NO. 48927-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

RICHARD L. BOYD

APPELLANT,

v.

CITY OF OLYMPIA, *ET. AL*,

RESPONDENTS.

BRIEF OF RESPONDENT DEPARTMENT OF LABOR & INDUSTRIES

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I. INTRODUCTION

If a party does not want to contest a Department of Labor & Industries order, then that party is not an aggrieved party who protested the order. Richard Boyd relies on a chart note from a doctor to argue it was a request for reconsideration—a protest—of a Department order. But the doctor says that he did not intend to protest the Department's decision when he sent in the chart note and Boyd's arguments fail.

Additionally, to be a protest a document must be "reasonably calculated to put the Department on notice that it is requesting relief inconsistent with the action in the order."[1] The chart note here is not a protest because it discusses treatment of Boyd's left hip, which is unrelated to the low-back condition accepted under his workers' compensation claim. A note about Boyd's hip is not inconsistent with the Department's order about his back and so it is not a protest.

This Court should affirm the trial court's decision that there was no timely protest and conclude that the Department order on appeal is final.

II. ISSUES

1. Any "other person aggrieved" by a Department decision may request the Department reconsider the decision—a protest. RCW 51.52.050(2)(a). Dr. Rao has stated that he did not intend to protest the order. Was he nonetheless an aggrieved party who protested the relevant decision under RCW 51.52.050?

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[1] *In re Mike Lambert*, No. 91 0107, 1991 WL 11008451, *1 (Wash. Bd. Ind. Ins. App. Jan. 29, 1991).

2. To be construed as a protest, a document must be reasonably calculated to put the Department on notice that the party submitting the document is requesting action inconsistent with the Department's decision. The February 2014 chart note at issue here did not reference a claim number or industrial injury and discussed a condition unrelated to the industrial injury. Did the chart note put the Department on notice that the doctor disagreed with closure of the claim?

III. STATEMENT OF FACTS

A. The Department Closed Boyd's Low-Back Claim After He Received Treatment

Boyd injured his low back on October 22, 2009, while employed by the City of Olympia. Certified Appeal Board Record (BR) 369, 583. The City is self-insured, which means it administered Boyd's claim. *See* BR 3-7. Boyd received medical treatment for his injury and then the Department closed his claim on October 10, 2013, with a permanent partial disability award for his back. BR 328, 369.

On November 15, 2013, John Green, MD, one of the physicians treating Boyd, provided a chart note he created on September 24, 2013 noting that he believed a third independent medical examination might be necessary to resolve two previous conflicting independent medical examination impairment ratings for the low-back condition. BR 475-79. Dr. Green's note also assessed the following conditions: (1) left internal and external "snapping" hip; (2) status post left arthroscopic debridement

and osteoplasty; and, (3) chronic low back pain with primarily right-sided lower extremity residual. BR 475-79. He referred Boyd to Ashwin Rao, MD, to perform a steroid injection in the left hip. BR 475-79.

On January 2, 2014, counsel for the City sent a letter to the Department indicating that the September 24, 2013 chart note that asked for a further independent medical examination might be considered a protest. BR 328, 370. The City then filed its own protest to the closing order to ask that the Department address the inconsistent medical opinions about the permanent partial disability award. BR 328.

On January 15, 2014, the City's third party administrator received a letter from Dr. Green agreeing that the hip symptoms described in the September 24, 2013 chart note were unrelated to Boyd's October 2009 industrial injury. BR 233-34. On January 27, 2014, the Department addressed the City's protest and provided an updated closing order for Boyd's low-back claim that reduced his impairment award. BR 224. The order was sent to Boyd's attorney and to his attending physician, Michael Lee, MD. *See* BR 224-25, 370. Two days later, Boyd protested the January 27, 2014 order through his attorney. BR 370.

B. The Department Addressed Boyd's Protest and Affirmed Claim Closure

On February 18, 2014, the Department affirmed the closing order. BR 370. The Department sent a copy of this order to the City, Boyd (through his attorney), and Dr. Lee, the attending physician on Boyd's claim at that time. BR 227. The closing order was communicated to Boyd through his counsel and he did not protest or appeal the closing order within 60 days. BR 371. Boyd's attending physician also did not submit a protest. BR 371.

