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NO. 81049-4

SUPREME COURT OF THE STATE OF WASHINGTON

KELLY L. SHAFER,

Respondent,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Petitioner.

**DEPARTMENT OF LABOR AND INDUSTRIES' BRIEF IN
ANSWER TO AMICUS BRIEF OF WSAJ FOUNDATION
[CORRECTED]**

ROBERT M. MCKENNA
Attorney General

JOHN R. WASBERG
Senior Counsel
WSBA No. 6409
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-6039
JAY D. GECK
Deputy Solicitor General
WSBA No. 17919
PO Box 40100
Olympia, WA 98504-0100
(360) 586-2697

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I. INTRODUCTION

The Department of Labor and Industries responds to the brief of amicus curiae Washington State Association for Justice Foundation (WSAJF). WSAJF suggests a reading of the statutes that defeats the finality provided by straightforward application of clear statutory protest-appeal deadlines. Under WSAJF's interpretation, the protest-appeal period does not begin until *all parties and all* affected persons (including attending physicians) have received a copy of the Department order. WSAJF Am. Br. at 7. Thus, a person aggrieved by an order or award can bypass finality by claiming a third person did not receive the order.

To get to its result, WSAJF contends that the statutes are ambiguous, and that the liberal construction principle of RCW 51.12.010 requires that Ms. Shafer's closing order be considered open until her physician (and presumably any other party or persons affected) received the order. WSAJF also claims that its reading advances a general legislative policy for ensuring input to the Department from doctors. WSAJF Am. Br. at 7-11.

The Court should reject the WSAJF argument. The operative language of the statute is not ambiguous with regard to the finality of Ms. Shafer's order. Even if there were ambiguity, the doctrine of liberal construction does not aid WSAJF's argument because the construction

advanced by WSAJF harms the interests of workers. Finally, notwithstanding the legislative policies and provisions that ensure input from doctors, that role of doctors does not justify reading the statute to defeat finality.

II. ARGUMENT

A. **Read Together, RCW 51.52.050 And .060 Unambiguously Bar Ms. Shafer's Argument That Her Closing Order Is Not Final**

RCW 51.52.060(1)(a) provides in relevant part: “[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.” (Emphasis added.)

Under this unambiguous language, the deadline for Ms. Shafer to appeal her closure order was 60 days from the date it “was communicated” *to her*, regardless of when the order was received by other affected persons. DLI Supp. Br. at 6-8; *Porter v. Dep't of Labor & Indus.*, 44 Wn.2d 798, 801, 271 P.2d 429 (1954) (period for aggrieved person to appeal begins “the day . . . such order . . . *is communicated to that person*”) (Emphasis in original).

RCW 51.52.050, the statute cited by WSAJF, does not conflict with RCW 51.52.060(1)(a)'s 60-day deadline – it merely references the appeal deadline in a warning. Section .050 directs the Department to serve its orders, decisions, and awards on “the worker, beneficiary, employer, or other person affected thereby” by mail. The Department is required to include a warning “that such final order, decision, or award shall become final within sixty days from the date the order is communicated to the parties unless” there is a request for reconsideration or an appeal. The required warning under section .050 references the individualized 60-day deadline that RCW 51.52.060(1)(a) explicitly sets for “appeals” (and clarifies that a timely “request for reconsideration” would also avoid finality).

To claim ambiguity, WSAJF rhetorically asks if the deadline is sixty days from the date the order is “communicated to the parties” (the language in .050) or sixty days after it is “communicated to such person” (the language in .060(1)(a)). WSAJF Brief at 6. WSAJF thus elevates the statement in RCW 51.52.050 into a conflict with RCW 51.52.060(1)(a). If the Court reads RCW 51.52.050 in light of the plain language in RCW 51.52.060(1)(a), however, there is no ambiguity. *Christensen v. Ellsworth*, 162 Wn.2d 365, 373, 173 P.3d 228 (2007) (“plain meaning”

can be discerned from several related statutes that disclose legislative intent about a particular provision in one of the statutes).

Ms. Shafer was required to protest or appeal within sixty days of the day she received the closing order. She did not do so, and the order became final as to her.

