NO. 31081-7

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

Department of Labor & Industries

Respondent

v.

Donald Slaugh

Appellant

BRIEF OF RESPONDENT DEPARTMENT OF LABOR AND INDUSTRIES

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I. INTRODUCTION

This is a workers' compensation case under Title 51, RCW, the Industrial Insurance Act. In general, a worker is eligible to receive medical treatment until his or her medical condition becomes "fixed" and a further recovery from the effects of the injury is not expected to occur. At that point, the claim may be closed, and the worker is ineligible for further treatment unless the claim is reopened. RCW 51.36.010 provides, however, that if a worker's claim is closed with total permanent disability (a pension) the worker may ask the supervisor of the Department of Labor and Industries (Department) to provide the worker with further medical treatment on a purely discretionary basis.

Donald Slaugh's claim was closed with a permanent partial disability award, and he has not applied to reopen his claim. He argues the proviso that allows the Department to provide a pensioner with treatment on a discretionary basis also applies to workers whose claims were closed with permanent partial disability awards.

The superior court correctly rejected this argument, concluding that RCW 51.36.010's proviso did not apply to workers who have received such awards and that it applied only to workers who have received pensions. Under the plain language of RCW 51.36.010—particularly when it is read in the context of the last antecedent rule—it is

apparent that a worker may not receive further treatment after a permanent partial disability award, and accordingly, this Court should affirm.

II. COUNTER STATEMENT OF THE ISSUES

> Does the proviso to RCW 51.36.010 that allows the supervisor to authorize further treatment on a purely discretionary basis apply to claims that have been closed with permanent partial disability awards, when the proviso that authorizes such care comes immediately after a clause of a statute that discusses workers who have been placed on pensions, and when, under the last antecedent rule, a proviso is presumed to modify only the clause that immediately precedes it?

III. STATEMENT OF THE CASE

Slaugh was injured on January 20, 2003, while working for Lockheed Martin Corporation, a self-insured employer. BR 57.[1] The Department directed the employer to allow his claim for workers' compensation benefits. BR 57.

Slaugh's claim was eventually closed in September 2009 with a permanent partial disability award for respiratory impairment. BR 62. Slaugh requested reconsideration of this decision and the Department affirmed. BR 57-58.

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[1] The certified appeal board record contains numerous documents that are consecutively numbered with a machine-stamped number. Citations to those documents will be cited to as "BR", followed by the appropriate page number.

On May 25, 2010, the Department issued an order that observed that the claim had been closed (through a previously issued order[2]) and that concluded that the supervisor of industrial insurance may not, as a matter of law, authorize further medical treatment to a worker whose claim has been closed with a permanent partial disability award under RCW 51.36.010. BR 66. Slaugh appealed this decision to the Board of Industrial Insurance Appeals (Board). BR 58.

A proposed decision and order was issued that reversed the Department's May 25, 2010 order and directed the Department to exercise discretion as to whether to authorize further treatment, based on the industrial appeal judge's conclusion that he was bound to rule in this fashion under the Board's significant decision *In Re Debra Reichlin*, 2003 WL 22273065, BIIA Dec. 00 15943 (Wash. Bd. of Indus. Ins. Appeals July 25, 2003).[3] BR 54-59. Both the Department and the employer petitioned for review, but the Board denied review and adopted the proposed decision as its decision. BR 27-44, 3-26. 1.

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[2] In his brief of appellant, Slaugh suggests that the May 25, 2010 order both closed his claim and denied his request that he receive treatment subsequent to the closure of his claim. App's Br. (Appellant's Brief) at 3-4. However, the May 25, 2010 order did not close Slaugh's claim. It merely observed that his claim had already been closed through a previously issued order. *See* BR 66. In any event, the only issue raised by Slaugh on appeal is whether he should receive treatment subsequent to the closure of his claim, and he does not contend that the Department erred when it closed it.

[3] Under RCW 51.52.160, the Board may designate some of its decisions and orders as "significant."

The Department appealed to the Franklin County Superior Court. CP 98-107. The superior court reversed the Board's decision and affirmed the Department, concluding that RCW 51.36.010 does not authorize the Department to provide further treatment on a claim that has been closed with an award of permanent partial disability because the portion of that statute that authorizes the Department to provide further treatment on a discretionary basis applies only to claims that have been closed with pensions. CP 12-16.

IV. SUMMARY OF THE ARGUMENT

RCW 51.36.010 does not authorize treatment for claims closed with permanent partial disability because the proviso that allows for treatment in closed claims applies to pensions only. Under the last antecedent rule, when a sentence in a statute contains multiple clauses, and when one of the clauses is modified by a proviso, the proviso is presumed to apply only to the clause that immediately precedes it unless the legislature has done something to indicate that it intends for that proviso to apply to all of the previous clauses.

Here, the proviso in RCW 51.36.010 that Slaugh relies on is contained in a sentence in a statute that contains three, distinct, clauses, each of which ends in a semi-colon. The first clause applies to workers, like Slaugh, whose claims were closed with a permanent partial disability

award, and it does not contain any proviso for further treatment on a discretionary basis.

The second clause applies to workers whose claims have not yet been closed, and it contains a proviso allowing for further treatment for workers who have are no longer receiving time loss but whose conditions may improve if they receive further medical care. It is plain that neither that clause, nor its proviso, applies to Slaugh, as his claim is no longer open and as he does not contend that further treatment will improve his condition.

The third clause of the statute applies to workers who have been pensioned, and it contains a proviso that allows such workers to receive further care on a purely discretionary basis. Under the last antecedent rule, this proviso applies only to the clause that immediately precedes it, and, thus, it applies only to workers who have been placed on pensions. The legislature has not done anything to signal that it intended for this proviso to apply to the other clauses, nor would make sense to apply it to the other clauses. Indeed, in order to apply the second proviso in the way that Slaugh argues it should be applied, the first proviso would have to be ignored, and doing so would be contrary to the principle that all words in a statute are given effect. The superior court properly concluded that the

proviso that Slaugh relies upon does not apply to him, and this Court should affirm.

V. STANDARD OF REVIEW

In a worker's compensation matter involving an appeal from a superior court's decision to this Court, the ordinary civil standard of review applies. *Malang v. Dep't of Labor & Indus.*, 139 Wn. App. 677, 683, 162 P.3d 450 (2007). It is the decision of the superior court that is reviewed, not the Board. *See Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179-81, 210 P.3d 355 (2009). Because there is no dispute as to any issue of fact and the questions on appeal are pure questions of law, the issues raised by this appeal are subject to de novo review by this Court. *See Romo v. Dep't of Labor & Indus.*, 92 Wn. App. 348, 353, 962 P.2d 844 (1998).

VI. ARGUMENT

A. Under RCW 51.36.010, The Department May Authorize Further Treatment Only On A Claim That Has Been Closed With A Finding Of Permanent Total, Not Partial, Disability

1. In General, Once A Worker's Claim Is Closed The Worker Is Ineligible For Further Medical Treatment

As a general matter, the Department may close a worker's claim when the worker's condition is "fixed", that is, when there is no further medical treatment that is likely to further improve the worker's condition.

E.g., *Miller v. Dep't of Labor & Indus.*, 200 Wash. 674, 680, 94 P.2d 764 (1939). Thus, when the Department has closed a worker's claim, as it has here, it has implicitly determined that the worker's condition is fixed and that there is no further treatment available that is reasonably likely to improve the injured worker's medical condition. *See Miller*, 200 Wash. at 680.