Boyd obtained new counsel and filed a late appeal of the February 18, 2014 order to the Board of Industrial Insurance Appeals on October 20, 2014, based on the claim that a chart note generated by Dr. Rao's was an unaddressed protest on his behalf. BR 371.

C. Dr. Rao Prepared the February 13, 2014 Chart Note While Treating Boyd's Unrelated Hip Condition

On February 13, 2014, Dr. Rao examined Boyd for his unrelated left hip complaints and performed an injection of Boyd's left hip. BR 233-34. The chart note reflected that Dr. Rao was seeing Boyd on referral from Dr. Green and that Dr. Green had suggested steroid injections into the left hip. BR 332. Dr. Rao provided his chart note along with a bill to the City. BR 370.

On February 18, 2014, the Department closed the claim. The Department did not send a copy of the closing order to Dr. Rao as he was

not the attending physician and the record does not reflect that he otherwise reviewed the order before he mailed the February 13, 2014 chart note to the City's third party administrator. BR 227, 559.

On February 23, 2014, the third party administrator received the chart note reflecting the February 13th visit to Dr. Rao. BR 559. The chart note discussed the treatment (an injection) that he provided for the hip condition on February 13, and suggested that the worker continue home physical therapy and follow up in 4-6 weeks to see if another injection was necessary. BR 332-36. The chart note contained no reference to the claim number, no reference to the industrial injury, no reference to the employer of injury, and contained nothing that indicated disagreement with closing the claim. *See* BR 332-36. The third party administrator knew from Dr. Green's earlier chart note that the hip condition was not related to the industrial injury. BR 370.

The third party administrator then sent a letter to Dr. Rao asking him to clarify why he had sent the chart note in. BR 330. The letter attached Dr. Green's September 24, 2013 chart note (confirming that the hip conditions were unrelated) and the January 15, 2014 letter (confirming he was not recommending any further treatment for the industrial injury) for his review. BR 330. The letter asked for clarification because "[i]t is unclear whether there was simply miscommunication regarding the billing

party, or whether you intended to protest/appeal the closing order." BR 330. The letter then told the doctor how to protest the closing order if he disagreed with it. BR 330, 370-71. Dr. Rao did not respond to the March 28, 2014 letter requesting a protest. BR 371.

During the litigation before the Board, Dr. Rao provided a declaration that clarified that (1) his chart note did not address whether he felt that "the need for injections or further treatment for the hip was proximately caused by the industrial injury under SC-77017"; (2) in forwarding his February 13, 2014 chart note and bill the third party administrator he did not intend to protest the February 18, 2014 closing order; and (3) he has "no opinion as to whether or not Mr. Boyd's hip symptoms are related to the industrial injury covered under Claim No. SC-77017 . . . ." BR 559.

D. The Board and Trial Court Concluded That Dr. Rao's Chart Note Did Not Constitute a Protest and So the Closing Order Was Final and Binding

The parties cross-moved for summary judgment at the Board. BR 188. In his proposed decision, the industrial appeals judge concluded that Dr. Rao's chart note was not a protest, reasoning that the chart note did not notify the Department that its order was incorrect because the chart note "contains no claim number, contains no reference to the alleged industrial injury, contains no reference to the employer of injury, no protest

language, and no specific recommendation of further treatment . . . ." BR 188-91. Boyd petitioned for review to the Board. BR 120-33. With his petition for review, Boyd submitted a new declaration with more than a dozen new documents that were not provided during the cross-motions for summary judgment. BR 135-137. The Board rejected Boyd's untimely submissions concluding that Boyd failed to present "any evidence or argument that by the exercise of reasonable diligence, he could not have discovered all of the proposed evidence and presented it with his summary judgment motion." BR 5. It also concluded that "Dr. Rao's chart note did not put the City of Olympia or the Department of Labor & Industries on reasonable notice that closure of Mr. Boyd's claim was being challenged." BR 6.

Boyd appealed to superior court and the superior court affirmed the Board's decision. CP 3-5, 47-49.

