No.
Court of Appeals No. 31081-7

SUPREME COURT OF THE STATE OF WASHINGTON

DON M. SLAUGH, *Appellant/Petitioner*,

v.

LOCKHEED MARTIN HANFORD, CORP., *Respondent.*

ANSWER OF LOCKHEED MARTIN HANFORD, CORP. TO PETITION FOR REVIEW

WALLACE, KLOR & MANN, P.C.
Lawrence E. Mann, WSBA#20655
William A. Masters, WSBA#13958
Attorneys for Lockheed Martin Hanford Corporation

By William A. Masters, WSBA#13958
Lawrence E. Mann, WSBA # 20655
Attorneys at Law
5800 Meadows Road, Suite 220
Lake Oswego, Oregon 97035
(503) 224-8949
bmasters@wallaceklormann.com
lmann@wallaceklormann.com

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I. INTRODUCTION

This dispute arises from an industrial insurance claim. The Petitioner, in the course of his employment with Respondent, developed an occupational disease. As a result, he filed an industrial insurance claim and the claim was allowed. Eventually, the claim was closed with an award of permanent partial disability. The Petitioner requested that the supervisor of the Department of Labor and Industries, in its sole discretion, authorize continued life-sustaining medical treatment under RCW 51.36.010. The supervisor denied that request, stating:

> The law does not permit the Department to consider the discretionary authorization for life-sustaining treatment per the second proviso of RCW 51.36.010 after a claim is closed with permanent partial disability award.

Clerk's Papers (CP) at 101.

II. IDENTITY OF RESPONDENT

The answering Respondent is Lockheed Martin Hanford Corporation, the Petitioner's employer and one of the Respondents in the Court of Appeals.

III. COUNTERSTATEMENT OF ISSUE

The Respondent contends the Petitioner has failed to state a proper issue for discretionary review. But Respondent notes, without waiving its objection, that the issue as framed by the Court of Appeals on page one of

its decision is the correctly stated issue before the Court of Appeals: "Does RCW 51.36.010 provide the supervisor of industrial insurance with discretion to consider extending life-sustaining medical and surgical treatment to workers in all cases that the department has accepted and then closed, or only cases of permanent total disability?" *Dep't of Labor & Indus., et. al. v. Slaugh*, No.31081-7-III, slip op. at 1 (Court of Appeals, October 31, 2013).

IV. COUNTERSTATEMENT OF THE CASE

The Respondent accepts as its Statement of the Case the statement of facts which the Court of Appeals provided in its opinion. *Slaugh*, slip op. at 2-4.

The Respondent notes that the Petitioner has provided his "Argument" under the heading of "Statement of the Case" without providing a statement of the case as required and defined by RAP13.4(c)(6).

V. ARGUMENT WHY REVIEW SHOULD BE DENIED

The Petitioner, pursuant to RAP 13.4(b), has asserted that this Court should accept discretionary review on the sole basis that the issue presented to the Court of Appeals is of such substantial public interest that it should be determined by the Supreme Court. RAP 13.4(b)(4); Pet. at 12-13. In response, the Respondent contends the reasoning of the Court of

Appeals is a straightforward assessment of the plain language of the RCW 51.36.010 using settled principles of statutory construction that no public interest would be impaired should this Court decline review until some later date in the unlikely event that other divisions of the Court of Appeals publish interpretations of this statute which conflict with that provided by the Court of Appeals (Division III).

