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2009 FEB -9 P 3:39
IN THE SUPREME COURT OF THE STATE OF WASHINGTON
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KELLY L. SHAFER,
Claimant/Respondent,

vs.

DEPARTMENT OF LABOR & INDUSTRIES,
Petitioner.

FILED
SUPREME COURT
STATE OF WASHINGTON
2009 FEB 18 12:45
BY RONALD R. CARPENTER
CLERK

BRIEF OF AMICUS CURIAE
WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation organized under Washington law, and a supporting organization to the Washington State Association for Justice (WSAJ). WSAJ Foundation is the new name of Washington State Trial Lawyers Association Foundation (WSTLA Foundation), a supporting organization to the Washington State Trial Lawyers Association (WSTLA), now renamed WSAJ. These name changes were effective January 1, 2009.

WSAJ Foundation, which operates the amicus curiae program formerly operated by WSTLA Foundation, has an interest in the rights of workers under the Industrial Insurance Act (IIA), Title 51 RCW.

II. INTRODUCTION AND STATEMENT OF THE CASE

This case involves whether a Department of Labor & Industries (Department) closure order is final when the Department failed to serve the order on the worker's attending physician. The underlying facts are drawn from the published opinion of the Court of Appeals, and the briefing of the Department and worker Kelly L. Shafer (Shafer). See Shafer v. Dep't of Labor & Indus., 140 Wn.App. 1, 159 P.3d 473 (2007), *review granted*, 163 Wn.2d 1052 (2008); Shafer Br. at 4-12; Department Br. at 6-21; Department Pet. for Rev. at 2-6; Shafer Ans. to Pet. for Rev. at 2-4; Department Supp. Br. at 1-2, 3-5; Shafer Supp. Br. at 2.

For purposes of this amicus curiae brief, the following facts are relevant: Shafer filed a timely application for benefits with the Department for an injury sustained during the course of employment. Shafer's attending physician for treatment of the injury was Dr. Elizabeth Cook, who received notices from and filed reports with the Department during the pendency of the claim. In October 2000, the Department closed Shafer's claim, ending treatment and awarding permanent partial disability benefits. The order closing the claim was served on Shafer but was not served on Dr. Cook. Shafer did not protest or appeal the closure order within sixty days of being served with the order.

In March 2003, Shafer applied to reopen the claim, contending her condition had worsened, and was aggravated. The Department denied the application to reopen, and Shafer timely appealed the denial to the Board of Industrial Insurance Appeals (Board). In the course of proceedings before the Board, Shafer also contended that the October 2000 closing order was not final because her attending physician had not been served with a copy of the order, as required by RCW 51.52.050. As a consequence, Shafer argued that she could still challenge the original closure order, in connection with her aggravation claim. The Industrial Appeals Judge (IAJ) rejected this argument, and also found Shafer's condition had not worsened and that her claim for reopening was properly

denied.¹ The Board adopted the IAJ's proposed decision and order as its final decision.

Shafer appealed to the superior court, again contending that the original closure order was not final due to the failure to serve the attending physician with the order. The superior court did not pass upon this contention. A jury returned a verdict against Shafer on the aggravation claim, and she appealed.

Shafer argued on appeal that the original closure order was not final, also challenging whether there was substantial evidence to support the jury's verdict on the aggravation claim. The Court of Appeals, Division I, reversed, concluding that because Shafer's attending physician was never served with the closure order it was not final, when the closure order was based upon a medical determination. See Shafer, 140 Wn.App. at 10-11 & n.29. The Court of Appeals held that under RCW 51.52.050 Shafer or her attending physician could still pursue a request for reconsideration to the Department or an appeal to the Board. See id. at 11.

This Court granted the Department's petition for review, which characterizes the issue on review as "whether a Department closing order that was contemporaneously communicated to the worker, but was not communicated to her attending physician, is not final as to the worker and

¹ Shafer presented evidence before the IAJ by affidavit from her attending physician, Dr. Cook, that Dr. Cook had not received the closure order and that, had she received it, she would have challenged the order because she did not consider Shafer's condition fixed and stable at that time. See Shafer, 140 Wn.App. at 4-5; Department Pet. for Rev. at 4-5.

is instead subject to a direct protest or direct appeal.” See Department Pet. for Rev. at 1-2.

III. ISSUE PRESENTED

Under RCW 51.52.050-.060, when the Department of Labor & Industries serves a closure order on the worker but fails to serve the order on the worker’s attending physician, and the worker does not protest or appeal that order within sixty days of service on the worker, is the order final or may the worker file a protest or appeal outside the sixty day period?

