81049-4

No. 81049-4

SUPREME COURT
OF THE STATE OF WASHINGTON

KELLY L. SHAFER,

Respondent,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Petitioner.

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SHAFER'S
ANSWER TO PETITION FOR REVIEW

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A. INTRODUCTION

The Department of Labor & Industries (Department) claims that this case merits review under RAP 13.4(b)(1), (2), and (4). It does not. In fact, the Department utterly fails to challenge the actual holding of the Court of Appeals: that a physician is an "interested party" entitled to notice under RCW 51.52.050. Because the Department's petition is concerned only with dicta and matters of settled law, it should be denied under RAP 13.4(b).

There is no public interest at stake here as required by RAP 13.4(b)(4). In fact, the Court of Appeals protected the public interest by requiring the Department to obey RCW 51.52.050. Despite the Department's insistence that the Court of Appeals' opinion confers a duty on physicians to appeal from Department decisions, the only duty the opinion confers is on the *Department:* to ensure that all parties receive notice of a claim closure. This Court should deny the Department's petition for review.

Although this Court should deny the Department's petition, under RAP 13.4(b)(1), (2), and (4) this Court should grant Shafer's petition for review on the sole issue of attorney fees on appeal. The Court of Appeals disregarded this Court's decision in *Brand v. Dep't of Labor & Industries,* 139 Wn.2d 659, 989 P.2d 1111 (1999), when it considered the

Department's attorney fee argument for the first time in a motion for reconsideration, and ignored this Court's precedent regarding attorney fees to injured workers on appeal. This Court held in *Brand* that there is a substantial public interest in ensuring competent legal representation for workers who are denied justice by the Department. The Court of Appeals' decision frustrates this important public policy goal. Review is merited on that narrow issue. RAP 13.4(b)(1).

B. COUNTERSTATEMENT OF THE CASE

Kelly Shafer was injured on the job, applied for and received industrial insurance benefits. Op. 1-2. The Department's physician, Dr. Kenneth Briggs, examined Shafer and concluded her condition was fixed and stable, meriting closure. Op. at 2. Dr. Briggs never sent his report to Shafer's attending physician, Dr. Elizabeth Cook. *Id.* When the Department asked Dr. Cook to evaluate the report, Dr. Cook informed the Department that she had not seen the report. *Id.* She also stated her disagreement with the conclusion that Shafer's medical condition was fixed and stable. *Id.* The Department never sent Dr. Cook a copy of the Briggs report. *Id.*

Two months later, the Department issued its final order closing Shafer's claim, based on Dr. Briggs' report. *Id.* Dr. Cook did not receive a copy of the final order. *Id.* Had Dr. Cook been notified, she testified

that she would have requested reconsideration, as was her right under RCW 51.52.050 and WAC 296-20-09701.[1] *Id.* at 3.

When Shafer applied to reopen her claim pursuant to RCW 51.32.160 based on the objective worsening of her condition, the Department denied her aggravation application. *Id.* Dr. Cook requested reconsideration, which the Department also denied. *Id.* Shafer appealed the Department's order to the Board of Industrial Insurance Appeals (Board), the King County Superior Court, and the Court of Appeals, arguing to each tribunal that under RCW 51.52.050, her claim was never properly closed because Dr. Cook did not receive notice. *Id.* Shafer also requested attorney fees under RCW 51.52.130 in her opening brief to the Court of Appeals. The Department did not respond to her request for attorney fees it its Court of Appeals brief.

The Court of Appeals examined the language of RCW 51.52.050 and agreed with Shafer: the Department's failure to notify Dr. Cook meant that the claim was never properly closed. *Id.* at 10. Therefore, Shafer could pursue her aggravation claim. The Court of Appeals initially awarded Shafer her attorney fees as the prevailing party citing *Brand.* Op. at 12.

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[1] The complete texts of RCW 51.52.050, RCW 51.52.130, and WAC 296-20-09701, are reprinted in the Appendix.

The Department then filed a motion for reconsideration of the Court of Appeals' opinion, *raising for the first time* the argument that Shafer was only entitled to attorney fees if she was successful on remand. The Court of Appeals did not even request a response from Shafer, so under RAP 12.4(d), Shafer was not permitted to file one.

On September 4, 2007, the Court of Appeals granted the Department's motion and changed its opinion to indicate that Shafer's attorney fee request "must abide remand," deleting any reference to *Brand*. Appendix C at 1.

C. ARGUMENT WHY REVIEW OF THE DEPARTMENT'S PETITION SHOULD NOT BE ACCEPTED

Nothing in the Department's petition merits review under RAP 13.4(b). The Court of Appeals did nothing more than recognize the important and unique role an attending physician plays in the Industrial Insurance Act's (IIA) claim process. The petition does not actually challenge the legal issue decided by the Court of Appeals: that an attending physician's rights and duties in that claim process – including the right to contest closure of a worker's claim – means that the physician is a *party* affected by closure who must be notified before a closing decision becomes final under RCW 51.52.050. Op. at 12.

Instead, the Department focuses on (1) the wisdom of the express language of RCW 51.52.050 stating that a claim is not closed until 60 days after notice is provided to all affected persons, and (2) language in the Court of Appeals' decision acknowledging an attending physician's legal rights and responsibilities under the IIA.