A. RCW 51.36.010

RCW 51.36.010, the stature at issue, provides in relevant part as follows:

> ***
> [1] Upon the occurrence of any injury to a worker entitled to compensation under the provisions of this title, he or she shall receive proper and necessary medical and surgical services at the hands of a physician or licensed advanced registered nurse practitioner of his or her own choice, if conveniently located, and proper and necessary hospital care and services during the period of his or her disability from such injury. [2] The department for state fund claims shall pay, in accordance with the department's fee schedule, for any alleged injury for which a worker files a claim, any initial prescription drugs provided in relation to that initial visit, without regard to whether the worker's claim for benefits is allowed. [3] In all accepted claims, treatment shall be limited in point of duration as follows: [3.1] **In the case of permanent partial disability**, not to extend beyond the date when compensation shall be awarded him or her, except when the worker returned to work before permanent partial disability award is made, in such case not to extend beyond the time when monthly allowances

> to him or her shall cease; [3.2] **in case of temporary disability** not to extend beyond the time when monthly allowances to him or her shall cease: [Proviso 1] PROVIDED, That after any injured worker has returned to his or her work his or her medical and surgical treatment may be continued if, and so long as, such continuation is deemed necessary by the supervisor of industrial insurance to be necessary to his or her more complete recovery; [3.3] **in case of a permanent total disability** not to extend beyond the date on which a lump sum settlement is made with him or her or he or she is placed upon the permanent pension roll: [Proviso 2] PROVIDED, HOWEVER, That the supervisor of industrial insurance, solely in his or her discretion, may authorize continued medical and surgical treatment for conditions previously accepted by the department when such medical and surgical treatment is deemed necessary by the supervisor of industrial insurance to protect such worker's life or provide for the administration of medical and therapeutic measures including payment of prescription medications, but not including those controlled substances currently scheduled by the state board of pharmacy as Schedule I, II, III, or IV substances under chapter 69.50 RCW, which are necessary to alleviate continuing pain which results from the industrial injury. [4] In order to authorize such continued treatment the written order of the supervisor of industrial insurance issued in advance of the continuation shall be necessary. [Emphasis supplied.]

B. SYNTATIC STRUCTURE OF RCW 51.36.010

Syntactically, in this quoted portion of the statute, there are four sentences. They are labeled [1], [2], [3] and [4]. The sentence labeled [3]

is in dispute as to the scope of application (or reference) of the last proviso, designated above as "Proviso 2".

The syntactical structure of sentence [3] is that of an independent clause comprising a noun phrase as subject ["treatment"] and a verb phrase as predicate ["shall be limited in point of duration as follows:"], with the predicate having a list of three adverbial infinitive phrases ["not to extend..."] modifying the main verb ["shall be limited"] and introduced by a colon. The three listed adverbial infinitive phrases are labeled [3.1], [3.2], and [3.3]. Each listed adverbial infinitive phrase is demarcated by semicolons based on the category of *disability benefits* available to the worker, with each category being introduced through a prepositional phrase: "In the case of permanent partial disability ...", "in the case of temporary disability ... ", and "in the case of permanent total disability ... ".

Each adverbial infinitive phrase contains subordinates clauses. The first phrase [3.1] has a subordinate clause beginning with the word, "except," limiting the portion of the phrase that precedes it. The second phrase [3.2] has a subordinate clause beginning with the word, "PROVIDED," enlarging the portion of the phrase that precedes it. The third phrase [3.3] has a subordinate clause beginning with the word, "PROVIDED HOWEVER," enlarging the portion of the phrase that

precedes it. Each listed adverbial infinitive phrase and its attendant subordinate clause is demarcated by a semicolon, and, within the bounds of these semicolons, should be considered a self-contained grammatical unit.

C. SEMANTIC STRUCTURE OF RCW 51.36.010

Semantically, RCW 51.36.010, as illuminated by its syntax, has a plain meaning. Sentence [1] states the general rule that the worker receive "proper and necessary" medical treatment *during the period of his or her disability* from such injury. Proper and necessary medical treatment is defined in WAC 296-20-010. Generally, under WAC 296-20-010, proper and necessary medical treatment ends when the worker is at maximum medical improvement.

Sentence [2], irrelevant to this dispute here, concerns the duty of the department in state fund claims to pay for initial prescription drugs as to the initial visit with a physician, without regard to whether the worker's claim for benefits is allowed.

Sentence [3], the focus of this dispute, states that medical treatment shall be limited in point of duration as particularized in three situations: [3.1] "in the case of permanent partial disability"; [3.2] "in the case of temporary disability"; and [3.3] "in the case of permanent total disability".

