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**SUPREME COURT
OF THE STATE OF WASHINGTON**

KELLY L. SHAFER,

Respondent,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Petitioner.

**DEPARTMENT'S REPLY TO SHAFER'S ANSWER TO PETITION
FOR REVIEW**

ROBERT M. MCKENNA
Attorney General

John R. Wasberg
Senior Counsel
WSBA 6409
800 Fifth Avenue Suite 2000
Seattle, WA 98104-3188
(206) 464-6039

ORIGINAL

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I. INTRODUCTION

Ms. Shafer's answer to the Department's petition raises a new issue. She argues that the Court of Appeals erred in qualifying her award of attorney fees, making it contingent on the accident fund or medical aid fund being affected after remand. Answer at 17-19. Her arguments ignore the plain language of the fourth sentence of RCW 51.52.130 and a near-century of precedents and, for this reason, Ms. Shafer's issue is not appropriate for review under RAP 13.4(b).

In its successful motion for reconsideration to the Court of Appeals, the Department explained that, in the Court's initial Opinion issued June 11, 2007, in not making its attorney fee award to Ms. Shafer contingent on the results on remand, the Court overlooked the fourth sentence of RCW 51.52.130.¹ An award of attorney fees against the Department in a worker's appeal is not justified merely where some form of relief is granted, such as remand allowing further consideration. In a worker appeal, RCW 51.52.130, per its fourth sentence, obligates the Department to pay attorney fees only if and when the accident or medical aid fund is affected by the litigation.

¹ The relevant language of the fourth sentence of RCW 51.52.130 reads: "If in a worker . . . appeal the decision . . . is reversed or modified *and if the accident fund or medical aid fund is affected by the litigation* . . . the attorney's fee fixed by the court, for services before the court only, . . . shall be payable out of the administrative fund of the department." (Emphasis added).

The revised Opinion, issued September 4, 2007, corrected the ruling on attorney fees. Contrary to Ms. Shafer's argument, neither public interest nor any conflict with precedent supports her request for review of the attorney fees ruling.

II. ARGUMENT WHY THIS COURT SHOULD DENY REVIEW OF ATTORNEY FEES

A. Ms. Shafer offers no persuasive support for her argument that the Court of Appeals should have ignored the language of RCW 51.52.130 and a near-century of precedents

1. The Court of Appeals correctly recognized that neither the accident fund nor the medical aid fund may ever be affected by its decision

Even if this Court does not, per the Department's petition, accept review and reverse the remand order of the Court of Appeals (*see* Department's Petition for Review), Ms. Shafer may never receive any additional benefits after remand. On remand, the Department may ultimately affirm its closing order. If that decision occurs and it is not reversed on further protest or appeal, then no attorney fees would ever be due because neither the accident fund nor the medical aid fund would be affected by this Court's ruling on the merits of Ms. Shafer's case. *See* RCW 51.52.130 (fourth sentence); *Flanigan v. Dep't of Labor & Indus.*, 123 Wn.2d 418, 427-28, 869 P.2d 14 (1994) ("attorney fees are recoverable . . . only if . . . the litigation affects the accident fund");

Ziegler v. Dep't of Labor & Indus., 42 Wn. App. 39, 43-44, 708 P.2d 1212 (1985) (“[no fees can be awarded because] no proof was produced or finding made that the accident fund was affected [by the appeal]”).

In its original Opinion of June 11, 2007, the Court of Appeals apparently based its non-contingent awarding of attorney fees on the *fee-fixing* language of the first sentence of RCW 51.52.130. That sentence refers to fee fixing, which is the determination of the fees an attorney may charge a worker. Fees are “fixed” when “the decision or order is reversed or modified and additional relief is granted.” On September 4, 2007, the Court revised the attorney fees ruling. *Shafer v. Dep't of Labor & Indus.*, 140 Wn. App. 1, 12, 159 P.3d 473 (2007). That was because *awarding* attorney fees against the Department in a worker benefits appeal based on the *fee-fixing* language of the first sentence of RCW 51.52.130 would conflict with a near-century of statutory history and case law.²

A qualified or conditional award of attorney fees is justified here (assuming for argument that this Court does not accept review and reverse

