No. 310817

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

Department Of Labor and Industries
Of The State Of Washington,

Respondent

v.

DON M. SLAUGH, et al.

Appellant

SECOND AMENDED BRIEF OF APPELLANT

David L. Lybbert,
WSBA No. 15951

CALBOM & SCHWAB, P.S.C.
P.O. Drawer 1429
Moses Lake, WA 98837
(509) 765-1851

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COMES NOW, the appellant, DON M. SLAUGH, by and through his attorneys of record, CALBOM & SCHWWAB, P.S.C., per DAVID L. LYBBERT, and files this brief of Appellant.

A. ASSIGNMENT OF ERROR

The Appellant seeks review of an order of Superior Court issued in Benton County on August 6th, 2012. *(CP, pp.12-15)* The order of the Superior Court overturned a decision of the Board of Industrial Insurance Appeals. The Board of Industrial Insurance Appeals had found that the language of RCW 51.36.010 would permit consideration of coverage of medical treatment in potentially life threatening conditions to persons whose claims have closed with awards of Permanent Partial Impairment. The Board remanded the case to the Department to exercise its discretion in Mr. Slaugh's case. *(CABR, pp.101-107)* [1] The Department appealed to the Superior Court of Benton County.

The Superior Court reversed the Board of Industrial Insurance Appeals' determination and decreed that the Department of Labor and Industries does not have authority, under RCW 51.36.010 to authorize further treatment to an injured worker once the claim has closed with an award of Permanent Partial Disability. *(CP, pp.12-15)*

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[1] Certified Appeal Board Record *("CABR")*

The Appellant believes that the Superior Court erred when it concluded that the language of RCW 51.36.010, which grants authority to the Department to extend authorization of treatment beyond the closure of the claim, would not apply to cases of Permanent Partial Disability.

B. STATEMENT OF THE CASE

The Appellant, Don Slaugh had asked the Department of Labor and Industries to consider authorization of continued medical monitoring of a severe lung condition, occupational asthma, beyond the date in which the Department was closing the claim with an award of Permanent Partial Disability.

The claimant filed an occupational disease claim for occupational asthma, which was allowed by the Department of Labor and Industries on December 4, 2003. *(CABR, p.76)* [1]

On February 14, 2008, the Department issued an order closing the claim without further time loss or PPD. The claimant filed a timely notice of appeal to this determination. *(CABR, p.76)*

On March 11, 2008, the Department of Labor and Industries issued an order setting aside the closure and leaving the claim open for further treatment. *(CABR, p.76)*

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[1] Certified Appeal Board Record *("CABR")*

On May 13, 2008, the employer filed an appeal to the Board of Industrial Insurance Appeals from the order reopening the claim. *(CABR, p.76)*

On December 26, 2008, as part of an agreement of all parties, including the employer, the injured worker, and the Department of Labor and Industries, the Board of Industrial Insurance Appeals issued an order of remand. In the Order on Agreement of Parties, the Board directed the Department of Labor and Industries to set aside the previous order of March 11, 2008. The Board directed the Department to thereafter determine whether the claimant's industrially related condition has reached maximum medical improvement, and based on an assumption that the Department would find that his condition was not in need of current proper and necessary treatment (medical fixity), to thereupon determine his entitlement to permanent partial disability and to decide whether the claimant was in need of life-sustaining treatment for the second proviso of RCW 51.36.010 and, if so, to determine whether or not, under their discretionary authority, the Department would permit such further treatment. *(CABR, p.77)*

Thereafter, following a series of Department orders, which were either protested or appealed by the employer and/or the claimant, the

Department ultimately issued an order dated May 25, 2010, which closed the claim with an award for permanent partial disability and further stated:

> "The law does not permit DLI to consider the discretionary authorization of life-sustaining treatment per the second proviso of RCW 51.36.010 after a claim is closed with a PPD award."

(CABR, pp.66, 76-77)

The injured worker filed a timely appeal from this second element of the determination. *(CABR p.69)* Upon briefing of the parties, the Board of Industrial Insurance Appeals issued a decision dated April 20, 2011, favorable to the claimant and remanded the matter back to the Department of Labor and Industries to exercise discretion on the issue of allowing continued treatment to Mr. Slaugh under RCW 51.36.010. *(CABR, pp.101-107)*

The Board of Industrial Insurance Appeals, in its decision, followed a prior Board decision entitled *In re Debra Reichlin,* BIIA Dec., 00 15943 (2003). *(CABR, pp.54-58)*

In Mr. Slaugh's case, the Board cites language in the *Reichlin* decision, which states:

> "The issue raised by Ms. Reichlin in this appeal is whether RCW 51.36.010, that

permits the Director of the Department of Labor and Industries to exercise discretion to provide continued treatment under certain circumstances, only applies to claims closed with total permanent disability (TPD), and not to claims closed with permanent partial disability (PPD). Ms. Reichlin seeks ongoing medication for her serious occupational asthma. We have granted review because we determined the Director has discretion to provide ongoing treatment in a claim closed with permanent partial disability.