(1) The Decision of the Court of Appeals Interpreting RCW 51.52.050 Does Not Conflict With Any Decision of this Court or Another Court of Appeals

The Court of Appeals' decision is in harmony with existing case law and statutes. The Department's cited cases "conflicting" with the decision here are distinguishable, and the Court of Appeals has not created any new duty for attending physicians.

(a) The Court of Appeals' Decision Is in Harmony With Prior Court of Appeals Authority Interpreting RCW 51.52.050, and With This Court's Authority Strictly Construing Notice Provisions Against the Party Required to Give Notice

The Department claims at 9-12 that the Court of Appeals' decision conflicts with case law and creates new duties for attending physicians under the IIA, thus meriting review by this Court under RAP 13.4(b)(2). The Department is incorrect.

Absent from the Department's discussion of existing precedent is *Ochoa v. Department of Labor and Industries*, 100 Wn. App. 878, 999 P.2d 633 (2000) *reversed on other grounds*, 143 Wn.2d 422, 20 P.3d 939

(2001). In *Ochoa,* the Department initially granted industrial insurance benefits to a racehorse jockey, but two years later reversed itself and demanded repayment. The jockey appealed the Department's order denying him industrial insurance coverage, arguing that the original order granting him benefits had become final under RCW 51.52.050 and that therefore the Department had no authority to reopen and reverse it. *Id.* at 881. The Department claimed it had authority to reverse the two-year-old unappealed order because Ochoa's employer had never been notified of the order. *Id.* at 880. Although Ochoa's employer was not involved in the appeal, the Court of Appeals held the Department's reversal was timely, because Ochoa's employer had not received it and thus it had never become final. *Id.* at 881-82.[2]

The Court of Appeals' decision here is in harmony with *Ochoa.* It and holds under the IIA, that if a closing order is not communicated to *all* parties, it is not final and may be appealed by any party, even if that party originally had notice of closure. Op. at 10-11.

The Court of Appeals' decision is also in harmony with precedent strictly construing notice provisions *against* the party who is obligated to provide notice. For example, in *Nevers v. Fireside, Inc.,* 133 Wn.2d 804,

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[2] The Legislature has never amended RCW 51.52.050 to overrule *Ochoa,* thus evincing its acquiescence in that decision's interpretation of the statute. *Soproni v. Polygon Apartment Partners,* 137 Wn.2d 319, 327 n.3, 971 P.2d 500 (1999).

947 P.2d 721 (1997), parties to a mandatory arbitration failed to timely file proof of service on all other parties of their request for a trial de novo within 20 days as required by the mandatory arbitration rules. *Id.* at 808. This Court affirmed the trial court's dismissal of the request for a trial de novo as untimely, stating that to ignore the plain notice provisions of the statute would, in effect, rewrite them. *Id.* at 812-13. This Court has also strictly construed Administrative Procedure Act (APA) notice provisions against the party charged with giving notice. *Union Bay Preservation Coalition v. Cosmos Develop. & Admin. Corp.*, 127 Wn.2d 614, 620, 902 P.2d 1247 (1995).

Here, the Court of Appeals strictly construed the notice provision of RCW 51.52.050 against the party required to give notice: the Department. To ignore the notice language of RCW 51.52.050, and hold that a claim not served on all persons affected is closed nevertheless, would rewrite the statute. The Court of Appeals recognized this, and refused the Department's invitation to do so.

(b) <u>This Case is Distinguishable from the Department's Cited Cases Because an Attending Physician Has a Unique Role in the IIA as a Non-Litigant Who is Nonetheless a Person Affected By Claim Closure</u>

Dr. Cook, as attending physician, plays a vital role in the process of filing and pursuing a Shafer's claim for industrial insurance benefits.

Op. at 9-10. The IIA recognizes the key role of treating physicians in handling claims of injured workers so that it is eminently sensible to treat them as "parties" under RCW 51.52.050 to whom notice of Department orders must be given.

When a decision of the Court of Appeals is factually and legally distinguishable from precedent, then the decision is not in conflict with that precedent. *See State v. Stewart*, 130 Wn.2d 351, 922 P.2d 1356 (1996).

The Court of Appeals' decision interpreting RCW 51.52.050 does not conflict with *Wells v. Western Washington Growth Management Hearings Board*, 100 Wn. App. 657, 997 P.2d 405 (2000) and *Simmerly v. McKee,* 120 Wn. App. 217, 84 P.3d 919 (2004), as the Department contends. *Wells* and *Simmerly* are factually and legally distinguishable from the case at bar. They are not IIA cases, nor do they contend with the question of whether a physician is a person affected by claim closure and therefore entitled to notice. *Wells* involved interpretation of a provision in the Administrative Procedures Act, RCW 34.05.542(2), which required parties to file a petition for review within 30 days of the "date of service of the order." *Wells,* 100 Wn. App. at 677. In *Simmerly,* the court interpreted a provision in the Mandatory Arbitration Rules, MAR 7.1(a), which required parties to request a trial de novo within 20 days of filing of

the arbitrator's award with the clerk. But before the time for appeal began to run, the arbitrator was required to file proof of service on each party. *Simmerly,* 120 Wn. App. at 221. The Court of Appeals interpreted the MAR provision to mean that the 20-day period commenced as to each party from the day when proof of service was filed. *Id.* at 223.