IV. SUMMARY OF ARGUMENT

The Court of Appeals correctly held that when a closure order regarding a worker’s claim is based upon a medical determination and the Department fails to serve the order on the worker’s attending physician, as required by RCW 51.52.050, the order is not final until sixty days after the attending physician is served with the order. The mandated liberal construction of the Industrial Insurance Act, the unique role of the attending physician in the claims adjudication process, and this Court’s case law require this result. A contrary interpretation compromises the worker’s entitlement to “sure and certain relief” under the act.

V. ARGUMENT

A.) Overview of RCW 51.52.050-.060, the Statutes Governing Protest or Appeal of a Department Closure Order, and the Ambiguity in these Statutes Regarding When an Order Becomes Final.

Shafer and the Department dispute whether the October 2000 closure order became final sixty days after it was served on Shafer, even though the order was not served on her attending physician. See Shafer

Supp. Br. at 1, 13-15; Department Supp. Br. at 6-8. The answer hinges upon interpretation of RCW 51.52.050 and RCW 51.52.060, the statutes governing protests or appeals of Department orders, decisions or awards.

RCW 51.52.050 requires, *inter alia*, that when the Department enters an order “it shall promptly serve the worker, beneficiary, employer, or other person affected thereby” with a copy of the order.² The statute also provides that the closure order “shall become final within sixty days from the date the order is *communicated to the parties* unless a written request for reconsideration is filed with the department of labor & industries, Olympia, or an appeal is filed with the board of industrial insurance appeals, Olympia” RCW 51.52.050 (emphasis added).³ The term “parties,” as used in RCW 51.52.050, is not defined. The Court of Appeals concluded that an attending physician is a party within the contemplation of the statute, at least insofar as a closure order that involves a medical determination. *See Shafer*, 140 Wn.App at 8, 11.

RCW 51.52.060 governs how an appeal of an order subject to RCW 51.52.050 is undertaken. This statute provides, in pertinent part:

² The 1987 version of RCW 51.52.050 was in effect at the time of the closure order in question, October 2000. *See* 1987 LAWS, Ch. 151 §1. The text of this version of the statute is reproduced in the Appendix to this brief. The Department references the 2008 version of RCW 51.52.050 in its briefing before this Court, noting that the 2008 amendment did not alter the key language pertinent to this appeal. *See* Department Supp. Br. at 12 n.3, & APPENDIX A. The text of this current version of RCW 51.52.050, based upon 2008 LAWS, Ch. 280 §1, is reproduced in the Appendix to this brief. All references to RCW 51.52.050 in this brief are to the 1987 version of this statute.

³ As the Department notes, an order is “communicated” if the served copy is received by the person. *See* Department Supp. Br. at 2 & n.4.

RCW 51.52.050 further provides that when the Department has taken any action or made any decision relating to any phase of administration of the IIA, “the worker, beneficiary, employer, or other person aggrieved thereby may request reconsideration of the department, or may appeal to the board.”

Except as otherwise specifically provided in this section, a worker, beneficiary, employer, health services provider, or other person aggrieved by an order ... must, before he or she appeals to the courts, file with the board and the director, by mail or personally, within sixty days from the day on which a copy of the order ... *was communicated to such person*, a notice of appeal to the board.

RCW 51.52.060(1)(a) (emphasis added).⁴

The Department concedes that an attending physician must be served with a closure order under RCW 51.52.050, as a “person affected thereby.” See Shafer, 140 Wn.App. at 8; Department Supp. Br. at 14-15; Department Br. at 27, 30. It also recognizes that under RCW 51.52.050-.060 an attending physician may protest or appeal in his or her own right. See Department Supp. Br. at 14.⁵

While the right of an attending physician to protest or appeal is not at issue, there is an ambiguity created by the differing language of RCW 51.52.050 and RCW 51.52.060 as to when an order becomes final. Is it within sixty days of the date the order is “communicated to the parties” (§.050), with the attending physician a “party” for such purposes? Or is the order deemed final as to any given person sixty days after it is “communicated to such person” (§.060)? While Shafer and the Department agree that an attending physician must be served with a closure order under these statutes, they have markedly different views on

⁴ The text of RCW 51.52.060 has not changed since the original closure order in October 2000. The statute was last amended in 1995. See 1995 LAWS, Ch. 253 §1. The current version of RCW 51.52.060 is reproduced in the Appendix to this brief.