IV. STANDARD OF REVIEW

In workers' compensation cases, the ordinary civil standard of review applies. RCW 51.52.140; *Malang v. Dep't of Labor & Indus.*, 139 Wn. App. 677, 683, 162 P.3d 450 (2007). The appellate court reviews the trial court's decision, not the Board's decision, and the Administrative Procedure Act does not apply. *See Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179-81, 210 P.3d 355 (2009).

The appellate court reviews a summary judgment order de novo. *Bennerstrom v. Dep't of Labor & Indus.*, 120 Wn. App. 853, 858, 86 P.3d 826 (2004). Summary judgment is proper if no genuine issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c).

V. ARGUMENT

This case is about whether documents submitted by a physician who provided treatment to a worker, but who is not the worker's attending physician and who does not claim to have been aggrieved by the Department order, can nevertheless constitute a protest under RCW 51.52.050. If a party does not protest or appeal an adverse order within 60 days of communication, the order is final. RCW 51.52.050(1), .060(1). An unappealed final order precludes relitigation of its issues. *Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 538, 886 P.2d 189 (1994). Boyd may not relitigate the issues in the closing order because he fails to establish that Dr. Rao's February 13, 2014 chart note and attached bill was a protest for two independent reasons.

First, Dr. Rao was not aggrieved because he was not the attending physician and he was not seeking reimbursement for the treatment of Boyd's hip symptoms. He did not even get the order that Boyd now claims the doctor protested. Second, Boyd cannot show that the documents were

reasonably calculated to put the Department or City on notice that he is requesting relief inconsistent with the action in the order. The chart note and bill did not reference the claim number, did not reference the alleged industrial injury, did not reference the employer of injury, contained nothing that indicated disagreement with closing the claim, and addressed treatment for hip symptoms the doctor did not contend were related to the worker's low-back injury and which the City's third party administrator already knew was not related. This Court should affirm the trial court's determination that Boyd failed to timely protest the February 18, 2014 order and conclude that it is final.

A. Dr. Rao's February 13, 2014 Chart Note Was Not a Protest Because He Was Not an Aggrieved Party Requesting Reconsideration of a Decision under RCW 51.52.050

1. Dr. Rao Was Not the Attending Physician for Boyd's Workers' Compensation Claim and Is Not an Aggrieved Party Based on That Status

The Industrial Insurance Act allows a worker, beneficiary, employer, or "other person aggrieved" by the Department's decision to request reconsideration of the decision or appeal to the Board. RCW 51.52.050(2)(a). This can include the attending physician. WAC 296-20-09701. The attending physician may protest on behalf of a worker because he or she has a unique status under the Industrial Insurance Act: the attending physician helps the worker file a claim, provides reports to

the Department about the treatment, and assumes "numerous other statutory and regulatory obligations once the worker's claim is accepted." *Shafer v. Dep't of Labor & Indus.*, 166 Wn.2d 710, 721, 213 P.3d 591 (2009). Accordingly, an attending physician may protest or appeal a Department order. *Shafer*, 166 Wn.2d at 716; *see also Taylor v. Dep't of Labor & Indus.*, 175 Wash. 1, 2, 26 P.2d 391 (1933) (recognizing a protest may be filed by an attending physician on behalf of an injured worker).

Boyd asserts that Dr. Rao is an "attending doctor." App. Br. 15. This is not true; he is a treating physician only. There is a difference under the Department's rules between the two. WAC 296-20-071. Boyd cites WAC 296-20-01002 for the proposition that "[a]n attending physician is a treating physician." App. Br. 15. This is true, but it does not mean that the converse, that every "treating physician" is an "attending physician," is true. A physician is not an attending physician merely because he or she is involved in the claimant's care. Rather, the industrial insurance regulatory scheme requires the worker to "select *an* attending physician from the provider network for all care beyond the initial visit." WAC 296-20-065 (emphasis added). WAC 296-20-071 also provides for only one attending physician. The worker may transfer attending physicians freely (with some limited restrictions) and the Department allows treatment by more than one health care provider on a claim at any one time, but the Department

only recognizes "one primary attending physician who will be responsible for directing the overall treatment program." WAC 296-20-071. The Department defines "attending provider" and "treating provider" separately, showing they have separate meanings. WAC 296-20-01002; *see also* WAC 296-20-071. Recognizing this difference, the Board has ruled that orders need not be communicated to all treating physicians for the order to become final and binding. *In re Mary K. Waldron*, Nos. 09 20656, 09 20656, 2011 WL 1903466, *2-4 (Wash. Bd. Ind. Ins. App. Mar. 22, 2011) (citing WAC 296-20-071).[2]

The Department did not send the February 18, 2014 order to Dr. Rao because he was not Boyd's attending physician and is not aggrieved as such. Dr. Rao did not review the order before he sent his chart note and bill in, showing that he did not protest anything. *See* BR 226-27, 559.