Even if the plural usage of "parties" in the warning in .050 gives momentary pause, a fair reading of the warning is consistent with the long-standing plain language of .060(1)(a). The warning is read by an individual worker, an employer, or some other person. Any individual reading the statement would naturally conclude that he or she must appeal within the next sixty days because the very heart of the warning is that the enclosed order will otherwise become final. It would be implausible for the individual to read the statement and conclude that a closing order remains non-final so long as some hypothetical third person did not receive it.¹

¹ Historical development of the statutes also supports reading the .050 reference to reconsideration-request deadline and rights in parallel to RCW 51.52.060(1)(a). The individualized finality language of RCW 51.52.060 has, with only minor changes, been part of the Industrial Insurance Act for over 80 years. See § 4, c. 310, Laws of 1927 (addressing then-newly-created Joint Board within Department); § 1, c. 219, Laws of 1949 (addressing then-newly-created independent Board of Industrial Insurance Appeals). The reference to a reconsideration deadline and right was added to the warning language of .050 (previously addressing, since 1949, only the appeal right) in 1982 by § 4, c. 109, Laws of 1982. Nothing in the text or legislative history of that 1982 legislation suggests any intent other than to take pressure off the Board by codifying a reconsideration mechanism. Nothing suggests intent to make the finality rule different for *motions for reconsideration* from the express, individualized finality rule for *appeals*

B. Liberal Construction In Favor Of Providing Benefits To Workers Does Not Require Reading The Statutes To Eliminate Finality For An Unappealed Closing Order

WSAJF's reliance on the liberal construction principle is misplaced. First, as shown above, the deadline for Ms. Shafer's appeal is not ambiguous, and the liberal construction rule does not apply to unambiguous terms in the Industrial Insurance Act. *See Harris v. Dep't of Labor & Indus.*, 120 Wn.2d 461, 474, 843 P.2d 1056 (1993). Second, the construction advanced by WSAJF is harmful to workers, and thus liberal construction does not support the WSAJF construction.

Department orders that are not timely protested or appealed are entitled to the same res judicata effect as court orders. *Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 537-38, 866 P.2d 189 (1994). Res judicata serves the dual purposes of protecting all litigants from the burden of litigation and promoting judicial economy. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326, 99 S. Ct. 645, 649, 58 L.Ed.2d 552 (1979). The principles and public values underlying res judicata have also been described more concretely and explicitly as follows:

The most purely public purpose served by res judicata lies in preserving the acceptability of . . . dispute resolution against the corrosive disrespect that would follow if the same matter were twice litigated to inconsistent results . . .

that had been followed for the previous 55 years and that has been maintained to this day.

A second largely public purpose has been found in preserving [adjudicative tribunals] against the burdens of repetitious litigation . . .

. . . We want to free people from the uncertain prospect of litigation, with all its costs to emotional peace and the ordering of future affairs. Repose is the most important product of res judicata.

18 Wright, Miller, & Cooper, Federal Practice and Procedure: Jurisdiction 2d § 4403, at 23-27 (2002) (footnotes and citations omitted).

A worker will presumably spend a partial disability award relying on finality of the closing order. But under *Shafer*, an employer could have second thoughts, locate a party or affected person who had not received a copy, and apprise the Department. *Shafer v. Dep't of Labor & Indus.*, 140 Wn.App. 1, 159 P.3d 473 (2007), *review granted*, 163 Wn.2d 1052 (2008). The Department would have no choice under the WSAJF argument but to deem the prior order non-final, regardless of the wishes of that unserved party or person or anyone else. Or a Department or Board adjudicator, simply doing his or her job of neutral but careful adjudication, could discover such facts. There would be no true finality until after 60 days had passed following receipt (provable by a preponderance) by every possible party or affected person.²

² In the Department's Petition, it suggested, assuming for argument this Court's affirmance of *Shafer*, that on remand to the Department Ms. Shafer's reopening application could be treated as a reconsideration request. Pet. at 3 n.2. That Department suggestion is arguably wrong. Under *Shafer*, it appears that for each and every otherwise

The WSAJF argument thus undermines a worker's reasonable reliance on finality. On happenstance, a previously served party would get a second bite at the apple, and the worker might be required to pay back a large award, in part or in its entirety, or lose his or her pension or other benefits. Repose would be destroyed, even if the worker, employer, or affected person had otherwise decided not to appeal a decision. Moreover, in addition to defeating the reliance of the worker (and others) on otherwise final results, the parties could be required to try cases challenging a closing order using whatever stale evidence may continue to exist. DLI Supp. Br. at 11.

