NO. 1032625

SUPREME COURT
OF THE STATE OF WASHINGTON

RODOLFO M. APOSTOL,

Petitioner,

v.

WASHINGTON STATE DEPARTMENTOF
LABOR AND INDUSTRIES,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Petitioner Rodolfo Apostol seeks this Court's review based on a wrong fact and a waived issue, and his petition meets none of the criteria for review under RAP 13.4(b). The Court should deny the petition.

In this worker's compensation appeal, Apostol applied to reopen a closed claim for a worsening condition, arguing the claim was never closed because the closing order was never communicated to his attending physician. Apostol insists that Ken Mayeda, MD, was the attending physician for his wrist injury workers' compensation claim, but the record shows that Dr. Mayeda treated Apostol for a different injury—not the injury underlying the claim here. Nothing supports Apostol's argument that Dr. Mayeda was his attending physician for the relevant injury claim, so the rule in *Shafer v. Department of Labor & Industries*, 166 Wn.2d 710, 718, 213 P.3d 591 (2009)—that the Department of Labor and Industries must send a closing order to a worker's attending physician for it to

become final and binding—does not apply. Furthermore, a jury found that the Department's order was communicated to David Kim, MD, who did treat the wrist injury. On appeal, Apostol did not argue that his claim never became final because of who the Department sent notice to until he raised it in his reply brief. Because Apostol did not assign error or argument to this issue in his opening brief, the Court of Appeals correctly declined to consider the issue.

Apostol fails to show a conflict with the decision below and *Shafer* or an issue of substantial public interest. This Court should deny review.

II. ISSUE

1. **Did the Court of Appeals properly decline to consider whether Apostol's closing order was final when it was not sent to Dr. Mayeda when Apostol raised this issue for the first time in his reply brief?**

2. **Does the Court of Appeal's decision conflict with *Shafer*, when substantial evidence shows that Dr. Kim was Apostol's attending physician and that Dr. Kim received the closing order, and when Dr.**

Mayeda treated Apostol for an unrelated injury?

III. FACTS

A. Background of Industrial Insurance Act

When the Department allows a claim for an on-the-job injury, it provides the worker with "proper and necessary" medical treatment until the medical conditions caused by the injury have reached maximum medical improvement. RCW 51.36.010(2)(a); WAC 296-20-01002. While a worker's claim is open for treatment, their doctor may prescribe treatment for conditions related to the injury and certify wage replacement benefits. *See* RCW 51.32.090; RCW 51.36.010.

Once the worker's medical condition has reached a "fixed" state and no further improvement is expected to occur, the Department closes the worker's claim. *Franks v. Dep't of Lab. & Indus.*, 35 Wn.2d 763, 766-67, 215 P.2d 416 (1950). The Department must send the closing order to the worker's

attending physician for the injury at issue in the claim or the closure is not final. *Shafer*, 166 Wn.2d at 718.

A worker can apply to reopen their claim if their condition has worsened since closure. RCW 51.32.160. This depends on having a closed claim originally. *Reid v. Dep't of Lab. & Indus.*, 1 Wn.2d 430, 436-38, 96 P.2d 492 (1939)

B. Apostol Sustained an Industrial Injury in August 2005, While Using a Sledgehammer

Apostol has an allowed claim based on an August 2005 industrial injury, which occurred while he was using a sledgehammer to break up concrete. AR 1155, 1658.

Apostol received treatment from Dr. Kim for a stress fracture to his left wrist that he incurred as a result of the August 2005 injury. AR 1483. Dr. Kim assisted Apostol in filing the claim for the August 2005 injury. AR 1484. Dr. Kim treated Apostol through 2006. AR 1486-87. Dr. Kim put Apostol's wrist in a cast for four months, after which time the fracture healed. AR 1553-54. Dr. Kim did not treat any of

Apostol's medical issues other than the left wrist injury. AR 1496-97.

Separate from the August 2005 industrial injury, Apostol filed a different worker's compensation claim based on stress that Apostol related to his employer's treatment of him, including ultimately terminating Apostol. AR 1503-04. Apostol referred to this as a stress claim. AR 1503-04. Dr. Mayeda treated Apostol for the stress claim. AR 1503-04, 1599-1600. Apostol's stress claim was rejected under RCW 51.08.142, which does not allow claims solely based on stress. AR 1506-07. He appealed but was not successful. AR 1506-07. Dr. Mayeda did not treat Apostol's left wrist. *See* AR 1581.

