NO. 1034580

SUPREME COURT OF THE STATE OF WASHINGTON

ELDINA NOVALIC,

Petitioner,

v.

PEACEHEALTH AND DEPARTMENT OF LABOR AND INDUSTRIES,

Respondents.

DEPARTMENT OF LABOR AND INDUSTRIES ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

The Court of Appeals decision follows the well-settled legal principle that injured workers who do not cooperate with medical exams without good cause have their workers' compensation claims suspended. Eldina Novalic was injured while working as a nurse for PeaceHealth Southwest Washington Medical Center. She applied for workers' compensation benefits under the Industrial Insurance Act. As part of the administration of Novalic's claim, PeaceHealth requested that Novalic attend an independent medical examination (IME). Because of the COVID-19 pandemic and related travel restrictions, PeaceHealth notified Novalic shortly before the examination that it would be conducted remotely by telehealth. Novalic's counsel objected, and Novalic did not attend.

As a result of Novalic's failure to attend the exam, the Department of Labor and Industries (L&I) suspended her benefits. The Board of Industrial Insurance Appeals (BIIA), the

superior court, and the Court of Appeals affirmed the suspension of benefits.

Novalic now seeks review based on the argument that PeaceHealth violated L&I's temporary telehealth policy when it shifted the exam to telehealth without her consent. But this policy does not present an issue of substantial public interest that should be determined by this Court under RAP 13.4(b)(4). First, the temporary policy was authorized by statute and rule. Further, the temporary policy in question is no longer in effect, with no reoccurrence of this issue possible. This Court should deny review.

II. ISSUE PRESENTED

Did L&I correctly suspend benefits where the employer scheduled a telehealth independent medical examination, as permitted by governing statute and rules, and the claimant refused to attend without good cause?

III. STATEMENT OF THE CASE

A. Background of Industrial Insurance Law

When a worker sustains an industrial injury, they may file a claim for workers' compensation benefits. RCW 51.28.020. Workers' compensation benefits include medical treatment, wage replacement, and disability benefits. RCW 51.32.010, .060, .080, .090, .180; RCW 51.36.010.

L&I claims may be administered by L&I, or if an employer has elected to self-insure, by that employer. RCW 51.08.173; RCW 51.14.010. Self-insured employers "pay directly to workers any disability and medical benefits." *Dep't of Lab. & Indus. v. Ortiz*, 194 Wn. App. 146, 152, 374 P.3d 258 (2016).The Industrial Insurance Act defines a "[s]elf-insurer" as an "employer . . . which has been authorized under [the Act] to carry its own liability to its employees covered by [the Act]." RCW 51.08.173.

When L&I or a self-insured employer needs a medical opinion to move a claim forward (for example, to resolve a new

medical issue), L&I or the self-insured employer may schedule the worker to be examined by a physician of L&I or the self-insured employer's choice. *See* former RCW 51.36.070 (2001). Workers receiving benefits must attend such an exam at a location reasonably convenient to the worker. Former RCW 51.32.110(1) (1997). If the worker receives notice of an exam and refuses to attend to the exam without good cause, L&I can suspend the worker's benefits. Former RCW 51.32.110(2).

The need for the telehealth appointment in this case was caused by the COVID-19 pandemic, and while COVID-19 remains, the pandemic phase has resolved. At the time, "[t]he COVID-19 pandemic [was] a disaster unlike any the citizens of Washington have seen before." *Matter of Recall of Inslee*, 199 Wn.2d 416, 434, 508 P.3d 635 (2022). "COVID-19 is a novel, potentially deadly, severe acute respiratory illness caused by a virus that is most commonly transmitted person to person." *Slidewaters LLC v. Dep't of Lab. & Indus.*, 4 F.4th 747, 752 (9th Cir. 2021). It is estimated that there have been over 103

million cumulative cases in the United States. World Health Org., *WHO COVID-19 Dashboard: United States of America*.[1] In Washington, in 2020 alone, there were over 262,000 cases, with over 15,000 hospitalizations and almost 4,500 deaths. Wash. State Dep't of Health, *COVID-19 Annual Report 2020: Case, Hospitalization, and Death Surveillance* 3 (2023).[2]

In response to the pandemic, on March 9, 2020, L&I issued a payment policy related to L&I or self-insured employers paying doctors that was directed explicitly to IME providers that provided for compensation for telehealth examinations. As the Court of Appeals observed, "the disruption caused by the pandemic forced hasty innovations throughout society." *Novalic v. Peacehealth*, No. 58451-4-II, Slip op. at 10 n. 3 (Wash. Ct. App. July 16, 2024) (published).