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[2] The Court may consider both the Board's significant and non-significant decisions as persuasive authority. Appellate courts often cite and discuss non-significant Board decisions as persuasive authority to support their legal analysis. For example, in a recent case, the Court of Appeals cited and discussed the Board's application of the multiple proximate cause doctrine from two non-significant decisions. *See Dep't of Labor & Indus. v. Shirley*, 171 Wn. App. 870, 888-91, 288 P.3d 390 (2012) (citing *In re David Killian*, No. 06 17478, 2007 WL 4986270 (Wash. Bd. Indus. Ins. App. Nov. 20, 2007); *In re Bobbie Thomas*, Nos. 04 17345 & 04 17536, 2006 WL 2989442 (Wash. Bd. Indus. Ins. App. May 17, 2006)).

The parties appear to agree that Dr. Lee was Boyd's attending physician at the time of claim closure. BR 370; *see* App. Br. 28-29.[3] Boyd claims that any medical provider may request reconsideration, pointing to the following language "If upon reconsideration requested by a worker or medical provider . . . ." App. Br. 14 (quoting RCW 51.52.050(2)(b)(i)). But RCW 51.52.050(2)(b)(i) addresses stays of payments after a protest. It deals with what happens after an aggrieved medical provider protested an order. RCW 51.52.050(2)(a). RCW 51.52.050(2)(a) provides that only aggrieved parties may protest, and this threshold determination needs to be met before RCW 51.52.050(2)(b)(i) is triggered.

Dr. Rao is not the attending physician, Dr. Lee is. Since Dr. Rao was not Boyd's attending physician, Boyd would need to establish that Dr. Rao was somehow otherwise aggrieved by the order to show that Dr. Rao's letter was a protest, and Boyd cannot do so.

2. Dr. Rao Was Not an "Other Person Aggrieved" by the Closing Order Because He Had No Proprietary, Pecuniary, or Personal Right Affected By the Order

While a closing order need not be *communicated* to a treating physician—as opposed to the attending physician—for that order to become final, any "other person aggrieved" by the Department's decision

[3] Tellingly, Boyd does not argue that the closing order is not final because it was not sent to Dr. Rao—confirming that Dr. Rao was not his attending physician. *Shafer*, 166 Wn.2d at 718 (closing order not final unless sent to attending physician).

may protest or appeal the decision. *Waldron*, 2011 WL 1903466 at *2-4 (closing orders need not be communicated to non-attending physician); RCW 51.52.050(2)(a). The Board has adopted the standard Washington courts apply to the similar language in RAP 3.1 to determine if a person is aggrieved by an order: it "requires that the person have a proprietary, pecuniary, or personal right which is substantially affected by the Department's determination." *In re Chambers Bay Golf Course*, No. 09 20604, 2010 WL 5882060, *3 (Wash. Bd. Ind. Ins. Appeals Dec. 7, 2010); *see also Cooper v. City of Tacoma,* 47 Wn. App. 315, 317, 734 P.2d 541 (1987).

Boyd claims that Dr. Rao is aggrieved "as a treating doctor who seeks compensation for his professional medical services . . . ." App. Br. 15. This argument fails for two reasons. First, Dr. Rao does not claim that the treatment was for a condition covered under the claim and he is not seeking reimbursement for that treatment. *See* CP 168, 176-77, 559. The Department or a self-insured employer is only responsible for proper and necessary treatment for conditions caused by the industrial injury. *See* RCW 51.36.010(2)(a); *see also* WAC 296 -20-01002(1) ("Proper and necessary: (1) The department or self-insurer pays for proper and necessary health care services that are related to the diagnosis and treatment of an accepted condition."). A treating doctor who seeks no

reimbursement for proper and necessary treatment and asks for nothing inconsistent with the Department order is not aggrieved. Here, Dr. Rao submitted a chart note and bill, but when he was asked to file a separate protest (if he felt aggrieved) he did not, and in his declaration he stated that he did not have an opinion about whether the hip conditions were related and did not intend to protest the February 18, 2014 closure order. CP 168, 176-77. The chart note cannot be a protest because a protest can only be construed as such if the sender is "aggrieved." If the sender does not want to protest a Department decision, he or she is not aggrieved.