If a worker's claim has been closed with a permanent partial disability award (or, for that matter, with no award for permanent disability), the worker may file an application to reopen it. RCW 51.32.160. However, in order for a worker to reopen his or her claim, he or she must show that his or her industrially-related disability has been aggravated and that the aggravation was proximately caused by the industrial injury. RCW 51.32.160; *Wilber v. Dep't of Labor & Indus.*, 61 Wn.2d 439, 444, 378 P.2d 684 (1963).

A worker may also be found to be totally and permanently disabled at the time of claim closure. A worker who has been found to be permanently unable to obtain or perform any form of gainful employment is considered totally and permanently disabled. *Clauson v. Dep't of Labor & Indus.*, 130 Wn.2d 580, 584, 925 P.2d 624 (1996). The payments that are provided to workers who have been found to be totally and permanently disabled are referred to as "pension" benefits. *Id.* at 583.

Since total and permanent disability represents the highest form of disability that an injured worker may receive, and since a worker who wishes to have his or her claim reopened must establish that there has been an aggravation of the worker's disability, a worker who has been placed on a pension cannot have his or her claim reopened. *See Wilber*, 61 Wn.2d at 444 (stating that worker seeking reopening of a claim must demonstrate that there has been an increase in his or her disability); *Harrington v. Dep't of Labor & Indus.*, 9 Wn.2d 1, 7-8, 113 P.2d 518 (1941) (stating that total and permanent disability is the highest form of disability that is recognized by the Industrial Insurance Act). A worker who has been pensioned may, however, request that the Department provide him or her with further treatment on a purely discretionary basis. RCW 51.36.010.

Here, Slaugh's claim was closed with a permanent partial disability award. BR 57-58. Slaugh contends, however, that the proviso that allows the Department to authorize further treatment on a discretionary basis in pension cases also applies to claims, like his, that have been closed with permanent partial disability awards. App's Br. at 12. As the Department will explain below, however, the proviso that Slaugh relies upon does not apply to him.

2. RCW 51.36.010 Should Be Analyzed Under The Last Antecedent Rule

A worker's right to receive medical treatment under the Industrial Insurance Act is governed by RCW 51.36.010, which provides in pertinent part:

> 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 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; 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: 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. 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.[4]

When interpreting a statute, a court strives to give effect to the legislature's intent by considering the plain language of the statute. *State v. Bunker*, 169 Wn.2d 571, 577-78, 238 P.3d 487 (2010). In order to determine the plain language of a statute the court employs traditional rules of grammar. *Id.* at 578. Unlike a rule of statutory construction, which can be considered only if a statute is ambiguous, a grammar rule is employed to discern "the plain language of a statute." *See id.*

One such grammar rule is the last antecedent rule. *Bunker*, 169 Wn.2d at 578. Under that rule, a proviso to a clause of a statute is generally interpreted as applying *only* to the "last antecedent," in other words, a proviso modifies only the words and phrases that immediately precede it, unless it is apparent from the text of the statute that the legislature intended for the proviso to apply to all of the preceding clauses. *Berrocal v. Fernandez*, 155 Wn.2d 585, 593, 121 P.3d 82 (2005) (noting that where the last antecedent rule applies, qualifying words in a statute

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[4] Subsequent to the date of Slaugh's injury (and subsequent to the date of the Department order that is currently under appeal) RCW 51.36.010 was amended, and, among other things, the statute was divided into subsections, with the language that is critical to the current appeal being placed in subsection (4). However, none of the amendments to that statute impact the issue currently under appeal, namely, whether a worker may receive further treatment on a discretionary basis after the worker's claim was closed with a permanent partial disability award. *See* RCW 51.36.010. A copy of the Westlaw entry for RCW 51.36.010, which includes a summary of the history of the statute, is attached as Appendix One for this Court's convenience.

"refer to the last antecedent" unless a contrary intention is plain); *In re Sehome Park Care Ctr.*, 127 Wn.2d 774, 781, 903 P.2d 443 (1995) (noting that under the last antecedent rule, qualifying words and phrases refer to the last antecedent, but also noting that a presence of a comma before the qualifying words and phrases indicates that legislature intended for qualifying words to apply to entire sentence); *Boeing Co. v. Dep't of Licensing*, 103 Wn.2d 581, 587, 693 P.2d 104 (1985) (applying last antecedent rule and concluding, under that rule, that a proviso modified only the clause that immediately preceded it).

As it is a rule of grammar, the function of the last antecedent rule is to help a court discern the plain meaning of the statute. *Bunker*, 169 Wn.2d at 578. Indeed, as the Ninth Circuit Court observed in *Flowers v. Carville*, 310 F.3d 1118, 1124 (9th Cir. 2002), ignoring the "last antecedent" rule can lead to strained and "telescopic" interpretations of a statute, where "words leap across stretches of text, defying the laws of both gravity and grammar."

When this rule of grammar is applied to the statute at issue in this case it is apparent that the "second proviso" to RCW 51.36.010, which comes immediately after the clause of that statute that addresses a worker's eligibility for treatment after being found totally and permanently disabled, applies only to such workers, and it does not apply

to workers, like Slaugh, whose claims were closed with permanent partial disability awards.

3. Reviewing Each Section Of RCW 51.36.010 With The Last Antecedent Rule In Mind Reveals That The Department May Authorize Further Treatment Only On A Claim That Has Been Closed With A Total, Not A Partial, Disability Award

If one looks at the language in each section of RCW 51.36.010 and applies the last antecedent rule to each section, it becomes even more plain that the proviso allows for further treatment only if a claim is closed with a pension.

a. Workers Whose Claims Have Been Closed With Permanent Partial Disability Awards May Not Receive Further Treatment

The first clause of the relevant portion of RCW 51.36.010 discusses a worker's eligibility for medical care in a claim involving permanent partial disability, and it provides:

> In the case of permanent partial disability, [treatment is] 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;

The first clause does not contain a proviso. RCW 51.36.010. It contains an exception, but the exception limits the circumstances under which treatment is provided in a case of permanent and partial disability

rather than expanding upon them. RCW 51.36.010. The first clause states that treatment may not be provided after a worker has been awarded permanent partial disability unless the worker returns to work before that award is made, and, in that instance, treatment is not provided after the "monthly allowances" to the worker "shall cease." *Id.* The exception that is contained in the first clause is inapplicable to Slaugh, as it applies to workers whose claims are open but who have stopped receiving time loss compensation payments. Slaugh's claim was not open at any time that is relevant to this appeal.