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[1] https://data.who.int/dashboards/covid19/cases?m49=840&n=c (choose "Total cumulative") (last visited Oct. 7, 2024).

[2] https://doh.wa.gov/sites/default/files/2023-05/421038-2020Covid19AnnualReport.pdf.

The policy was called the "Temporary Record Review & Telehealth Independent Medical Exams (IME) Policy." Certified Appeal Board Record (AR) 18. On the first page of the policy, immediately above the title, the document carries the description "Payment Policies for Healthcare Services Provided to Injured Workers and Crime Victims." AR 18. Another portion of the policy was entitled "Payment [P]olicy: Temporary Telehealth IME and Record Review." AR 20. In that portion, the policy explained that it was designed to limit the spread of COVID-19 while allowing IMEs to continue. *Id.* The policy instructed providers on how to conduct telehealth exams to be able to bill for them and how to bill and document telehealth exams. AR 20. It had language opining that "[t]he claims manager, worker, representative, employer, or any other party to the claim, must also agree a telehealth IME is appropriate." *Id.*

In 2020, the Legislature amended RCW 51.36.070 to clarify the procedures about telehealth examinations "if the

department determines telemedicine is appropriate for the examination." Laws of 2020, ch. 213, § 3(1)(b). The amendment effective January 1, 2021, specifies that the examination must be "at a place where residents in the injured worker's community would normally travel to seek medical care for the same specialty as the examiner." *Id.* And WAC 296-14-410(3)(a) provides that a notice of an examination must provide "at least 14 but no more than 60 days" of notice of the exam. The notice is required to include three things: "the date, time[,] and location of the examination." *Id.* If the notice does not include these three things, the worker will not be considered noncooperative for failing to attend the examination. *Id.*

B. Novalic Refused to Attend a Telehealth Psychiatric Exam

In spring 2019, Novalic sustained a back injury while working for PeaceHealth, a self-insured employer. AR 172, 198. Novalic applied for workers' compensation benefits, and L&I allowed the claim. AR 198. CorVel Corporation administered Novalic's claim on PeaceHealth's behalf, and

Harold Lee, MD, treated Novalic for her claim-related back conditions. AR 169, 172-73. In January 2020, Dr. Lee expressed concern that Novalic had anxiety stemming from her industrial injury. AR 172-73.

Based on Dr. Lee's concerns, CorVel scheduled an IME for Novalic in February 2020 with psychiatrist Michael Ward, MD. *See* AR 170, 174. That exam was cancelled (for reasons that are not part of the record) and later rescheduled for May 2020. AR 175-76.

In a May 7, 2020, letter, CorVel notified Novalic that psychiatrist Jean Dalpe, MD, would examine Novalic on May 22, 2020. AR 176. The letter included the date and time of the exam, as well as its location in Vancouver, Washington. AR 176. The letter further notified Novalic that her attendance was mandatory, she must notify CorVel within five working days of any "valid" reason why she cannot attend, and her benefits may be suspended if she fails to attend and cooperate with any exam requested by PeaceHealth. *Id*.

Dr. Dalpe could not travel to Vancouver as planned because of COVID-19 related reasons. AR 141. Dr. Dalpe notified the company that arranged her IME (Medical Consultants Network) of this, and she asked to conduct the exam via telehealth. AR 141, 182-83. The telehealth payment policy went into effect after Novalic's initially scheduled February 2020 examination but before the rescheduled examination. *See* AR 18.

On May 19, 2020, the company notified Novalic that the exam would be via telehealth. AR 182-83. The company told Novalic that she could attend the exam as scheduled at its Vancouver office, where staff could help her connect with Dr. Dalpe on an in-office computer, or she could attend on her own using any smartphone, tablet, or computer. AR 180, 182-83.