Second, even assuming Dr. Rao was seeking reimbursement for a bill, such a request would not necessarily be inconsistent with the Department's decision to close Boyd's claim, as the treatment at issue was provided before Boyd's claim was closed. By closing Boyd's claim the Department determined that Boyd was not in need of further medical treatment as of that date. Since Dr. Rao's treatment was provided before the claim was closed, payment of that bill would not necessarily be inconsistent with the Department's decision to close Boyd's claim. *See Dep't of Labor & Indus. v. Slaugh*, 177 Wn. App. 439, 452–53, 312 P.3d 676 (2013) (no reimbursement for treatment after claim closed with permanent partial disability). As Dr. Rao chart note did not seek relief that was inconsistent with the Department's decision to close Boyd's claim,

the note was not reasonably calculated to put the Department on notice that Dr. Rao disagreed with that decision. (The chart note also lacks the other hallmarks of a protest as discussed below.)

B. Dr. Rao's February 13, 2014 Chart Note Was Also Not a Protest Because the Chart Note Was Not Reasonably Calculated to Put the Reader on Notice that the Party Submitting the Document Was Requesting Action Inconsistent with Claim Closure

Whether Dr. Rao's chart note is a valid protest depends on the language contained in the chart note itself as well as the facts surrounding the claim and filing of the document, not just the four corners of the document as Boyd asserted below. *See* CP 16-18. Such a review is limited to the evidence properly submitted in the parties' motions for summary judgment at hearing. *See* WAC 263-12-135.

A written document qualifies as a protest if the Department receives it in a timely manner and it is reasonably calculated to put the Department on notice that the party submitting the document is requesting action inconsistent with the decision of the Department. *Lambert*, 1991 WL 11008451 at *1. No appellate court has specifically adopted this standard, but the parties agree that it is the *Lambert* standard that this Court should apply. App. Br. 16; City's Resp't's Br. 13.

In *Lambert*, the Department's adjudicator issued a third party recovery order and demanded a reimbursement for claim costs from the

worker of $86,447.99.[4] 1991 WL 11008451 at *1. The worker's attorney sent a letter within 60 days of the order that failed to reference the specific order or use the word "protest" or "request for reconsideration," but which stated that he believed that the Department was not entitled to the recovery based on the "employer fault" provision contained in the third party statute. *Id.* The Board reasoned that the Department adjudicator "knew, or should have known, that the claimant was disputing the Department's right to share in his third party recovery . . . ." *Id.* at *1. The *Lambert* standard is an objective standard in two senses. First, when reviewing the document itself to see whether it provided the Department with adequate notice, it is not necessary to speculate about the subjective intent of the person sending the document. Indeed subjective intent is not relevant to that particular inquiry, which is limited to whether the chart note and bill put the Department or the City on notice that "the party submitting the document is requesting action inconsistent with the decision of the Department." Therefore, Dr. Rao's subjective intent as described in his declaration is not relevant to a determination of whether the document should be construed as a protest, independent of the question of whether he was aggrieved by it. *See Id.* at *1.

[4] The Department is entitled to recover certain damages if a worker obtains relief from a third party who is responsible for a worker's industrial injury. RCW 51.24.030.

Conversely, intent is relevant when making a factual determination as to whether a party is aggrieved by a Department order, which might require evidence—such as Dr. Rao's statement here—that the party is actually seeking relief from the order. *See* Part V.A.1 *supra*. Second, the objective posture means the court does not delve into the mental processes of the Department adjudicator, which courts do not do—but looks to objective facts available to the reader of the order, such as the language of the order being appealed. *See Nationscapital Mortg. Corp. v. State Dept. of Fin. Insts*, 133 Wn. App. 723, 762-63, 137 P.3d 78 (2006) ("Courts should not probe the mental processes of administrative officials in making a decision.").