Under the plain language of the first clause, Slaugh is not eligible for further treatment because his claim has been closed with a permanent partial disability award: his is a case "of permanent partial disability," and, therefore, treatment is "not to extend beyond the date" that such an award was made. RCW 51.36.010. Furthermore, as the Department will explain below, the provisos to the second and third clauses do not apply to the first clause of the statute, and, thus, they provide no basis for granting relief to Slaugh.

b. Workers Who Are Receiving Time-Loss Compensation May Receive Treatment Benefits In Certain Circumstances

The second clause discusses a worker's eligibility for medical care during periods of temporary total disability, and it provides:

> . . . in case of temporary disability [treatment is] 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 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;

Unlike the first clause (which involves workers who have received permanent partial disability awards and workers whose claims are open but who are not receiving time loss compensation), the second clause does contain a proviso. As noted previously, a proviso to a clause of a statute applies only to the words that immediately precede it unless the legislature has somehow indicated that the proviso applies to the statute as a whole. *Boeing*, 103 Wn.2d at 587. Here, the first proviso comes after the *second* clause (which discusses workers who are receiving time loss compensation), not the first clause (which discusses workers who have received permanent partial disability awards). RCW 51.36.010. Thus, under the last antecedent rule, the first proviso is presumed to apply only to workers who are receiving time loss compensation, and it is presumed not to apply to the other provisions of the statute. *See* RCW 51.36.010; *Boeing*, 103 Wn.2d at 587. Moreover, the presumption created by the last antecedent rule cannot be rebutted here, because the legislature did not do anything to signal that it intended for the first proviso to apply to workers

whose claims have been closed with permanent partial disability awards.[5] *See* RCW 51.36.010. Indeed, the proviso, on its face, discusses a worker's eligibility for treatment after the worker has *returned to work* rather than a worker's eligibility for treatment after the worker has become *permanently and partially disabled.* RCW 51.36.010.

Additionally, it must be noted that the first proviso allows for the provision of treatment when such treatment is necessary to allow for "a more complete recovery" from the effects of an industrial injury. RCW 51.36.010. By definition, that is not true of a worker who has become permanently and partially disabled, because a worker is not eligible for a permanent partial disability award if a more complete recovery can be expected from further medical treatment. *See Hunter v. Dep't of Labor & Indus.*, 43 Wn.2d 696, 263 P.2d 586 (1953); *Franks v. Dep't of Labor & Indus.*, 35 Wn.2d 763, 215 P.2d 416 (1950); *see also supra* discussion Part VI.A.1.

Finally, the inference that the first proviso applies only to the clause that precedes it is further strengthened by the fact that the proviso is introduced with a colon, rather than a semi-colon. The function of a colon is to introduce a topic that relates to the topic that was discussed

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[5] Slaugh does not contend that this particular proviso applies to his case. However, in order to have a comprehensive understanding of RCW 51.36.010, it is helpful to consider each of the three clauses of the critical sentence in the statute.

previously. "A colon tells the reader that what follows is closely related to the preceding clause." W. Strunk, Jr. and E.B. White, *The Elements of Style* 7-8 (3d ed. 1979). Since the "preceding clause" discussed a worker's eligibility for treatment while receiving time loss compensation, the colon tells the reader that the first proviso applies only to such workers.

c. Workers Who Have Been Pensioned May Receive Treatment Benefits Under Certain Circumstances

The third clause discusses a worker's eligibility for treatment after being found to be totally and permanently disabled. It provides as follows:

> in case of a permanent total disability [treatment is] 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: 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.

As noted previously, it is well settled that a proviso to a clause modifies only the words that immediately precede it, not the statute as a

whole, unless the legislature has indicated that it had a different intent. *Boeing*, 103 Wn.2d at 587. Therefore, the second proviso is presumed to apply only to the clause that immediately precedes it—the third clause—which discusses a worker's eligibility for treatment after having been found to be totally and permanently disabled. Furthermore, like the proviso to the second clause, the proviso to the third clause is introduced by a colon, not a semi-colon, which even further strengthens the inference that that proviso applies *only* to the clause that immediately precedes it (the clause discussing totally and permanently disabled workers). *See* Strunk, Jr. and White at 7-8.

Nothing in the language of this proviso suggests that the legislature intended for it to apply to the other clauses of the statute. To paraphrase the *Flowers* Court, one can conclude that the second proviso applies to workers who have received a permanent partial disability award only by allowing the words of the proviso to jump over "stretches of text, defying the laws of both gravity and grammar." *Flowers*, 310 F.3d at 1124. Under Slaugh's interpretation of the statute, the proviso to the third clause of the key sentence of the statute must vault over the second clause (and the first proviso) and land atop the first clause. Such an interpretation is not reasonable, and is contrary to the plain language of the statute.

Reading RCW 51.36.010 as a whole shows that the legislature set three tests for determining the duration during which a worker may receive medical treatment: one for workers who have received permanent partial disability awards; one for workers who are receiving temporary and total disability payments and whose claims have not been closed; and one for workers who have been placed on the pension rolls. The test for a worker's eligibility for treatment when a worker has received a permanent partial disability award is subject to an exception but it does not have a proviso. RCW 51.36.010. The test for a worker's eligibility for treatment while on time loss compensation (and after time loss compensation has been terminated) is subject to a proviso: treatment may be provided after a worker has returned to work *if* such treatment is necessary to achieve a "more complete recovery." *Id.* The test for a worker's eligibility for treatment after having been found to be totally and permanently disabled is subject to a different proviso: such workers may receive treatment if it is necessary to protect their life or the treatment is necessary to "alleviate continuing pain." *Id.*

The structure of the statute compels the conclusion that the test for a worker's eligibility for treatment after receiving a permanent partial disability award is modified *only* by the exception that immediately follows it, while the test for a worker's eligibility for treatment while on

time loss compensation is modified *only* by the proviso that immediately follows it, and the test for a worker's eligibility for treatment after being declared totally and permanently disabled is modified *only* by the proviso that immediately follows it. Nothing about the structure of the statute suggests, in any way, that the legislature intended the proviso to the third clause of RCW 51.36.010 (which applies to workers who are totally and permanently disabled) to also apply to workers like Slaugh (who have received permanent partial disability awards).

When RCW 51.36.010 is read in the context of the general rule of law that medical treatment is available only until a worker's condition has become fixed, it becomes even more apparent that the Department may not authorize further treatment on a claim that has been closed with a permanent partial disability award unless the claim is reopened.

B. Slaugh Fails To Advance Any Persuasive Reason For His Claim That The Proviso To The Clause Of The Statute That Discusses Workers Who Have Been Pensioned Should Also Apply To Workers Who Have Received Permanent Partial Disability Awards

Slaugh offers four arguments in support of his interpretation of the statute, none of which are supportable.

1. Although the Board's *Reichlin* Is Consistent With Slaugh's Arguments, *Reichlin* Was Wrongly Decided

First, Slaugh argues that this Court should adopt the position taken by the Board in the *Reichlin* decision, namely, that the "plain language" of RCW 51.36.010 supports his claim that the proviso to the third clause of the statute (discussing workers who have received pensions) also applies to the first clause of the statute (discussing workers who have received permanent partial disability awards). App's Br. at 11-12 (citing *Reichlin*, 2003 WL 22273065).

The Board asserts in *Reichlin* that "we do not believe there is really any doubt" that the proviso that immediately follows the third clause of the statute (involving workers who have been pensioned) also applies to the first clause of the statute (involving workers who have received permanent partial disability awards). *Reichlin*, 2003 WL 22273065 at 4*. However, this is neither a reasonable interpretation of the statutory language nor one that is consistent with the rules of grammar. *See* RCW 51.36.010; *Bunker*, 169 Wn.2d at 578; *Boeing*, 103 Wn.2d at 587. This Court should not follow the Board's lead. *See Ackley-Bell v. Seattle Sch. Dist. No. 1*, 87 Wn. App. 158, 940 P.2d 685 (1997) (noting that the courts are not required to follow decisions of the Board).[6] Slaugh,

[6] The Board's interpretation of RCW 51.36.010 is relevant only if there is an ambiguity in the statute and since there is no ambiguity here it should not be considered.

like the Board in its *Reichlin* decision, fails to demonstrate that the language of the statute itself plainly and unambiguously supports his assertion that the proviso to the third clause of the statute also applies to the first clause of it. *Reichlin*, 2003 WL 22273065 at 4*.

