NO. 1034580

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

ELDINA NOVALIC,
Appellant,
v.

PEACEHEALTH and THE DEPARTMENT OF LABOR AND INDUSTRIES,
Respondents.

RESPONDENT'S ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

IDENTITY OF PETITIONER AND RESPONDENT

Petitioner is Eldina Novalic. Respondent is PeaceHealth. Ms. Novalic was employed with PeaceHealth as a nurse.

CITATION TO COURT OF APPEALS DECISION

Ms. Novalic asks this Court to reverse *Novalic v. PeaceHealth,* No. 58451-4-II, 2024 WL 3947367 (Wash. Ct. App. July 16, 2024) a majority decision of the Court of Appeals (Division Two).

ISSUES PRESENTED FOR REVIEW

In her petition to this Court, Ms. Novalic asserts the issues presented for review are whether the self-insured employer had authority to schedule a psychiatric examination pursuant to RCW 51.32.110 by telehealth prior to the amendment of the statute effective January 1, 2021, and whether the self-insured employer gave adequate notice of

psychiatric evaluation on May 22, 2020, pursuant to WAC 296-14-410. *Petition for Review* at 6.

PeaceHealth counters that the proper issue before this Court is whether any of the considerations found in RAP 13.4(8) (considerations governing acceptance of review) has been satisfied

STATEMENT OF THE CASE

Ms. Novalic strained her back at her workplace on March 21, 2019. CABR 198. A claim for benefits under the Industrial Insurance Act was allowed by the Department of Labor and Industries on June 5, 2019. *Id.* In response to a November 2019 independent examination report that found her physical complaints unsupported by objective medical findings, Ms. Novalic's doctor—a physical medicine and rehabilitation specialist—suggested that she was experiencing symptoms, including tremors, attributable to "anxiety from her injury and her inability to return to work[.]" *Id.*, at 172. On that account,

the self-insured employer arranged for an independent psychiatric examination to take place on February 13, 2020. *Id.*, at 174. This appointment was not kept, however, and extenuating circumstances changed the examination landscape going forward.

On February 29, 2020, the Governor of Washington directed state agencies to "do everything reasonably possible to … respond to and recover from the [COVID-19] outbreak"[1]; and by March 9, 2020, the Department of Labor and Industries had adopted a "Temporary Record Review & Telehealth Independent Medical Exams (IME) Policy."[2] CABR 18-23.

When conditions allowed for rescheduling, notice was timely mailed to Steven L. Busick, Esq. (hereinafter "counsel") on May 7, 2020, requiring Ms. Novalic's attendance at an

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[1] Proclamation by the Governor 20-05, Feb. 29, 2020 (https://governor.wa.gov/sites/default/files/2023-01/20-05%20Coronavirus%20%28final%29.pdf).

[2] This Policy was created to "limit the spread of the coronavirus (COVID-19) outbreak, while still allowing [independent] exams to occur." CABR 20.

examination in Vancouver, WA on May 22, 2020. CABR 95. In the dynamic of a pandemic, however, the parties learned on May 19 that the reserved independent psychiatrist, Jean Dalpe MD, could no longer appear in person due to travel restrictions. *Id.*, at 141-42. Dr. Dalpe asked to keep his appointment via telemedicine—as authorized by the March 9, 2020 Telehealth IME Policy—but Ms. Novalic declined to participate. *Id.*, at 113-14. This was despite being presented with the options of either (a) appearing in Vancouver as planned, using in-office telemedicine equipment; or (b) connecting with Dr. Dalpe at her home (or other location of her choice) using her own personal device(s). *Id.*, at 114.

Opposing counsel wrote on May 20 that Ms. Novalic "would not be attending the psychiatric evaluation" because "the most important part of the [] evaluation, needs to be based on personal observations." CABR 186. She did not appear on May 22, 2020, as counsel pledged. As the self-insured employer pursued noncooperation suspension, a no-show fee,

and tried to secure Ms. Novalic's attendance at a later examination date, opposing counsel expanded on his objection to the form of telemedicine. He wrote on July 24:

> A mental status examination, the most important part of the evaluation, **cannot be conducted telephonically**. The use of teleconferencing produces substantial visual distortions, **as evidenced by national video productions, such as witnessed on the PBS NewsHour, broadcast nightly.**

Id., at 188 (emphasis added).