The chart note did not put the Department on notice of a request for inconsistent action—as required by the *Lambert* standard—for three reasons.

First, the chart note addressed treatment for conditions that were not accepted under the claim and that no provider, including Dr. Rao, propose the conditions be accepted. The "department or self-insurer pays for proper and necessary health care services that are related to the diagnosis and treatment of an accepted condition." WAC 296-20-01002; *see* RCW 51.36.010(2)(a). Here, the evidence in the record shows that Boyd injured his low-back and he was provided treatment and a

permanent partial disability award for that condition. BR 328. Whether Boyd's unrelated medical conditions were "stable" is immaterial to whether his claim can be properly closed. *Contra* App. Br. 16. The February 13, 2014 chart note described the injection into Boyd's left hip. BR 588-92. The chart note also discusses the earlier surgical treatment (arthoscopic labral debridement) for his left hip, but there is no evidence in the record that shows that this treatment was related to his industrial injury. BR 589. And critically, neither treating physician contends that the hip conditions were related to the industrial injury: Dr. Green says it is unrelated and Dr. Rao did not offer an opinion. BR 370, 559. While Boyd claims that he was not "stable," he only claims his hip condition was not "stable," and because it is unrelated his argument fails. App. Br. 10.

Looking to see if the subject of a chart note is related to an industrial injury makes sense because often-times claimants have multiple medical conditions that they are receiving treatment for and not all of these conditions are related to the industrial injury. So to provide notice to the Department that is reasonably calculated to put the Department on notice that the party submitting the document is requesting action inconsistent with a Department order requires some sort of affirmative notice that there is a claim that the condition is related to the industrial

injury. Otherwise reference to any medical condition would constitute a protest.

Boyd belatedly offered inadmissible evidence with his petition for review to suggest that his hip symptoms are related to the claim. App. Br. 21-27. This Court should not consider this inadmissible evidence, but in any case the only thing the evidence purports to show—that the City may have chosen to pay for treatment for Boyd's hips—does not mean that the current hip symptoms are proximately caused by his industrial injury. The Department speaks through its orders and there is no order accepting the hip condition. Moreover, WAC 296-20-055 allows the City to provide treatment for *unrelated* conditions that may be retarding recovery of the accepted industrial injury without accepting responsibility for the condition. Indeed, the Board has interpreted WAC 296-20-055 as applying only to *pre-existing* conditions: it does not authorize treatment for conditions developed after the industrial injury. *See In re Kris L. Ayers*, No. 04 10250, 2005 WL 2121298, *2-3 (Wash. Bd. Ind. Ins. App. May 18, 2005). Accordingly, if there was hip treatment that was paid for under the claim, it is consistent to conclude that any hip treatment described in Boyd's documents belatedly submitted after the close of evidence *pre-existed* the industrial injury.

And in any event, the City's third-party administrator was fully aware that that the condition was not related to the industrial injury based on information that was provided *before* she received the February 13, 2014 chart note and bill from Dr. Rao because Dr. Green wrote a letter she received on January 15, 2014 that stated that the hip symptoms were not related. BR 370. Therefore, the February 2014 chart note did not provide either the City or the Department with any previously unknown information.

Second, the injection treatment described also occurred on February 13, 2014, which was *before* the date when the claim was closed on February 18, 2014. If a worker does not need further treatment and his or her condition is fixed and stable (meaning it has reached maximum medical improvement), the claim may be closed. *See* RCW 51.32.055(1); WAC 296-20-01002 (definition of "proper and necessary"); *see also Pend Oreille Mines & Metal Co. v. Dep't of Labor & Indus.*, 64 Wn.2d 270, 272, 391 P.2d 210 (1964); *Miller v. Dep't of Labor & Indus.*, 200 Wash. 674, 681, 94 P.2d 764 (1939).[5] A chart note that reports a treatment provided before the closing date is consistent with the conclusion that a worker was at maximum medical improvement and that claim closure was

[5] "'Maximum medical improvement' is equivalent to 'fixed and stable.'" WAC 296-20-01002.

appropriate and thus does not put the Department on notice that closure is being challenged.