Reichlin concluded that since the legislature did not expressly provide that that proviso does *not* apply to workers whose claims were closed with permanent partial disability awards, it somehow follows that the proviso does apply to such workers. *See Reichlin*, 2003 WL 22273065 at *3. This analysis is contrary to the last antecedent rule, as, under that rule, a proviso is presumed to apply only to the clause that precedes it unless the legislature has affirmatively done something to indicate that it

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If there were ambiguity, the Board's decision should not be followed as it is the Department's interpretation that should be deferred to not the Board's. *See, e.g., Port of Seattle v. Pollution Control Hearings Bd.,* 151 Wn.2d 568, 593-94, 90 P.3d 659 (2004) (recognizing that the courts should defer to the interpretation of a statute by the executive agency that is charged with administering it rather than the interpretation given to it by a quasi-judicial agency that hears appeals from such decisions); *Bradley v. Dep't of Labor & Indus.*, 52 Wn.2d 780, 786-87, 329 P.2d 196 (1958) (stating that "Where a statute is ambiguous, construction placed upon it by the officer or department charged with its administration is not binding on the courts but is entitled to considerable weight in determining the legislative intention," particularly when the agency's interpretation of the act is longstanding and the legislature has not amended the statute). Here, it is the Department that is charged with the administration and enforcement of the Industrial Insurance Act: the Board hears appeals from decisions of the Department but it does not administer the Act. RCW 51.04.020 (outlining duties and authority of the Director of the Department); RCW 51.52.060 (directing that party who disagrees with decision of the Department may file an appeal with the Board). The Department has consistently interpreted RCW 51.36.010's proviso as authorizing ongoing care only to a claimant whose claim has been closed with a total, not a partial, disability award, and its interpretation is entitled to deference. The longstanding nature of the Department's interpretation of RCW 51.36.010 is evidenced by the Declaration of Victoria Kennedy, and by the 1978 advice memorandum attached to that declaration. BR 136-47. For the Court's convenience, the Declaration of Victoria Kennedy is attached as Appendix Two.

intends for the clause to modify the entire statute. *Compare Reichlin*, 2003 WL 22273065 at *3 *with Boeing*, 103 Wn.2d at 587.

It was not necessary for the legislature to expressly exclude workers who have received permanent partial disability awards from the second proviso in order for it to follow that that proviso does not apply to such workers. *See Boeing*, 103 Wn.2d at 587. Rather, if the legislature intended for the proviso to apply to all injured workers, and not just to those who have been found to be permanently and totally disabled, it was incumbent upon the legislature to do something to signal that that was its intent. *See id.* The legislature did not do so.

The Board in *Reichlin* also cited, in support of its view that the second proviso to RCW 51.36.010 applies both to workers who have received partial disability awards and to workers who received total disability awards, the fact that the Department sometimes provides treatment, in the form of prostheses and hearing aids, to workers after they have received permanent partial disability awards. *Reichlin*, 2003 WL 22273065 at *4. This analysis ignores the fact that a specific statute, RCW 51.36.020(5), authorizes the Department to provide workers with mechanical appliances "after treatment has been completed" and "without regard to the date of injury or date treatment was completed, *notwithstanding any other provision of law*." (Emphasis added).

Thus, under RCW 51.36.020(5), hearing aids and prostheses, which are mechanical appliances, can be provided to any injured worker even if the claim has been closed with an award for permanent partial disability. The specific statutory authorization for such assistance to workers in closed claims cannot be read to broaden RCW 51.36.010 to allow the Department to provide any form of medical treatment to worker's whose claims were closed with permanent partial disability awards. RCW 51.36.020(5), by its terms, applies only to hearing aids and prostheses. Therefore, the fact that the Department provides such assistance to workers on closed claims does not support the Board's conclusion in *Reichlin* that the Department can provide *any* form of medical treatment to a worker on *any* claim that has been closed with permanent partial disability, since RCW 51.36.020(5), by its terms, applies only to "mechanical appliances." *Reichlin*, 2003 WL 22273065 at *4.

On the contrary, the existence of the explicit language in RCW 51.36.020(5) expressly authorizing post-closure medical benefits in a particular instance, juxtaposed against the absence of any such language in the provisos in RCW 51.36.010 for further treatment once a worker's claim is closed with a permanent partial disability award, supports the Department's argument. *See generally In Re Detention of Williams*, 147 Wn.2d 476, 491, 55 P.3d 597 (2002), (stating, "Under expressio unius

est exclusio alterius, a canon of statutory construction, to express one thing in a statute implies the exclusion of the other. Omissions are deemed to be exclusions."); *see also Black on Interpretation of Laws* §34 (2d ed. 1911).

Where the same 1965 legislative enactment provided that certain services under RCW 51.36.020 would be authorized "without regard to the date of injury or date treatment was completed, notwithstanding any other provision of law," and the legislature did not provide such express language regarding claims that have been closed with permanent partial disability awards, the inference should be drawn that the legislature did not intend the result the Board reached in *Reichlin*. *Reichlin*, 2003 WL 22273065 at *4.

2. Slaugh's Argument That The Legislature's Use Of The Phrase "PROVIDED, HOWEVER," Indicates That It Wished For The Proviso To Modify The Entire Statute Lacks Merit

Second, Slaugh argues that the second proviso is introduced with the phrase "PROVIDED, HOWEVER," rather than simply by the word, "PROVIDED," and that this somehow establishes that the legislature intended for that proviso to apply to workers who have received partial disability awards as well as to those workers awarded total disability. App's Br. at 12. Slaugh states that the phrase "PROVIDED,

HOWEVER," is a "significant break" in the statute. App's Br. at 12. However, Slaugh fails 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. *See id.* As his contention is unsupported by a citation to authority, it must be rejected. *See Cowiche Canyon Conservancy v. Bosely*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (noting that an appellate court generally declines to consider arguments that are not supported by a citation to authority).

Moreover, from a semantic and grammatical standpoint, the phrase "PROVIDED, HOWEVER," means precisely the same thing as "PROVIDED" in this context. And, if anything, to the extent that the legislature's use of the language "PROVIDED, HOWEVER," (instead of, "PROVIDED") was included to emphasize the fact that the applicable language is a proviso to a clause in a statute, this simply reinforces the conclusion that the general rules regarding provisos to the clauses of statutes are applicable here, and that, therefore, the proviso modifies only the clause that immediately precedes it (relating to workers who have been pensioned). RCW 51.36.010; *Boeing*, 103 Wn.2d at 587.

3. Slaugh Fails To Show That Any Exception To The Last Antecedent Rule Applies

Third, Slaugh argues that the last antecedent rule does not apply in all situations, noting that the rule has not been followed in cases in which the clauses that preceded the qualifying phrase ended in commas rather than semi-colons. App's Br. at 13. It is true that the courts have held that when the language that *precedes* the proviso ends in a comma, that this signals a legislative intent that the proviso apply to the statute as a whole. *See Sehome Park*, 127 Wn.2d at 781.