Dr. Mayeda had been providing Apostol with general medical care since the 1990s. AR 1578. Dr. Mayeda testified that Apostol had a dysthymic disorder, which he described as a mood disorder, as of 1997. AR 1947; *see also* AR 1753, 1795. Dr. Mayeda believed Apostol had post-traumatic stress disorder (PTSD), and other mental and physical conditions, as of 2005,

but did not have those conditions before that date. AR 1933-35. Dr. Mayeda believed the PTSD was related to Apostol's job stress, his treatment at work, and his termination from employment. AR 1937, 1948-49.

Apostol continued working for his employer after the August 2005 injury, until towards the end of September 2005. AR 1659. Apostol had a meeting with his employer on the last day he worked. AR 1867. Apostol stated that his "stress claim" was based on the meeting. *See* AR 1867. Dr. Mayeda put Apostol on medical leave after the meeting, based on stress and PTSD symptoms. AR 1599-1600.

The Department issued an order closing Apostol's wrist claim in October 2006. AR 519-20, 1155. The Department sent a copy of the order to the Virginia Mason Medical Center, the medical facility at which Dr. Kim treated Apostol for the wrist injury. *See* AR 519-20. The Department did not send a copy of the order to Dr. Mayeda. *See* AR 519-20. Apostol did not appeal from the October 2006 order.

C. The Department Denied Apostol's Application To Reopen His Wrist Injury Claim in 2018, and the Board Affirmed the Department

Apostol applied to reopen his claim in February 2017. AR 1155. After a series of decisions and protests by Apostol, the Department ultimately denied the application to reopen the claim in July 2018. AR 1156. In addition to denying the request to reopen the claim, the Department's July 2018 order also determined that Apostol's PTSD, depression, and neck sprain were not related to the August 2005 injury. AR 1156.

Dr. Kim testified that the wrist condition had likely resolved as of the date of the closing order. AR 1499. Gary Pushkin, MD, examined Apostol and reviewed records regarding his claim. AR 2075-76. Dr. Pushkin testified that the left wrist injury "healed years ago" and that the wrist was normal at the time of his examination (AR 2111) and that the other conditions Apostol was complaining of were not related to the wrist injury (AR 2079).

Dr. Mayeda testified that it is possible, but hard to know, whether Apostol's various medical conditions other than the left wrist injury were proximately caused by the left wrist injury. *See* AR 1593-94. Dr. Mayeda explained that it was hard to connect the PTSD to the left wrist injury, and that the PTSD had more to do with Apostol's overall work experiences and his ultimate termination from employment. AR 1920.

The Board affirmed the Department, finding no worsening of the wrist injury claim. AR 8-12. Apostol appealed the Board's decision. *See* CP 525-28.

D. The Superior Court Affirmed the Board, Which Had Affirmed the Department

At superior court, the case was tried before a jury. *See* CP 526. The jury returned a verdict indicating that it agreed with the Board of Industrial Insurance Appeals (Board) that Apostol's condition had not worsened. CP 504-05. The jury found that the Department's order closing the wrist injury claim

was communicated to Dr. Kim, who treated the wrist injury. CP 505.

Apostol appealed. CP 590-611, 613-19. At the Court of Appeals, Apostol argued in his reply brief that the closing order did not become final because it was not communicated to Dr. Mayeda. *Apostol v. Dep't of Lab. & Ind.*, No. 58072-1-II, 2024 WL 2151815 (Wash. Ct. App. May 14, 2024) (unpublished). The Court of Appeals declined to consider the issue because Apostol did not assign error or argument to the claim in his opening brief. *Id*. at *6 (FN 3). While Apostol's opening brief raised a question of whether Dr. Mayeda was a person affected by the closing order and whether he should have received it, he did not argue in his opening brief that the failure to send the closing order to Dr. Mayeda meant that the claim was never closed, nor did he argue that that meant that litigation of whether his claim should be reopened was premature. *See* AB 1, 28. Rather, he argued that the

failure to send the closing order to Dr. Mayeda meant that Apostol was allowed to seek benefits "with no time limitation in reopening per RCW 51.32.160." The Court of Appeals affirmed the Board's decision in an unpublished opinion. *Id*.

Apostol petitions for review. In a reopening case, it is germane whether the original closing order was a final decision: if there was no final closing order, then litigation of whether the claim should be reopened is premature. *See Reid v. Dep't of Lab. & Indus.*, 1 Wn.2d 430, 436-38, 96 P.2d 492 (1939). Apostol argues before this Court that there was not a final decision closing Apostol's claim, because Dr. Mayeda did not receive the order. Pet. at 7-8, 24.