Novalic's attorney, Steven Busick, and PeaceHealth's attorney discussed the telehealth exam the next day. AR 184-85. In a May 20, 2020, email, PeaceHealth's attorney advised Novalic's attorney that "we are expecting Ms. Novalic to attend

the May 22, 2020 psychiatric examination with Dr. Dalpe. Should [you] continue objecting, we will pursue noncooperation." AR 184. Around that same time, Busick faxed a letter to PeaceHealth's attorney stating that Novalic would not attend the exam because it would be held via telehealth. Busick wrote:

> When we learned . . . that the psychiatric evaluation . . . was to be by telecommunication rather than in person, we called the claim administrator and I talked to her supervisor to advise her that claimant would not be attending the psychiatric evaluation. The mental status examination, which is the most important part of the psychiatric evaluation, needs to be based on personal observations.

AR 186. CorVel cancelled the exam based on Novalic's refusal to attend. AR 187.

Afterward, Novalic's attorney wrote a letter to L&I further explaining Novalic's position. AR 188. In the letter, Busick argued that "[t]he use of teleconferencing produces substantial visual distortions, as evidenced by national video productions, such as witnessed on the PBS NewsHour,

broadcast nightly." AR 188. After receipt of the letter, L&I issued an order suspending Novalic's benefits for her refusal to attend the May 2020 exam. AR 219-20.

C. The Board Ruled That the Department Correctly Suspended Novalic's Benefits for Good Cause, and the Superior Court and Court of Appeals Affirmed

Novalic appealed L&I's decision to the BIIA. AR 198, 213-14. PeaceHealth and Novalic both cross-moved for summary judgment. AR 110, 128. PeaceHealth argued that L&I's order should be affirmed because the May 7, 2020, notice gave Novalic 14 days' notice of the date, time, and location of the exam as required by WAC 296-14-410(3)(a), and Novalic did not show good cause for her refusal to attend the exam. AR 133-38. Novalic disputed this theory, arguing an in-person examination was necessary. AR 118.

In their declarations, Dr. Ward, Dr. Dalpe, and Paul Ciechanowski, MD, stated their qualifications as licensed and board-certified psychiatrists. AR 141, 143, 167. They all stated that, because of the COVID-19 pandemic, they regularly used

telehealth to conduct exams, not only for IMEs, but also in their regular practices with their own patients. AR 141-42, 143-44, 167-68. And they all stated that telehealth exams are an appropriate alternative for evaluating psychiatric conditions. AR 142, 144-45, 168. Dr. Ciechanowski stated that he based his opinion on published peer-reviewed journals, which show that there is no significant difference between telehealth and in-person psychiatric exams. AR 144, 146-166.

In a proposed decision and order, the Industrial Appeals Judge (IAJ) granted PeaceHealth's motion for summary judgment, denied Novalic's, and affirmed L&I's decision to suspend Novalic's benefits. AR 35-40. The IAJ determined that the May 7, 2020, notice of exam met all of WAC 296-14-410(3)'s requirements, that there was no dispute that Novalic did not attend the exam, and that Novalic did not have good cause for refusing to attend the exam. AR 36-38. The IAJ rejected Novalic's argument that telehealth was not authorized. AR 38.

Novalic petitioned for review. AR 6-10. The BIIA denied Novalic's petition, granting summary judgment. AR 4.

Novalic appealed to superior court. CP 1. The superior court upheld the BIIA's decision. CP 13-14. The Court of Appeals affirmed. *Novalic*, slip op. at 15. The Court of Appeals held that PeaceHealth could require Novalic to attend a telehealth IME and that L&I's policy did not override the statutory authority to require attendance. *Id.* at 8-12.

IV. ARGUMENT

L&I or a self-insurer can require a worker to attend a medical exam to resolve a new medical issue, and the worker must attend if the examination is scheduled at a reasonably convenient place. Former RCW 51.32.110(1); former RCW 51.36.070(1).

If a worker refuses to submit to the medical exam, the Department may suspend the worker's benefits if the worker had no good cause for the refusal. Former RCW 51.32.110(2). The burden of justifying any refusal to attend an exam is on the

worker. *Andersen v. Dep't of Lab. & Indus.*, 93 Wn. App. 60, 64, 967 P.2d 11 (1998) (citing former RCW 51.32.110).