The phrase [3.1] provides that medical benefits end when a worker receives an award for a permanent partial disability unless the worker returns to work beforehand, in which case he/she is subject to the limitation on medical benefits as to temporarily disabled workers [3.2] (see below). WAC 296-20-19000 defines permanent partial disability generally. The worker is eligible for an award for permanent partial disability once he/she reaches maximum medical improvement. Under RCW 51.16.120(1), an award of permanent partial disability to a worker found to have a permanent total disability is paid into the reserve fund. So the limitation provided in [3.1] is inapplicable to a worker with a permanent total disability [3.3].

A worker not permanently totally disabled may reopen his/her claim when the allowed condition objectively worsens after claim closure (*viz.*, for example, if he/she needs treatment to save his/her life). Moreover, under WAC 296-20-097, "necessary treatment should ***not*** be deferred pending a department or self-insurer adjudication decision" on the reopening application. *Boise Cascade Corp. v. Huizar*, 76 Wn. App. 676, 686, 887 P.2d 417 (1994).

The phrase [3.2] provides that medical benefits end for a *temporarily* disabled worker when the worker's time loss payments end (*viz.*, when the worker returns to work and, if applicable, payments for loss

of earning potential end)--unless under proviso 1 the department believes the worker needs medical treatment to reach maximum medical improvement, given that on occasion a worker may return to work even though he/she is not at maximum medical improvement.

The phrase [3.3] provides that medical benefits end when a *permanently* disabled worker obtains a pension--unless under proviso 2 the department, in its discretion, believes the worker needs medical treatment (1) to protect his/her life and/or (2) to provide therapy, excluding narcotic medications, to alleviate continuing pain. A worker may be at maximum medical improvement and still have continuing pain and need maintenance treatment—*viz.*, non-curative or non-rehabilitative treatment needed to prevent harm to the worker. Unlike a worker with a permanent partial disability, a worker with a permanent total disability needs the relief provided under proviso 2 because he/she cannot reopen his/her claim to receive further life saving treatment.

D. PETITIONER'S ARGUMENT

Set against the syntactic and semantic structure of RCW 51.36.010 provided above, the Petitioner argues that proviso 2 in phrase [3.3] refers not only to its adjacent phrase [3.3] but also to non-adjacent phrases [3.1] and [3.2]. Pet. at 5. The Petitioner's argument is two pronged, and contradictory.

1. FIRST PRONG OF PETITIONER'S ARGUMENT AND RESPONDENT'S REBUTTAL

On the first prong of his argument, the Petitioner argues that RCW 51.36.010 has an unambiguous, plain meaning such that as to claims closed with an award of permanent partial disability, the department, in its discretion, may authorize continued medical treatment (1) to protect the worker's life and/or (2) to provide therapy, excluding narcotic medications, to alleviate continuing pain. Pet. at 1. The Petitioner announces the interpretive keys he believes inhere in the language and structure of the statute that compel this Court to accept his interpretation. The Petitioner appears to have four keys. These keys are by nature syntactic rather than semantic. None is persuasive.

(1) First Key. The Petitioner asserts the premise that "a colon may introduce a summing up, and [*sic*] illustration, quotation, or enumeration, for which the previous words in the sentence have prepared the reader." LOIS IRENE HUTCHINSON, STANDARD HANDBOOK FOR SECRETARIES (8th ed. 1979); *Stuart v. East Valley Consolidated School District No. 361*, 61 Wn.2d 571, 575, 379 P.2d 369 (1963). Pet. at 6. The Petitioner argues this grammatical role for the colon supports his interpretation of the statute. Pet. at 6. The subordinate clause of the phrase [3.3] on which the Petitioner relies is introduced by a colon

followed by the words "PROVIDED, HOWEVER." He argues that such punctuation, without paragraph breaks preceding it, clearly indicates that the clause following the colon is a "summing up" for which the previous words in the sentence have prepared the reader. Pet. at 7. Therefore, as he argues, the qualifying clause refers to phrases [3.1] and [3.2] as well as [3.3]. Pet. at 7.