² Appendix B to the Department’s Motion for Reconsideration below provided an annotated tracing of the entire history of development of the language of RCW 51.52.130 and its predecessor codifications going back to the origin of the Industrial Insurance Act (IIA) in 1911. Also set forth in that Appendix B was the text and historical development of RCW 51.52.120, also annotated with the single court decision interpreting that statute. The history of both statutes demonstrates that (1) the Legislature has carefully distinguished between: (a) granting authority to the Department, the Board and the courts to *fix* attorney fees and (b) granting the courts authority to *award* attorney fees; (2) that the Legislature has carefully restricted such authority; and (3) that the appellate courts have carefully and consistently recognized those distinctions and restrictions.

the result reached on the merits). The Opinion, however, was correctly revised by the Court of Appeals to reflect the statutory requirement that the qualified language of the fourth sentence of the attorney fee statute, RCW 51.52.130, is the exclusive *fee-awarding* authority, and that authority must be followed.

2. The Legislature provides for fee *awards* only in limited circumstances

Incorrect application of *fee-fixing* language in the first sentence of RCW 51.52.130 to grant awards against the Department, taken to its logical extreme and in the aggregate, could result in a multi-million-dollar expansion of fee awards in worker benefits cases. That is because erroneous application of *fee-fixing* language would imply that *fee-awarding* authority extends to RCW 51.52.120 (which addresses fixing, but not awarding, of fees for attorney work at the Department and Board). This erroneous and unjustified approach to fee fixing could support fee awards for attorney work at all levels of review, a proposition the Legislature and the appellate courts have squarely rejected in at least 20-plus appellate decisions over the past 90-plus years. *See supra* fn. 2.

3. RCW 51.52.130 requires that any award in a worker appeal be contingent on the litigation affecting the accident or medical aid fund

The fourth sentence of RCW 51.52.130 provides unambiguously that fees can be *awarded* only for work done during the court-review phase of review and only under certain specified circumstances. Here, the relevant language requires that the result of a worker's appeal affect either the accident fund or the medical aid fund:

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 . . . 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.

RCW 51.52.130 (emphasis added). Just four years ago, the Court of Appeals denied attorney fees for counsels' work performed while the case was at the Board. *Piper v. Dep't of Labor & Indus.*, 120 Wn. App. 886, 889-91, 86 P.3d 1231 (2004), *review denied*, 152 Wn.2d 1032 (2004). The Court explained that RCW 51.52.130's fourth sentence (1) is the sole ground for a fee award against the Department, and (2) is unambiguous in precluding fee awards against the Department for Board work. *Id.*

Piper relied on *Borenstein v. Department of Labor & Industries*, 49 Wn.2d 674, 676-77, 306 P.2d 228 (1957) and *Rosales v. Department of Labor & Industries*, 40 Wn. App. 712, 716, 70 P.2d 748 (1985), both of which distinguish between *fee-fixing* and *fee-awarding* authority in RCW

51.52.130. *Piper*, 120 Wn. App. at 889-90. The *Piper* Court rejected policy arguments for expanding the fee-*fixing* language in the first three sentences of RCW 51.52.130 to encompass fee-*awarding* because those policy arguments are for the Legislature. *Id.*

Borenstein similarly explained that RCW 51.52.130's language for *fixing* a fee does not grant authority to *award* a fee:

RCW 51.52.130 provides for the payment of the attorney's fee out of the administrative fund 'for services *before the court only*,' where the board is in error and the accident fund is affected. That is not to say that the attorney's fee may not be charged against an injured workman, personally, for services rendered before the department or board where some relief is secured for the workman as a result of the attorney's services. . . . The legislature, however, has made no provision for the recovery of attorney's fees from or *payable by the department for services rendered before the board*.

...

If such fees are to be paid by the department, it is a matter of policy to be determined and directed by the legislature through the enactment of a statute clearly providing

Borenstein, 49 Wn.2d at 676-77 (internal citations omitted).³

³ *Borenstein* emphasized that revising the statutory scheme to allow fee awards for services at the board level was a policy question for the Legislature:

Thus, [t]he legislature has made no provision for recovery of attorney's fees from or *payable by the department for services rendered before the board*. . . . If such fees are to be paid by the department, it is a matter of policy to be determined by the legislature through the enactment of a statute clearly providing for the payment of such fees by the department of labor and industries.