Finally, the Department agrees with the City that a chart note and bill (with nothing else) prepared before an order, but received after the order, does not mechanically place the order in abeyance. City's Resp't's Br. 30. And contrary to Boyd's claims, *Santos Alonzo* does not require that anything that could possibly be construed as a protest operates as such. App. Br. 16 (citing *In re Santos Alonzo*, Nos. 56,833, 56,833A, 1981 WL 375946, *3 (Wash. Bd. Ind. Ins. App. Dec. 9, 1981)). Consistent with *Lambert* and the multitude of Board decisions that have followed it, *Santos Alonzo* only applies when there is a finding by the Board that there is a document that "is reasonably calculated to put the Department on notice that the party submitting the document is requesting action inconsistent" with the order. *See Lambert*, 1991 WL 11008451 at *1.

But *Santos Alonzo* also does not require that the Department actually take action directing abeyance in order for the document to be construed as a protest. Rather, in Boyd's case, the chart note's preparation before the closure is simply evidence that shows that the chart note was not "reasonably calculated to put the Department on notice" because the fact that it was prepared before the Department issued its order shows that

"the party submitting the document [was not] requesting action inconsistent with the decision of the Department."

C. Public Policy Favors Not Allowing Documents Coincidentally Received by the Department to Upset the Finality of Orders That the Claimant and Attending Physician Chose Not to Protest

Hundreds of thousands of orders are issued annually by the Department and chart notes or other records are frequently provided to the Department as a matter of course by medical providers who are not aggrieved by any of its orders. *See Kingery v. Dep't of Labor & Indus.*, 132 Wn.2d 162, 169, 937 P.2d 565 (1997) (180,000 workers' compensation claims are filed in an average year—and each claim contains multiple orders). The serendipitous filing of a chart note by a physician treating an unrelated condition does not transform this chart note into a protest, it does not demand the mechanical abeyance of the order, and it does not unwind a final and binding order. To read such effect into an unrelated chart note would cause uncertainty in the adjudication of workers' compensation claims and prevent the Department, employers, and workers from enjoying the certainty of finality.

Boyd's demand to revive his untimely appeal through liberal construction of the documents is also without merit. App. Br. 9-12. Liberal construction "does not apply to questions of fact but to matters concerning

the construction of the statute." *Ehman v. Dep't of Labor & Indus.*, 33 Wn.2d 584, 595, 206 P.2d 787 (1949); *Hastings v. Dep't of Labor & Indus.*, 24 Wn.2d 1, 13, 163 P.2d 142 (1945). The court does not apply the liberal construction rule in in a workers' compensation case where the statutory language is unambiguous. *Raum v. City of Bellevue*, 171 Wn. App. 124, 155, 286 P.3d 695 (2012).

Boyd does not claim that RCW 51.52.050 is ambiguous (it is not); rather, he suggests that the language of the *chart note* is ambiguous and it should be construed in his favor. *See* App. Br. 9-11. But Boyd agrees with the City and the Department that the correct standard to apply here is whether "the record was reasonably calculated to put the SIE on notice that Mr. Boyd was not 'stable,' and that action was requested that was inconsistent with the Department's order." App. Br. 10. Determining whether a document is reasonably calculated to request action inconsistent with the order is a factual determination, not the construction of an ambiguous statute, and therefore liberal construction is inapplicable.

D. The Board Properly Excluded Evidence Not Offered at Hearing

Boyd seeks to have this Court consider belatedly submitted evidence. At the Board, an industrial appeals judge takes evidence and issues a proposed decision. RCW 51.52.104. If a party objects to the

proposed decision, he or she may petition the Board for review. RCW 51.52.104. Boyd belatedly attached hearsay documents to his petition for review at the Board. The Board denied his request to submit the evidence and the superior court sustained the ruling by affirming the Board. BR 5; CP 3-5. This ruling is reviewed under the abuse of discretion standard. *State v. Finch*, 137 Wn.2d 792, 810, 975 P.2d 967 (1999). An abuse of discretion occurs when a trial court's exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons. *Id.*

Boyd argues that the Board itself can consider new evidence upon a petition for review because RCW 51.52.100 provides a de novo hearing at the Board. App. Br. 36. First, the Board conducts a de novo review, but only of that record created at hearing. WAC 263-12-135. Second, to the extent the Board has the discretion to consider whether to admit newly offered hearsay documents, the Board decided that there was no reason why Boyd could not have submitted the evidence earlier in the exercise of diligence. BR 5. This is a reasonable basis as to exclude the evidence and there was no abuse of discretion.

