Waldron, Mary

COMMUNICATION OF DEPARTMENT ORDER

Failure to provide order to attending physician

A Department order segregating a mental health condition was not communicated to the claimant's treating psychologist; the order was communicated to the worker's attending physician as shown by Department records. The holding by the Supreme Court in Shafer v. Department of Labor and Indus., 166 Wn.2d 710 (2009), which requires that the Department communicate the closing order to the attending physician does not prevent an order from becoming final when 1) the order segregates a condition and was not a closing order, and 2) the treating provider was not an attending physician per WAC 296-20-01002. **….*In re Mary Waldron*, BIIA Dec., 09 20656 (2011)** [dissent] [*Editor's Note*: The Board's decision was appealed to superior court under Clallam County Cause No. 11-2-00317-8.]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: MARY K. WALDRON	)	**DOCKET NOS. 09 20656 & 09 20657**
	)	
CLAIM NO. Y-436991	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Mary K. Waldron, by
Maxwell & Webb, PLLC, per
Karen Webb

Employer, James J. O'Hagan,
None

Department of Labor and Industries, by
The Office of the Attorney General, per
Lionel Greaves IV, Assistant

In Docket No. 09 20656, the claimant, Mary K. Waldron, filed an appeal with the Board of Industrial Insurance Appeals on October 16, 2009, from an order of the Department of Labor and Industries dated August 24, 2009. In this order, the Department ended time-loss compensation benefits as paid through August 20, 2009, because the worker was able to work. The Department order is **AFFIRMED**.

In Docket No. 09 20657, the claimant, Mary K. Waldron, filed an appeal with the Board of Industrial Insurance Appeals on October 16, 2009, from an order of the Department of Labor and Industries dated September 2, 2009. In this order, the Department closed the claim with an award for permanent partial disability equal to 5 percent of the amputation value of the right arm at or above the deltoid insertion or by disarticulation at the shoulder. The Department order is **AFFIRMED**.

DECISION

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The Department and claimant filed timely Petitions for Review of a Proposed Decision and Order issued on December 20, 2010, in which the industrial appeals judge reversed and remanded the orders of the Department dated August 24, 2009, and September 2, 2009. On February 25, 2011, the Board received Claimant's Response to Department's Petition for Review, and on March 1, 2011, the Board received Department's Response to Claimant's Petition for Review.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. The rulings are affirmed.

We have granted review because we conclude the Department orders should be affirmed. We confirm our industrial appeals judge's conclusion that Ms. Waldron's mental health condition was segregated by a final and binding order. That being the case, she was no longer entitled to treatment for that condition under the claim after her physical condition reached maximum medical improvement. Because the mental health condition was treated only as a condition retarding recovery, by definition, treatment was no longer required once her physical condition resolved. No medical evidence was presented to establish Ms. Waldron's physical condition had not reached maximum medical improvement. In addition, the evidence established her ability to work at a gainful occupation on a reasonably continuous basis

Ms. Waldron was injured on October 20, 2003, while working for James O'Hagan as a cranberry harvester. This was part-time seasonal work. The claimant also worked as a home health provider. On October 20, 2003, Ms. Waldron's supervisor asked her to put license plates on a truck. While she was bending down to do so, the tailgate dropped on her and pinned her right shoulder down on the attached trailer. We really do not have a detailed description of the treatment for this injury.

Ms. Waldron seeks to have her mental health condition accepted as part of this claim. She began receiving mental health counseling from Mary Wegmann, Ph.D., a psychologist, on January 20, 2005. On August 17, 2005, the Department issued an order in which it segregated the mental health condition diagnosed as adjustment disorder with depressed mood. Ms. Waldron did not file a protest or appeal to this order. Nevertheless, she asserts the order did not become final and binding because it was not mailed to Dr. Wegmann. We note, however, that it was mailed to the attending physician on record with the Department. To support her argument, Ms. Waldron cites to the supreme court decision in *Shafer v. Department of Labor & Indus.,* 166 Wn.2d 710 (2009).