Borenstein, 49 Wn.2d at 676-77; *see also* *Rosales*, 40 Wn. App. at 716.

These cases show that Ms. Shafer's additional issue is not based on any conflict in court decisions and presents no significant policy issue for this Court to address. The Court of Appeals correctly relied on the qualified language in the fourth sentence of RCW 51.52.130 in making its award of attorney fees contingent on the result on remand affecting the accident fund or the medical aid fund. *Shafer*, 140 Wn. App. at 12, citing *Flanigan*, 123 Wn.2d at 427. *Flanigan* held in a consolidated appeal by workers' compensation beneficiaries that "attorney fees are recoverable . . . only if . . . the litigation affects the accident fund," and therefore the Court remanded one of the cases for a determination of whether the litigation did have that effect. *Flanigan*, 123 Wn.2d at 427-28.

A wealth of precedent supports *Flanigan's* singular focus on the fourth sentence of RCW 51.52.130. See *Ziegler*, 42 Wn. App. at 43-44 ("no proof was produced or finding made that the accident fund was affected" by the litigation);⁴ *Jackson v. Harvey*, 72 Wn. App. 507, 521, 864 P.2d 975 (1994) (award held supported because accident and medical aid funds affected by the court's decision); *Boeing Aircraft Co. v. Dep't of Labor & Indus.*, 26 Wn.2d 51, 58, 173 P.2d 164 (1946) (concluding that

⁴ In 1993, in apparent response to *Ziegler*, the Legislature addressed this categorical circumstance when it revised the fourth sentence of RCW 51.52.130 to authorize an award of fees to a worker for an attorney's services in the superior court where the court litigation affects the "medical aid" fund. See Laws of 1993, ch. 122, § 1.

no fees could be awarded because the accident fund was not affected by the litigation); *Carnation Co. Inc. v. Hill*, 54 Wn. App. 806, 812-13, 776 P.2d 158 (1989) (“The first portion of the statute pertains to the *fixing* of fees by the superior court. It does not authorize an *award* of fees. Its purpose is to prevent the charging of unreasonable attorney fees.”), *aff’d*, 115 Wn.2d 184, 187-89, 796 P.2d 416 (1990)⁵; *Simpson Timber Co. v. Smith*, 37 Wn. App. 796, 800, 682 P.2d 969 (1984) (concluding that the fee-fixing language of the first sentence was met but that no fees could be awarded because the fee-awarding authorization in the fourth sentence was not met).

Similarly, under a prior version of RCW 51.52.130, in *Spring v. Dep’t of Labor & Indus.*, 39 Wn. App. 751, 757, 695 P.2d 612 (1985), the Court relied on the statute’s distinction between *fixing* fees and *awarding* fees in rejecting a worker’s request for a fee award against the Department for an attorney’s *appellate* court work:

[A] party is not entitled to an *award* of attorney’s fees under a statute such as RCW 51.52.130 unless the *award* - - not merely the *fixing* - - of fees is specifically provided for in the statute.

⁵ In 1993, in apparent response to *Carnation*, the Legislature revised the fourth sentence of RCW 51.52.130 to authorize an award of fees to a worker for an attorney’s services in superior court in successfully defending (sustaining) a favorable Board decision against a Department or employer appeal. *See* Laws of 1993, ch. 122, § 1.