⁵ The Department contends the attending physician’s right to protest or appeal is as a “person affected thereby” under RCW 51.52.050 & .060. See Department Supp. Br. at 14. Note, however, that RCW 51.52.060 specifically lists “health services provider” as a person entitled to appeal.

whether the closure order ever became final as to Shafer before he sought to reopen his claim in March 2003. See Shafer, 140 Wn.App. at 4-5; Shafer Supp. Br. at 1; Department Supp. Br. at 6-8. As explained in Section B. below, the Court of Appeals correctly determined that the closure order was not final as to Shafer, as the order was not served on her attending physician.

B.) The Mandated Liberal Construction of RCW 51.52.050-.060, Unique Role of the Attending Physician in the Workers' Compensation System, and this Court's Case Law Require that a Department Closure Order Does Not Become Final as to the Worker Unless Also Served on his or her Attending Physician.

The IIA must be construed in favor of the worker. See RCW 51.12.010; Dennis v. Labor & Industries, 109 Wn.2d 467, 470, 745 P.2d 1295 (1987). In harmonizing RCW 51.52.050 & .060 in a light most favorable to the worker, the closure order does not become final until sixty days from the date the order is "communicated to the parties." RCW 51.52.050. This language contemplates that *all* parties must be served by the Department. Further, liberally construed, the term "parties" encompasses "the worker, beneficiary, employer or other person affected thereby" – all participants referenced earlier in the statute. These persons are each provided with the right to protest or appeal under the statute, and thus fall within the notion of "parties."

This liberal reading of these statutes is also wholly in keeping with the unique nature of the worker's compensation system, and the role of the attending physician in the proper functioning of the system.

Unquestionably, the attending physician serves as a medical advisor for the worker. The physician's learned assessments and opinions help guide the worker to the "sure and certain relief" promised under the act. See RCW 51.04.010 (promising "sure and certain relief"); 51.28.010 (notifying worker of rights regarding health care services); 51.28.020 (describing application for benefits process and physician's role in processing claim); 51.28.050 (establishing one-year application period for injury claim); 51.36.010 (describing extent of health care services available under the IIA); 51.36.060 (describing obligations of physicians examining or attending injured workers); see also WAC 296-20-09701 (describing attending physician's right to seek reconsideration of Department closure of worker's claim).⁶ At the same time, the attending physician is required to provide assessments and reports to the Department, to guide it in its disposition of the claim. See RCW 51.36.060. Further, the attending physician's services relevant to the industrial claim are paid by the Department. See Ch. 296-20 WAC.

All of these factors cast the attending physician in a pivotal role in the claims adjudication dynamic. It is not surprising, then, that RCW 51.52.050-.060 allow the attending physician to protest or appeal a final order adjudicating a claim. It is equally understandable why a closure order on a claim would not be deemed final as to the worker until the attending physician is served with the order. When this does not

⁶ The current version of RCW 51.28.010, .020, .050, RCW 51.36.010, .060, and the administrative regulation is reproduced in the Appendix to this brief.

occur, the worker is without the benefit of the attending physician's opinion and advice on whether the Department has properly assessed the worker's medical condition. Absent such input, the system breaks down, to the worker's detriment. The Department is also disadvantaged because it will be without the attending physician's reaction to the closure order.

It is for this reason that the Department's reliance on cases involving the mandatory arbitration rules and state administrative procedures act, holding that service on the claimant alone triggers the appeal period, is misplaced. See Department Supp. Br. at 9-10; Simmerly v. McKee, 120 Wn.App. 217, 84 P.3d 919 (holding notice to one party triggers appeal period as to that party under mandatory arbitration act, even if other parties not served), *review denied*, 152 Wn.2d 1033 (2004); Wells v. Growth Mgmt. Hearings Bd., 100 Wn.App. 657, 997 P.2d 405 (2000) (similar holding regarding administrative review under administrative procedure act). These statutory schemes are far removed from the world of workers' compensation, which is truly *sui generis*.

Notwithstanding the foregoing arguments, the Department insists that resolution of this issue is governed by this Court's case law interpreting RCW 51.28.020 and RCW 51.28.050, regarding the inability of a worker to rely upon his or her physician in making a timely *application for benefits*. See Department Supp. Br. at 11-13 & n.8; see also Leschner v. Dept. of Labor & Ind., 27 Wn.2d 911, 919-28, 185 P.2d 113 (1947) (concluding worker not excused from timely application for

benefits based on physician's failure to file claim; adhered to on rehearing en banc but opinion designated "non authoritative" due to dismissal of appeal); Pate v. General Electric Co., 43 Wn.2d 185, 260 P.2d 901 (1953) (rejecting civil action against employer's physician for failure to assist worker in timely pursuing workers' compensation claim), *adhered to on rehearing*, 44 Wn.2d 919, 269 P.2d 589 (1954).⁷