Counsel agreed further on July 30 that "it would not be advisable" for Dr. Dalpe to appear under pandemic restrictions, but nonetheless insisted that a *different* psychiatrist appear in-person in Vancouver to examine Ms. Novalic because, in counsel's words, "The appearance, body gestures and manner of speech **are distorted** by teleconferencing." CABR 189 (emphasis added). Counsel wrote again conclusively on July 31 that distortion "exists with teleconferencing." *Id.*, at 190.

Also on July 31, 2020, the Department issued an order suspending Ms. Novalic's benefits for her failure to participate

in the May 22, 2020 examination. CABR 198. She took that order to the Board of Industrial Insurance Appeals, where the self-insured employer presented a motion for summary judgment showing that no genuine issue as to any material fact existed as to Ms. Novalic's decision to decline the appointment with Dr. Dalpe. *Id.*, at 128-71. According to Dr. Dalpe, for example, he "regularly utilized" telemedicine in his private practice and would cancel or reschedule any examination "without a fully functioning video and audio connection." *Id.*, 142; *see also Id.*, at 128-71 (employer's motion for summary judgment and accompanying evidence).

Counsel filed an arguably belated cross-motion, contending that "the self-insured employer did not have authority by statue or otherwise to conduct a medical or psychiatric evaluation by telemedicine[.]" CABR 118. An Industrial Appeals Judge granted summary judgment to the employer on May 19, 2021, finding, among other things, that counsel's position regarding statutory authority (or lack thereof)

was "an allegation [that] ignore[d] the record [] which provides the uncontroverted material fact that the Department issued a temporary policy effective March 9, 2020 allowing the use of telemedicine in [psychiatric] evaluations[.]" *Id.*, at 38.

The Board affirmed its Industrial Appeal Judge's decision and order, which affirmed noncooperation suspension, over counsel's Petition for Review on August 9, 2021. *Id.*, at 4.

In Superior Court, counsel's statutory challenge to the Department's order shifted: he acknowledged that the March 9, 2020 policy allowed for independent psychiatric examinations via telemedicine, but contended instead that the policy was not followed. The Honorable David Gregerson of Clark County issued an order, dated June 13, 2023, finding "the Board [had] acted within its power, [had] correctly construed the law, and [had] correctly found the facts."

Ms. Novalic appealed to the Court of Appeals. The Court of Appeals held (1) Ms. Novalic was given adequate notice the examination would be held by telehealth; (2) the Department's

temporary telehealth payment policy did not limit employer's legal authority to require Ms. Novalic to attend telehealth IME without her consent; and (3) Ms. Novalic did not establish "good cause" for failing to attend telehealth IME. *Novalic v. PeaceHealth,* No. 58451-4-II, 2024 WL 3947367 (Wash. Ct. App. July 16, 2024).

ARGUMENT

I. Ms. Novalic Fails to Show Review is Appropriate

Where, as here, the Court of Appeals has issued a decision terminating appellate review, this Court will not revive the matter unless:

(1) the decision is in conflict with a decision of the Supreme Court;
(2) the decision is in conflict with a published decision of the Court of Appeals;
(3) the petition raises a significant question of constitutional law; or
(4) the petition raises an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b) (considerations governing acceptance of review).

Ms. Novalic fails to show that any one of these considerations is met. She does not allege the Court of Appeals' decision conflicts with a decision of this Court, nor that the decision conflicts with another published decision of the Court of Appeals, nor that the Court of Appeals applied an incorrect constitutional framework. Ms. Novalic makes conclusory statements indicating the Court should grant review because the petition raises an issue of substantial public interest that should be determined by the Supreme Court. *Petition* at 12. PeaceHealth respectfully disagrees, as there is no ongoing issue of substantial public interest to be decided in this matter.