Novalic argues that L&I's payment policy for IME providers requires her consent to a telehealth independent medical examination. Pet. 15. She is incorrect, and this is not an issue of substantial public interest warranting this Court's review. *See* Pet. 8. Under governing law, Novalic's consent to a telehealth IME was not required. Moreover, this case does not present a recurring problem. The policy was a temporary one and is no longer in effect. There is no issue of substantial public interest warranting review.

A. There Is No Reason for Review Because, by Both Statute and Rule, Telehealth IME Examinations Were Allowed at the Time of Novalic's Examination

L&I had the authority to require telehealth examinations. Former RCW 51.32.110(l), in effect at the time of the facts here, provided that any worker who is entitled to receive benefits "shall, if requested by the department or self-insurer, submit [themselves] for medical examination, . . . at a place

reasonably convenient for the worker." Former RCW 51.36.070 requires a worker to submit to an examination whenever L&I or the self-insurer "deems it necessary" to resolve any medical issue.

As the Court of Appeals concluded, there is no language in former RCW 51.32.110(1) and former RCW 51.36.070 that restricts a self-insured employer to only scheduling in-person exams. *Novalic*, slip op. at 9-10. And "other than requiring that the location must be 'reasonably convenient for the worker,' there is no indication that the legislature was concerned with the modality of IMEs when it passed the statute." *Novalic*, slip op. at 10.

Although Novalic relies on liberal construction to argue for her interpretation, Pet. 11-12, the liberal construction rule does not apply to unambiguous terms in the Industrial Insurance Act. *See Harris v. Dep't of Lab. & Indus*., 120 Wn.2d 461, 474, 843 P.2d 1056 (1993). A statute's silence on an issue creates no

ambiguity. *See Birgen v. Dep't of Lab. & Indus.*, 186 Wn. App. 851, 859, 347 P.3d 503 (2015).

Nor is there any reason to assume that workers as a class benefit from a statutory interpretation forbidding telehealth exams. At the time the COVID-19 pandemic was raging, workers—like anybody else—benefited from having limited social contact, something furthered by the view that the statute implicitly authorized telehealth exams. Sure and certain relief guaranteed by the Industrial Insurance Act demanded access to IMEs. *See* RCW 51.04.010. And there is no basis in the record to conclude that a telehealth exam, as compared to any other exam, will tend to result in findings or recommendations unfavorable to workers. While Novalic herself would benefit from a construction of the statute forbidding telehealth exams, that is only because she refused to attend the telehealth exam, not because telehealth exams go against the best interests of injured workers. The purpose of liberal construction is to lessen the suffering and economic loss caused by workplace injuries

(RCW 51.12.010), and there is no reason to conclude that telehealth exams would contribute to workers' suffering or economic losses. In fact, reducing the spread of COVID-19 to workers reduced the suffering associated with the adjudication of workers' claims.

The notice given to Novalic also comported fully with WAC 296-14-410(3)(a). Nothing in the plain language of WAC 296-14-410(3)(a) specifies how the examination is to be conducted. Rather, the regulation states that notice of an examination must provide "at least 14 but no more than 60 days" of notice of the exam. WAC 296-14-410(3)(a). The notice is required to include three things: "the date, time[,] and location of the examination*." Id.* Here the notice was provided to Novalic 14 days before the examination. The initial and subsequent notice also included the date, time, and location of the examination. AR 174, 176. This process satisfied the rule and the governing statutes.

B. Review Is Unnecessary Because a Payment Policy Directed to IME Providers Cannot Override a Statute and a Rule

Nothing about L&I's IME payment policy entitles Novalic to relief or warrants this Court's review. PeaceHealth had the authority to schedule the exam at issue, and because the statute authorizes self-insurers to schedule IMEs, PeaceHealth was within its authority to schedule the exam in the telehealth setting for three reasons.

First, L&I's temporary telehealth policy only addressed the medical providers' authority to charge L&I or a self-insured employer for IMEs—not self-insured employers' authority to schedule IMEs. It would be unfair for a policy directed to IME providers to tie self-insured employers' hands.

