Ma'ae, Ronald

AGGRAVATION (RCW 51.32.160)

Non-network provider authorized to file application to reopen

The provision of WAC 296-14-400 that allows only a network provider to file an application to reopen a claim is an interpretive rule and not a binding legislative rule, and RCW 51.36.010 does not limit the filing of an application to reopen to network providers. ***In re Ronald Ma'ae*, BIIA Dec., 14 21595 (2015)** [dissent] [*Editor's Note: Affirmed, Ma'ae v. Dep't of Labor & Indus*., 8 Wn. App. 2d 189 (2019).]

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: RONALD V. MA'AE	)	**DOCKET NOS. 14 21595 & 14 21598**
	)	
	)	
	)	
CLAIM NO. AD-75675	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Ronald V. Ma'ae, by
Tacoma Injury Law Group, Inc., P.S., per
Isabel A. M. Cole

Employer, Safeway Services, LLC,
None

Department of Labor and Industries, by
The Office of the Attorney General, per
David I. Matlick

In Docket No. 14 21595, the claimant, Ronald V. Ma'ae, filed an appeal with the Board of Industrial Insurance Appeals on September 30, 2014, from an order of the Department of Labor and Industries dated September 5, 2014. In this order, the Department denied the reopening of the claim on the basis that there was no medical documentation as required by law. The Department order is **REVERSED AND REMANDED.**

In Docket No. 14 21598, the claimant, Ronald V. Ma'ae, filed an appeal with the Board of Industrial Insurance Appeals on September 30, 2014, from a letter determination of the Department of Labor and Industries dated September 5, 2014. In this letter, the Department denied the claimant's reopening application because it was not filed by a member of the Department's medical provider network. The Department decision is **REVERSED AND REMANDED**.

DECISION

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The claimant filed a timely Petition for Review of a Proposed Decision and Order issued on June 26, 2015, in which the industrial appeals judge affirmed the Department's order and letter determination. On September 8, 2015, the Department filed a response to the claimant's Petition for Review. We decided this appeal on summary judgment.

The following documents were received and considered in our decision:

(1) Department of Labor and Industries' Motion and Memorandum in Support of Motion for Judgment as a Matter of Law and Supporting

Memorandum with accompanying declarations, exhibits, and documents;

(2) Claimant's Response to Department of Labor and Industries' Motion for Summary Judgment with accompanying declarations, exhibits and documents; and

(3) Department of Labor and Industries' Reply Memorandum in Support of Motion for Judgment as a Matter of Law and accompanying attachments.

In these appeals we are asked to decide if a physician who is not a member of the Department's network of providers is permitted to file an application to reopen a claim under the Industrial Insurance Act. The industrial appeals judge resolved these appeals based on the Department's motion for summary judgment. In granting the Department's motion, the industrial appeals judge determined that only approved network providers may file reopening applications under the Department's rule, WAC 296-14-400. Because Mr. Ma'ae's application was filed by a non-network provider, our industrial appeals judge determined that the Department was entitled to judgment as a matter of law, and affirmed both Department orders.

We disagree with our industrial appeals judge. RCW 51.36.010 and RCW 51.32.160 do not limit the authority to file an application to reopen to Department network providers. We find that WAC 296-14-400 is an interpretive rule, not a legislative rule, and therefore not a binding determination by the Department regarding who may file an application to reopen. We reverse the Department letter and order, and grant summary judgment to Mr. Ma'ae, the non-moving party, and remand to the Department to find that the reopening application filed by Mr. Ma'ae was a valid application; to consider the medical information, including the information received from Dr. H. Richard Johnson; and to issue a further order allowing or denying the application to reopen.

Ronald V. Ma'ae sustained an industrial injury on January 19, 2007, in the course of his employment with Safeway Services, LLC. The Department allowed the claim in an order dated February 5, 2007. On July 24, 2009, the Department issued an order closing the claim with a permanent partial disability award for right upper extremity impairment. Mr. Ma'ae protested and the Department affirmed its order on August 18, 2009. In April of 2011, Mr. Ma'ae filed a reopening application with the Department. The Department denied the application, and Mr. Ma'ae appealed under Docket No. 11 22191. On June 1, 2012, we dismissed the appeal based on Mr. Ma'ae's request.