To determine whether a case presents an issue of continuing and substantial public interest, this Court considers three factors: (1) the public or private nature of the question presented, (2) the desirability of an authoritative determination for the future guidance of public officers, and (3) the likelihood of future recurrence of the question. *State v. Beaver*, 184 Wash. 2d 321, 358 P.3d 385 (2015). The Court has determined cases

involving interpretation of statutes are public in nature and provide guidance to future public officials. *Id.,* at 331. However, there is not an ongoing interpretation of a statute needed in this case as Ms. Novalic's pivoted argument on petition is that the Department did not have authority to enact the telehealth policy on March 9, 2020 in response to the Governor's declaration of a statement of emergency due to the COVID-19. However, the telehealth policy has been ongoing since March 9, 2020, and the policy was explicitly added to the statute effective January 1, 2021.

An interpretation of the IME statute RCW 51.36.070 prior to January 1, 2021 is not an ongoing public issue and it would not provide future guidance to future public officials, as the statute has been updated to explicitly include telehealth appointments for independent medical examinations, including those of psychiatric nature. Further, the question is unlikely to reoccur as the period in question is four years in the past. If a significant number of individuals had been impacted, there

would be multiple cases at the Board, Superior Court, or Court of Appeals regarding a similar issue, which does not appear to be the case.

Rule of Appellate Procedure 13.4(b) has not been satisfied. For the foregoing reasons, Ms. Novalic has failed to show review is appropriate as there is no ongoing substantial public issue that needs to be decided by this Court.

II. If the Court Determines Review is Appropriate, the Court Should Affirm the Court of Appeals Published Decision

PeaceHealth maintains that Ms. Novalic has failed to show review is appropriate, as there is no ongoing substantial public interest issue that needs to be determined by this Court. However, if the Court grants review of Ms. Novalic's Petition, PeaceHealth respectfully requests the Court affirm the Court of Appeals published decision.

a. The Court of Appeals Correctly Found Ms. Novalic was Given Adequate Notice That the Examination Would be Held by Telehealth.

Ms. Novalic argues that she was not provided the required 14 day notice of the examination because she found out the examination was to be switched to be conducted by telehealth 3 days prior to the examination. WAC 296-14-410(3)(a) requires a notice of examination must be provided at least 14 days in advance and include the date, time, and location of the examination.

Ms. Novalic received 14 days' notice of the examination with the required information, but argues that because there was no indication it would be conducted via telehealth, the notice was insufficient to meet the statutory requirement. However, there is nothing in the statute to indicate the method in which the examination will be conducted needs to be specified. *Novalic v. PeaceHealth,* No. 58451-4-II, 2024 WL 3947367 (Wash. Ct. App. July 16, 2024). This is particularly true as the telehealth appointment was to be conducted at the location

listed on the original notice. Ms. Novalic has not cited any authority that indicates a new notice is required when an examination is to be conducted via telehealth.

As such, this Court should uphold the Court of Appeal finding that Ms. Novalic was provided proper notice of the independent medical examination.

b. The Court of Appeals Correctly Found the Department Had Authority to Suspend Ms. Novalic's Benefits for Failure to Attend the IME

Ms. Novalic argues that the Department did not have a right to suspend her benefits for failing to attend the psychiatric examination via telehealth because there was no policy in place that gave the self-insured employer authority to schedule the examination via telehealth. Ms. Novalic further argues the Department would not have updated the Industrial Insurance Acts to explicitly allow for telehealth examinations, if it was already permitted under the statute. However, the Department has stated there is nothing in the original statute that limited

examinations to be in person. *Novalic v. PeaceHealth,* No. 58451-4-II, 2024 WL 3947367 (Wash. Ct. App. July 16, 2024).