The policy states that IME providers should assess the worker's ability and willingness to participate in an exam via telehealth, providers should ensure telehealth is appropriate, and the claims manager and parties must agree that telehealth is appropriate (the requirements Novalic puts at issue). AR 20. In

isolation, it may appear (as Novalic argues) that these requirements impact PeaceHealth's authority to schedule a telehealth exam without the worker's consent, but that is not the case when these requirements are put into context. The requirements are under the heading, "*Payment Policy*: Temporary Telehealth IME and Record Review." AR 20 (emphasis added). Under that heading, L&I advises that it is temporarily allowing exams via telehealth, details how a provider must conduct telehealth exams in order to bill for them, and explains how the provider must bill for and document telehealth exams. AR 20-22. Nowhere does the policy state that it limits a self-insured employer's authority to schedule IMEs via telehealth or otherwise. *See* AR 18-23.

As the Court of Appeals held, no provision of the Industrial Insurance Act restricted the ability of employers to use telehealth. *Novalic*, slip op. at 9. And the Court of Appeals correctly concluded that, although the language of the temporary telehealth policy appears in places to require worker

consent for telehealth, when viewed in context, the policy is about payment to providers. *Id.*

Second, Novalic argues that the policy applied to her rights and needed to be followed because L&I had the power to fill in the gaps to affect a general statutory scheme, provided the agency does not purport to amend the statute. Pet. 12 (citing *Dep't of Lab. & Indus. v. Rowley,* 185 Wn. App. 154, 165, 340 P.3d 929 (2014)). Even if the policy tried to do what Novalic claims (i.e., limit PeaceHealth's authority to conduct telehealth exams, *see* Appellant's Br. 20-21), the policy is not law. Policies "[have] no force or effect as a law or regulation." *Carranza v. Dovex Fruit Co.*, 190 Wn.2d 612, 624, 416 P.3d 1205 (2018) (quoting *Stevens v. Brink's Home Sec., Inc.*, 162 Wn.2d 42, 54, 169 P.3d 473 (2007) (Madsen, J., concurring)).

And, while Department policies can be persuasive in interpreting agency regulations, *Fiore v. PPG Industries, Inc.*, 169 Wn. App. 325, 335 n. 3, 279 P.3d 972 (2012), the temporary telehealth policy Novalic relies on does not interpret

WAC 296-14-410. The policy does not address what is and is not good cause, and it does not otherwise explain the circumstances under which a worker might be excused from attending a telehealth exam. *See* AR 18-23.

Finally, Novalic agrees that not wanting to attend an IME is not good cause to refuse the IME. *See* Pet. 15 (citing *Andersen*, 93 Wn. App. at 64). Courts have held that workers did not have good cause when their refusals were based on solely on their beliefs. *See Romo v. Dep't of Lab. & Indus.*, 92 Wn. App. 348, 351, 358-59, 962 P.2d 844 (1998); *Garcia v. Dep't of Lab. & Indus.*, 86 Wn. App. 748, 752, 939 P.2d 704 (1997). A worker does not have good cause for refusing to attend an IME because they believe that the exam was scheduled without authority. *See Andersen*, 93 Wn. App. at 62-63. Novalic shows no good cause and no reason for review here.

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V. CONCLUSION

L&I asks this Court to deny review.

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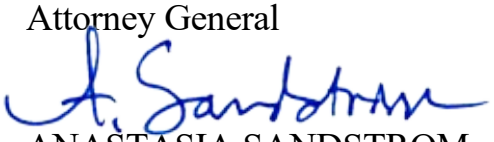
RESPECTFULLY SUBMITTED this 9th day of October, 2024.

ROBERT W. FERGUSON
Attorney General



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SUPREME COURT
STATE OF WASHINGTON

ELDINA NOVALIC, Petitioner, v. PEACEHEALTH and DEPARTMENT OF LABOR AND INDUSTRIES, Respondents	CERTIFICATE OF SERVICE

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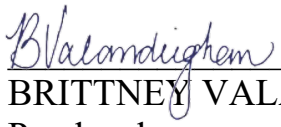

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