However, this does not apply here because the applicable language in RCW 51.36.010 that precedes the proviso ended in semi-colons, not commas. For the exception to the last antecedent rule that Slaugh mentions to apply, Slaugh would need to show that the clause discussing workers who are permanently and partially disabled and the clause discussing workers who are receiving time loss compensation end in commas rather than semi-colons. *See Sehome Park*, 127 Wn.2d at 781. If both of those clauses had ended in commas then it could possibly be inferred that the legislature intended for the proviso that Slaugh is attempting to rely upon to apply to all three clauses of the statute. *See id.* However, since each of those clauses end in semi-colons, the exception to

the last antecedent rule that Slaugh references does not apply. *Compare Sehome Park*, 127 Wn.2d at 781 *with* RCW 51.36.010.

4. The Liberal Construction Doctrine Is Of No Aid To Slaugh

Finally, Slaugh relies on the principle that the provisions of the Industrial Insurance Act are subject to liberal construction and that the benefit of the doubt belongs to the injured worker. *See* App's Br. at 9-11, 14, 16-17. But the doctrine of liberal construction does not apply when a statute is unambiguous. *Harris v. Dep't of Labor & Indus.*, 120 Wn.2d 461, 474, 843 P.2d 1056 (1993). A statute is ambiguous if it is susceptible to more than one reasonable interpretation. *Estate of Haselwood v. Bremerton Ice Arena, Inc.*, 166 Wn.2d 489, 498, 210 P.3d 308 (2009). Here, given the structure of the statute and application of the last antecedent rule, there are not two reasonable interpretations of it.

Slaugh argues that the mere fact that the Board interpreted the statute to favor his position shows that statute can be read two reasonable ways, and accordingly, the statute should be liberally interpreted to favor him. App's Br. at 17-18. However, as discussed above, the Board's interpretation was not reasonable, and there is no authority for the proposition that the mere fact that a quasi-judicial agency has opined on the meaning of the statute creates an ambiguity as to its meaning.

Slaugh also contends that the legislature intended the proviso to apply to permanent partial disability because the legislature would not want delay by the adjudication of a reopening application to occur. App's Br. at 14. Slaugh provides no support for his assertion that the intent that he ascribes to the legislature was, in fact, its intent when it enacted that proviso. Moreover, he fails to demonstrate that a worker who seeks treatment on a purely discretionary basis under RCW 51.36.010 would, in fact, be likely to face less administrative delay in having such a request acted upon than a worker who filed an application to reopen his or her claim would face. Indeed, RCW 51.36.010 does not specify any timeframe with regard to when the supervisor of industrial insurance shall make a decision. It is implausible that the legislature would create the proviso to RCW 51.36.010 with the specific intention of allowing workers to receive further treatment without experiencing the delay occasioned by filing reopening applications while simultaneously failing to place any time limits on decisions made under that proviso.

The Department is unaware of any legislative history that sheds light on precisely why the legislature did carve out the proviso that is at issue in this case. However, a far more plausible inference than the one offered by Slaugh is that the legislature was concerned that workers who have been pensioned, unlike workers who have received permanent partial

disability awards, cannot reopen their claims because they have already been found to have incurred the greatest form of disability that is recognized by the Industrial Insurance Act. *See Wilber*, 61 Wn.2d at 444; *Harrington,* 9 Wn.2d at 7-8. Thus, in the absence of a special proviso authorizing further care on a purely discretionary basis, workers who have received pensions would be unable to receive further medical care even if it was readily apparent that their need for such care was profound. It would be an anomalous result indeed if the workers who have suffered the greatest form of disability that is recognized under the Industrial Insurance Act would become unable to receive ongoing medical care precisely because they were found to be disabled in that fashion. In contrast, a worker whose claim has been closed with a permanent partial disability award does have the ability to ask that it be reopened, and, therefore, such a worker does not need a special proviso to have access to further care in the event that the worker's condition destabilizes and the worker again requires medical treatment.

The liberal construction standard cannot be used to construe a statute in a way that is inconsistent with the plain meaning of the statute. *Bird-Johnson v. Dana Corp.*, 119 Wn.2d 423, 427, 833 P.2d 375 (1992). Here, when RCW 51.36.010 is read in the context of the last antecedent rule, it is apparent that it authorizes the Department to direct that a worker

receive treatment after the worker's claim has been closed only when the worker's claim was closed with a pension. *Compare* RCW 51.36.010 *with Boeing*, 105 Wn.2d at 587. Since RCW 51.36.010 can be established under the plain language of that statute, there is no "doubt" as to the statute's proper meaning, and the liberal construction standard is of no aid to Slaugh.

In the alternative, even if this Court concludes that RCW 51.36.010 is ambiguous, it does not follow that it must be construed in the way that Slaugh urges. While it is true that the Industrial Insurance Act is subject to liberal construction, the doctrine of liberal construction does not trump the other rules of statutory construction, nor does it support a court adopting a strained or unrealistic interpretation of a statute. RCW 51.12.010; *see Senate Republican Campaign Comm. v. Pub. Disclosure Comm'n*, 133 Wn.2d 229, 241-43, 943 P.2d 1358 (1997). The application of this rule of construction does not mean that any time a statute is ambiguous that the statute must be construed in the way contended by the worker. On the contrary, the courts apply the generally-accepted rules of statutory construction when they must interpret ambiguous statutory provisions within the Industrial Insurance Act. *See, e.g., Gorman v. Garlock*, 155 Wn.2d 198, 212-13, 118 P.3d 311 (2005) (resolving ambiguity created by fact that two statutes within the Industrial

Insurance Act were inconsistent with each other under the canon that, where possible, such a conflict should be resolved by harmonizing the two statutes in a way that gives some effect to each statute, even though this was not favorable to the workers).

Here, assuming arguendo that RCW 51.36.010 is ambiguous as to whether its proviso for ongoing medical care applies to a worker who received a permanent partial disability award, it is vastly more reasonable to conclude that it does not apply to such workers. This conclusion is apparent when the language of the statute is read as a whole, when its purpose to aid pensioned workers is kept in mind, when the statutory language is viewed through the lens of the last antecedent rule, and in light of the deference that must be given to the Department's interpretation of the Act that it administers. *See Bradley v. Dep't of Labor & Indus.*, 52 Wn.2d 780, 786-87, 329 P.2d 196 (1958) (Department's interpretation of Industrial Insurance Act entitled to deference).

VII. CONCLUSION

For the reasons discussed above, the Department asks that this Court affirm the decision of the superior court that affirmed the decision of the Department.

RESPECTFULLY SUBMITTED this 27 day of December, 2012.

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Attorney General

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APPENDIX 1

C
West's Revised Code of Washington Annotated Currentness
Title 51. Industrial Insurance (Refs & Annos)
Chapter 51.36. Medical Aid (Refs & Annos)

→→ 51.36.010. Findings--Minimum standards for providers--Health care provider network--Advisory group--Best practices treatment guidelines--Extent and duration of treatment--Centers for occupational health and education--Rules--Reports

(1) The legislature finds that high quality medical treatment and adherence to occupational health best practices can prevent disability and reduce loss of family income for workers, and lower labor and insurance costs for employers. Injured workers deserve high quality medical care in accordance with current health care best practices. To this end, the department shall establish minimum standards for providers who treat workers from both state fund and self-insured employers. The department shall establish a health care provider network to treat injured workers, and shall accept providers into the network who meet those minimum standards. The department shall convene an advisory group made up of representatives from or designees of the workers' compensation advisory committee and the industrial insurance medical and chiropractic advisory committees to consider and advise the department related to implementation of this section, including development of best practices treatment guidelines for providers in the network. The department shall also seek the input of various health care provider groups and associations concerning the network's implementation. Network providers must be required to follow the department's evidence-based coverage decisions and treatment guidelines, policies, and must be expected to follow other national treatment guidelines appropriate for their patient. The department, in collaboration with the advisory group, shall also establish additional best practice standards for providers to qualify for a second tier within the network, based on demonstrated use of occupational health best practices. This second tier is separate from and in addition to the centers for occupational health and education established under subsection (5) of this section.