Before this Court, Ms. Novalic argues the RCW 51.32.110, which requires a worker to submit to an examination by a psychiatrist was last amended in 1997, when telehealth technology did not yet exist. However, just because a statute was created before a certain technology exists does not mean it cannot be broadly construed to include future technologies. There are many laws that are written broadly to include future technology not conceptualized at the time written. For example, the Second Amendment has continually been upheld to apply to guns beyond the muskets that were in use at the time it was written. Based on the pandemic and widespread use of telehealth, it would seem the decision to update the statutory language to include telehealth was done to eliminate any question that the Department viewed telehealth to be included in the interpretation of RCW 51.32.110.

As the employer had authority to schedule the examination via telehealth and Ms. Novalic failed to attend, WAC 296-14-410(1) gives the Department authority to suspend benefits for noncooperation. Thus, the Court of Appeals correctly found the Department had the authority to terminate Ms. Novalic's benefits.

c. The Court of Appeals Correctly Held Ms. Novalic Did Not Establish "Good Cause" to Failing to Attend Telehealth IME

Ms. Novalic's did not show "good cause" for failing to attend the psychiatric IME via telehealth. After learning the examination was to be conducted through telehealth, Ms. Novalic's counsel indicated she would not be attending because "the most important part of the evaluation needs to be based on personal observations". CABR 186. Ms. Novalic's counsel further indicated on July 24, 2020, "a mental status examination…cannot be conducted telephonically. The use of

teleconferencing produces substantial visual distortions…" *Id.,* at 188.

Ms. Novalic's arguments that the visit could not be conducted via telehealth because it would not allow for personal observations and produces "visual distortions" are wholly unfounded. The Department issued a "Temporary Record Review & Telehealth Independent Medical Exams Policy" and updated the statutory language to explicitly include teleahtlh for examinations, including psychiatric examinations. As the Department has indicated telehealth is a reasonable form of examination, Ms. Novalic's beliefs that the examination would be distorted based on the telehealth nature are unfounded. Thus, Ms. Novalic had no reasonable or "good cause" for failure to attend the psychiatric examination.

Ms. Novalic benefits were properly terminated by the Department under WAC 296-14-410 for noncooperation, as PeaceHealth had authority to schedule the examination by telehealth under the Department's "Temporary Record Review

& Telehealth Independent Medical Exams Policy", PeaceHealth provided Ms. Novalic with proper notice of the examination as required under WAC 296-14-410 and Ms. Novalic failed to attend the psychiatric examination without good cause.

CONCLUSION

Ms. Novalic has failed to show that review is appropriate under RAP 13.4(b), as there is no ongoing substantial public interest that needs to be determined by this Court. As such, PeaceHealth respectfully requests Ms. Novalic's Petition for Review to the Court be Denied.

In the event this Court accepts Ms. Novalic's Petition, the employer respectfully requests this Court affirm the Court of Appeals decision and asserts the Court of Appeals properly held the self-insured employer had authority to require Ms. Novalic to attend a telehealth IME without her consent, Ms. Novalic had adequate notice of the telehealth examination, and Ms. Novalic

failed to establish “good cause” for failing to attend the telehealth IME.

WORD CERTIFICATION

Certificate of Compliance
Pursuant to RAP 18.17(b) of the Washington State Rules of Appellate Procedure

I, Steven Reinisch, appointed counsel for PeaceHealth, hereby certify, that the foregoing Answer to Petition for Review contains 2,578 words, not including sections excluded by RAP 18.17(b)

Dated this 3rd day of October 2024.

Respectfully submitted,

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

ELDINA NOVALIC Appellant, v. PEACEHEALTH and THE DEPARTMENT OF LABOR AND INDUSTRIES, Respondents.	**DECLARATION OF SERVICE**

I declare under penalty of perjury under the laws of the State of Washington that on the date stated below I caused the documents referenced below to be served in the manners indicated below on the following:

DOCUMENTS:
1. Respondent's Answer to Petition for Review
2. This Declaration of Service.

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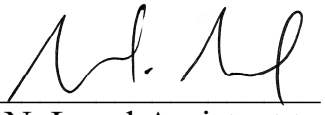
Dated this 3rd day of October 2024.



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