On March 14, 2014, Mr. Ma'ae was examined by orthopedic surgeon, H. Richard Johnson, M.D., for purposes of reopening Mr. Ma'ae's industrial insurance claim. Although a licensed physician, Dr. Johnson was not a member of the Department's medical provider network at the time of the examination. On April 14, 2014, Dr. Johnson filed a reopening application on behalf of Mr. Ma'ae. In the application, Dr. Johnson stated that Mr. Ma'ae's industrially related conditions had objectively worsened and that further treatment was appropriate.

On June 30, 2014, the Department issued an order extending the period to act on Mr. Ma'ae's reopening application to September 11, 2014. At the Department's direction, Mr. Ma'ae underwent independent medical examinations on August 14, 2014, and August 15, 2014. The examiners found that there was no objective evidence of worsening of a condition caused by the industrial injury. The Department then determined that Mr. Ma'ae had not provided the required medical documentation for reopening because Dr. Johnson was a non-network provider. Based on this determination, the Department denied Mr. Ma'ae's reopening application in the September 5, 2014 order and the letter under appeal.

In 2011, the Legislature amended RCW 51.36.010 to require the Department to establish a health care provider network to treat injured workers. The stated purpose of the provider network is to ensure that injured workers receive "high quality medical care in accordance with current health care best practices."[1] The amendments to the statute directed the Department to establish minimum standards for providers who treat injured workers and accept providers into the network who meet these standards. Section 10 of RCW 51.36.010 provides that the Department "may adopt rules" related to the provisions of the statute.

The Department amended WAC 296-14-400 effective April 6, 2012. The Department rejected Mr. Ma'ae's reopening application on the basis that it did not satisfy the requirements of the rule. WAC 296-14-400 provides in pertinent part:

> When a claim has been closed by the department or self-insurer for sixty days or longer, the worker must file a written application to reopen the claim.
>
> …
>
> For services or provider types where the department has established a provider network, beginning January 1, 2013, medical treatment and documentation for reopening applications must be completed by network providers.

[1] RCW 51.36.010(1)(a).

Dr. Johnson was not a member of the Department's provider network when he filed Mr. Ma'ae's reopening application. The Department argues that it correctly denied the reopening of the claim because WAC 296-14-400 requires that reopening applications be filed by network providers. The Department argues that the rule is a valid legislative rule enacted by the Department and as such is a binding rule on the courts and the public.

Mr. Ma'ae asserts that the rule is in conflict with RCW 51.36.010. He points out that the statute authorizes an injured worker to receive care from a non-network provider for "an initial office or emergency room visit."[2] Mr. Ma'ae believes that his one-time examination with Dr. Johnson was an initial office visit within the meaning of RCW 51.36.010. The Department takes a more narrow view of the statute. It argues that the term an initial office or emergency room visit refers to the first visit to a health care provider for purposes of reporting the injury or occupational disease. Under this definition, Dr. Johnson's examination would not be covered under the claim because it was done for reopening purposes.

We first address whether WAC 296-14-400, that prohibits non-network providers from assisting injured workers in filing an application to reopen the claim for aggravation of conditions, is a binding administrative rule. Administrative rules can be either legislative rules or interpretive rules. We must first determine whether the cited provision of WAC 296-14-400, that limits who may assist an injured worker in filing an application for reopening, is a legislative rule or an interpretive rule.

The legislative authority for agency rule making is found in RCW 34.05.328. The definition of a legislative rule is found in RCW 34.05.328(5)(c)(iii):

> A 'significant legislative rule' is a rule other than a procedural or interpretive rule that (A) adopts substantive provisions of law pursuant to delegated legislative authority, the violation of which subjects a violator of such rule to a penalty or sanction; (B) establishes, alters, or revokes any qualification or standard for the issuance, suspension, or revocation of a license or permit; or (C) adopts a new, or makes significant amendments to, a policy or regulatory program.

The definition of an interpretive rule is found in RCW 34.05.328(5)(c)(ii):

> An 'interpretive rule' is a rule, the violation of which does not subject a person to a penalty or sanction, that sets forth the agency's interpretation of statutory provisions it administers.

[2] RCW 51.36.010(2)(b).

