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

APPELLANT'S REPLY BRIEF

David L. Lybbert,
WSBA No. 15951

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STATUTES

COMES NOW the appellant, DON M. SLAUGH, by and through his attorneys of record, CALBOM & SCHWAB, P.S.C., per DAVID L. LYBBERT, and herein files Appellant's Reply Brief to that of Respondents Department of Labor and Industries and Lockheed Martin Hanford Corporation.

A.

SUMMARY OF PURPOSE OF APPEAL

Within the Department's review it is noted that there are several manners in which a claim may be brought to closure. The Department listed specifically closures with permanent partial disability, and closures wherein the worker is found to be totally and permanently disabled at the time of claim closure. The Department acknowledges that the worker who is totally and permanent disabled, pursuant to RCW 51.36.010, may request the Department of Labor and Industries to provide him or her with further treatment on a purely discretionary basis.

The appellant in this case is asking the court to read RCW 51.30.010 and determine whether its last proviso, which allows the Director, in his or her discretion, to authorize continued medical and/or surgical treatment for conditions previously accepted by the Department, when such treatment is deemed necessary to protect the worker's life or

provide for the administration of medical and therapeutic measures, including payment of prescription medications.

B.

INTERPRETING THE STATUTE RCW 51.36.010 AND/OR "LAST ANTECEDENT" RULE

Page 9 of the Department's brief is the only time that they type out the statute in its entirety. We would ask the court to review and consider the statute as it appears, not as it is chopped up in later argument by the Department of Labor and Industries.

On page 10, the Department provides case law that tells us that when interpreting statute, a proviso to a clause of a statute, is generally interpreted as applying only to the "last antecedent". In the very same paragraph, they acknowledged that this general rule of applying the proviso only to the "last antecedent" is not to be utilized if it is apparent from the text of the statute that the legislature intended for the proviso to apply to all the preceding clauses. *See Berrocal v. Fernandez*, 155 Wn.2d 585, 593, 121 P.3d 82 (2005).

The Department of Labor and Industries, on page 11, acknowledged that case law tells us that the last antecedent rule, with qualifying words and phrases referring to the last antecedent, recognize that the presence of a comma before the qualifying words and phrases

would be an indication that the legislature intended for the qualifying words to apply to the entire sentence. *See Boeing Company v. Dep't of Licensing*, 103 Wn.2d 581, 587, 693 P.2d 104 (1985).

Looking back at the statute in question, we see that the last proviso has in bold letters the word "PROVIDED" followed by a comma, and then followed with the term in bold "HOWEVER". The term 'HOWEVER" is also followed by a comma.

We submit that this bolding of the word "HOWEVER", the placement of commas both before and after it, would be a clear indication that the legislature intended that the last proviso authorizing the Department to exercise discretion to allow continued treatment for the protection of the worker's life or for pain medications, would apply to this case and would allow a ruling that the legislature intended for the last proviso to apply to all three of the separate scenarios described in the upper half of the statute.

This is contrary to the Department's allegation contained at the bottom of page 14, where they suggest the legislature did nothing to signal that it intended for the final proviso to apply to claims closed with permanent partial disability awards.

We submit that the proviso when read in a plain and normal fashion, considering the placement of commas, the bolding of letters, etc., would be a clear indication that the legislature did intend for it to apply to all the circumstances described within in the statute.

On page 17, the Department of Labor and Industries suggest that the appellant's interpretation of the statute, when considering the third clause, must vault over the second clause to be attached to the first proviso. That is not the appellant's argument.

The appellant argues that this last proviso, or third clause, would apply equally to a claim closed for pension, as well as the middle section wherein claimants would be normally deemed no longer entitled to medical treatment because it was no longer accomplishing "a more complete recovery", as well as applying to cases of permanent partial disability.

The middle scenario in the first half of the statute refers to workers who have returned to work who continue to need medical or surgical care so long as that care is providing a more complete recovery, *i.e.,* "curative". We submit that the ending proviso can and should have application to continue to provide, under the discretion of the Director, to

authorize continued medical or surgical treatment so as to protect the worker's life even though it may not be curative.

Therefore, the application argued by the appellant is not that the third clause vaults over the second clause, but that the final clause applies to all three scenarios, pension, curative treatment cases, and permanent partial disability cases.

The Department reiterates the need, as to why the legislature may have intended this discretionary allowance for non-curative treatment, when they declare on page 19, that pursuant to RCW 51.36.010, medical treatment is available only until a worker's condition has become fixed. The "fixed" status of a worker's condition is present in PPD cases as well as TPD cases. So what do we do with an injured worker whose condition has become fixed, and medical treatment is no longer going to cure the problem or decrease his disability, yet the condition remains life threatening?

We believe the legislature intended to extend the courtesy to the Director of the Department of Labor and Industries to exercise discretion so as to allow treatment to either someone whose condition has become fixed and has no permanent partial disability, or one whose condition has

become fixed and has permanent partial disability, or whose condition has become fixed and is totally and permanently disabled.