Whatever may be the limitations on the physician's role regarding the degree of assistance mandated in the initial application for benefits, this Court has made clear that once the initial application has been filed, the attending physician's duty to advise the claimant attaches. In Pate, this Court said:

The duty which the statute [a predecessor to RCW 51.28.020] places upon the physician in the preparation of such certificate and application, is that of telling the applicant the relationship of his specific injury to his rights to compensation therefor, and the duty of making it possible for the applicant to furnish to the department accurate and complete information in support of his application. It not the purpose of the statute to place upon the physician the primary duty of timely instituting a claim on behalf of the workman or of advising him that he should, or should not, make such claim. The responsibility of initiating a claim is upon the workman. *When it has been initiated, it then becomes the duty of the physician to perform his statutory duties as outlined.*

43 Wn.2d at 190-91 (emphasis added). Pate is wholly consistent with the notion that under RCW 51.52.050-.060 a closure order is not final as to the worker until the attending physician is properly served. Only then will the

⁷ In Pate, this Court noted that the Leschner opinion was "non authoritative," but adopted its analysis. See Pate, 43 Wn.2d at 191.

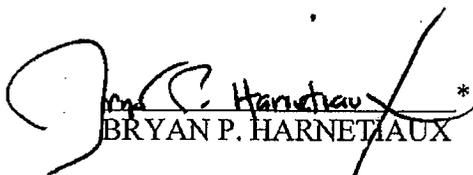
worker have the full benefit of the physician's expertise in determining whether to protest or appeal the order. Also, only then may the Department learn why its disposition is ill-advised, and have the opportunity to retrace its steps.

Lastly, Shafer is correct that the concerns about lack of finality under this interpretation of RCW 51.52.050-.060, expressed by the Department and amicus curiae Washington Defense Trial Lawyers (WDTL), are overstated. See Shafer Supp. Br. at 13-14; Department Supp. Br. at 16-17; WDTL Am. Curiae Memo. at 5-7. These concerns pale in comparison to the threat posed by a strict reading of RCW 51.52.050-.060, which discounts the attending physician's role in the claims adjudication dynamic.

VI. CONCLUSION

The Court should adopt the argument advanced in this brief and resolve this appeal accordingly.

DATED this 9th day of February, 2009.


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On behalf of WSAJ Foundation

*Brief transmitted for filing by email; signed original retained by counsel.

Appendix

51.28.010. Notice of accident--Notification of worker's rights--Claim suppression

(1) Whenever any accident occurs to any worker it shall be the duty of such worker or someone in his or her behalf to forthwith report such accident to his or her employer, superintendent, or supervisor in charge of the work, and of the employer to at once report such accident and the injury resulting therefrom to the department pursuant to RCW 51.28.025 where the worker has received treatment from a physician or a licensed advanced registered nurse practitioner, has been hospitalized, disabled from work, or has died as the apparent result of such accident and injury.

(2) Upon receipt of such notice of accident, the department shall immediately forward to the worker or his or her beneficiaries or dependents notification, in nontechnical language, of their rights under this title. The notice must specify the worker's right to receive health services from a physician or a licensed advanced registered nurse practitioner of the worker's choice under RCW 51.36.010, including chiropractic services under RCW 51.36.015, and must list the types of providers authorized to provide these services.

(3) Employers shall not engage in claim suppression.

(4) For the purposes of this section, "claim suppression" means intentionally:

(a) Inducing employees to fail to report injuries;

(b) Inducing employees to treat injuries in the course of employment as off-the-job injuries; or

(c) Acting otherwise to suppress legitimate industrial insurance claims.

(5) In determining whether an employer has engaged in claim suppression, the department shall consider the employer's history of compliance with industrial insurance reporting requirements, and whether the employer has discouraged employees from reporting injuries or filing claims. The department has the burden of proving claim suppression by a preponderance of the evidence.

(6) Claim suppression does not include bona fide workplace safety and accident prevention programs or an employer's provision at the worksite of first aid as defined by the department. The department shall adopt rules defining bona fide workplace safety and accident prevention programs and defining first aid.

[2007 c 77 § 1, eff. July 22, 2007; 2004 c 65 § 3; 2001 c 231 § 1; 1977 ex.s. c 350 § 32; 1975 1st ex.s. c 224 § 4; 1971 ex.s. c 289 § 5; 1961 c 23 § 51.28.010. Prior: 1915 c 188 § 9; 1911 c 74 § 14; RRS § 7689.]