RCW 51.52.050 is different from the APA and MAR governing the right to appeal in *Wells* and *Simmerly* because the role of Shafer's attending physician as a "person affected" is unique under the scheme of the IIA. *Wells* and *Simmerly* dealt only with the question of when the time period for appeal commenced. Also, the statutes at issue in those cases did not mandate that an order only became final upon notice to all parties.

The problem that the Court of Appeals faced here arises from the fact that an IIA claim is not closed until *all* parties receive notice, and that an attending physician has many rights and responsibilities regarding industrial insurance claims, but is not a "party" in the traditional sense of a person with an actual stake in the outcome. Op. at 10. For example, an attending physician often assists a worker to initiate a claim with the Department, and actually has the authority to file a claim on the worker's behalf. RCW 51.28.020. The physician also must report on a worker's condition at the Department's request. RCW 51.36.060. An attending physician's opinion is given special consideration in determining whether

the Department has handled a claim correctly. *Hamilton v. Dep't of Labor & Indus.*, 111 Wn.2d 569, 571, 761 P.2d 618 (1988). Most importantly, the Department's own regulations specify that a physician who disagrees with a closure order, the attending physician "*should submit immediately in writing his request for reconsideration of the adjudication action.*" WAC 296-20-09701 (emphasis added). Thus, the Department's *own regulation* contemplates that the injured worker's treating physician is a key player in the claim process who has standing to seek *reconsideration* of a Department order. Similarly, a physician should have notice of a Department order as a "party" for purposes of RCW 51.52.050, and any right to appeal the Department order to the Board.

The Court of Appeals recognized this unique statutory and regulatory scheme, and correctly rejected *Wells* and *Simmerly* as inapposite.

The elegance of the solution offered by the Court of Appeals lies in its simplicity: the Department must adhere to the statute. As a stakeholder with a right to protest, the worker's attending physician is considered a party. Under the plain language of RCW 51.52.050, if the closing order is not communicated to all affected parties; the claim remains open until 60 days after the Department remedies its error.

The Court of Appeals correctly decided this issue in harmony with existing precedent. The Department's contention that the decision conflicts with *Wells* and *Simmerly* is incorrect.

(c) The Court of Appeals' Decision Recognizes the Rights and Responsibilities of an Attending Physician Already Present in the IIA and Existing Case Law, Including the Physician's Right to Protest Improper Claim Closure

The Department argues at 13-15 that the Court of Appeals decision conflicts with *Leschner v. Dep't of Labor & Indus.*, 27 Wn.2d 911, 927, 185 P.2d 113 (1947) and similar authority holding that the duty to timely file a claim rests with the worker, not the attending physician. The Department is incorrect; there is no conflict.

To be in conflict with the Court of Appeals' decision, *Leschner* and the related cases would have to stand for the proposition that a physician is not a person entitled to notice under RCW 51.52.050. They do not. The question of insufficient notice to a person affected by closure was never raised in any of the cases the Department cites. *Leschner* places primary responsibility for filing a timely notice of appeal on the injured worker, but does not *foreclose* an appeal by a treating physician. *Leschner* and its progeny are inapplicable to the question presented here.

The Court of Appeals' decision here simply recognized an attending physician's legal rights and responsibilities as laid out in the IIA,

the Washington Administrative Code, Department guidelines, etc. The Court of Appeals did not rule that an attending physician has a *mandatory* duty to appeal on behalf of an injured worker. A physician *may* appeal if the physician, upon notice, feels the Department's order is in error. A claim is not closed until 60 days after the order is communicated to all parties, and included the physician as one of those parties, because the physician has a right to protest closure. Op. at 10.

The Court of Appeals' decision regarding a physician's rights under the IIA is not in conflict with any prior court ruling.

(d) The Court of Appeals Followed This Court's Decision in *Marley* In Concluding that the Department Has Jurisdiction to Consider Claims Arising Under the IIA.

The Department contends in its petition at 15-18 that the Court of Appeals' decision conflicts with existing precedent on the issue of jurisdiction, citing *Marley v. Dep't of Labor & Ind.*, 125 Wn.2d 533, 539, 886 P.2d 189 (1994); *Kingery v. Dep't of Labor & Ind.*, 132 Wn.2d 162, 170-73, 937 P.2d 565 (1997); and *Perry v. Dep't of Labor & Ind.*, 48 Wn.2d 205, 292 P.2d 366 (1956).

The Department profoundly misreads both *Marley* and *Kingery*, which both clearly state that an unappealed order raises problems of claim preclusion and lack of authority, *not* jurisdiction. *Marley*, 125 Wn.2d at

537-38; *Kingery,* 132 Wn.2d at 170-73. Jurisdiction is not at issue here, and the Court of Appeals so stated. Slip op. at 5.

Any language in *Perry* regarding jurisdiction has been overruled *sub silentio* by *Marley* and *Kingery.* Although *Perry* is "cited with approval" in *Marley, Marley* does not cite *Perry* for its language regarding jurisdiction. *Marley*, 125 Wn.2d at 537-38. In fact, the *Marley* decision notes that courts have often misused the word "jurisdiction" in this context: "The term 'subject matter jurisdiction' is often confused with a court's 'authority' to rule in a particular manner." *Id.* at 539. In light of the holdings of *Marley* and *Kingery,* the statements in *Perry* relating to "jurisdiction" must instead be read as references to the Department's and Board's "authority."