(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.

(b) Once the provider network is established in the worker's geographic area, an injured worker may receive care from a nonnetwork provider only for an initial office or emergency room visit. However, the department or self-insurer may limit reimbursement to the department's standard fee for the services. The provider must comply with all applicable billing policies and must accept the department's fee schedule as payment in full.

(c) The department, in collaboration with the advisory group, shall adopt policies for the development, credentialing, accreditation, and continued oversight of a network of health care providers approved to treat injured

workers. Health care providers shall apply to the network by completing the department's provider application which shall have the force of a contract with the department to treat injured workers. The advisory group shall recommend minimum network standards for the department to approve a provider's application, to remove a provider from the network, or to require peer review such as, but not limited to:

(i) Current malpractice insurance coverage exceeding a dollar amount threshold, number, or seriousness of malpractice suits over a specific time frame;

(ii) Previous malpractice judgments or settlements that do not exceed a dollar amount threshold recommended by the advisory group, or a specific number or seriousness of malpractice suits over a specific time frame;

(iii) No licensing or disciplinary action in any jurisdiction or loss of treating or admitting privileges by any board, commission, agency, public or private health care payer, or hospital;

(iv) For some specialties such as surgeons, privileges in at least one hospital;

(v) Whether the provider has been credentialed by another health plan that follows national quality assurance guidelines; and

(vi) Alternative criteria for providers that are not credentialed by another health plan.

The department shall develop alternative criteria for providers that are not credentialed by another health plan or as needed to address access to care concerns in certain regions.

(d) Network provider contracts will automatically renew at the end of the contract period unless the department provides written notice of changes in contract provisions or the department or provider provides written notice of contract termination. The industrial insurance medical advisory committee shall develop criteria for removal of a provider from the network to be presented to the department and advisory group for consideration in the development of contract terms.

(e) In order to monitor quality of care and assure efficient management of the provider network, the department shall establish additional criteria and terms for network participation including, but not limited to, requiring compliance with administrative and billing policies.

(f) The advisory group shall recommend best practices standards to the department to use in determining second tier network providers. The department shall develop and implement financial and nonfinancial incentives for network providers who qualify for the second tier. The department is authorized to certify and decertify second tier providers.

(3) The department shall work with self-insurers and the department utilization review provider to implement utilization review for the self-insured community to ensure consistent quality, cost-effective care for all injured workers and employers, and to reduce administrative burden for providers.

(4) 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. 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 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; 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: 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. 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.

The supervisor of industrial insurance, the supervisor's designee, or a self-insurer, in his or her sole discretion, may authorize inoculation or other immunological treatment in cases in which a work-related activity has resulted in probable exposure of the worker to a potential infectious occupational disease. Authorization of such treatment does not bind the department or self-insurer in any adjudication of a claim by the same worker or the worker's beneficiary for an occupational disease.

(5)(a) The legislature finds that the department and its business and labor partners have collaborated in establishing centers for occupational health and education to promote best practices and prevent preventable disability by focusing additional provider-based resources during the first twelve weeks following an injury. The centers for occupational health and education represent innovative accountable care systems in an early stage of development consistent with national health care reform efforts. Many Washington workers do not yet have access to these innovative health care delivery models.

(b) To expand evidence-based occupational health best practices, the department shall establish additional centers for occupational health and education, with the goal of extending access to at least fifty percent of injured and ill workers by December 2013 and to all injured workers by December 2015. The department shall also de-

velop additional best practices and incentives that span the entire period of recovery, not only the first twelve weeks.

(c) The department shall certify and decertify centers for occupational health and education based on criteria including institutional leadership and geographic areas covered by the center for occupational health and education, occupational health leadership and education, mix of participating health care providers necessary to address the anticipated needs of injured workers, health services coordination to deliver occupational health best practices, indicators to measure the success of the center for occupational health and education, and agreement that the center's providers shall, if feasible, treat certain injured workers if referred by the department or a self-insurer.

(d) Health care delivery organizations may apply to the department for certification as a center for occupational health and education. These may include, but are not limited to, hospitals and affiliated clinics and providers, multispecialty clinics, health maintenance organizations, and organized systems of network physicians.

(e) The centers for occupational health and education shall implement benchmark quality indicators of occupational health best practices for individual providers, developed in collaboration with the department. A center for occupational health and education shall remove individual providers who do not consistently meet these quality benchmarks.

(f) The department shall develop and implement financial and nonfinancial incentives for center for occupational health and education providers that are based on progressive and measurable gains in occupational health best practices, and that are applicable throughout the duration of an injured or ill worker's episode of care.

(g) The department shall develop electronic methods of tracking evidence-based quality measures to identify and improve outcomes for injured workers at risk of developing prolonged disability. In addition, these methods must be used to provide systematic feedback to physicians regarding quality of care, to conduct appropriate objective evaluation of progress in the centers for occupational health and education, and to allow efficient coordination of services.

(6) If a provider fails to meet the minimum network standards established in subsection (2) of this section, the department is authorized to remove the provider from the network or take other appropriate action regarding a provider's participation. The department may also require remedial steps as a condition for a provider to participate in the network. The department, with input from the advisory group, shall establish waiting periods that may be imposed before a provider who has been denied or removed from the network may reapply.

(7) The department may permanently remove a provider from the network or take other appropriate action when the provider exhibits a pattern of conduct of low quality care that exposes patients to risk of physical or psychiatric harm or death. Patterns that qualify as risk of harm include, but are not limited to, poor health care outcomes evidenced by increased, chronic, or prolonged pain or decreased function due to treatments that have not been shown to be curative, safe, or effective or for which it has been shown that the risks of harm exceed the be-

nefits that can be reasonably expected based on peer-reviewed opinion.

(8) The department may not remove a health care provider from the network for an isolated instance of poor health and recovery outcomes due to treatment by the provider.

(9) When the department terminates a provider from the network, the department or self-insurer shall assist an injured worker currently under the provider's care in identifying a new network provider or providers from whom the worker can select an attending or treating provider. In such a case, the department or self-insurer shall notify the injured worker that he or she must choose a new attending or treating provider.

(10) The department may adopt rules related to this section.

(11) The department shall report to the workers' compensation advisory committee and to the appropriate committees of the legislature on each December 1st, beginning in 2012 and ending in 2016, on the implementation of the provider network and expansion of the centers for occupational health and education. The reports must include a summary of actions taken, progress toward long-term goals, outcomes of key initiatives, access to care issues, results of disputes or controversies related to new provisions, and whether any changes are needed to further improve the occupational health best practices care of injured workers.

