these statutory protections for the physician-patient relationship are inapplicable when the physician in question has been denied the right to participate in the Department's new Medical Provider Network, even though there is an ongoing treatment relationship between the physician and injured workers.

The termination of Dr. Thysell's relationships with his patients has disrupted his practice, caused distress for the patients, hindered the patients' access to medical care, and may well result in harm to them. CP 38 (Thysell Decl., ¶¶ 17-20). As a result, Dr. Thysell filed a complaint in Thurston County Superior Court seeking declaratory and other appropriate relief to give them the benefit of the protections of RCW 51.52.075 during the pendency of his appeal before the BIIA. CP 3-12. The superior court denied any relief on summary proceedings. CP 257-

59.⁴ From this decision Dr. Thysell timely appeals. CP 262-70 (notice of appeal).

V. SUMMARY OF ARGUMENT

The enabling statute for the new Medical Provider Network does not repeal or amend RCW 51.52.075, and the Department does not have authority to limit the rights conferred by the statute. Regulations implementing the new network do not otherwise render RCW 51.52.075 inapplicable to terminations of ongoing physician-patient relationships, even if based upon a denial of the physician's right to participate in the new network. The Department must comply with RCW 51.52.075 by petitioning the BIIA and proving a risk of serious physical or mental harm before terminating ongoing physician-patient relationships. Failure to do so violates the statute and the physician's due process rights.

VI. ARGUMENT

A. The superior court erred in ruling that Dr. Thysell was not entitled to the protections of RCW 51.52.075 when the Department terminated ongoing treatment relationships with his injured worker patients.

The superior court ruled that "[t]he Department of Labor and Industries has not issued any order 'terminating' [Dr. Thysell's] authority to treat and to bill for treatment of injured workers in Washington within

⁴ As noted in Dr. Thysell's Statement of Grounds for Direct Review, at 8 n.6, the order is a decision determining the action within the meaning of RAP 2.2(a)(3), and is therefore appealable as a matter of right.

the meaning of RCW 51.52.075.” CP 258. This ruling is contrary to the plain language and the required liberal construction of the statute.

Under the plain language of the statute, the protections of RCW 51.52.075 are triggered by “an order terminating the provider’s authority to provide services related to the treatment of industrially injured workers[.]” “Interpretation of statutes begins with the plain language.” *Diaz v. State*, 175 Wn.2d 457, 463, 285 P.3d 873 (2012). The meaning of undefined statutory terms is ascertained from common dictionaries. *See In re C.M.F.*, 179 Wn.2d 411, 421, 315 P.3d 1109 (2013). The dictionary definition of “terminate” is “to bring to an end,” “to form the conclusion of” or “to discontinue the employment of.” *Merriam-Webster Online s.v. “terminate”* (transitive verb form definitions 1(a)-(c); viewed May 6, 2014). Under these definitions, the Department’s form letter to Dr. Thysell’s patients—urgently informing them that Dr. Thysell cannot continue to treat their workers compensation injuries and directing them to transfer to another provider on pain of losing their workers compensation benefits—is nothing less than a termination of Dr. Thysell’s relationship with these patients. CP 44. Likewise, the Department’s notice to Dr. Thysell that he would no longer be reimbursed for any ongoing treatment of injured workers under his care, and that he is required to assist any current patients in transitioning to another provider, effectively terminated

his patient relationships. CP 45. The Department is merely playing a semantic game when it characterizes the termination of Dr. Thysell's ongoing patient relationships as a denial of his right to participate in the new Medical Provider Network.

If the plain language of the statute were not sufficiently clear, the mandated liberal construction of the Industrial Insurance Act (IIA), Title 51 RCW, would require the Department's conduct to be treated as a termination of Dr. Thysell's patient relationships. A statute should be interpreted in accordance with its legislative purpose. *See Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 822, 16 P.3d 583 (2001). The IIA is supposed to be "liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death in the course of employment." RCW 51.12.010. One way that the IIA reduces suffering to a minimum is by fostering the relationship between a treating physician and an injured worker. *See* RCW 51.28.020(1)(b) (requiring physician to inform injured worker of rights under the IIA, and "lend all necessary assistance" in applying for benefits); RCW 51.36.060 (requiring physician to act as intermediary between the injured worker and the Department); RCW 51.36.060 (providing greater protection for confidentiality in workers compensation proceedings than other civil proceedings subject to RCW 5.60.060(4)(b));

RCW 51.52.063 (restricting ex parte contact with treating health care provider once a dispute arises); *Groff v. Dep't of Labor & Indus.*, 65 Wn.2d 35, 45, 395 P.2d 533 (1964) (requiring special consideration to be given to the opinions of the attending physician). The limits on terminating the physician-patient relationship contained in RCW 51.52.075 are an essential component of this statutory scheme. If the statutory protections for the relationship can be circumvented merely by re-casting a termination of ongoing physician-patient relationships in terms of a denial of the physician's right to participate as an approved network provider, it would undermine the purpose of the IIA.

There is no basis for the Department's distinction between termination of ongoing physician-patient relationships and denial of a physician's right to participate as an approved network provider. The statute directing the Department to create a new provider network did not expressly or impliedly repeal the protections of RCW 51.52.075. *See* Laws of 2011, ch. 6, § 1 (codified as amended at RCW 51.36.010). The Department does not have the freedom to sidestep the protections of RCW 51.52.075. In any event, the Department's interpretation of its own regulations supports application of the statute here. *See* Concise Explanatory Statement, p. 19. The Court should hold that the Department's actions against Dr. Thysell violate RCW 51.52.075.