Spring, 39 Wn. App. at 757 (quoting from *Simpson Timber Co. v. Smith*, 37 Wn. App. 796, 800, 682 P.2d 969 (1984) (holding the same).⁶

The distinction in RCW 51.52.130 between the *fixing* of a fee and the *awarding* of a fee was also central to decisions denying fees for superior court services *to workers of self-insured employers*. See *Maxwell v. Dep't of Labor & Indus.*, 25 Wn. App. 202, 204-10, 607 P.2d 310 (1980). *Maxwell* was consolidated with another case for Supreme Court review and was reversed on both liberal construction and constitutional equal protection grounds. *Johnson v. Tradewell Stores, Inc.*, 95 Wn.2d 739, 742-45, 630 P.2d 441 (1981) (because an award would have been paid to workers for state fund employers under the fourth sentence of statute where they obtained an increase in benefits on appeal, thus affecting the accident fund, equal protection required that an award be paid to identically situated workers for self-insured employers).⁷

Indeed, nearly a century of precedents make this distinction between *fixing* fees and *awarding* fees. See also *Bodine v. Dep't of Labor & Indus.*, 29 Wn.2d 879, 887, 190 P.2d 89 (1948) (discussing predecessor

⁶ In 1993, in apparent response to the *Spring* line of cases, the Legislature addressed this categorical circumstance when it revised the fourth sentence of RCW 51.52.130 to authorize an award of attorney fees against the Department or self-insured employer for *appellate court* work under circumstances where such work would merit an award for superior court work. See Laws of 1993, ch. 122, § 1.

⁷ In 1982, in apparent response to *Maxwell* and *Tradewell*, the Legislature added a fifth sentence to RCW 51.52.130 to allow attorney fee awards to workers employed by self-insured employers. See Laws of 1982, ch. 63, § 23.

statute and cases); *Harbor Plywood Corp. v. Dep't of Labor & Indus.*, 48 Wn.2d 553, 558-60, 295 P.2d 310 (1956); *Siegrist v. Dep't of Labor & Indus.*, 39 Wn. App. 500, 504, 694 P.2d 1110 (1985) (“Among other things the statute provides for the fixing of attorney’s fees for all successful claimants in order to prevent the charging of unreasonable fees and also awards fees in certain limited cases.”); *Trapp v. Dep't of Labor & Indus.*, 48 Wn.2d 560, 561, 295 P.2d 315 (1956); *O'Brien v. Ind. Ins. Dep't*, 100 Wash. 674, 681, 171 P. 1018 (1918); *Boyd v. Pratt*, 72 Wash. 306, 308, 130 P. 371 (1913).

4. Statutory interpretation principles militate against ignoring the fourth sentence of RCW 51.52.130

Four fundamental rules of interpretation compel rejecting a fee-awarding construction of the fee-fixing provisions of RCW 51.52.120 (fee-fixing for Department and Board work) and of the first three sentences of .130 (fee-fixing for court work). First, the precedents discussed above are “as much a part of the statute as if [they] were written into it.” See *State v. Regan*, 97 Wn.2d 47, 51-52, 640 P.2d 725 (1982).

It is thus significant that the Legislature has failed to change the fee-awarding language of RCW 51.52.130 to allow fee awards against the Department for all circumstances where the courts (or administrative agencies) have fee-fixing authority, but the Legislature has amended the

fee-awarding language to address court decisions focusing on certain elements of the fee-awarding provisions.⁸ See generally *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 789, 719 P.2d 531 (1986) (legislative failure to change certain provisions in a statute, while changing others, manifests approval of construction of unchanged provisions). If the Legislature amends a statute without modifying previously construed statutory language, as has repeatedly been the case with RCW 51.52.130, the Legislature is deemed to have acquiesced in the interpretation. *Carnation Co. v. Hill*, 115 Wn.2d at 189 (“It would be judicial legislating of the most egregious nature for this court simply to amend the statute and award the requested attorney fees, particularly because the language complained of by the claimant was brought to the attention of the Legislature in [*Trapp v. Dep’t of Labor & Indus.*, 48 Wn.2d 560, 561, 295 P.2d 315 (1956)], with no legislative correction being made since then.”)

Second, this Court harmonizes statutes and avoids superfluous constructions. See *Cockle v. Dep’t of Labor & Indus.*, 142 Wn.2d 801, 809, 16 P.3d 583 (2001). If fee-fixing language supports fee awards, there would be no need for the Legislature to expressly make attorney fees payable by the Department under the fourth sentence of RCW 51.52.130.

⁸ See *supra* footnotes 2, 4-7.