CREDIT(S)

[2011 c 6 § 1, eff. July 1, 2011; 2007 c 134 § 1, eff. Jan. 1, 2008; 2004 c 65 § 11; 1986 c 58 § 6; 1977 ex.s. c 350 § 56; 1975 1st ex.s. c 234 § 1; 1971 ex.s. c 289 § 50; 1965 ex.s. c 166 § 2; 1961 c 23 § 51.36.010. Prior: 1959 c 256 § 2; prior: 1943 c 186 § 2, part; 1923 c 136 § 9, part; 1921 c 182 § 11, part; 1919 c 129 § 2, part; 1917 c 28 § 5, part; Rem. Supp. 1943 § 7714, part.]

HISTORICAL AND STATUTORY NOTES

Effective date--2011 c 6: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect July 1, 2011." [2011 c 6 § 2.]

Report to legislature--2007 c 134: "By December 1, 2009, the department of labor and industries must report to the senate labor, commerce, research and development committee and the house of representatives commerce and labor committee, or successor committees, on the implementation of this act." [2007 c 134 § 2.]

Effective date--2007 c 134: "This act takes effect January 1, 2008." [2007 c 134 § 3.]

Report to legislature-Effective date-Severability-2004 c 65: See notes following RCW 51.04.030.

Effective dates--Severability--1971 ex.s. c 289: See RCW 51.98.060 and 51.98.070.

Laws 2004, ch. 65, § 11, in the first paragraph, inserted reference to licensed advanced registered nurse practitioner.

Laws 2004, ch. 65, § 19, which provided for the repeal of "this act" on June 30, 2007, was itself repealed by Laws 2007, ch. 275, § 1, eff. May 2, 2007.

Laws 2007, ch. 134, § 1, in the introductory paragraph, substituted "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. In all accepted claims, treatment" for ", but the same".

Laws 2007, ch. 134, § 2 provides:

"By December 1, 2009, the department of labor and industries must report to the senate labor, commerce, research and development committee and the house of representatives commerce and labor committee, or successor committees, on the implementation of this act."

2011 Legislation

Laws 2011, ch. 6, § 1, rewrote the section, which formerly read:

"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. 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. 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 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; 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: 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. 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.

"The supervisor of industrial insurance, the supervisor's designee, or a self-insurer, in his or her sole discretion, may authorize inoculation or other immunological treatment in cases in which a work-related activity has resulted in probable exposure of the worker to a potential infectious occupational disease. Authorization of such treatment does not bind the department or self-insurer in any adjudication of a claim by the same worker or the worker's beneficiary for an occupational disease."

CROSS REFERENCES

Compensation for permanent partial disability, see§ 51.32.080.
Compensation for temporary total disability, see§ 51.32.090.
Lump sum for total disability, see§ 51.32.130.
Medical aid functions of the department of labor and industries, see§ 51.04.030.
Permanent total disability compensation, see§ 51.32.060.

LIBRARY REFERENCES

Workers' Compensation 966, 982.
Westlaw Topic No. 413.

RESEARCH REFERENCES

ALR Library

7 ALR 545, Workmen's Compensation: Liability of Employer or Insurance Company for Medical and Hospital Aid Furnished to Injured Employee.

98 ALR 416, Workmen's Compensation: Claim or Action Against One as Third Party as Precluding Action or Claim Against Him as Employer, or Vice Versa.

165 ALR 9, Workmen's Compensation: Time and Jurisdiction for Review, Reopening, Modification, or Reinstatement of Award or Agreement.

Treatises and Practice Aids

Modern Workers' Compensation § 202:5, Requirement that Treatment be Necessary.

Modern Workers' Compensation § 202:6, Preventive Care.

Modern Workers' Compensation § 321:8, Medical Benefits.

Modern Workers' Compensation § 200:40, Disability Changes.

Modern Workers' Compensation § 202:11, Surgery.

Modern Workers' Compensation § 202:33, Period of Treatment.

Modern Workers' Compensation § 202:35, Selection of Physician.

Modern Workers' Compensation § 321:18, Selection of Physician.

NOTES OF DECISIONS

1. Sufficiency of evidence

Substantial evidence supported trial court's finding that workers' compensation claimant's unauthorized spinal fusion surgery did not constitute "proper and necessary" medical care, under the Industrial Insurance Act, and, thus, was not subject to reimbursement to claimant for its costs; claimant's own testimony established that the surgery was a failure. Rogers v. Department of Labor and Industries (2009) 151 Wash.App. 174, 210 P.3d 355, review denied 167 Wash.2d 1015, 220 P.3d 209. Workers' Compensation ⚿ 998.6(3)

2. Presumptions and burden of proof

In order for a workers' compensation claimant to succeed on appellate review of trial court's finding that her unauthorized surgery did not constitute "proper and necessary" medical procedure, and, thus, was not subject to reimbursement, claimant must demonstrate that, in hindsight, the procedure was objectively curative or rehabilitative. Rogers v. Department of Labor and Industries (2009) 151 Wash.App. 174, 210 P.3d 355, review denied 167 Wash.2d 1015, 220 P.3d 209. Workers' Compensation ⚿ 1001

3. Necessary treatment

After Health Technology Clinical Committee (HTCC) deemed that spinal cord stimulation was not a necessary and proper procedure for workers' compensation claimant's workplace neck injury, neither the Board of Industrial Insurance Appeals nor the reviewing court could make an individual determination as to whether the treatment was medically necessary and proper, and claimant was precluded from obtaining relief from denial of be-

nefits based on such HTCC finding. Joy v. Department of Labor and Industries (2012) 285 P.3d 187. Workers' Compensation 966

West's RCWA 51.36.010, WA ST 51.36.010

Current with all 2012 Legislation and Initiative Measures 502, 1185, 1240

END OF DOCUMENT

APPENDIX 2

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS OF THE STATE OF WASHINGTON

In Re: Don M. Slaugh	Docket Nos. 10 15063
Claim No. W856053	DECLARTION OF VICTORIA KENNEDY

I, Victoria Kennedy, hereby declare as follows:

I am above the age of majority, I have personal knowledge of the contents of this declaration and I am competent to testify.

1) I have been employed at the Washington State Department of Labor & Industries (Department) since 1971. I am currently the Chief Policy Advisor to the Director of the Department. In that capacity, I consult with the Director and meet with stakeholders and legislators regarding public policy and legislative proposals concerning Washington's Worker's compensation system and proposed changes to Title 51, RCW. Prior to serving as the Chief Policy Advisor, I worked in many of the industrial insurance divisions at the Department, and recently served as the Program Manager for Policy and Quality Coordination.

2) I have reviewed statistical data regarding the claims of injured workers. Based on my review of that data, there are approximately 180,690 claims with dates of injury from 1991 through 2009 that have been closed with PPD awards.

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3) The Department's longstanding interpretation of RCW 51.36.010 is that it does not allow the Department to authorize further medical treatment after a worker's claim has been closed with a PPD award, unless the claim is reopened. Attached as exhibit one to this declaration is a true and correct copy of a memorandum regarding this issue.

5) It is the Department's experience that a significant percentage of injured workers whose claims were closed with PPD awards continue to have ongoing, chronic pain after their conditions reached maximum medical improvement, and that such workers frequently use palliative medical treatment to ameliorate their chronic pain.

6) If it was determined that the Department may authorize further treatment for workers whose claims were closed with PPD, the potential impact on the state fund would be considerable.

I hereby declare under penalty of perjury under the laws of the State of Washington, that the above is true and accurate to the best of my knowledge and ability.

DATED this 12 day of January, 2011 at Tumwater, Washington.