This argument is without merit. The stated premise fails to support the conclusion. That is, the premise supports the contrary conclusion—namely, the qualifying clause introduced by a colon is explanatory and restrictive of that clause to which it is appended, with that clause being demarcated from the clause that precedes it by a semicolon. *See Stuart v. East Valley Consolidated School District No. 361*, 61 Wn.2d 571, 575, 379 P.2d 369 (1963).

(2) Second Key. The Petitioner asserts the premise that "an act should be read as punctuated unless there is some reason to do otherwise". 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION §47:15 at 264 (6th ed. 2000). Pet. at 7. The Petitioner argues that the Court of Appeals in its analysis, when it broke the statute into paragraphs, strayed from this interpretive key, thereby distorting the statute's meaning. Pet. at 7.

This argument is without merit. The conclusion does not follow from the premise. The Court of Appeals analyzed the statute on the basis of its syntax as created by the Legislature. At one point in its analysis, the Court of Appeals formatted the series of adverbial infinitive phrases of the predicate of sentence [3], as demarcated by the semicolons, such that the parallel grammatical structure of that series was displayed to aide readers in following its textual analysis. The statute was not reformatted, as the Petitioner alleges, into paragraphs.

(3) Third Key. The Petitioner asserts the premise that "the meaning of a statute would typically heed the commands of its punctuation ... a purported plain meaning analysis based only upon punctuation is necessarily incomplete and runs the risk of distorting a statutes true meaning." *U.S. Nat'l Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 454, 113 S. Ct. 2173, 124 L.Ed.2d 402 (1993). Pet. at 7-8. (This key, as quoted, commands that semantic assessment of a statute be guided, but not trumped, by a syntactic interpretation.) The Petitioner then argues that the Court of Appeals, by inappropriately imposing paragraph breaks, completely reformatted the statute to conform to its incorrectly imposed meaning. Pet. at 8.

This argument is without merit. The conclusion does not follow from the premise. As stated above, the Court of Appeals analyzed the

statute on the basis of its syntax as created by the Legislature and on the basis of the semantics or meaning of the statute as guided but not trumped by that syntax. At one point in its analysis, the Court of Appeals formatted the series of adverbial infinitive phrases of the predicate of sentence [3], as demarcated by the semicolons, such that the parallel grammatical structure of that series was displayed to aide readers in following its textual analysis. The statute was not reformatted, as the Petitioner alleges, into paragraphs.

(4) Fourth Key. The Petitioner asserts the premise that when construing a statute, the court should construe the statute as a whole, trying both to accommodate all the language and to harmonize its provisions. *City of Seattle v. Fontanilla*, 128 Wn.2d 492, 498, 909 P.2d 1294 (1996). Pet. at 11. In this regard, he also asserts a premise that "the presence of a comma before the qualifying phrase is evidence that the qualifier is intended to apply to all antecedents instead of only the immediately preceding one." *Judson v. Assoc. Meats & Seafoods*, 32 Wn. App. 794, 800-801, 651 P.2d 222 (1982); 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION §47-33 [*sic*] (6th ed. 2000). Pet. at 11. The Petitioner then argues that "this particular emphasis with capitalization and commas, and with no paragraph breaks within the body of the statute shows that the intent of the legislation was to allow the

discretion of the Director to be extended in all cases of closure of the claim." Pet. at 5.

This argument is without merit. It is unsound. First, the premise about commas is inappropriate to this statute, as written, as the Court of Appeals cogently discussed on page 11 of its opinion. The phrases were separated by semicolons, not commas, and the qualifying clauses (provisos 1 and 2) were introduced by colons, not commas. There is no syntactic or semantic necessity that the final qualifier (introduced by the terms "PROVIDED, HOWEVER,") referred to or qualified phrases [3.1] and [3.2], rather than merely the last phrase [3.3]. Indeed, the "last antecedent rule" dictated that the qualifying clauses referred only to the immediately preceding antecedent phrase from its tail demarcated by a colon to its head demarcated from the phrase that immediately preceded it by a semicolon. *Boeing v. Dep't Licensing*, 103 Wn.2d 581, 587, 693 P.2d 104 (1985).