In the *Shafer* case, the supreme court found that a closing order that was not served on the attending physician did not become final and binding. To support its decision, the supreme court noted that the attending physician plays an important role in the claims process. *See, Shafer,* at 718. The supreme court explained in a subsequent paragraph.

> The IIA makes it abundantly clear that a worker's attending physician plays an important role once the worker has chosen that physician for treatment. For instance, the physician is required to inform the injured worker of his or her rights under the IIA

> and lend assistance in filing a claim. RCW 51.28.020 (1)(b). . . . In addition, there are numerous other statutory and regulatory obligations that an attending physician is required to assume once the worker's claim is accepted by the Department. *See, e.g.,* ch. 296-20 WAC.

Shafer at 720. For those reasons, the attending physician is a "critical component to the final resolution of claims" and must receive a copy of any order closing the claim. *Shafer* at 720. The decision in the *Shafer* case relied on certain important elements that limit its applicability to this case. It required service of closing orders. The August 17, 2005 order was not a closing order; it was a segregation order. The ruling in *Shafer* also required service on attending physicians. Although not defined by the court, the term, attending physician, is defined by the regulations. The pertinent regulation contains several definitions, including:

> **Attending Provider:** For these rules, means a person licensed to independently practice one or more of the following professions: Medicine and surgery; osteopathic medicine and surgery, chiropractic, naturopathic physician, podiatry; dentistry; optometry; and advanced registered nurse practitioner. An attending provider actively treats and injured or ill worker.
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> **Doctor or attending doctor:** For these rules, means a person licensed to independently practice one or more of the following professions: Medicine and surgery; osteopathic medicine and surgery, chiropractic, naturopathic physician, podiatry; dentistry; optometry. An attending doctor is a treating doctor.
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> **Health services provider or provider:** For these rules means any person, firm, corporation, partnership, association, agency, institution, or other legal entity providing any kind of services related to the treatment of an industrially injured worker. It includes, but is not limited to, hospitals, medical doctors, dentists, chiropractors, vocational rehabilitation counselors, osteopathic physicians; pharmacists, podiatrists, physical therapists, occupational therapists, massage therapists, psychologists, naturopathic physicians, and durable medical equipment dealers.
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> **Physician or attending physician (AP):** For these rules, means any person licensed to perform one or more of the following professions: Medicine and surgery; or osteopathic medicine and surgery. An AP is a treating physician.

WAC 296-20-01002. Dr. Wegmann did not meet the definition of an attending physician or attending provider. As a psychologist, she is included in the definition of healthcare provider, but she is not licensed to practice medicine or surgery, or any of the other specialties listed in the definition of attending provider or physician.

Our reading of the *Shafer* opinion is that the ruling is limited to the requirement that closing orders, not all orders, must be served on the attending physician, not all treating physicians, in

order for the closing order to become final and binding. Our esteemed colleague takes a much broader view of the application of the *Shafer* decision. The supreme court provided some general background about the Industrial Insurance Act and the appeal procedure in the *Shafer* decision. But, the court also said that the requirement was based on language in RCW 51.52.050 and RCW 51.52.060, which was somewhat ambiguous, but also because Ms. Shafer's position regarding the need to serve the attending physician was supported by other provisions of the Industrial Insurance Act, the provisions were construed in her favor. *Shafer* at 721. Therefore, we think the application of the principles discussed in the *Shafer* decision will depend on how the provisions of the Industrial Insurance Act interact. The results will vary from case to case. In this case, other provisions of the statute suggest there is no reason to require service of a segregation order on an attending provider, when the order was served upon the attending physician.