51.28.020. Worker's application for compensation--Physician to aid in

(1)(a) Where a worker is entitled to compensation under this title he or she shall file with the department or his or her self-insured employer, as the case may be, his or her application for such, together with the certificate of the physician or licensed advanced registered nurse practitioner who attended him or her. An application form developed by the department shall include a notice specifying the worker's right to receive health services from a physician or licensed advanced registered nurse practitioner of the worker's choice under RCW 51.36.010, including chiropractic services under RCW 51.36.015, and listing the types of providers authorized to provide these services.

(b) The physician or licensed advanced registered nurse practitioner who attended the injured worker shall inform the injured worker of his or her rights under this title and lend all necessary assistance in making this application for compensation and such proof of other matters as required by the rules of the department without charge to the worker. The department shall provide physicians with a manual which outlines the procedures to be followed in applications for compensation involving occupational diseases, and which describes claimants' rights and responsibilities related to occupational disease claims.

(2) If the application required by this section is:

(a) Filed on behalf of the worker by the physician who attended the worker, the physician may transmit the application to the department electronically using facsimile mail;

(b) Made to the department and the employer has not received a copy of the application, the department shall immediately send a copy of the application to the employer; or

(c) Made to a self-insured employer, the employer shall forthwith send a copy of the application to the department.

[2005 c 108 § 3, eff. June 30, 2007; (2005 c 108 § 2 expired June 30, 2007); 2004 c 65 § 4; 2001 c 231 § 2; 1984 c 159 § 3; 1977 ex.s. c 350 § 33; 1971 ex.s. c 289 § 38; 1961 c 23 § 51.28.020. Prior: 1927 c 310 § 6, part; 1921 c 182 § 7, part; 1911 c 74 § 12, part; RRS § 7686, part.]

51.28.050. Time limitation for filing application or enforcing claim for injury

No application shall be valid or claim thereunder enforceable unless filed within one year after the day upon which the injury occurred or the rights of dependents or beneficiaries accrued, except as provided in RCW 51.28.055 and 51.28.025(5).

[2007 c 77 § 3, eff. July 22, 2007; 1984 c 159 § 1; 1961 c 23 § 51.28.050. Prior: 1927 c 310 § 6, part; 1921 c 182 § 7, part; 1911 c 74 § 12, part; RRS § 7686, part.]

51.36.010 Extent and duration.

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, and proper and necessary hospital care and services during the period of his or her disability from such injury. The department for state fund claims shall pay, in accordance with the department's fee schedule, for any alleged injury for which a worker files a claim, any initial prescription drugs provided in relation to that initial visit, without regard to whether the worker's claim for benefits is allowed. In all accepted claims, treatment shall be limited in point of duration as follows:

In the case of permanent partial disability, not to extend beyond the date when compensation shall be awarded him or her, except when the worker returned to work before permanent partial disability award is made, in such case not to extend beyond the time when monthly allowances to him or her shall cease; in case of temporary disability not to extend beyond the time when monthly allowances to him or her shall cease: PROVIDED, That after any injured worker has returned to his or her work his or her medical and surgical treatment may be continued if, and so long as, such continuation is deemed necessary by the supervisor of industrial insurance to be necessary to his or her more complete recovery; in case of a permanent total disability not to extend beyond the date on which a lump sum settlement is made with him or her or he or she is placed upon the permanent pension roll: PROVIDED, HOWEVER, That the supervisor of industrial insurance, solely in his or her discretion, may authorize continued medical and surgical treatment for conditions previously accepted by the department when such medical and surgical treatment is deemed necessary by the supervisor of industrial insurance to protect such worker's life or provide for the administration of medical and therapeutic measures including payment of prescription medications, but not including those controlled substances currently scheduled by the state board of pharmacy as Schedule I, II, III, or IV substances under chapter 69.50 RCW, which are necessary to alleviate continuing pain which results from the industrial injury. In order to authorize such continued treatment the written order of the supervisor of industrial insurance issued in advance of the continuation shall be necessary.

The supervisor of industrial insurance, the supervisor's designee, or a self-insurer, in his or her sole discretion, may authorize inoculation or other immunological treatment in cases in which a work-related activity has resulted in probable exposure of the worker to a potential infectious occupational disease. Authorization of such treatment does not bind the department or self-insurer in any adjudication of a claim by the same worker or the worker's beneficiary for an occupational disease.