* * *

The section of [RCW 51.36.010] that is material to this case is the final proviso that states the Supervisor of Industrial Insurance, in his sole discretion, may authorize continued medical and surgical treatment for accepted conditions to protect the workers' life or to provide for the administration of medical and therapeutic measures, including (non-narcotic) prescription medications that are necessary to alleviate continuing pain.

As stated in the *Malmberg* [*In re David H. Malmberg,* Dckt. No. 86 1326 (November 12, 1987)] concurrence and in the claimant's petition for review, that proviso follows the discussion about treatment for both PPD and TPD workers. **There is no distinction made in the proviso**. Although the more typical course for a worker whose claim has been closed would be to apply to reopen for further treatment if the condition has worsened, given the nature of certain illnesses like asthma, that could be life-threatening or with acute temporary flare-ups, that process is not of much benefit.

> The rules of statutory construction dictate that absent some obvious ambiguity, the words of the statute must be given their plain meaning. This statute read as a whole does not limit the discretion to provide continuing treatment to TPD cases. That interpretation is also contrary to the plain statutory language and is contrary to the principle that any doubt, though we do not believe there is really any doubt here, should be resolved in favor of the worker. We note that under certain circumstances, the Department **does** provide continued treatment in PPD cases -- for example, prosthesis or hearing aids and what is associated with providing them. All that is sought here is that the Director exercises his discretion, and finds that RCW 51.36.010 provides for that relief. We reverse the order and letters under appeal and remand this matter for the Director to exercise his discretion." *(Emphasis added)*

In Mr. Slaugh's case, the Board, quoting the language from its previous decision in *Reichlin* directed the Department of Labor and Industries to exercise its discretion finding that the clear language of the statute would allow its application to both TPD and PPD cases. *(CABR, pp.103-104)*

We have not yet reached the point of deciding or determining or arguing whether or not that discretion would justify the allowance of such benefits to Mr. Slaugh yet. We are merely asking that this court support

the Board's determination that the interpretation of RCW 51.36.010 can be read to allow the Director to exercise discretion in cases involving PPD and TPD.

No one in this case would suggest that the Director does not have authorization to provide such discretionary treatment measures in total permanent disability cases (TPD). The question for this court is whether or not the language of the statute can be read in such a fashion that it would allow coverage for both.

C. SUMMARY OF ARGUMENT

The Appellant maintains that the clear and unambiguous language of RCW 51.36.010 would allow the Department to consider or otherwise exercise its discretion and allow for treatment to be authorized and covered beyond the date of closure of a claim that involves Permanent Partial Disability. The Department already considers and allows such continued treatment in cases involving Permanent Total Disability (Pension) cases. We believe the language of the statute is written in such a fashion that it would equally apply to cases of Permanent Partial Disability. The Provisos within the statute limit only the circumstances where they might allow such further treatment, *i.e.*, cases of protecting the worker's life.

D. ARGUMENT

Let us begin with a reading of the statute. RCW 51.36.010 provides:

> "... (2)(a) 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, except as provided in (b) of this subsection, and proper and necessary hospital care and services during the period of his or her disability from such injury. ... For the Department for State Fund claims shall pay in accordance with 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. In all accepted claims, treatment shall be limited in point of duration as follows:
>
> 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; in case of temporary disability not to extend beyond the time when monthly allowances to him or her shall cease: PROVIDED that after any injured worker has returned to his or her work his or her 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; in case of a permanent total disability, not to extend beyond the date on which a lump sum settlement is made to him or her, of he or she is placed upon the pension role: 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 administration of medical and therapeutic measures including payment of prescription medications, ... which are necessary to alleviate continuing pain which results from the industrial injury. 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."

As we begin the process of reviewing the length, and breadth of RCW 51.36.010, we would take a moment to remind the court that by statute and case law, Title 51 is to be liberally construed in favor of the injured worker.

RCW 51.12.010 states:

> "This title shall be liberally construed for the purpose of reducing to a minimum the suffering **and economic loss** arising from

> injuries and/or death occurring in the course of employment." *(Emphasis Added)*

In the legion of cases wherein there has been an attempt to interpret terms or provisions of the act, the courts have repeatedly stated that:

> "The guiding principle in construing provisions of the Industrial Insurance Act is that the Act is remedial in nature and is to be liberally construed in order to achieve its purpose of providing compensation to all covered employees injured in their employment with doubts resolved in favor of the worker. *See Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587, 257 P.3d 532 (2011). *See also Cockle v. Dep't of Labor & Indus.*, 142 Wn.3d 801, 16 P.3d 583 (2001); *McIndoe v. Dep't of Labor & Indus.*, 100 Wash. App. 64, 995 P.2d 616 (2000) review granted 141 Wn.2d 1020, 11 P.3d 826, affirmed 144 Wn.2d, 252, 26 P.3d 903; *See also Hubbard v. Dep't of Labor & Indus.*, 140 Wn.2d 35, 992 P.2d 1002 (2000); *Clausen v. Dep't of Labor & Indus.*, 79 Wash. App. 537, 903 P.2d 518 (1995), review granted 128 Wn.2d 1022, 913 P.2d 815 affirmed 130 Wn.2d 580, 925 P.2d 624."