On page 20, the Department argues that the interpretation of the statutory language of RCW 51.36.010, as set forth by the appellant, is not a reasonable interpretation of the statutory language, nor is it consistent with the rules of grammar. We would ask this question then, if the Appellant's interpretation is so unreasonable, why did the Board of Industrial Insurance Appeals, both in the prior decision in *Reichlin, (In re Debra Reichlin*, BIIA Dec. 00 15943 (2003)), and in its decision in Mr. Slaugh's case, find that RCW 51.36.010 would allow consideration of this discretionary authority to be exercised by the Director of the Department of Labor and Industries? Are we saying that the Board of Industrial Insurance Appeals would not make a rational and reasonable interpretation of the statute?

The Department of Labor and Industries on page 25, states that the appellant, Donald Slaugh, has failed to provide legal support for his argument that the legislature's use of the phrase "**PROVIDED, HOWEVER,**" supports the conclusion that the proviso applies to the statute as a whole. The appellant cannot provide legal support for this because this appeal is the first time this question of what is meant by these

terms, in bold letters, with two commas, really means to the effect of the statute.

We are asking the Court of Appeals to tell us whether or not the interpretation of those words, as they lead into the last clause of the statute, would be an indication of the legislature's intent that that discretionary authority of the Director would extend to all three scenarios, not just to the last one mentioned in the statute.

Certainly the Department of Labor and Industries has failed to provide any direct legal support for their argument that the legislature, by its use of the phrase **"PROVIDED, HOWEVER"** would specifically indicate an intent that the proviso would not apply to the statute as a whole.

On pages 28 and 29 the Department suggests that because an injured worker already had a statutory right to apply to reopen their claim, that they have no need for the application of the provisos contained in RCW 51.36.010. We have argued previously, and continue to argue, that the reopening application process is slow, cumbersome, and requires objective proof of worsening of a condition before the claim can be reopened.

In the case of Mr. Slaugh, he has a condition that is potentially life threatening. The remedy to apply to reopen his claim to see if the Department would authorize further care, and the need to provide actual worsening of his condition, could be too slow of a response. We believe that is why the legislature carved out the exception of allowing the Director to authorize treatment for potentially life threatening conditions without the need to apply to reopen the claim.

C.

THE RESPONDENT LOCKHEED MARTIN HANFORD COMPANY'S ARGUMENTS IN REICHLIN RE USE OF DISCRETIONARY AUTHORITY ARE ALSO MISPLACED

Appellant continues to submit that the Department of Labor and Industries has the authority to consider discretionary authorization of medical treatment of a potential life threatening condition pursuant to RCW 51.36.010, even in claims closed with permanent partial disability awards.

We take exception to the manner in which the respondent, Lockheed Martin Hanford Corporation, has cited and typed in RCW 51.36.010. They have placed numerous breaks within the statute that do not exist. They have highlighted words that are not highlighted in

the statute itself. By doing so, we believe they have changed the clear meaning of the statute and the affected the possible interpretations thereof.

The duty of this court is to look at the statue, the way it is written, and decide whether or not the interpretation set forth and alleged by the appellant, is a reasonable interpretation of the statute.

On page 9, the respondent Lockheed Martin Hanford Corporation, argues that the Department of Labor and Industries has "consistently "found the second proviso of RCW 51.36.010 does not permit the Department to consider discretionary authorization of lift-sustaining treatment after a claim is closed with a permanent partial disability award. There is no factual basis to support this conclusion.

D.

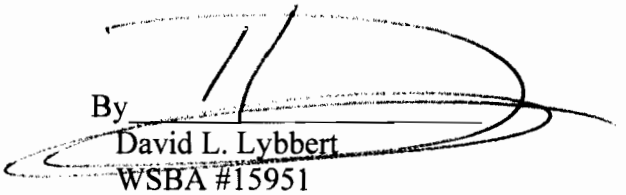
CONCLUSION

For the reasons discussed above, the appellant asks that this court overturn the decision of the superior court, and specifically find that the reading of RCW 51.36.010, and particularly with the conclusion of the term, **"PROVIDED, HOWEVER"** was a clear indication that the legislature intended for this portion of the statute to apply to all of the other clauses of the statute, or, at a minimum, that the statute itself is ambiguous enough that the doctrine of liberal construction would require

the court to determine that the last paragraph applies to all preceding clauses and would allow the Director of the Department of Labor and Industries to exercise discretion and decide, even in cases of permanent partial disability, whether a claimant may need further medical monitoring and/or care in cases or conditions that may be life threatening.

Respectfully submitted this 11th day of February, 2013.

CALBOM & SCHWAB, P.S.C.



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CERTIFICATE OF SERVICE

I certify that I caused to be mailed or delivered on the 11th day of February, 2013, the following document:

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