The Department's jurisdictional argument fails. The Court of Appeals accurately identified this case as one *not* raising a jurisdictional issue.

(2) The Decision of the Court of Appeals Requiring Notice to Attending Physicians Protects the Public Interest in Fair and Correct Handling of Industrial Insurance Claims

The Court of Appeals' decision protects important public interests. The public has an interest seeing that administrative agencies obey statutes, and that interest outweighs any alleged cost savings that the agency might enjoy. *National Elec. Contractors Ass'n, Cascade Chapter*

v. Riveland, 138 Wn.2d 9, 22-23, 978 P.2d 481 (1999). Also, the public has an interest in protecting injured workers and processing IIA claims properly. This is particularly true as to injured workers because courts must liberally construe injured workers' entitlement to benefits. RCW 51.12.010. A physician's right to notice ensures the Department is treating the injured person appropriately.

The Department argues that the Court of Appeals' decision harms workers, employers, and insurers by creating a "new theory that could that could cause them to lose the benefit of settled Department decisions." Petition at 19. The so-called "new theory" of the Court of Appeals is not new at all. Workers, employers and other affected parties already have the right to contest closure of claims by erroneous Department orders.

In its last bid to convince this Court of a substantial public interest in this case, the Department warns at 19 of the "Opinion's creation of a legal advocacy role for attending physicians." As explained *supra,* the decision here does not "create" any such role. Also, the Department's specter of increased negligence suits against physicians who fail to protest is utterly speculative. *Leschner* still holds the primary duty to timely appeal erroneous Department orders rests with injured workers. Physicians believing Department orders are wrong *may* appeal them, upon proper notice.

D. ARGUMENT WHY SHAFER'S PETITION FOR CROSS-REVIEW SHOULD BE ACCEPTED

Review is merited under RAP 13.4(b)(1) and (2) as to the Court of Appeals fee decision. The Court of Appeals' decision conflicts with existing precedent, first by allowing the Department to argue for the first time in its motion for reconsideration that Shafer was not entitled to attorney fees on appeal, then in granting the Department's request in spite of conflicting authority. It also concerns a matter of great public interest: ensuring competent legal representation for injured workers on appeal. The Court of Appeals decision will chill competent appellate attorneys' willingness to take industrial insurance cases on appeal, contrary to *Brand*.

(1) The Court of Appeals Reversal on the Attorney Fee Issue Conflicts With Existing Authority Regarding a Party's Ability to Raise an Issue for the First Time in a Motion for Reconsideration

The Department raised, and the Court of Appeals considered the Department's attorney fee arguments raised *for the first time* in its motion for reconsideration. This is not permitted under established case law, and merits review under RAP 13.4(b)(1) and (2). The Department's failure to address an issue in its responsive brief constitutes an abandonment of that issue. *AAS-DMP Management, L.P. Liquidating Trust v. Acordia Northwest, Inc.,* 115 Wn. App. 833, 865-66, 63 P.3d 860 (2003); *R. A. Hanson Co. v. Magnuson,* 79 Wn. App. 497, 505, 903 P.3d 496 (1995).

Moreover, a party may not raise an issue for the first time in its appellate motion for reconsideration. *1515-1419 Lakeview Blvd. Condominium Ass'n v. Apartment Sales Corp.,* 146 Wn.2d 194, 203 n.4, 43 P.3d 1233 (2002).

The Department's motion was especially pernicious because (1) Shafer properly raised the fee issue in her opening Court of Appeals brief, but the Department failed to address the issue in its responsive brief, and (2) under RAP 12.4(d) Shafer did not have the right to respond to the Department's newly raised argument. Had Shafer made the same mistake it is highly unlikely that the Court of Appeals would have allowed her to raise the issue in a motion for reconsideration. *See* RAP 18.1(b); *Wilson Court Ltd. P'ship v. Tony Maroni's, Inc.,* 134 Wn.2d 692, 710 n.4, 952 P.2d 590 (1998); *Steele v. Lundgren,* 96 Wn. App. 773, 778, 982 P.2d 619 (1999).

Shafer followed proper procedure and raised the attorney fee issue in her opening brief. The Department ignored the issue and should not be allowed to raise it for the first time in a motion for reconsideration, a motion to which the Court of Appeals did not permit a response. Review is merited.

(2) The Court of Appeals' Decision Conflicts With This Court's Authority and Threatens the Substantial Public Interest In Encouraging Competent Legal Representation for Workers

The Court of Appeals' decision conflicts with this Court's holding that the purpose of the attorney fee provision in RCW 51.52.130 is to ensure competent legal representation on appeal for injured workers who are denied justice by the Department. *Brand,* 139 Wn.2d at 667; *Boeing Co. v. Lee,* 102 Wn. App. 552, 8 P.3d 1064 (2000). This purpose is important because a fee award is designed to guarantee the injured worker will not, in effect, experience a diminished recovery because of the need to pay counsel. *Id.* Because the IIA is a "closed system" of remedies, it must be liberally construed. *Brand,* 139 Wn.2d at 668.