[2007 c 134 § 1; 2004 c 65 § 11; 1986 c 58 § 6; 1977 ex.s. c 350 § 56; 1975 1st ex.s. c 234 § 1; 1971 ex.s. c 289 § 50; 1965 ex.s. c 166 § 2; 1961 c 23 § 51.36.010. Prior: 1959 c 256 § 2; prior: 1943 c 186 § 2, part; 1923 c 136 § 9, part; 1921 c 182 § 11, part; 1919 c 129 § 2, part; 1917 c 28 § 5, part; Rem. Supp. 1943 § 7714, part.]

51.36.060. Duties of attending physician or licensed advanced registered nurse practitioner--Medical information

Physicians or licensed advanced registered nurse practitioners examining or attending injured workers under this title shall comply with rules and regulations adopted by the director, and shall make such reports as may be requested by the department or self-insurer upon the condition or treatment of any such worker, or upon any other matters concerning such workers in their care. Except under RCW 49.17.210 and 49.17.250, all medical information in the possession or control of any person and relevant to the particular injury in the opinion of the department pertaining to any worker whose injury or occupational disease is the basis of a claim under this title shall be made available at any stage of the proceedings to the employer, the claimant's representative, and the department upon request, and no person shall incur any legal liability by reason of releasing such information.

[2004 c 65 § 12, eff. July 1, 2004; 1991 c 89 § 3; 1989 c 12 § 17; 1975 1st ex.s. c 224 § 15; 1971 ex.s. c 289 § 53.]

51.52.050. Copy of departmental action to be served—Demand for repayment by service provider—Reconsideration or appeal of departmental action

Whenever the department has made any order, decision, or award, it shall promptly serve the worker, beneficiary, employer, or other person affected thereby, with a copy thereof by mail, which shall be addressed to such person at his or her last known address as shown by the records of the department. The copy, in case the same is a final order, decision, or award, shall bear on the same side of the same page on which is found the amount of the award, a statement, set in black faced type of at least ten point body or size, that such final order, decision, or award shall become final within sixty days from the date the order is communicated to the parties unless a written request for reconsideration is filed with the department of labor and industries, Olympia, or an appeal is filed with the board of industrial insurance appeals, Olympia: *Provided*, That a department order or decision making demand, whether with or without penalty, for repayment of sums paid to a provider of medical, dental, vocational, or other health services rendered to an industrially injured worker, shall state that such order or decision shall become final within twenty days from the date the order or decision is communicated to the parties unless a written request for reconsideration is filed with the department of labor and industries, Olympia, or an appeal is filed with the board of industrial insurance appeals, Olympia.

Whenever the department has taken any action or made any decision relating to any phase of the administration of this title the worker, beneficiary, employer, or other person aggrieved thereby may request reconsideration of the department, or may appeal to the board. In an appeal before the board, the appellant shall have the burden of proceeding with the evidence to establish a prima facie case for the relief sought in such appeal: *Provided*, That in an appeal from an order of the department that alleges fraud, the department or self-insured employer shall initially introduce all evidence in its case in chief. Any such person aggrieved by the decision and order of the board may thereafter appeal to the superior court, as prescribed in this chapter.

Enacted by Laws 1961, ch. 23, § 51.52.050, eff. Feb. 14, 1961. Amended by Laws 1975, 1st Ex.Sess., ch. 58, § 1; Laws 1977, Ex.Sess., ch. 350, § 75; Laws 1982, ch. 109, § 4; Laws 1985, ch. 315, § 9; Laws 1986, ch. 200, § 10, eff. April 1, 1986; Laws 1987, ch. 151, § 1.

51.52.050. Service of departmental action--Demand for repayment--Orders amending benefits--Reconsideration or appeal

(1) Whenever the department has made any order, decision, or award, it shall promptly serve the worker, beneficiary, employer, or other person affected thereby, with a copy thereof by mail, which shall be addressed to

such person at his or her last known address as shown by the records of the department. The copy, in case the same is a final order, decision, or award, shall bear on the same side of the same page on which is found the amount of the award, a statement, set in black faced type of at least ten point body or size, that such final order, decision, or award shall become final within sixty days from the date the order is communicated to the parties unless a written request for reconsideration is filed with the department of labor and industries, Olympia, or an appeal is filed with the board of industrial insurance appeals, Olympia. However, a department order or decision making demand, whether with or without penalty, for repayment of sums paid to a provider of medical, dental, vocational, or other health services rendered to an industrially injured worker, shall state that such order or decision shall become final within twenty days from the date the order or decision is communicated to the parties unless a written request for reconsideration is filed with the department of labor and industries, Olympia, or an appeal is filed with the board of industrial insurance appeals, Olympia.