2. SECOND PRONG OF PETITIONER'S ARGUMENT AND RESPONDENT'S REBUTTAL

On the second prong of the Petitioner's argument, he argues that RCW 51.36.010 has no plain meaning, and so is ambiguous. Pet. at 5. To establish that ambiguity, he invokes three tests. First, he argues that if the Court of Appeals requires pages of analysis to explicate the plain meaning

of the statute, then *ipso facto* the statute has no plain meaning. Pet. at 8. If the statute has no plain meaning, it is ambiguous. If it is ambiguous, then RCW 51.12.010 requires the Court to resolve the ambiguity in the Petitioner's favor. Pet. at 9 & 11.

This argument is without merit. The Court of Appeals analyzed this statute cogently and concisely according to stated legal precedents about the proper procedure for interpreting a statute. None of those precedents is consistent with the Petitioner's proposed procedure, and the Petitioner has cited no case authorizing such a proposed procedure.

The Court of Appeal spent four pages in introductory remarks, in stating the issue, and in identifying the appropriate standard of review. . *Slaugh,* slip op. at 4-8. It spent two pages methodically explicating the obvious syntactical structure of the statute. *Slaugh,* slip op. at 8-10. It spent a page explicating how the semantic structure of the statute was consistent with its syntactical structure. *Slaugh,* slip op. at 10-11. And it spent four pages explaining and dismissing the Petitioner's various arguments for his position. *Slaugh*, slip op. at 11-15.

Second, the Petitioner argues that if the Board of Industrial Insurance Appeals construed the statute differently from both the Superior Court and the Court of Appeals, then *ipso facto* the statute is ambiguous.

Pet. at 12. If it is ambiguous, then RCW 51.12.010 requires the Court to resolve the ambiguity in the Petitioner's favor.

This argument is without merit. Appellate court review of a purely legal issue is *de novo*. *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 593, 90 P.3d 659 (2004). If the Petitioner's argument were accepted, it would overturn longstanding case law on the standard of review in appellate courts, and no appeal would be practicable.

Third, the Petitioner argues that if the Court of Appeals must resort to a "multitude of authority" (various grammar guides) to interpret the statute, then *ipso facto* the statute is ambiguous. Pet. at 5. If it is ambiguous, then RCW 51.12.010 requires the Court to resolve the ambiguity in the Petitioner's favor.

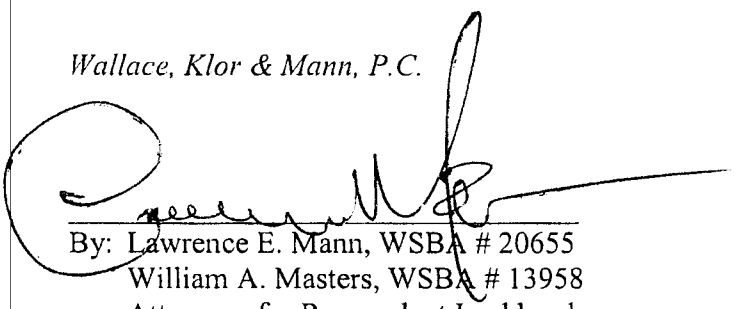
This argument is without merit. If this argument is a legal argument, it has no supporting cited legal authority. If this argument is a factual statement, it is vacuous. The Court of Appeals' in its "Analysis" cited to several grammar guides to explain traditional rules of grammar, such as the identification of clauses and parallel grammatical structure and the function of commas, semicolons, colons. *Slaugh,* slip op. at 8-10. Each authority reinforced the other. None of the authorities apparently provided any basis supporting the Petitioner's interpretive arguments.