This Court has recognized the overwhelming public interest in encouraging counsel to take industrial insurance cases. In *Brand,* this Court held the normal lodestar method for calculating fees was inapplicable, because of the passing need to induce counsel to take industrial insurance cases. *Id.* at 670-73. This Court has granted attorney fees to a successful worker in a case where, as here, the accident or medical aid fund was not affected by the litigation. *Johnson v. Tradewell Stores, Inc.,* 95 Wn.2d 739, 747, 630 P.2d 441 (1981). The Court of Appeals has also awarded attorney fees in a case where the worker's right

to relief was not technically sustained on appeal as required by RCW 51.52.130 because the employer dismissed its appeal before trial. *Lee,* 102 Wn. App. at 558. *Brand, Tradewell,* and *Lee* uphold the liberal construction that must be afforded RCW 51.52.130 under the remedial purposes of the Act. *Tradewell,* 95 Wn.2d at 743. The Court of Appeals ignored those decisions.

There is a powerful public interest in allowing workers who successfully challenge the Department to recover their attorney fees on appeal. An attorney who pursues an industrial insurance appeal on behalf of the injured worker already incurs a substantial risk that he or she will never be paid, due to the generally low chances of success on appeal. Attorneys for employers and the Department do not suffer from this inequity. The statutory interpretation proposed by the Department creates a chilling effect where attorneys will be disinclined take even the most meritorious of industrial insurance appeals if the Department denied benefits to the worker below, because there is a high probability that it will be years before that successful attorney will ever be compensated. This case presents a perfect example of this principle, because having lost at the Court of Appeals nearly *eight months ago*, the Department has managed to delay compensation for Shafer's counsel by at least that period, plus the time until this case is considered by this Court. That delay will only

continue when this case is remanded to the Department. Even if Shafer prevails on remand, further appeals could ensue for years.

Flanigan v. Dep't of Labor & Indus., 123 Wn.2d 418, 427, 869 P.2d 14 (1994), which was cited by the Department in its motion for reconsideration to the Court of Appeals, is inapposite. It predates *Brand.* Protection for workers' benefits was not at issue, only the Department's right of reimbursement for pension benefits extended to spouses who then recovered from third parties for loss of consortium. *Id.* at 422.

The rule adopted by the Court of Appeals directly conflicts with this Court's holding in *Brand,* that competent legal representation for industrial insurance claimants must be encouraged by an award of attorney fees to successful[3] litigants. If attorney fees after a successful appeal are only granted after full and "final" resolution of a worker's claim on remand, the purpose of RCW 51.52.130 will be thwarted. Workers who successfully challenge Department or employer actions on appeal should not have to await final action before they are awarded attorney fees. This Court should accept review and award Shafer her attorney fees on appeal.

E. CONCLUSION

The Department's petition for review fails to meet any of the criteria for review set forth in RAP 13.4(b). The Court of Appeals opinion

is entirely in accord with existing precedents, and protects significant public interests. However, the Court of Appeals did err when it concluded on reconsideration that Shafer is not entitled to attorney fees unless she prevails below.[3] This Court should deny review of the Department's petition, and grant Shafer's request for review on the issue of attorney fees.

DATED this ___ day of February, 2008.

Respectfully submitted,

FILED AS ATTACHMENT TO E-MAIL

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Attorneys for Respondent Kelly L. Shafer

[3] Shafer's appellate counsel was successful in overturning an erroneous Department order after appeals to the Board and the trial court.

APPENDIX

A

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.

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 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.

RCW 51.52.130:

(1) If, on appeal to the superior or appellate court from the decision and order of the board, said decision and order is reversed or modified and additional relief is granted to a worker or beneficiary, or in cases where a party other than the worker or beneficiary is the appealing party and the worker's or beneficiary's right to relief is sustained, a reasonable fee for the services of the worker's or beneficiary's attorney shall be fixed by the court. In fixing the fee the court shall take into consideration the fee or fees, if any, fixed by the director and the board for such attorney's services before the department and the board. If the court finds that the fee fixed by the director or by the board is inadequate for services performed before the department or board, or if the director or the board has fixed no fee for such services, then the court shall fix a fee for the attorney's services before the department, or the board, as the case may be, in addition to the fee fixed for the services in the court. If in a worker or beneficiary appeal the decision and order of the board is reversed or modified and if the accident fund or medical aid fund is affected by the litigation, or if in an appeal by the department or employer the worker or beneficiary's right to relief is sustained, or in an appeal by a worker involving a state fund employer with twenty-five employees or less, in which the department does not appear and defend, and the board order in favor of the employer is sustained, the attorney's fee fixed by the court, for services before the court only, and the fees of medical and other witnesses and the costs shall be payable out of the administrative fund of the department. In the case of self-insured employers, the attorney fees fixed by the court, for services before the court only, and the fees of medical and other witnesses and the costs shall be payable directly by the self-insured employer.

(2) In an appeal to the superior or appellate court involving the presumption established under RCW 51.32.185, the attorney's fee shall be payable as set forth under RCW 51.32.185.

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...."

