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STATE OF WASHINGTON

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No. 81049-4

BY RONALD R. CARPENTER

SUPREME COURT

CLERK OF THE STATE OF WASHINGTON

KELLY L. SHAFER,

Respondent,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Petitioner.

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SHAFER'S  
ANSWER TO WASHINGTON STATE ASSOCIATION FOR JUSTICE  
FOUNDATION'S AMICUS CURIAE BRIEF

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A. INTRODUCTION

Amicus curiae Washington State Association for Justice Foundation (the Foundation) argues that liberal construction of the language of RCW 51.52.050 warrants affirmation of the Court of Appeals' decision. The Foundation also argues that once a claim is filed, a physician is undeniably a party to an industrial insurance claim. Shafer agrees.

Any ambiguity in the Industrial Insurance Act ("IIA") must be construed in favor of the worker. The Court of Appeals correctly resolved the ambiguity of RCW 51.52.050 with respect to RCW 51.52.060 in the worker's favor, by concluding that an order does not become final as to any party until sixty days after it is communicated to all parties. Under the IIA, a physician is a party.

B. ARGUMENT

It is well-established that the IIA must be construed liberally to fulfill the statute's purpose of providing sure and certain relief to workers. RCW 51.52.010; *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 811, 16 P.3d 583 (2001). Where reasonable minds can differ about the meaning of an IIA provision, the worker's position must receive the benefit of the doubt. *Harry v. Buse Timber Sales*, \_\_ Wn.2d \_\_, Supreme Court No. 79613-1 (February 26, 2009).

This public policy in support of injured workers is so powerful that even when a party undeniably has failed to comply with RCW 51.52.060, this Court has applied equitable principles in certain situations to allow an untimely appeal from a closing order. In *Rodriguez v. Department of Labor and Industries*, 85 Wn.2d 949, 540 P.2d 1359 (1975), an extremely illiterate worker received the Department's closing order, but could not read it because his interpreter was in the hospital. *Id.* at 950. By the time the worker regained access to his interpreter and understood the order, the sixty day deadline for appeal had passed. This Court concluded that the word "communicated" meant simply that the worker received the order, not that he understood it, and therefore the worker had no statutory right to appeal. *Id.* at 952-53. However, this Court ordered the Board to hear his appeal on equitable grounds:

The general policy of our laws is to protect those who are unable to protect themselves, and equitable doctrines grew naturally out of the humane desire to relieve under special circumstances from the harshness of strict legal rules. ... In enacting this statute, the Legislature must have had in mind that equity would relieve in all proper cases from the hardships which otherwise would occur in enforcing the strict letter of the statute.

*Id.* at 953 (citing *Ames v. Dep't of Labor & Indus.*, 176 Wash. 509, 513-14, 30 P.2d 239 (1934)).

In Shafer's case, no resort to equity is needed to fulfill the purposes of the IIA, because liberal construction of the statute supports her position. The IIA provides that an order becomes final sixty days after the date it is communicated to the parties *unless* a request for reconsideration or appeal is submitted. RCW 51.52.050. If any one party has not received notice, then the reconsideration and appeal period has not expired as to that party. *Id.*

There is no question that an attending physician is a party who may file for reconsideration of, or appeal from, a Department order. RCW 51.52.060. This right to appeal is not limited to issues regarding payment to the physician, it extends to, *inter alia*, whether the worker has reached "maximum medical improvement," or whether the Department's addresses all of the claimant's relevant medical conditions. *See, e.g., In re: Freda K. Hicks*, BIIA Significant Decision No. 01-14838 (2004).

Because it is undisputed that Dr. Cook never received notice of the Department's decision to close Shafer's claim, then the sixty-day period in which to file a protest has not yet expired. RCW 51.52.050, .060. The time for appeal from the reconsideration decision will not begin to run as to any party until the Department resolves the issues raised in the protest. *Id.*

The Foundation also correctly identifies the fallacy in equating the role of a physician before the claims process commences with the role of a physician during the process. Foundation br. at 8-9. No statute or regulation requires a physician to file a claim on behalf of a worker. Once the claim is filed, the physician has many legal duties, both to the Department and to the worker. *Id.* To assume, as the Department does, that case law holding claimants solely responsible for filing claims precludes this Court from considering physicians to be parties, ignores this body of law.

As the Foundation notes, the attending physician plays an indispensable role in the claims process once it has commenced. *Id.* at 8-10. The "sure and certain relief" to workers contemplated by the IIA may be denied if the attending physician is not given notice of the most final and irretrievable decision the Department can make. To allow an order to become final without notice to the attending physician flies in the face of the entire statutory scheme of the IIA, this Court's precedent, and the Department's own regulations.

### C. CONCLUSION

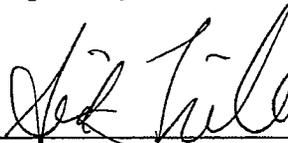
The Foundation observes two points critical to proper disposition of the present issue: the need to resolve IIA ambiguities in favor of

workers, and the critical and unique role the physicians fulfill as both parties and advocates in the industrial insurance system.

The language of RCW 51.52.050 and .060 prohibit the Department from declaring a closing order final and binding when that order was never communicated to the worker's attending physician.

DATED this 2<sup>nd</sup> day of March, 2009.

Respectfully submitted,



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# APPENDIX

RCW 51.52.050:

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.

WAC 296-20-09701:

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....”

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2009 MAR -2 A 10: 49 DECLARATION OF SERVICE

BY RONALD R. OAS, said day below I sent by electronic mail a true and accurate copy of the following document: Shafer's Answer to Washington State Association for Justice Foundation's Amicus Curiae Brief in Supreme Court Cause No. 81049-4 to:

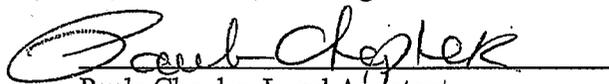
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Original sent by email for filing with:  
Washington Supreme Court  
Clerk's Office  
Olympia, WA

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: March 2, 2009, at Tukwila, Washington.

  
Paula Chapler, Legal Assistant  
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