VI. CONCLUSION

For the preceding reasons, this Court should deny the Petition for Review.

Respectfully submitted this 16th day of December 2013.

Wallace, Klor & Mann, P.C.



By: Lawrence E. Mann, WSBA # 20655
William A. Masters, WSBA # 13958
Attorneys for Respondent Lockheed Martin Hanford Corp.
5800 Meadows Road, Suite 220
Lake Oswego, OR 97035
Phone: (503) 224-8949

SUPREME COURT OF THE STATE OF WASHINGTON

Don M. Slaugh, Appellant/Petitioner, v. Lockheed Martin Hanford, Corporation, Respondent.	No. Court of Appeals No. 31081-7 **DECLARATION OF SERVICE OF ANSWER TO PETITION FOR REVIEW**

I hereby certify under penalty of perjury under the laws of the State of Washington that I caused the ANSWER TO THE PETITION FOR REVIEW to be served on the following:

Ronald R. Carpenter, Clerk/Administrator Washington Supreme Court Temple of Justice, P.O. Box 40929 Olympia, WA 98504-0929	[✔] **Via Email** [ ] Via Hand Delivery [ ] Via Facsimile
Renee S. Townsley, Clerk/Administrator Washington State Court of Appeals, Division III 500 N. Cedar Street Spokane, WA 99210	[✔] **Via U.S. Mail** [ ] Via Hand Delivery [ ] Via Facsimile
David L. Lybbert, Counsel for Don M. Slaugh Calbom & Schwab, PSC P.O. Drawer 1429 Moses Lake, WA 98837-1429	[✔] **Via U.S. Mail** [ ] Via Hand Delivery [ ] Via Facsimile
Steve Vinyard, Asst. Attorney General of WA Counsel for WA Dept. of Labor & Industries P.O. Box 40121 Olympia WA 98504-0121	[✔] **Via U.S. Mail** [ ] Via Hand Delivery [ ] Via Facsimile

SIGNED this 16th day of December 2013.

Wallace, Klor & Mann, P.C.

Lawrence E. Mann, WSBA # 20655
William A. Masters, WSBA#13958
Attorneys for Respondent
Lockheed Martin Hanford, Corp.
5800 Meadows Road, Suite 220
Lake Oswego, OR 97035
Phone: (503) 224-8949

OFFICE RECEPTIONIST, CLERK

From: Kathleen Seethaler <ks@wallaceklormann.com>
Sent: Monday, December 16, 2013 11:05 AM
To: OFFICE RECEPTIONIST, CLERK
Subject: Donald M. Slaugh, Petitioner v. State of WA, Dept. of Labor & Industries, Respondent; Court of Appeals No. 31081-7 (New Case - Supreme Ct. Case No. not yet assigned)
Attachments: Slaugh.Answr.to.Petition.pdf

Attached is a letter and **Answer to Petition for Review** regarding *Donald M. Slaugh, Petitioner v. State of WA, Dept. of Labor & Industries, Respondent* (Court of Appeals No. 31081-7), which has not yet been assigned a case number by your court. This document is being filed by the following attorneys in our firm:

William A. Masters, WSBA#13958
Lawrence E. Mann, WSBA # 20655
5800 Meadows Road, # 220
Lake Oswego, Oregon 97035
(503) 224-8949
bmasters@wallaceklormann.com
lmann@wallaceklormann.com

Feel free to contact me at our Lake Oswego office with further questions. Thank you for your assistance.

Kathleen Seethaler
Legal Assistant
ks@wallaceklormann.com

Lake Oswego Office*
5800 Meadows Road, Suite 220
Lake Oswego, Oregon 97035
503-224-8949
503-224-0410 fax

Seattle Office
4200 Two Union Square
601 Union Street
Seattle, WA 98101-4000
206-652-3265
206-652-3205 fax

San Jose Office
2033 Gateway Place, Suite 500
San Jose, California 95110
408-467-3845
503-224-8949 fax