B

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

KELLY L. SHAFER, Appellant, v. DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, Respondent.	)	No. 58454-5-I PUBLISHED OPINION FILED: June 11, 2007

ELLINGTON, J. We must decide whether an order closing an industrial insurance claim becomes final where the order is based upon the opinion of a physician hired by the Department of Labor and Industries, and the closure is not communicated to the worker's treating physician. We hold that under the circumstances here, the order is not final.

BACKGROUND

Kelly Shafer worked as a waitress at AMF Sports World. In October 1998, she heard her back "snap or crack" as she lifted a keg of beer.[1] Her back pain increased during the following months, and her physician referred her to Dr. Elizabeth Cook, a physician certified in physical medicine and rehabilitation with a subspecialty in

[1] Report of Proceedings (RP) (Apr. 14, 2004) at 9.

musculoskeletal problems, particularly spinal problems. Dr. Cook was "very certain" that Shafer's work accident caused her back pain.[2] Dr. Cook treated Shafer regularly from March 1999 through November 1999, and again in 2000. With Dr. Cook's assistance, Shafer filed a workers' compensation claim with the Department of Labor and Industries (the Department). The Department approved the claim, but authorized only some of the treatments recommended by Dr. Cook.

On behalf of the Department, Dr. Kenneth Briggs also examined Shafer. After his second examination, in July 2000, Dr. Briggs concluded that Shafer's condition was "fixed and stable," such that no further treatment was available that would improve her condition.[3]

Dr. Cook had received notice of other events in Shafer's claim, and had filed reports on Shafer's behalf. She did not, however, receive a copy of Dr. Briggs' report, despite Department policy that all independent medical examination reports are sent automatically to the treating physician. When the Department asked Dr. Cook to evaluate Dr. Briggs' report, she replied that she had never seen it. She also informed the Department that she did not consider Shafer's condition fixed and stable. The Department still did not send her a copy of Dr. Briggs' report.

Two months later, on October 19, 2000, in reliance upon Dr. Briggs' report, the Department closed Shafer's claim. Shafer received a copy of the order, but Dr. Cook did not. Shafer did not request reconsideration or file an appeal with the Bureau of Industrial Insurance Appeals (BIIA). Dr. Cook later attested that had she been aware of

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[2] Id. at 66.

[3] RP (Apr. 29, 2004) at 23.

the decision to close Shafer's claim, she would have requested reconsideration because she did not believe Shafer's condition was fixed and stable.

After the claim was closed, Shafer stopped seeing Dr. Cook because she could not afford the treatments. Two-and-a-half years later, in March 2003, she returned complaining of worsening back pain. Based upon review of an MRI, Dr. Cook recommended that Shafer apply to reopen her claim on the grounds that her condition had deteriorated after the claim was closed.

The Department denied the application, finding that Shafer's condition had not objectively worsened. Dr. Cook timely requested reconsideration. The Department affirmed. Shafer timely appealed. Proceedings before the BIIA stretched on for a year.

In a telephonic hearing before an industrial appeals judge in January 2004, Shafer contended that the October 2000 closing order never became final, because Dr. Cook had not received a copy. The industrial appeals judge rejected that argument in an interlocutory order. Eventually the BIIA found that Schafer's condition had not objectively worsened after her claim was closed in October 2000.

Shafer appealed to superior court. She again contended that the closing order had never become final, but nothing in the record suggests any ruling was made. The case was tried to a jury, which found that the BIIA correctly decided that Shafer's condition had not objectively worsened.

Shafer appeals. She first contends that the order closing her claim was never final. She also argues that substantial evidence does not support the jury's finding on her petition to reopen the claim, and that the trial court abused its discretion when it ordered a CR 35 mental examination at the Department's behest.

ANALYSIS

If the closing order never became final, that issue is dispositive. We therefore address it first.

The Department argues Shafer waived this argument by failing to raise it in her petition for review before the BIIA. Although the issue was argued in proceedings before the industrial appeals judge, the Department is correct that Shafer did not expressly raise it in her petition to the Board. RCW 51.52.104 requires that a petition for review "set forth in detail the grounds therefor and the party or parties filing the same shall be deemed to have waived all objections or irregularities not specifically set forth therein." Shafer's petition sought Board review of all interlocutory orders, but this is technically not enough to satisfy RCW 51.52.104. But neither did the Department timely object, as required by RAP 2.5(a), when Shafer raised the argument before the superior court.[4] The issue has been fully briefed by both parties, here and below. We elect to resolve it pursuant to our inherent power to address issues necessary to a proper decision.[5]

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[4] RAP 2.5(a) ("The appellate court may refuse to review any claim of error which was not raised in the trial court.").

[5] Roberson v. Perez, 156 Wn.2d 33, 39, 123 P.3d 844 (2005) (appellate court's refusal to review issues not raised below is discretionary); Belnap v. Boeing Co., 64 Wn. App. 212, 223 n.6, 823 P.2d 528 (1992) (court elected to address issue crucial to case not raised in petition for review before BIIA).