IV. ARGUMENT

This Court should deny review as Apostol fails to show either that the decision conflicts with *Shafer* or that the case presents an issue of substantial public interest.

A. There Is No Conflict With *Shafer*

Below, the Court of Appeals declined to reach the issue of whether Apostol's industrial injury claim became final, because he did not argue this issue in his opening brief. *See Apostol*, 2024 WL 2151815, at *3 (citing *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992)). They were right to conclude that "[a]n issue raised and argued for the first time in a reply brief is too late to warrant consideration." *Cowiche Canyon Conservancy*, 118 Wn.2d at 809.

Moreover, the Department complied with RCW 51.52.050 by sending a copy of its October 2006 order closing Apostol's claim to Dr. Kim, who was the attending physician for the August 2005 wrist injury claim. *See* AR 519-20; *Shafer*, 166 Wn.2d at 718. Under *Shafer*, a decision of the Department must be communicated to a worker's attending physician in order for the decision to become final and binding. *Id*. *Shafer* does not require the Department to communicate its

orders to any physician who may have ever treated the worker: it specifically held that the worker's attending physician must receive the order. *Id*. *Shafer* is based in substantial part on the fact that attending providers have legal duties to assist injured workers with their claims, a duty not shared by other treating providers. *See id*.

The record supports that Dr. Kim was Apostol's attending physician for his August 2005 injury, in which he sustained a wrist fracture as a result of hammering concrete with a sledgehammer.AR 1155, 1493-87. Dr. Kim treated Apostol for the wrist fracture and assisted Apostol in filing the August 2005 injury claim. AR 1483-87. Assisting a worker in filing a claim is a duty of a worker's attending physician. *See* RCW 51.28.020. The jury's verdict is supported by substantial evidence.

Apostol insists that Dr. Mayeda was the attending physician for his wrist injury claim, pointing to the documents in the record from Dr. Mayeda. Pet. 23-24. But many of the

records Apostol cites were rejected by the Board and are not part of the record in this case and cannot properly be used to support any factual assertion regarding the case. AR 12 (rejecting exhibits 1 through 26, except for Exhibit 17 and Exhibit 19, and admitting Exhibit 27).

None of the records, including the ones that the Board rejected, establish that Dr. Mayeda was the attending physician for Apostol's wrist injury claim. Most of the medical charts from Dr. Mayeda do not mention an injury. *See, e.g.,* AR 2126, 2129-32, 2134-2138. The ones that mention an injury reference stress or harassment at work rather than a wrist injury. *See, e.g.*, AR 2144. Other notes mention stress related to some sort of "legal" case with his employer, but not the wrist injury. *See, e.g.*, AR 2123, 2129, 2139.

For *Shafer* to apply, Dr. Mayeda had to be Apostol's attending physician under the wrist injury claim, not simply a doctor who treated him for different issues at the same time that the wrist claim was pending. Apostol points to testimony from

Dr. Mayeda that he was still Apostol's "treating doctor" as of October 13, 2006. Pet. 23; AR 1582. But this does not establish that he was Apostol's attending physician as opposed to a doctor who treated him for other non-claim related conditions or for injuries under separate claims. And Dr. Mayeda acknowledged he did not really have any records regarding Apostol's left wrist, making it implausible that the was the attending physician for the wrist claim at any time. AR 1582.

Apostol shows no conflict with *Shafer*.

B. Apostol Shows No Issue of Substantial Public Interest

Dr. Mayeda did not treat Apostol for the wrist injury claim, and instead treated him for a separate and unrelated job stress claim, so there is no issue of substantial public interest as to whether Dr. Mayeda was a person affected by the Department's decision to close Apostol's wrist injury claim under RCW 51.52.050. Under any reasonable interpretation of the relevant statute, a provider who did not treat a worker under

a given claim is not a person "affected" by a decision on that claim. *See* RCW 51.52.050.

V. CONCLUSION

The Department asks this Court to deny review.

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RESPECTFULLY SUBMITTED this 16th day of September, 2024.

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SUPREME COURT
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RODOLFO M. APOSTOL, Appellant, v. WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES, Respondent.	DECLARATION OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the state of Washington, declares that on the below date, I served the Department's Answer to Petition for Review and this Declaration of Service in the below described manner:

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DATED this 16th day of September, 2024, at Olympia, Washington.

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