To summarize: A legislative rule is a rule promulgated by the administrative agency at the direction of the Legislature. The Legislature delegates the power to make a rule that will be binding on the court if it is valid. A legislative rule is binding on the public and the courts if properly enacted. It carries with it the force of law. An interpretive rule differs from a legislative rule. It is not enacted at the direction of the Legislature but is enacted at the discretion of the administrative agency. The Legislature does not delegate the power to the administrative agency to make a rule which will be binding on the courts. An interpretive rule is not binding on the public or the courts.[3]

In *In re Bower Logging*, Inc., BIIA Dec., 11 13726 we held that we lacked the authority to invalidate Department rate classifications for the logging industry. We did so because we found that RCW 51.16.035(1) and (2) contained a directive from the Legislature to enact rules classifying occupations according to the degree of hazard and to fix rates for premiums. We found that because the codification of the classification system was required by the Legislature, the rules were legislative in nature and were not merely interpretive. We stated that we have only the authority vested in us by our governing statue, and the Industrial Insurance Act does not authorize us to determine the legality of the Department's legislative rules.[4]

Neither RCW 51.36.010, that establishes the provider network, nor RCW 51.32.160, that allows an injured worker to apply to reopen the claim, contain a directive from the Legislature to the Department to enact a rule regarding who may assist an injured worker in filing an application to reopen. RCW 51.36.010 clearly directs the Department to establish minimum standards for providers who treat workers and to establish a health care provider network to treat injured workers. The statute also clearly allows the Department to limit the providers in the network to those who meet the minimum standards. But nowhere in RCW 51.36.010 does the Legislature direct the Department to determine the qualifications of a provider who assists the injured worker in filing an application to reopen the claim. We find the provision of WAC 296-14-400 that states that documentation for reopening applications must be completed by network providers to be an interpretive rule and not a legislative rule. As an interpretive rule we are not bound by the rule and we look instead to the statues to determine whether an application to reopen filed by a non-network provider is a valid application that must be acted on by the Department. We consider the provision of WAC 296-14-400 as the Department's interpretation of RCW 51.36.010 but not as a binding rule.

---

[3] *Association of Wash. Bus. v. Department of Revenue*, 155 Wn.2d 430 (2005).
[4] *Snohomish County v. State*, 69 Wn. App. 655 (1963), *rev. denied* 123 Wn.2d 1003 (1994).

Neither RCW 51.36.010 or RCW 51.32.160 provides for an exclusion of medical evidence if submitted by a non-network provider when the injured worker submits an application for reopening. We see a distinction between a physician assisting an injured worker in making an application to reopen and a physician being admitted to the provider network to provide treatment to the worker. In filing an application to reopen Mr. Ma'ae's claim, Dr. Johnson does not seek to provide treatment to the worker but only to advise the Department of the worker's current condition and whether the current condition represents a worsening since the last claim closure. The limitation in WAC 296-14-400 is not an accurate interpretation of the provisions of RCW 51.36.010 relating to the establishment of or the administration of a provider network for the treatment of injured workers.

A primary purpose of the establishment of and administration of a provider network is to insure that injured workers are provided high quality treatment, but assisting an injured worker in the process of filing an application to reopen is not the equivalent of treatment. Rather it is more in the nature of an administrative function combined with presentation of medical information. Once the application is filed, the Department reviews the application and medical information and determines if the claim should be reopened. Until the application to reopen the claim is allowed by the Department the issue of treatment under the Industrial Insurance Act is not at issue. Once the application is allowed, RCW 51.36.010 requires that treatment provided under the Act is limited to a network provider.

The Department's interpretation of RCW 51.36.010 that limits the filing of an application to reopen to a network provider would create a duality of evidence regarding applications to reopen. Under the Department's interpretation, Dr. Johnson's opinions and findings regarding the reopening will not be considered in determining reopening and the reopening application will not be considered. But the same opinions and findings made by Dr. Johnson as part of the application to reopen would be considered competent medical evidence in a hearing before this Board, and ultimately the courts, on the issue of reopening for aggravation. The fact that Dr. Johnson is not admitted to the provider network is by itself insufficient to exclude his testimony before this Board. This dual approach to the opinions of a non-network provider in reaching a decision on whether an injured worker's claim should be reopened is illogical. We reject the Department interpretation of RCW 51.36.010 as set out in WAC 296-14-400 that provides that documentation for reopening applications must be completed by network providers. The application submitted by Dr. Johnson on behalf of Mr. Ma'ae meets the requirements of RCW 51.36.010 and RCW 51.32.160. The

Department order and letter are reversed and this matter is remanded to the Department to consider the application to reopen for aggravation submitted by Dr. Johnson and issue a further order allowing or denying the application.

Having determined that RCW 51.36.010 does not prohibit a non-network provider from filing an application to reopen we do not reach the question raised by Mr. Ma'ae of whether an examination by a provider for an application to reopen is within the meaning of initial office visit as set out in RCW 51.36.010.