In the case *Glacier NW Inc. v. Walker,* 151 Wash. App. 389, 212 P.3d 587 (2009), the court staid that whenever there is a need to interpret the Industrial Insurance Act, the court must resolve all doubts in the worker's favor.

Similarly, in the case of *Harry v. Buse Timber & Sales Inc.*, 166 Wn.2d p. 1, 201, P.3d 1011 (2009), the court said that any doubts and ambiguities in the language of the Industrial Insurance Act must be resolved in favor of the injured worker in order to minimize the suffering and economic loss that may result from work related injuries.

In *Lewis v. Simpson Timber*, 145 Wash. App. 302, 189 P.3d 178 (2008), published with some modifications at 144 Wash. App. 1028, the court states that all doubts about the meaning of the Industrial Insurance Act must be resolved in favor of workers.

Courts have further stated that where reasonable minds can differ over the meaning of the Industrial Insurance Act's provisions, the court must resolve all doubts in the injured worker's favor. *See Tomlinson v. Puget Sound Freight Lines Inc.,* 140 Wash. App. 845, 166 P.3d, 1276 (2007) review granted 163 Wn.2d 1039, 187 P.3d 271, affirmed 166 Wn.2d 105, 206 P.3d 657.

Here the Board of Industrial Insurance Appeals felt that the plain language of RCW 51.36.010 would indicate that the proviso at its end, capitalized and separated by colon and comma, would clearly apply to both the previous clauses, *i.e.*, to both permanent total disability and permanent partial disability cases.

The Board felt, both in this case and in the case of *Debra Reichlin*, that the statute read as a whole does not limit the discretion to provide continued treatment to TPD cases. The Board, consistent with prior case law requiring such, stated that if there is any doubt, even though they did not believe there was any doubt in this case, that doubts are to be resolved in favor of the worker and which would again support a remand for the Director of the Department of Labor and Industries to exercise their discretion.

The claimant believes that a fair reading of the statute would include, because the ultimate proviso of the term **"PROVIDED, HOWEVER,"** shows a significant break in the statute, and clear intent that it applied to all previous provisions of that section. Thus, it would equally apply to cases of TPD and PPD.

The Department of Labor and Industries will likely ask this court to defer to their interpretation because they are the agency overseeing the administration of the act. We remind the court though that an agency's interpretation is not binding upon the court and deference to an agency is inappropriate where the agency's interpretation then conflicts with a statutory mandate. *See Cockle*, *supra*. Deference to the agency's interpretation has been seen as "inappropriate" when the agency's

interpretation conflicts with a statutory mandate. *See Dep't of Labor & Indus. v. Landin*, 117 Wn.2d 122, 814 P.2d 626 (1991).

Both history and case law authority make it clear that it is emphatically the province and duty of the judicial branch to say what the law is and to determine the purpose and meaning of statutes. *See Overton v. Economic Assistance Authority*, 96 Wn.2d 552, 637 P.2d 652 (1981).

Whenever an attempt is made to construe a statute one must do so by construing the statute as a whole, trying to give effect to all the language and to harmonize all provisions. *See City of Seattle v. Fontanilla*, 128 Wn.2d 492, 909 P.2d 1294 (1996).

The Department may argue, under the last antecedent rule, that the proviso regarding allowance of discretionary consideration of continued medical treatment would apply only to TPD cases because that is the specific portion that immediately precedes the proviso. However, the last antecedent rule has its own limitations. It is known that the last antecedent rule is not applied if a contrary intention appears in the statute. *See Boeing Co. v. Dep't of Licensing*, 103 Wn.2d 581, 693 P.2d 104 (1985). Further, 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 Wash. App. 794, 651 P.2d 222 (1982); *2A Norman J. Singer, Statutory Construction* § 47-33 (5th Ed. 1992).

We recognize that the court may not construe a statute in such a way that would lead to a "strained or unrealistic interpretation". *See Senate Republican Campaign Comm. v. Public Disclosure Comm'n,* 133 Wn.2d 229, 943 P.2d 1358 (1997). However, where reasonable minds can differ over what Title 51 RCW provisions mean, in keeping with the legislation's fundamental purpose, "the benefit of the doubt belongs to the injured worker ... " *Cockle, supra.*

It is believed that the parties would all agree that if this proviso is not deemed to apply in this circumstance of permanent partial disability, the persons who have conditions that are life-threatening, as it is assumed Mr. Slaugh has, would not be allowed access to any medical treatment absent the opportunity to file a formal Re-Opening Application.