Fee-awarding authority would derive from the first three sentences of RCW 51.52.130 (and from RCW 51.52.120). The phrases, “if the accident fund or medical aid fund is affected by the litigation,” “shall be payable” and “for services before the court only,” would serve no purpose in the fourth sentence of RCW 51.52.130.

Third, strained results must be avoided in statutory construction. *State v. Keller*, 143 Wn.2d 267, 277, 19 P.3d 1030 (2001). It strains common sense to suggest that the Legislature would specify the particular state fund from which awards would be paid under certain circumstances specified in the language of the fourth sentence of section 130, but would not do so under the circumstances addressed in the first three sentences of section 130 and under the circumstances addressed in section 120.

A related fourth principle derives from the fact that the Legislature has expressly addressed in the fourth sentence of RCW 51.52.130 what triggers a fee award against the Department. This implies that other circumstances are excluded. “Expressio unius est exclusio alterius: the expression of one is the exclusion of the other.” *Landmark Development, Inc. v. City of Roy*, 138 Wn.2d 561, 571, 980 P.2d 1234 (1999).

5. Ms. Shafer misplaces reliance on “liberal construction” and on the *Brand, Lee, and Tradewell* decisions

Ms. Shafer argues that the principle of liberal construction (*see* RCW 51.12.010⁹) supports her attorney fee argument. Answer at 17. When the language of a statute is clear and unambiguous, however, the statute is not subject to judicial construction, and its meaning must be derived from the words used. *Berger v. Sonneland*, 144 Wn.2d 91, 105, 26 P.3d 257 (2001). Washington decisions hold that the pertinent language of RCW 51.52.130 is “clear,” i.e., unambiguous, in regard to the distinction between *fee-fixing* and *fee-awarding* authority. *See, e.g., Trapp v. Dep’t of Labor & Indus.*, 48 Wn.2d at 562 (“the statute is clear”).

Ms. Shafer does not point to a single word in RCW 51.52.130 that might be ambiguous in this context. She does not even assert that RCW 51.52.130 is ambiguous. There is no ambiguity in the statutory distinction between *fee-fixing* and *fee-awarding* authority. Moreover, even where a statute is ambiguous, the rule of liberal construction does not require a court to overlook other rules of statutory construction or to give a strained or

⁹ Washington decisions going back at least 72 years liberally construe the Industrial Insurance Act. *See, e.g., Hilding v. Dep’t of Labor & Indus.*, 162 Wash. 168, 175, 298 P. 321 (1931) (recognizing the doctrine of liberal construction as already extant in Washington). The “liberal construction” rule was at least 40 years old when it was codified in RCW 51.12.010. *See* § 2, ch. 289, Laws of 1971, ex. s. Thus, the rule of liberal construction was extant at the time nearly all of the decisions discussed above were decided.

unrealistic interpretation. *Republican Campaign Comm. v. Public Discl. Comm'n*, 133 Wn.2d 229, 241-45, 943 P.2d 1358 (1997).

Ms. Shafer also attempts to draw support from *Brand v. Dep't of Labor & Industries*, 139 Wn.2d 659, 989 P.2d 1111 (1999). Answer at 17-19. But she fails to show any logical link between *Brand* and this case.

There was no dispute in *Brand* that fees should be awarded where the superior court had granted additional compensation benefits that affected the accident fund per RCW 51.52.130. Rather, *Brand* concerned whether the fee award should be reduced by discounting hours spent on unsuccessful theories, and whether the fee award should include an assessment of overall success. *Brand*, 139 Wn.2d at 669-74. The Court held that the classes of compensation provided for “workers’ compensation claims [for different categories of benefits] are not unrelated and should not be segregated in terms of successful and unsuccessful claims for the purpose of calculating attorney fees under RCW 51.52.130.” *Brand*, 139 Wn.2d at 673.

Important to the *Brand* Court was that RCW 51.52.130 “does not distinguish between successful and unsuccessful claims brought on appeal.” 139 Wn.2d at 666. This is distinguishable from the instant case, where express language in RCW 51.52.130 precludes an award unless and until the accident fund or medical aid fund is affected by the litigation.

Thus, *Brand* did not involve a question of whether fees should be awarded, nor did it involve ignoring the controlling statutory language. Accordingly, Ms. Shafer's reliance on *Brand* is misplaced.