We believe the regulations and the supreme court envision the attending physician as unique among the number and variety of individuals who may treat an injured worker. WAC 296-20-071 indicates that although treatment by more than one practitioner may be allowed when conditions involve more than one system or require multi-disciplinary care, the Department will recognize one primary attending physician who will be responsible for directing the overall treatment program. The attending physician acts as a gatekeeper and clearing house to assist the injured worker in the medical management of the claim. Thus, there will be one attending physician, even though there may be multiple treating doctors. WAC 296-20-09701 charges the "attending doctor" with protesting Department action that is inappropriate. There are the same considerations the supreme court applied in *Shafer.*

The differences here are that Dr. Wegmann was not the attending physician and the order in question was not a closing order. Nor is there an allegation that Dr. Wegmann, herself, was aggrieved by the Department order. If she had been aggrieved by the order, nothing in this decision would prevent her from asserting that an uncommunicated order could be contested by her. For these reasons, we do not think the Department was obligated to serve the August 17, 2005 order on Dr. Wegmann.

In its August 17, 2005 order, the Department did provide for mental health treatment under the claim because the Department considered the mental health condition to be a condition retarding recovery. Under WAC 296-20-055, the Department "will not pay for treatment of an unrelated condition when it no longer exerts any influence upon the accepted industrial condition." Therefore, once the industrially related condition has reached maximum medical improvement,

treatment of the unrelated condition would no longer be provided. It is, by definition, no longer a condition retarding recovery. The claimant presented no evidence to indicate that her physical condition requires further curative or rehabilitative treatment.

In fact, the only evidence with regard to the physical condition is from the vocational counselor who relied on the opinions of physicians who performed an independent medical examination. Those physicians found Ms. Waldron's physical condition had resolved and deferred to the psychiatrist on the panel regarding Ms. Waldron's ability to work. The psychiatrist, Dr. Kooiker, opined that Ms. Waldron was able to work. Given the record in this case, there is no basis for finding Ms. Waldron required treatment for her physical condition or determining that her industrial injury prevented her from working.

The evidence presented in this case supports the Department's decision to end time-loss compensation benefits and close Ms. Waldron's claim. Therefore, we affirm the Department orders dated August 24, 2009, and September 2, 2009.

FINDINGS OF FACT

1. Mary K. Waldron, the claimant, filed an Application for Benefits with the Department of Labor and Industries on November 4, 2003, in which she alleged that she sustained an industrial injury on October 20, 2003, during the course of her employment with James J. O'Hagan, the employer. The claim was allowed and benefits paid.

   On February 11, 2005, the Department issued an order in which it segregated conditions diagnosed as adjustment disorder with depressed mood as not related to the industrial injury, but allowed treatment for the condition on a temporary basis because it was retarding recovery. On March 15, 2005, the claimant filed a Protest and Request for Reconsideration to the February 11, 2005 order. On August 17, 2005, the Department issued an order in which it affirmed its February 11, 2005 order.

   Docket No. 09 20656

   The Department issued an order on August 24, 2009, in which it ended time-loss compensation benefits on August 20, 2009, because the worker was able to work. Time-loss compensation benefits were paid from August 19, 2009, through August 20, 2009. The claim remained open for further action. Ms. Waldron filed a Notice of Appeal from this order on October 16, 2009, with the Board of Industrial Insurance Appeals. The Board issued an order on November 16, 2009, in which it extended time to act on appeal for an additional 10 days. On November 23, 2009, the Board issued an Order Granting Appeal under Docket No. 09 20656, and agreed to hear the appeal.

The Department issued an order on September 2, 2009, in which it awarded a permanent partial disability award for 5 percent of the right arm at or above the deltoid insertion or by disarticulation at the shoulder and closed the claim.

Ms. Waldron filed a Notice of Appeal from this order on October 16, 2009, with the Board. The Board issued an order on November 16, 2009, in which it extended time to act on appeal for an additional ten days. On November 23, 2009, the Board issued an Order Granting Appeal under Docket No. 09 20657, and agreed to hear the appeal.

2. On October 20, 2003, Ms. Waldron sustained an injury to her right shoulder and neck in the course of her employment with James J. O'Hagan. Ms. Waldron was injured when kneeling between a truck-trailer hitch and a trailer when the truck's tailgate dropped onto the left side of her head and pinned her right shoulder down onto the attached trailer.