We believe all parties would agree that in the adjudication of a Re-Opening Application that substantial delay can be incurred. We believe it is for this reason that the legislature carved out this proviso and stated that in cases of need for life-sustaining medical treatment and monitoring that it can and should apply to both cases of permanent total disability and cases of permanent partial disability.

The Department may argues that the general rule of law that a worker's claim remains open for treatment only until the worker's condition becomes fixed is justification to terminate access to medical care for life-sustaining medical treatment. This argument would appear to fail on the fact that workers who have been deemed to be totally permanently disabled (TPD) also have to have their industrially related conditions deemed "fixed" to qualify for pension benefits. Thus, they too would not be entitled to further medical care for life-sustaining therapy or treatment. However, the Department of Labor and Industries routinely provides continued medical treatment to persons placed on pension if there condition is life threatening.

The Department's application of WAC 296-20-01002 which defines allowable treatment as only that which is "proper and necessary" and designed to either cure the injured worker's underlying condition or rehabilitate the worker by increasing their functionality. We believe this is inapplicable because the last proviso of RCW 51.36.010 allows ongoing medical care, at the Director's discretion, in order to deal with life-sustaining medical treatment. This treatment is not required to otherwise satisfy the "proper and necessary" or the need to cure the injured worker's underlying condition limitations of WAC 296-20-01002.

The Department argues that to allow treatment in these circumstances, or to at this point force the Director to exercise discretion as to whether to allow such treatment, will open a floodgate of litigation. The Department's worry over the potential of a floodgate of litigation is not the appropriate focus for this court. We argue that the Department has made this plea to the courts on multiple occasions and did so in the case of the claimant in *Cockle v. Dep't of Labor & Indus., supra.*

In *Cockle* the Department also argued that its interpretation and calculation of time loss compensation was overall meant to be "administratively simple" and that it would be administratively inconvenient to expand the definition of the term "wages" to include health care coverage. The court in *Cockle* states that the legislature, by the language of the statute, expected the Department to overcome administrative inconvenience in order to ensure the fair compensation of disabled workers.

Even if this court were to decide that the statute is ambiguous, or if they were to decide that the interpretation made by the employer and the Department of Labor and Industries is just as reasonable as the one set forth by the injured worker and by the Board of Industrial Insurance Appeals, this court is mandated by case law and statute to come down on

the side of the injured worker and to find that the statute would allow for the Director of the Department of Labor and Industries to exercise discretion and make a decision in Mr. Slaugh's case as to whether or not he has a need for life-sustaining medical measures and to thereupon exercise that discretion and either allow him said medical management or to deny it.

The claimant believes that a fair reading of the statute would indicate, because the ultimate proviso of the term **"PROVIDED, HOWEVER,"** that this significant break in the statute is clear intent that it applied to all previous provisions of that section. Thus, it would equally apply to cases of TPD and PPD.

E. CONCLUSION

The Board of Industrial Insurance Appeals has determined that the plain language of RCW 51.36.010(4) would indicate that the statute does not specifically limit the Department's authority to exercise discretion to authorize treatment beyond closure of claim to just cases of TPD. The Board has found that the clear and unambiguous language of the statute would mandate that it apply to both PPD and TPD cases.

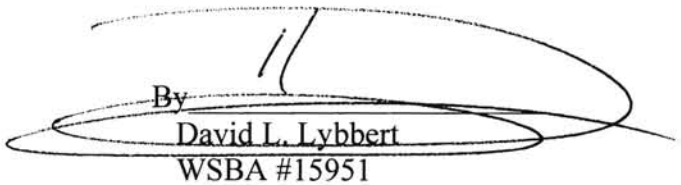
We agree with the Board of Industrial Insurance Appeals. The mere fact that the Board of Industrial Insurance Appeals, reading the

statute in question has found that their reading of the statute leads them to believe that the language allowing coverage of life-threatening conditions would apply equally to case of PPD as well as pension should at least stand for the proposition that the statute can be reasonably read both ways. If it can be interpreted by reasonable minds in these two ways, then case law mandates that we allow a reading that favors the injured worker or providing coverage to the injured worker.

We ask the Court of Appeals to reverse the Superior Court and remand this matter to the Department of Labor and Industries with an order that says they can, under RCW 51.36.010 exercise their discretion and consider Mr. Slaugh's application for continued medical care.

Respectfully submitted this 3rd day of December, 2012.

CALBOM & SCHWAB, P.S.C.



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CERTIFICATE OF SERVICE

I certify that I caused to be mailed or delivered on the 3rd day of December, 2012, the following document:

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