Ms. Shafer also relies on the 1981 *Tradewell* decision of this Court discussed briefly above at 9. Answer at 17-18. *Tradewell* primarily involved an equal protection issue under the fourth sentence of RCW 51.52.130, with the two classes for equal protection purposes being (1) workers for state fund employers, who were covered, and (2) workers for self-insured employers,¹⁰ who were not. *Tradewell*, 95 Wn.2d at 742-45.¹¹ Mrs. Shafer's attorney fee claim does not involve an equal protection problem and instead depends on the garden variety application of the plain language of the fourth sentence of RCW 51.52.130, which requires that any attorney fees award to the worker against the Department be contingent on the result of the litigation affecting the accident fund or the medical aid fund.

Ms. Shafer also claims support in *Boeing Company v. Lee*, 102 Wn. App. 552, 8 P.3d 1064 (2000). Answer at 17-18. There, the worker had prevailed in Boeing's appeal to the Board from a Department order

¹⁰ Under RCW 51.14.010, Washington employers must secure workers' compensation coverage for their workers either by paying premiums to the "state fund" or by qualifying as self-insurers.

¹¹ As noted *supra* n. 7, in 1982, in apparent response to *Tradewell*, the Legislature added a fifth sentence to RCW 51.52.130 to allow attorney fee awards to workers employed by self-insured employers. See Laws of 1982, ch. 63, § 23.

awarding compensation. *Id.* at 554. Boeing appealed to superior court but then voluntarily dismissed its appeal the first day of trial. *Id.*

Lee concerned whether, when an employer appeals to superior court and then dismisses the appeal prior to trial, the worker's "right to relief is sustained" on the appeal within the meaning of RCW 51.52.130. *Id.* at 555.¹² Analogizing to "prevailing party" cases from other areas of law, and considering the purposes of RCW 51.52.130, *Lee* held that the statute was met. *Id.* at 555-59. Ms. Shafer, in contrast, is not requesting that any particular language be construed. Instead, she is requesting that statutory language be ignored. *Lee* does not help Ms. Shafer.

Ms. Shafer also appears to suggest that the *Flanigan* decision relied upon by the Court of Appeals was implicitly overruled by *Brand*. Answer at 19. But *Brand* concerned how to compute fees, not the threshold question of whether fees should be awarded. *Brand* has nothing to do with the issue of whether the fourth sentence of RCW 51.52.130 controls fee-awarding authority. Nothing in *Brand*, and no decision since *Brand*, suggests that *Brand* overruled *Flanigan*.

¹² *Lee* quoted the fee-fixing language of the first sentence of RCW 51.52.130, rather than the applicable fee-awarding language of the fourth and fifth sentences of the statute. *Id.* at 555. But this technical error in *Lee* is of no moment because both the first sentence and the fourth sentence of RCW 51.52.130 identically reference court appeals by another party where a worker's "right to relief is sustained." RCW 51.52.130.

Ms. Shafer attempts to distinguish *Flanigan* by suggesting that *Flanigan* did not address workers' benefits but instead addressed only the protection of spousal recoveries in third party actions. Answer at 19. But *Flanigan* held that loss of consortium claims are "covered by" the Industrial Insurance Act. *Flanigan*, 123 Wn.2d at 426. The Court held that the attorney fees provisions of RCW 51.52.130 apply to such actions (*id.* at 427), and that if the accident fund were affected by its ruling limiting the Department's reimbursement right, then attorney fees would be payable to the beneficiaries under the fourth sentence of RCW 51.52.130 (*id.* at 427-28). Thus, *Flanigan* supports the attorney fees ruling here, and Ms. Shafer's attempt to distinguish *Flanigan* fails.

B. There is no merit to Ms. Shafer's argument that the Department was precluded below from requesting reconsideration on attorney fees

Ms. Shafer argues that the Department was precluded from arguing in its motion for reconsideration the nuance that Ms. Shafer was entitled to only a qualified award of attorney fees, contingent on her success on remand. Answer at 15-16. She contends the Department waived or abandoned the right to take any position on the issue of attorney fees

because the Department did not address attorney fees in its Brief of Respondent. Answer at 15-16.¹³ She is wrong for several reasons.