3. Ms. Waldron's October 20, 2003 industrial injury proximately caused a right shoulder sprain and neck sprain.

4. As of September 2, 2009, Ms. Waldron's right shoulder sprain and neck sprain had reached maximum medical improvement and were not in need of further proper and necessary medical treatment.

5. Ms. Waldron has the following work experience: sandwich maker, hotel housekeeper, assisted living facility caregiver, and a cranberry harvester.

6. During the period from August 21, 2009, through September 2, 2009, inclusive, the residual effects of the October 20, 2003 industrial injury did not preclude Ms. Waldron from obtaining or performing reasonably continuous, gainful employment in the competitive labor market, when considered in conjunction with Ms. Waldron's age, education, work history, and pre-existing disabilities.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter of these appeals.

2. The Department's August 17, 2005 order became final and binding pursuant to RCW 51.52.060.

3. Ms. Waldron's right shoulder sprain and neck sprain, proximately caused by the October 20, 2003 industrial injury, reached maximum medical improvement as of September 2, 2009, and she is not entitled to further proper and necessary medical treatment under RCW 51.36.010.

4. During the period from August 21, 2009, through September 2, 2009, inclusive, Ms. Waldron was not a temporarily, totally disabled worker within the meaning of RCW 51.32.090, and, therefore, is not entitled to time-loss compensation benefits for this period.

5. The Department orders dated August 24, 2009, and September 2, 2009, are correct and are affirmed.

DATED: March 22, 2011.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
DAVID E. THREEDY Chairperson

/s/_____
LARRY DITTMAN Member

DISSENT

I respectfully dissent. In my view, the message intended by the supreme court in issuing the *Shafer* decision was that in order for an aggrieved party to have a meaningful opportunity to protest or appeal a Department decision, the party must receive the decision. Therefore, the Department is obligated to serve orders and decisions on all parties who will be affected, and thereby, potentially aggrieved. My colleagues' decision to narrowly limit the holding of *Shafer* to only require service of closing orders on "attending physicians" fails to recognize this underlying premise of the *Shafer* decision.

In the *Shafer* decision, the supreme court discussed the statutes relating to finality of orders and methods of appealing, RCW 51.52.050 and RCW 51.52.060. The former statute clearly states the Department must serve "the worker, beneficiary, employer, or other person affected thereby" with a copy of any decision, order or award. RCW 51.52.050(1). The statute also says Department orders can be appealed by the "worker, beneficiary, employer, or other person aggrieved thereby." RCW 51.52.050(2)(a). This right of other persons aggrieved thereby to appeal is not limited to closing orders. The supreme court also identified WAC 296-20-09701, which allows attending physicians to protest closing orders, noting that the Department failed to explain how an attending physician could exercise that right unless the doctor is served with the order. *Shafer,* at 721. This

regulation does not limit the attending physician's protest rights to closing orders. It includes "other adjudication action" which seems inappropriate. WAC 296-20-09701.

Although the *Shafer* holding may appear to be limited by the statement "the IIA requires that attending physicians receive closure orders" (166 Wn.2d at 722), the reasoning the supreme court used to support the conclusion requires expansion of the rule to all persons who would be affected by the order. The supreme court's logic particularly supports a different conclusion than the one reached by the majority in this case. In this case, no one was more affected by the Department's decision to segregate the claimant's mental health condition from the claim than the claimant and her treating psychologist. The initial segregation order was served upon the psychologist, Dr. Wegmann. For some reason, when the affirming order was issued, Dr. Wegmann was not included in the parties to be served. I believe the *Shafer* holding required service on Dr. Wegmann. Dr. Wegmann was clearly affected by the decision, but was deprived of her right to protest or appeal because the order was not served upon her. The holding in *Shafer* requires that the order be found not final and binding, thereby permitting further consideration of a protest or appeal of that order.

DATED: March 22, 2011.

/s/_____
FRANK E. FENNERTY, JR. Member