B. The superior court erred in concluding that Dr. Thysell has no constitutionally protected interest in his ongoing patient relationships.

The superior court determined that Dr. Thysell does not have a constitutionally protected liberty or property interest in his ongoing patient relationships, and, as a result, that he does not have a due process right to a pre-deprivation termination hearing. CP 258-59. This determination appears to rest on the superior court's finding that the Department's actions in this case do not implicate RCW 51.52.075. However, because the Department's actions do trigger the protections of RCW 51.52.075, as discussed above, the superior court's due process determination is erroneous.

Due process is implicated when the state deprives a person of a protected liberty or property interest. *See Conard v. University of Washington*, 119 Wn.2d 519, 528-29, 834 P.2d 17 (1992), *cert. denied*, 510 U.S. 827 (1993).⁵ The state can create such constitutionally protected interests by statutes that create a legitimate claim of entitlement to benefits and/or impose substantive procedural restrictions on a decision maker's discretion. *See id.*, 119 Wn.2d at 528-29. RCW 51.52.075 creates a legitimate claim of entitlement on the part of physicians treating injured

⁵ The right to due process is guaranteed by U.S. Const. Amend. XIV and Wash. Const. Art. I, § 3. The federal and state constitutional rights are coextensive. *See In re Pers. Restraint of Dyer*, 143 Wn.2d 384, 394, 20 P.3d 907 (2001).

workers, and imposes substantive procedural restrictions on the Department's discretion to terminate ongoing physician-patient relationships during the pendency of a BIIA appeal. Under this statute, the Department is obligated not to terminate physician-patient relationships unless it files a petition and makes a showing that there is good cause to believe the patient's physical or mental health is at risk from continued treatment. As a result, a physician treating injured workers has a constitutionally protected interest.

Once a protected interest is involved, then the Court must decide what process is due, employing a three-factor test that balances (1) the private interest affected by the state action; (2) the risk of erroneous deprivation of the constitutionally protected interest; and (3) the government's interest, including the fiscal and administrative burdens of additional procedural requirements. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). At a minimum, due process requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner. *See id.* at 333.

Here, the private interest is the physician-patient relationship. This is not just the pecuniary interest of the physician in continuing to provide treatment. It also involves a fiduciary relationship of the highest degree between the physician and patient, involving every element of trust,

confidence and good faith. *See Smith v. Orthopedics Int'l, Ltd.*, 170 Wn.2d 659, 667, 244 P.3d 939 (2010). As noted above, the normal importance of the relationship is enhanced in the workers compensation context. The risk of erroneous deprivation involves both the likelihood of improper termination without a meaningful opportunity for the physician and patient to be heard, and also the magnitude of harm resulting from improper termination of a relationship of this nature. Finally, the Department's interest in avoiding the burdens associated with due process is undercut by RCW 51.52.075, which already requires the Department to file a petition and establish a risk of physical or mental harm from ongoing treatment before it may terminate an ongoing physician-patient relationship. These statutory requirements mirror the requirements of due process under the circumstances, and the Court should find that the Department's failure to satisfy these requirements before terminating Dr. Thysell's ongoing patient relationships violates due process.⁶

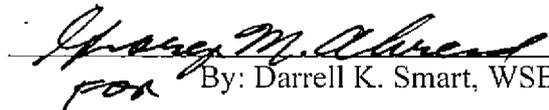
⁶ Although not a basis for the superior court's order, the Department has raised a defense based on Dr. Thysell's alleged failure to exhaust administrative remedies. *See* Department's Response to Petitioners' Statement of Grounds for Direct Review, at 7-9. However, there is no administrative remedy to be exhausted when the Department unilaterally terminates ongoing physician-patient relationships without filing a petition and establishing a risk of physical or mental harm. RCW 51.52.075 permits a physician to appeal an order terminating his or her authority to treat injured workers, but does not provide a means for the physician to obtain any administrative relief allowing the physician to continue treatment during the pendency of the appeal. Contrast the language of the statute permitting the Department to petition for immediate termination. *Cf. City of Pasco v. Napier*, 109 Wn.2d 769, 775, 755 P.2d 170 (1988) (holding exhaustion of administrative remedies not required where statute did not provide for remedy).

VII. CONCLUSION

Based on the foregoing, the Court should reverse the decision of the superior court, enter declaratory judgment that the Department's conduct in this case violates RCW 51.52.075 and due process, and allow Dr. Thysell to continue treating injured workers pending the appeal of the denial of his right to participate in the Department's new Medical Provider Network.

Respectfully submitted this 7th day of May, 2014.

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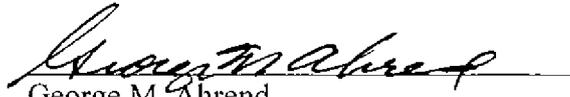
CERTIFICATE OF SERVICE

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

On May 7, 2014, I served the document to which this is annexed by email and First Class Mail, postage prepaid, as follows:

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Signed on May 7, 2014 at Ephrata, Washington.


George M. Ahrend