The following hypotheticals illustrate this point. The worker, the employer, the attending physician, and the Department might be satisfied at the time of issuance of an order, but someone might later claim, or it might simply be discovered, that: (1) The administrative order was not received by the attending physician (as is contended in this case); (2) The doctor who was named on the order was not actually the doctor who was acting in the role of "attending physician" on the date of the order; or (3) DSHS had a child support lien on compensation per RCW 43.20B.735 but did not receive the order.

final order discovered to be not yet final due to non-receipt by a party or person, the Department would need to ensure receipt by any and all parties not yet served, and then wait 60 days for a protest or appeal by one of those parties or affected persons.

Other circumstances where such destruction of expectations of finality could occur include: (4) A minor's custodial parent did not receive the order, *In re Andrew Gravlee*, BIIA Dec., 06 16783, 2007 WL 4986266 (2007), or one of several beneficiaries of a deceased worker did not receive a copy of the order, and now the served employer wishes to challenge it; (5) A retrospective rating group to whom the employer belonged did not receive the order, and the employer, who did get the order, now seeks to set aside the order (*see In Re David Tapia-Fuentes*, BIIA Dec., 06 15128, 2007 WL 3054888 (2007) (holding, in a dispute extending benefits to a worker, that a retrospective rating group is a separate party from an employer within the group, that the group has an independent right to challenge adjudicative orders issued against any of the many employer members of the group); (6) The Department order allowing a cumulative stress occupational disease claim and assigning percentages of responsibility on the claim per WAC 296-17-870(6) did not reach or name one of numerous responsible employers, and one of the employers that the order did reach later invokes the all-parties-receipt rule to make a late challenge to the allowance of the claim.

This non-exhaustive list illustrates the unintended ramifications of the WASJF argument that are adverse to many workers. Thus, the list negates the claims of WASJF and Ms. Shafer that liberal construction

applies here. The list also illustrates that *Shafer* conflicts with explicit Industrial Insurance Act policies to provide (1) “sure and certain” relief to workers, and (2) prompt resolution of litigation. RCW 51.04.010; *Kaiser Aluminum & Chem. Corp. v. Dep’t of Labor & Indus.*, 121 Wn.2d 776, 785-86, 854 P.2d 611 (1993) (limiting the Board’s authority to appeal because this reduces litigation and thus furthers RCW 51.04.010 interests of prompt resolution and sure and certain relief). Finality is directly related to both certainty and promptness of resolution because it allows the worker to rely on his or her award and receipt of benefits. *Id.*

Thus, the rule of liberal construction does not compel a different result with regard to the timing of appeals under RCW 51.52.060(1)(a).³ Instead, the rule advocated by WSAJF arbitrarily gives similarly situated workers who received a closing order different outcomes, based solely on the happenstance of whether a third person received the order.⁴

³ Ms. Shafer suggests that the doctrine of laches might be invoked in some circumstances to preserve the finality of the Department order. Shafer Supp. Br. at 14-15. But laches is an affirmative defense and equitable doctrine that is invoked only by a party against another party to bar the latter party’s cause of action. See generally *Voris v. Human Rights Comm’n*, 41 Wn. App. 283, 287-88, 704 P.2d 632 (1985). Here, the delay is by Dr. Cook. Moreover, laches is an equitable doctrine, and the Department and Board are administrative agencies and lack general equity powers. See, e.g., *In re Ben Ramahlo*, BIIA Dec., 85 C025, 1987 WL 61326 (1987). Even courts are limited in their equity powers in workers’ compensation cases. *Kingery v. Dep’t of Labor & Indus.*, 132 Wn.2d 162, 173, 937 P.2d 565 (1997) (plurality). Thus, laches is not a panacea for the destruction of finality.