First, the Department had no reason to anticipate that the Court of Appeals would not conform any award of attorney to the language of RCW 51.52.130 and the settled precedents interpreting it.

Moreover, nothing in Ms. Shafer's opening brief suggested that it would be necessary for the Department to explain this nuance of RCW 51.52.130 to prevent the Court of Appeals from granting an award of attorney fees that did not square with the fourth sentence of the statute. The attorney fees section of Ms. Shafer's opening brief argued only that she would be entitled to an award of attorney fees if the Court accepted her primary theory that her claim must be reopened for benefits as a matter of law. Appellant's Brief at 31-32. Nowhere in her request for attorney fees did she claim a right to fees should she prevail on her alternative theory that the case should be merely remanded for the Department to reassess whether the Department's claim closure order was appropriate. Thus, Ms. Shafer's opening brief did not request attorney fees based upon

¹³ Ms. Shafer also appears to complain that she had no opportunity to complain to the Court of Appeals regarding the Department's motion. Answer at 15-16. But nothing in the RAPs would have a precluded Ms. Shafer from filing a motion to strike the Department's motion for reconsideration or from filing a motion seeking permission to file an answer. In any event, Ms. Shafer filed a motion for reconsideration of the Court's September 4, 2007 revised Opinion, and the Court considered and rejected the same waiver and RCW 51.52.130 arguments that she is now making to this Court.

the particular merits theory addressed by the Court of Appeals (RCW 51.52.050) or upon the particular result the Court reached (remand).

Also, the Department's motion for reconsideration did not argue, and the Court of Appeals on reconsideration did not rule, that Ms. Shafer was not entitled to an award of attorney fees. Rather, the Department argued, and the Court of Appeals ruled on reconsideration, that under RCW 51.52.130 any award of attorney fees to Ms. Shafer must be made contingent on the results following remand.

Application of implicit abandonment and waiver theories is discretionary with the appellate courts and was appropriately rejected here, where nothing in the record supports abandonment or waiver. *See, e.g., Obert v. Envtl. Research & Dev. Corp.*, 112 Wn.2d 323, 333, 771 P.2d P.2d 340 (1989); RAP 1.2(a).

Finally, the appellate courts ultimately have inherent authority to address issues in this context. Appellate courts possess "inherent power to address issues necessary to a proper decision." *Shafer*, 140 Wn. App. at 6 (citing *Roberson v. Perez*, 156 Wn.2d 33, 39, 123 P.3d 844 (2005); *Belnap v. Boeing Co.*, 64 Wn. App. 212, 223 n.6, 823 P.2d 528 (1992)); *see also State v. Aho*, 137 Wn.2d 736, 740-41, 975 P.2d 512 (1999) ("this court has the authority to determine whether a matter is properly before the court, to perform those acts which are proper to secure fair and orderly review, and

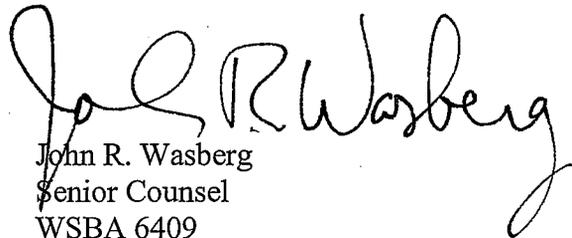
to waive the rules of appellate procedure when necessary to ‘serve the ends of justice”). Ms. Shafer cites no authority suggesting that, once the Court of Appeals has exercised its discretion to waive the rules or has exercised its inherent authority, there is any basis for overturning such a decision.

III. CONCLUSION

This Court should grant review on the merits issues the Department addressed in its petition but should deny review on the settled attorney fees issue that Ms. Shafer raises in her answer to the Department’s petition.

RESPECTFULLY SUBMITTED this ^{7th} day of March, 2008.

ROBERT M. MCKENNA
ATTORNEY GENERAL



John R. Wasberg
Senior Counsel
WSBA 6409
800 Fifth Avenue Suite 2000
Seattle, WA 98104-3188
(206) 464-6039