(2)(a) Whenever the department has taken any action or made any decision relating to any phase of the administration of this title the worker, beneficiary, employer, or other person aggrieved thereby may request reconsideration of the department, or may appeal to the board. In an appeal before the board, the appellant shall have the burden of proceeding with the evidence to establish a prima facie case for the relief sought in such appeal.

(b) An order by the department awarding benefits shall become effective and benefits due on the date issued. Subject to (b)(i) and (ii) of this subsection, if the department order is appealed the order shall not be stayed pending a final decision on the merits unless ordered by the board. Upon issuance of the order granting the appeal, the board will provide the worker with notice concerning the potential of an overpayment of benefits paid pending the outcome of the appeal and the requirements for interest on unpaid benefits pursuant to RCW 51.52.135. A worker may request that benefits cease pending appeal at any time following the employer's motion for stay or the board's order granting appeal. The request must be submitted in writing to the employer, the board, and the department. Any employer may move for a stay of the order on appeal, in whole or in part. The motion must be filed within fifteen days of the order granting appeal. The board shall conduct an expedited review of the claim file provided by the department as it existed on the date of the department order. The board shall issue a final decision within twenty-five days of the filing of the motion for stay or the order granting appeal, whichever is later. The board's final decision may be appealed to superior court in accordance with RCW 51.52.110. The board shall grant a motion to stay if the moving party demonstrates that it is more likely than not to prevail on the facts as

they existed at the time of the order on appeal. The board shall not consider the likelihood of recoupment of benefits as a basis to grant or deny a motion to stay. If a self-insured employer prevails on the merits, any benefits paid may be recouped pursuant to RCW 51.32.240.

(i) If upon reconsideration requested by a worker or medical provider, the department has ordered an increase in a permanent partial disability award from the amount reflected in an earlier order, the award reflected in the earlier order shall not be stayed pending a final decision on the merits. However, the increase is stayed without further action by the board pending a final decision on the merits.

(ii) If any party appeals an order establishing a worker's wages or the compensation rate at which a worker will be paid temporary or permanent total disability or loss of earning power benefits, the worker shall receive payment pending a final decision on the merits based on the following:

(A) When the employer is self-insured, the wage calculation or compensation rate the employer most recently submitted to the department; or

(B) When the employer is insured through the state fund, the highest wage amount or compensation rate uncontested by the parties.

Payment of benefits or consideration of wages at a rate that is higher than that specified in (b)(ii)(A) or (B) of this subsection is stayed without further action by the board pending a final decision on the merits.

(c) In an appeal from an order of the department that alleges willful misrepresentation, the department or self-insured employer shall initially introduce all evidence in its case in chief. Any such person aggrieved by the decision and order of the board may thereafter appeal to the superior court, as prescribed in this chapter.

[2008 c 280 § 1, eff. June 12, 2008; 2004 c 243 § 8, eff. June 10, 2004; 1987 c 151 § 1; 1986 c 200 § 10; 1985 c 315 § 9; 1982 c 109 § 4; 1977 ex.s. c 350 § 75; 1975 1st ex.s. c 58 § 1; 1961 c 23 § 51.52.050. Prior: 1957 c 70 § 55; 1951 c 225 § 5; prior: (i) 1947 c 281 § 1, part; 1943 c 210 § 1, part; 1939 c 41 § 1, part; 1937 c 211 § 1, part; 1927 c 310 § 1, part; 1921 c 182 § 1, part; 1919 c 131 § 1, part; 1911 c 74 § 2, part; Rem. Supp. 1947 § 7674, part. (ii) 1947 c 247 § 1, part; 1911 c 74 § 20, part; Rem. Supp. 1947 § 7676e, part. (iii) 1949 c 219 § 6, part; 1943 c 280 § 1, part; 1931 c 90 § 1, part; 1929 c 132 § 6, part; 1927 c 310 § 8, part; 1911 c 74 § 20, part; Rem. Supp. 1949 § 7697, part. (iv) 1923 c 136 § 7, part; 1921 c 182 § 10, part; 1917 c 29 § 3, part; RRS § 7712, part. (v) 1917 c 29 § 11;

RRS § 7720. (vi) 1939 c 50 § 1, part; 1927 c 310 § 9, part; 1921 c 182 § 12, part; 1919 c 129 § 5, part; 1917 c 28 § 15, part; RRS § 7724, part.]