As a threshold matter, we disagree with the parties about the nature of the argument. Shafer contends that because Dr. Cook did not receive a copy of the closing order, it never became final, and thus the BIIA lacked "jurisdiction" over her subsequent application to reopen the claim.[6] The Department responds that the fact Dr. Cook never received the closing order "is not a jurisdictional defect and does not relieve an injured worker of the [statutory] requirement [to file] a protest or appeal within 60 days of the worker's receipt of the Department order."[7]

Jurisdiction is not the issue here. "A tribunal lacks subject matter jurisdiction when it attempts to decide a type of controversy over which it has no authority to adjudicate. The focus must be on the words 'type of controversy.'"[8] A determination to close a claim or to deny an application to reopen a claim falls squarely within the Department's authority to decide claims for workers' compensation[9] and the BIIA's authority to review Department actions.[10] The Department had jurisdiction over the claim, and the BIIA had jurisdiction to review its decisions.

This is properly a question of statutory interpretation. We must decide whether the legislature intended to require the Department to notify the claimant's treating physician before finally closing a claim.

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[6] App. Br. at 27.

[7] Resp. Br. at 33.

[8] Marley v. Dep't of Labor & Indus., 125 Wn.2d 533, 539, 886 P.2d 189 (1994) (citation omitted).

[9] See Marley, 125 Wn.2d at 540 (citing RCW 51.04.020 and Abraham v. Dep't of Labor and Indus., 178 Wash. 160, 163, 34 P.2d 457 (1934)).

[10] RCW 51.52.050 ("Whenever the department has taken any action or made any decision relating to any phase of the administration of this title the worker, employer, or other person aggrieved thereby . . . may appeal to the board.").

In interpreting statutes, we first attempt to effectuate the plain meaning of the words used by the legislature.[11] We examine each provision in relation to other provisions and seek a consistent construction of the whole.[12] The Industrial Insurance Act, Title 51 RCW, is "liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment."[13] All doubts as to the meaning of the Act are resolved in favor of the injured employee.[14]

RCW 51.52.050 sets forth the requirements for notice, finality, and appeal of Department orders:

> 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 . . . . *[S]uch 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 . . . .
>
> 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.[15]

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[11] Advanced Silicon v. Grant County, 156 Wn.2d 84, 89, 124 P.3d 294 (2005).

[12] Id.

[13] RCW 51.12.010.

[14] Clauson v. Dep't of Labor & Indus., 130 Wn.2d 580, 584, 925 P.2d 624 (1996).

[15] (Emphasis added.)

An order is "communicated" upon receipt.[16] An order not communicated to a party does not become final, and the party is not subject to the 60-day limitation for requesting reconsideration or filing an appeal.[17]

Shafer contends that because Dr. Cook is a "person affected" by the closing order who should have received a copy of the order, and a "person aggrieved thereby" who had the right to appeal, Dr. Cook must also be a "party" to whom the order must be communicated before finality can ensue. The Department concedes Dr. Cook is a "person affected" and should have received a copy of the closing order. But the Department argues its failure to provide her with a copy had no effect upon finality, because the treating physician is not a party, and only parties must receive copies before an order becomes final.

Neither argument is fully persuasive. The legislature chose different terms for different sections of the statute, presumably for a reason, and meeting two designations does not necessarily mean the third is satisfied. It is, however, suggestive of legislative intent. The Department's assertion that the physician is not a party begs the question, which is whether the legislature intended treating physicians to receive a copy of a claimant's closing order when the order is based on an independent medical examination before the order can become final—in which case, the legislature included the physician in the "party" category for that purpose.

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[16] Rodriguez v. Dep't of Labor & Indus., 85 Wn.2d 949, 951, 540 P.2d 1359 (1975).

[17] Haugen v. Dep't of Labor & Indus., 183 Wash. 398, 401, 48 P.2d 565 (1935). See also In re Leibfried, Docket No. 88 2274, Bd. of Indus. Ins. Appeals (Dec. 7, 1990) (where claimant had not received order closing claim, application to reopen claim filed six months later should be construed as timely protest of decision to close claim).

Where a statute is ambiguous, we may look for guidance to related statutes and to the interpretation of the agency having expertise in the subject.[18] Those resources here are revealing.

RCW 51.28.020 imposes upon treating physicians an express duty to inform injured workers of their rights under the Act and to assist them in applying for compensation.[19] Further, the statute expressly authorizes physicians to file applications on their patients' behalves.[20] Physicians are also required to submit treatment reports at the Department's request.[21]

Under the Department's implementing regulations, physicians have a duty to request immediate reconsideration when they believe the Department has taken inappropriate action regarding the injured worker:

> 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 . . . .
>
> . . . .
>
> 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-

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[18] Dep't of Ecology v. Theodoratus, 135 Wn.2d 582, 589, 957 P.2d 1241 (1998) (administering agency's interpretation of statutes entitled to "great weight" if the statues are ambiguous).

[19] RCW 51.28.020 ("The physician . . . 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.").

[20] Id. ("If the application required by this section is filed on behalf of the worker by the physician, . . . the physician . . . may transmit the application to the department electronically using facsimile mail.").

[21] RCW 51.36.060.

> 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.[22]

Likewise, the Department's "Attending Doctor's Handbook," citing RCW 51.52.050, instructs physicians, "[i]f you or your patient disagree with a decision . . . *you* have the right to protest or appeal within 60 days of the date *you receive* notification of the department's decision.[23]

Thus, according to the Department, the treating physician is authorized (and indeed urged) to take steps on behalf of the injured worker that normally are available only to a claimant.