⁴ The plain language of RCW 51.52.060 and .050 creating an individualized rule for finality, moreover, would not prevent an aggrieved hypothetical third person, such as Dr. Cook here, from protesting or appealing in his or her own right following receipt of the order. It simply prevents employers (and workers) who did not appeal a

C. The Statutory Role For Physicians To Provide Information To The Department Does Not Compel A Different Statutory Interpretation

WSAJF, like Ms. Shafer, argues at length a point that the Department does not contest, i.e., that attending physicians play an important role in adjudication of worker claims and therefore are affected and interested persons who might be aggrieved to protest or appeal closing orders and other orders involving medical issues. WSAJF Am. Br. at 7-11 (attending physician has right to protest or appeal *on own behalf*); Shafer Supp. Br. at 6-15 (same); WDTL Amicus Memo at 2-10 (attending physician may protest on own behalf). Indeed, WAC 296-20-09701, a Department rule, expressly authorizes a physician to protest a Department closing order.⁵

closing order from using the third party as a loophole for a protest or appeal by a party who received the order years before.

⁵ All parties and amici agree, however, that the physician does not have a right or responsibility to appeal or to move for reconsideration as a representative of the worker. The Court of Appeals reached a contrary view because RCW 51.28.020 contains a statement that “[i]f the application . . . is *filed on behalf* of the worker by the physician . . . the physician . . . may transmit the application to the department electronically by using facsimile mail.” *Shafer*, 140 Wn. App. at 9, n. 20 (emphasis added). The “on behalf of” language in RCW 51.28.020 (added by section 3, chapter 108, Laws of 2005) cannot mean anything more than that an attending physician may assist a worker in *transmitting* the worker’s application to the Department. That is necessarily true because (1) case law discussed below in this section interpreting RCW 51.28.050 places the right and responsibility for making a claim for workers’ compensation exclusively on the worker; and (2) the many reasons (all tied to the personal, economic and legal interests of the worker) why the Legislature would never allow anyone but the worker or his or her legal guardian to make the final choice whether to file a claim. In any event, the “on behalf of” language is not found in RCW 51.52.050 or .060 and should not be engrafted onto the latter statutes. *In re Detention of Dydasco*, 85 Wn. App. 535, 538 n. 2, 933 P.2d 441 (1997) (Legislature’s amending one section and not making that change to another section implies exclusion of the change from the latter section).

The WSAJF reliance on the role of physicians should be rejected. First, the statutory language in RCW 51.52.060(1) unambiguously demonstrates legislative intent that an order is final 60 days after communication to the worker. That legislative intent should not be bypassed. The worker is given ample time, 60 days, to consult with both the worker's attending physician and with the worker's attorney.

Second, this Court's rulings regarding RCW 51.28.050 demonstrate that an attending physician's role does not change the worker's obligation to follow the Act. RCW 51.28.050 sets the time limits for filing claims for industrial injury. Under that statute, an attending physician is assigned limited responsibility to *assist* workers in filing *original injury claims*. This Court and others have rejected the notion that the physician's duty to assist can excuse the claimant from personally failing to comply with procedural deadlines in the Act. *See, e.g., Leschner v. Dep't of Labor & Indus.*, 27 Wn.2d 911, 927, 185 P.2d 113 (1947) (worker has sole duty to file own claim, even if doctor mistakenly told worker the doctor had already sent in the claim at the worker's request).⁶

⁶ *See also Pate v. Gen. Elec. Co.*, 43 Wn.2d 185, 189-91, 260 P.2d 901 (1953) (in a negligence action by a patient against company doctors for not explaining her workers' compensation claim-filing rights, holding that the sole responsibility for filing a claim is on the worker because "silence of the physicians breached no duty, statutory or otherwise, owed to [the worker]"); *Wilbur v. Dep't of Labor & Indus.*, 38 Wn. App. 553, 556-57, 686 P.2d 509 (1984) (a worker was not excused from the requirement for timely filing a claim where his attending physician's staff failed to follow through on a promise to timely apply for benefits); *cf. Roth v. Kay*, 35 Wn. App. 1, 3-4, 664 P.2d 1299 (1983)