51.52.060. Notice of appeal--Time--Cross-appeal--Departmental options

(1)(a) Except as otherwise specifically provided in this section, a worker, beneficiary, employer, health services provider, or other person aggrieved by an order, decision, or award of the department must, before he or she appeals to the courts, file with the board and the director, by mail or personally, within sixty days from the day on which a copy of the order, decision, or award was communicated to such person, a notice of appeal to the board. However, a health services provider or other person aggrieved by a department order or decision making demand, whether with or without penalty, solely for repayment of sums paid to a provider of medical, dental, vocational, or other health services rendered to an industrially injured worker must, before he or she appeals to the courts, file with the board and the director, by mail or personally, within twenty days from the day on which a copy of the order or decision was communicated to the health services provider upon whom the department order or decision was served, a notice of appeal to the board.

(b) Failure to file a notice of appeal with both the board and the department shall not be grounds for denying the appeal if the notice of appeal is filed with either the board or the department.

(2) Within ten days of the date on which an appeal has been granted by the board, the board shall notify the other interested parties to the appeal of the receipt of the appeal and shall forward a copy of the notice of appeal to the other interested parties. Within twenty days of the receipt of such notice of the board, the worker or the employer may file with the board a cross-appeal from the order of the department from which the original appeal was taken.

(3) If within the time limited for filing a notice of appeal to the board from an order, decision, or award of the department, the department directs the submission of further evidence or the investigation of any further fact, the time for filing the notice of appeal shall not commence to run until the person has been advised in writing of the final decision of the department in the matter. In the event the department directs the submission of further evidence or the investigation of any further fact, as provided in this section, the department shall render a final order, decision, or award within ninety days from the date further submission of evidence or investigation of further fact is ordered which time period may be extended

by the department for good cause stated in writing to all interested parties for an additional ninety days.

(4) The department, either within the time limited for appeal, or within thirty days after receiving a notice of appeal, may:

(a) Modify, reverse, or change any order, decision, or award; or

(b)(i) Except as provided in (b)(ii) of this subsection, hold an order, decision, or award in abeyance for a period of ninety days which time period may be extended by the department for good cause stated in writing to all interested parties for an additional ninety days pending further investigation in light of the allegations of the notice of appeal; or

(ii) Hold an order, decision, or award issued under RCW 51.32.160 in abeyance for a period not to exceed ninety days from the date of receipt of an application under RCW 51.32.160. The department may extend the ninety-day time period for an additional sixty days for good cause.

For purposes of this subsection, good cause includes delay that results from conduct of the claimant that is subject to sanction under RCW 51.32.110.

The board shall deny the appeal upon the issuance of an order under (b)(i) or (ii) of this subsection holding an earlier order, decision, or award in abeyance, without prejudice to the appellant's right to appeal from any subsequent determinative order issued by the department.

This subsection (4)(b) does not apply to applications deemed granted under RCW 51.32.160.

(5) An employer shall have the right to appeal an application deemed granted under RCW 51.32.160 on the same basis as any other application adjudicated pursuant to that section.

(6) A provision of this section shall not be deemed to change, alter, or modify the practice or procedure of the department for the payment of awards pending appeal.

[1995 c 253 § 1; 1995 c 199 § 7; 1986 c 200 § 11; 1977 ex.s. c 350 § 76; 1975 1st ex.s. c 58 § 2; 1963 c 148 § 1; 1961 c 274 § 8; 1961 c 23 § 51.52.060. Prior: 1957 c 70 § 56; 1951 c 225 § 6; prior: 1949 c 219 §§ 1, part, 6, part; 1947 c 246 § 1, part; 1943 c 280 § 1, part; 1931 c 90 § 1, part; 1929 c 132 §§ 2, part, 6, part; 1927 c 310 §§ 4, part, 8, part; 1923 c 136 § 2, part; 1919 c 134 § 4, part; 1917 c 28 § 1, part; 1913 c 148 § 1, part; 1911 c 74 §§ 5, part, 20, part; Rem Supp. 1949 §§ 7679, part, 7697, part.]

WAC 296-20-09701. Request for reconsideration.

On occasion, a claim may be closed prematurely or in error or other adjudication action may be taken, which may seem inappropriate to the doctor or injured worker. When this occurs the attending doctor should submit immediately in writing his request for reconsideration of the adjudication action, supported by an outline of:

- (1) The claimant's current condition.
- (2) The treatment program being received.
- (3) The prognosis of when stabilization will occur.

All requests for reconsideration must be received by the department or self-insurer within sixty days from date of the order and notice of closure. Request for reconsideration of other department or self-insurer orders or actions must be made in writing by either the doctor or the injured worker within sixty days of the date of the action or order.

Statutory Authority: RCW 51.04.020(4), 51.04.030, and 51.16.120(3). 81-01-100 (Order 80-29), § 296-20-09701, filed 12/23/80, effective 3/1/81.