Because the facts are not in dispute we grant summary judgment to the claimant, the nonmoving party.[5]

FINDINGS OF FACT

1. On 11/19/14, an industrial appeals judge certified that the parties agreed to include the Jurisdictional History in the Board record solely for jurisdictional purposes.

2. Ronald V. Ma'ae filed an application to reopen his claim in 2014, and the physician signing this application to reopen was H. Richard Johnson, M.D. Dr. Johnson is not a member of the Department's Medical Provider Network.

3. The pleadings and evidence submitted by the parties demonstrate that there is no genuine issue as to any material fact.

4. The provision in WAC 296-14-400, that limits the filing of an application to reopen to network providers is a Department interpretive rule and is not binding on the courts or the public.

5. RCW 51.36.010 does not prohibit a non-network provider from completing and filing an application to reopen a claim for aggravation.

6. Mr. Ma'ae submitted medical evidence with his application to reopen.

CONCLUSIONS OF LAW

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

2. The claimant is entitled to a decision as a matter of law as contemplated by CR 56.

3. Dr. H. Richard Johnson, although not a member of the Department's Medical Provider Network, is not prohibited from completing and filing a reopening application as provided by WAC 296-14-400 and RCW 51.36.010 and RCW 51.32.160.

[5] *Kim Impecoven, et al, v. Department of Revenue*, 120 Wn.2d 357 (1992).

4. The Department order dated September 5, 2014, and the Department letter dated September 5, 2014, are incorrect and are reversed. These matters are remanded to the Department with directions to consider the application to reopen filed by Dr. H. Richard Johnson, including the medical evidence submitted by Dr. Johnson, and issue a further order allowing or denying the reopening application.

Dated: November 23, 2015.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
DAVID E. THREEDY Chairperson

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

DISSENT

The majority opinion determines that the provision of WAC 296-14-400, which limits who may file an application to reopen for aggravation to a network provider, is an interpretive rule and not a binding legislative rule. The majority then goes on to interpret RCW 51.36.010 and determines that, notwithstanding the mandate from the Legislature that only network providers treat injured workers, a non-network provider may examine a worker for an application to reopen; make a diagnosis of the worker's condition; recommend specific treatment; and, file the application to reopen. Because the majority opinion mischaracterizes the provision of WAC 296-14-400 as an interpretive rule and ignores the legislative mandate regarding treatment of injured workers by network providers, I must dissent.

The first error in the majority opinion is determining that the provision of WAC 296-14-440, which limits who may file an application to reopen, is an interpretive rule and not a legislative rule. The Legislature passed the amendments to RCW 51.36.010 that create a provider network in order to assure that workers receive appropriate care. The Department admits providers into the network that meet the minimum standards set by the Department. This is a clear directive by the Legislature to the Department to establish standards for providers regarding all phases of the

Industrial Insurance Act. The Legislature did not provide any exceptions to the grant of authority to the Department regarding the establishment of the provider network. I find a clear grant of authority from the Legislature to the Department to establish legislative rules that govern providers in all aspect of the Industrial Insurance Act. I find that the provision of WAC 2967-14-400, which limits the filing of an application to reopen to network providers, is a binding legislative rule that this Board must follow. Dr. Johnson is prohibited by the rule from filing applications to reopen.

The second error by the majority is not recognizing that Dr. Johnson did treat Mr. Ma'ae. The majority adopts the position that Dr. Johnson was just engaging in an administrative function when he filed the application to reopen. Dr. Johnson examined Mr. Ma'ae, diagnosed Mr. Ma'ae's conditions and offered specific treatment recommendations. How is that different than any other treatment situation? Dr. Johnson is not admitted to the Department provider network. Whether Dr. Johnson cannot meet the minimum standards for admission into the provider network or whether he chooses not to belong to the provider network, the fact remains that he is not allowed to treat injured workers. Dr. Johnson did, in fact, treat Mr. Ma'ae.

Finally, the majority is concerned about a duality of evidence if the Department is allowed to reject the medical evidence offered by Dr. Johnson in the application to reopen. The majority argues that because Dr. Johnson could testify before this Board, the Department should consider his opinions in the application to reopen. That is a situation the Department may face, but it is not a basis for this Board to invalidate a legislative Department rule and to ignore the legislative changes to RCW 51.36.010.

I would affirm the Department letter and order.

Dated: November 23, 2015.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/ _____
JACK S. ENG Member