The fact that closing orders may implicate medical questions is no reason to infer a responsibility or role for attending physicians such that Ms. Shafer's 3-year acquiescence in the closure order can be ignored. The responsibility to file a claim, or a protest or an appeal from an order that aggrieves the worker, is the worker's alone. *See Leschner*, 27 Wn.2d at 922 ("a physician has no statutory power, express or implied, to alter any legal relation between a claimant and the . . . department").⁷

D. Dr. Cook Would Not Have Protested The Closing Order Over The Wishes Of Ms. Shafer's Attorney

WSAJF notes, as did the Court of Appeals (*Shafer*, 140 Wn. App. at 4-5) and Ms. Shafer (*Shafer Ans. Pet.* at 2-3), that Ms. Shafer's attending physician, Dr. Cook, stated that she believes she would have challenged the order in 2000. WSAJF Am. Br. at 3, n. 1. This post-hoc statement is contrary to reasonable inferences from the record.

(distinguishing *Pate* in a negligence action brought by a patient suing her attending doctor, and finding a qualified tort duty where the doctor's staff expressly promised to send in a report, but recognizing that for workers' compensation purposes, the duty to timely file a claim rests exclusively on the worker).

⁷ Even if the role of physicians to protest or appeal is equated to that of parties with a direct interest in benefits, this would not provide a meaningful reason for construing the deadlines of RCW 51.52.060(1)(a) differently from the deadlines for appeals in the APA and MAR. *See Wells v. W. Wash. Growth Management Hqs. Bd.*, 100 Wn. App. 657, 677-79, 997 P.2d 405 (2000) (APA); *Simmerly v. McKee*, 120 Wn. App. 217, 221-23, 84 P.3d 919 (2004) (MAR). As shown in DLI's briefing, *Wells* and *Simmerly*, while distinguishable here in the Department's favor because the APA and MAR provisions at issue in *Wells* and *Simmerly* were by contrast to RCW 51 ambiguous, provide persuasive legislative policy discussion supporting the common sense of the rule of individualized finality for equal parties. DLI Supp. Br. at 10-16. The WSAJF argument that Title 51 is "sui generis" fails to contradict the Department's showing.

On September 12, 2000, Dr. Cook received a September 11, 2000 Department order, the Department's first attempt to close the claim. The order did not pay anything for permanent partial disability. CABR 96. The Department mailed the order to Ms. Shafer's employer and to Ms. Shafer's attorneys, the long-time workers' compensation specialists at the Tacoma law firm Small Snell Weiss & Comfort. CABR 96. On October 11, 2000, attorney Snell filed a notice of appeal of the September 11 order. CABR 45 (page 2 of Board's 3-page recitation of stipulated jurisdictional history).

On October 19, 2000, after reassuming jurisdiction over the claim, the Department issued the closing order. CABR 98 (copy of order). The order paid Ms. Shafer \$6773.22 for permanent partial disability. CABR 98. Ms. Shafer's mother characterized the \$6773.22 as a "settlement," apparently based on her discussions at the time with Ms. Shafer. CABR Sharry Neuman, 4-14-04 at 54.

On March 13, 2003 the Department received the reopening application from Ms. Shafer. CABR 46. Before the Department denied reopening, the Department issued an order that Dr. Cook received on March 26, 2003, declaring, among other things that: "All [previous] orders are final and binding." CABR 99. Dr. Cook did not protest or appeal that order, nor did anyone else. CABR 46 (stipulated history).

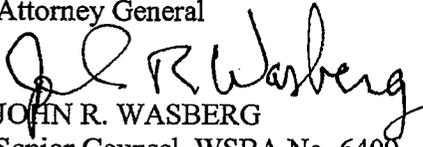
Other than purely speculative testimony, nothing from the year 2000 up to the time of the Board hearings in late 2003 suggests that in 2000 Dr. Cook would have actually taken any action to challenge Ms. Shafer's final order and settlement.

III. CONCLUSION

The WSAJF construction of RCW 51.52.060(1)(a) and RCW 51.52.050 should be rejected.

RESPECTFULLY SUBMITTED this 5th day of March, 2009.

ROBERT M. MCKENNA
Attorney General



JOHN R. WASBERG
Senior Counsel, WSBA No. 6409

JAY D. GECK
Deputy Solicitor General, WSBA No. 17916