Boyd also attempts to have this Court address documents for the first time on appeal, but has not shown he meets the criteria in RAP 9.11. App. Br. 25. The appellate court only considers evidence adduced in the proceedings below absent extraordinary circumstances. RAP 9.11. The

superior court only considers evidence that was submitted at the Board, absent a procedural irregularity at the Board. RCW 51.52.115; *Raum*, 171 Wn. App. at 139.

Boyd appears to argue that his new evidence should be considered because it was part of the Department file. App. Br. 25. But WAC 263-12-135 provides that "No part of the department's record or other documents shall be made part of the record of the board unless offered in evidence."

Boyd had his chance to try to get the hearsay evidence admitted at hearing, and he choose not to do so. This Court should not second guess the discretionary decision not to consider such evidence.

E. Judicial Estoppel Does Not Apply

The Department agrees with the City that Boyd's judicial estoppel arguments are without merit and that the record on appeal here does not include the documents on which Boyd relies. Boyd does not explain why the City's statements to the Department—as opposed to a quasi-judicial or judicial body—about what the City thought constituted a protest would invoke the judicial estoppel theory. But assuming *arguendo* that this Court would apply judicial estoppel to the City, it would still not apply to the Department. "[T]here is a consensus among the courts of appeal that judicial estoppel may be applied only in the event that a litigant's prior inconsistent position benefited the litigant or was accepted by the court."

Taylor v. Bell, 185 Wn. App. 270, 282, 340 P.3d 951 (2014) (citations omitted). Here, the Department did not take inconsistent *litigation* positions; rather it made a new decision regarding whether its closing order became final because it received new information from the parties regarding that issue. And it did not benefit from either position.

F. Boyd Is Not Entitled to Attorney Fees Because If the February 18, 2014 Order Is Not Final, Then the Department Would Issue a Further Order

Boyd is not entitled to attorney fees even if he should prevail. In a self-insured case, a claimant's attorney cannot receive attorney fees when remand is the only relief that the claimant obtains on appeal. *Sacred Heart Med. Ctr. v. Knapp*, 172 Wn. App. 26, 27, 288 P.3d 675 (2012). This is true even if, on remand, the claimant ultimately obtains benefits.[6] What is necessary is a direct and immediate impact on the funds from "for services before the court only" (RCW 51.52.130), not the hypothetical possibility of future benefits. *Id.*

In *Knapp*, the court declined to award attorney fees under RCW 51.52.130(1) when it remanded to the Department to determine whether the claimant would need additional vocational services. 172 Wn. App. at

[6] Boyd's demand for either a pension or a jury trial is not ripe. App. Br. 9. The only issue before this Court is whether there is timely protest. If the superior court was correct that the chart note is not a protest, his appeal is untimely and appeal was properly dismissed. If it is a timely protest, the Department must issue a further order after considering the protest.

27. Here, remand is the only relief and under *Knapp* no fees may be obtained. Boyd is not entitled to attorney fees because he should not prevail in this matter, but even if he does RCW 51.52.130 does not authorize the award of fees here.

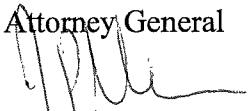
VI. CONCLUSION

The February 13, 2014 chart note and attached bill was not a protest because Dr. Rao explains that he is not an aggrieved party in his February 24, 2015 declaration. And the chart note is not a protest in any event because it discusses treatment of his new hip symptoms that are unrelated to the low-back condition accepted under his workers' compensation claim.

Accordingly, the Department requests that this Court affirm the Superior Court decision.

RESPECTFULLY SUBMITTED this 28th day of November, 2016.

ROBERT W. FERGUSON
Attorney General



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