In its brief, the Department does not address the regulations or the handbook. Rather, it encourages us to follow the analyses of Wells v. Western Washington Growth Management Hearings Board[24] and Simmerly v. McKee.[25] The Wells court held that under the Administrative Procedures Act (APA), an agency's failure to serve its final order on all parties to a multiparty appeal did not relieve parties who did receive the order from the 30-day deadline for appeal.[26] The Simmerly court held that under the Mandatory Arbitration Rules (MAR), the time period for an individual party to request a trial de novo commences when the arbitrator perfects filing of the award with respect to that party, not when filing is perfected with respect to all parties.[27]

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[22] WAC 296-20-09701 (emphasis added).

[23] DEP'T OF LABOR AND INDUS., ATTENDING DOCTOR'S HANDBOOK 30 (2005) (emphasis added).

[24] 100 Wn. App. 657, 997 P.2d 405 (2000).

[25] 120 Wn. App. 217, 84 P.3d 919 (2004).

[26] Wells, 100 Wn. App. at 678.

[27] Simmerly, 120 Wn. App. at 222–23.

But these cases are not helpful. They interpret the APA and the MAR, schemes entirely distinct from the Industrial Insurance Act which do not contemplate that a nonlitigant will have a right or duty to appeal on behalf of another. Further, in each case the court relied upon procedural safeguards ensuring that no party would be prejudiced by late receipt of the final order.[28] Assuming the physician is a party, the same safeguards are not present here.

Rather, we are guided by the statute and regulations. In the Industrial Insurance Act, the legislature has carved out roles and rights for nonlitigants. The legislature expects the treating physician to serve as a medical advocate for the injured worker and as a fulcrum in the agency's evaluation of the claim. The Department implements this expectation by advising physicians they have the right and the duty to seek review on their patients' behalf. The physician cannot decide whether to appeal unless the physician knows of the order. Failure to ensure that the physician learns of the order therefore deprives both the worker and the agency of the voice of the physician, just at the critical point of finalizing a determination of the worker's future medical condition.

We conclude that when a final order, decision, or award is based upon a medical determination, the legislature considers the treating physician to be an interested party.[29] In such cases, the order does not become final until 60 days after the doctor has received it.

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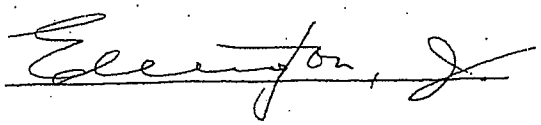
[28] Id. at 222; Wells, 100 Wn. App. at 678–69.

[29] We confine our holding to those orders based upon an assessment of the worker's medical condition. We do not address whether the physician is a party for purposes of other types of orders.

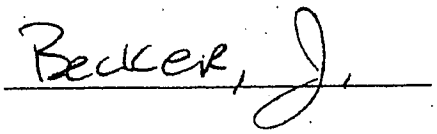
The October 19, 2000 order closing Shafer's claim never became final. A request for reconsideration or appeal, by Shafer or Dr. Cook, is still timely.

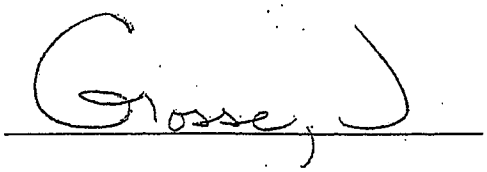
Given our disposition, we need not reach Shafer's other assignments of error. She is entitled to her attorney fees.[30]

Reversed and remanded.



WE CONCUR:





[30] RCW 51.52.130; Brand v. Department of Labor & Indus., 139 Wn.2d 659, 674, 989 P.2d 1111 (1999).

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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION ONE

KELLY L. SHAFER, Appellant, v. DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, Respondent.	)	No. 58454-5-I ORDER GRANTING MOTION FOR RECONSIDERATION IN PART AND CHANGING OPINION

The respondent filed a motion for reconsideration of the Court's opinion filed June 11, 2007. The panel has considered the motion and determined it should be granted in part. Now therefore, it is hereby

ORDERED that the opinion is hereby changed to replace all references to "treating physician" to "attending physician." It is further

ORDERED that the sentence on Page 11 that reads, "She is entitled to her attorney fees" be changed to "Her request for attorney fees must abide remand," with citation to Flanigan v. Dep't of Labor & Industries, 123 Wn.2d 418, 427, 869 P.2d 14 (1994) rather than Brand v. Dep't of Labor & Industries, 139 Wn.2d 659, 674, 989 P.2d 111 (1999). It is further

ORDERED that the phrase "have a duty to" on page 8 is changed to "are expected to" and the phrase "and the duty to" on page 10 is changed to "and are expected to."

Further reconsideration is denied.

Dated this 4th day of September 2007.

Becker, J.

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STATE OF WASHINGTON
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DECLARATION OF SERVICE

On said day below I deposited a true and accurate copy of the following document in the U.S. mail: Answer to Petition for Review in Supreme Court Cause No. 81049-4 to the following:

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Original filed 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: February 19, 2008, at Tukwila, Washington.

Christine Jones

Christine Jones, Legal Assistant
Talmadge/Fitzpatrick

FILED AS ATTACHMENT
TO E-MAIL