Victoria A. Kennedy

Victoria Kennedy

Chief Policy Advisor
Department of Labor & Industries

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INTEROFFICE COMMUNICATION

To: CHARLES F. MURPHY
Assistant Director for Industrial Insurance

Date: December 5, 1978

From: WALTER F. ROBINSON, JR.
Assistant Attorney General

Office:

DEPARTMENT RECEIVED
DEC 7 1978
SUPERVISOR IND. INS.
DEPT. LABOR & INDUSTRIES
OLYMPIA, WASHINGTON

Subject: MAY MEDICAL TREATMENT BE CONTINUED IN CLOSED CASES WHERE THE WORKER IS NOT PERMANENTLY TOTALLY DISABLED?

Phone:

Mr. Martin has handed me your memorandum of October 31, 1978 with the attached letters of October 2 and October 5, 1978 from Lawrence Kenney in regard respectively to the claims of [redacted] and [redacted] You have asked our opinion on whether treatment may be extended beyond the date of closure. I assume from the context of your memorandum and Mr. Kenney's letters that the question is in regard to cases where the worker has not been classified as permanently totally disabled.

In my personal opinion, the statute does not authorize treatment in such cases after the claim has been closed.

The controlling statute is RCW 51.36.010 which reads as follows:

> 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 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, but the same 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 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; 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: 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. 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.)

After the codification of the Industrial Insurance Act in the Revised Code of Washington, there were problems from differences between the language of the Code and that in the Session Laws. These problems in the case of Industrial Insurance were resolved in 1961. The legislature repealed the various chapters of the Session Laws dealing with Industrial Insurance and enacted chapter 23, Laws of 1961. The present Act thus dates back to 1961. The provision applicable to the problem you have posed was section 51.36.010, chapter 23, Laws of 1961. That section read as follows:

> Upon the occurrence of any injury to a workman entitled to compensation under the provisions of this title, he shall receive, in addition to such compensation and out of the medical aid fund, proper and necessary medical and surgical services at the hands of a physician of his own choice, if conveniently located, and proper and necessary hospital care and services during the period of his disability from such injury, but the same 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, except when the workman returned to work

> before permanent partial disability award is made, in such case not to extend beyond the time when monthly allowances to him out of the accident fund shall cease; in case of temporary disability not to extend beyond the time when monthly allowances to him out of the accident fund shall cease; in case of a permenent total disability not to extend beyond the date on which a lump sum settlement is made with him or he is placed upon the permanent pension roll. But after any injured workman has returned to his work his medical and surgical treatment may be continued at the expense of the medical aid fund if, and as long as, such continuation is deemed by the supervisor of industrial insurance to be necessary to his more complete recovery. 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.)

This language is the came as that in section 2, chapter 256, Laws of 1959. The 1961 language expressed termination points for treatment in cases of permanent partial, temporary and permanent total disability, but provided that the supervisor of Industrial Insurance could by written order authorize further treatment after the worker had returned to work. This language must be read in light of a body of case law on when an Industrial Insurance claim is closed.

One of the pre-1961 cases of significance is Franks v. Dept. of Labor & Industries, 35 Wn.2d 763, 215 P.2d 416 (1950) which pointed out the difference between temporary total disability and permanent partial disability in the following words at page 766:

> . . . The only time an injured workman is entitled to time loss is during the period that he is classified as temporarily totally disabiled. . . . Usually, during a period of temporary total disability, the workman is undergoing treatment. In any event, such classification contemplates that eventually there will be either complete recovery or an impaired bodily condition which is static. Until one or the other of these conditions is reached, the statutory classification is temporary total disability. Permanent partial disability, on the other hand, contemplates a situation where the condition of the injured workman has reached a fixed state from which full recovery is not expected. . . .

The court pointed out that these differences made it clear that a person could not be simultaneously entitled to both of these kinds of disability.

The Act does not in so many words provide for the "closing" of a claim. The courts, however, have consistently held that an award of permanent partial disability requires a determination that the worker's condition has reached a fixed state. To illustrate that this is long standing doctrine, it was one of the holdings of State ex rel. Stone v. Olinger, 6 Wn.2d 643, 108 P.2d 630 (1940). The court in that opinion also pointed out that a reopening of a case for aggravation of a condition presupposed a prior fixed condition, compensation on that basis, and claim closure.

The Act does provide a procedure for entering an order which may be appealed in RCW 51.52.050 which reads as follows:

> Whenever the department has made any order, decision, or award, it shall promptly serve the worker, beneficiary, employer, or other person affected thereby, with a copy thereof by mail, which shall be addressed to such person at his or her last known address as shown by the records of the department. The copy, in case the same is a final order, decision, or award, shall bear on the same side of the page on which is found the amount of the award, a statement, set in black faced type of at least ten point body or size, that such final order, decision, or award must be appealed to the board, Olympia, within sixty days, or the same shall become final.
>
> Whenever the department has taken any action or made any decision relating to any phase of the administration of this title the worker, beneficiary, employer, or other person aggrieved thereby may appeal to the board and said appellant shall have the burden of proceeding with the evidence to establish a prima facie case for the relief sought in such appeal. Any such person aggrieved by the decision and order of the board may thereafter appeal to the superior court, as prescribed in this chapter.

Our court has also consistently held that failure to appeal from such an order makes that order binding on all parties. Kleven v. Dept. of Labor & Industries, 40 Wn.2d 415, 243 P.2d 488 (1952) is

one of a great many judicial expressions of this principle.

The closure of a case is just that, closure. The Department is required to give notice of its final action by RCW 51.52.050. Administratively, there would be chaos if claims were not closed. The aggravation provision of the Act, RCW 51.32.160, clearly contemplates a closing order and the abundant case law authority establishes the last previous closing order which has become final as the beginning point of the aggravation period. In addition, the Kleven case, supra, Karniss v. Dept. of Labor & Industries, 39 Wn.2d 898, 239 P.2d 555 (1952) and Kresoya v. Dept. of Labor & Industries, 40 Wn.2d 40, 240 P.2d 257 (1952) are representative "aggravation" cases on the level of proof required. They all proceed from the basis that the claim has previously been "closed."

The general discussion of a series of cases decided before 1961 is pertinent in light of a well established principle of statutory construction. Where there has been no attempt to amend a statute following its judicial interpretation, the legislature is presumed to have approved. Foster v. Allsop Automatic, 86 Wn. 2d 579, 547 P.2d 856 (1976) is one of many decisions of our court which adheres to that doctrine. With this background, it will be well to examine the changes in RCW 51.36.010 since 1961.

The first of these changes was effected by section 2, chapter 166, Laws of 1965 Ex. Sess. RCW 51.36.010 as there amended reads as follows:

> Upon the occurrence of any injury to a workman entitled to compensation under the provisions of this title, he shall receive, in addition to such compensation and out of the medical aid fund, proper and necessary medical and surgical services at the hands of a physician of his own choice, if conveniently located, and proper and necessary hospital care and services during the period of his disability from such injury, but the same 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, except when the workman returned to work before permanent partial disability award is made, in such case not to extend beyond the time when monthly allowances to him out of the accident fund shall cease;

> in case of temporary disability not to extend beyond the time when monthly allowances to him out of the accident fund shall cease: PROVIDED, That after any injured workman has returned to his work his 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 more complete recovery; in case of a permanent total disability not to extend beyond the date on which a lump sum settlement is made with him or he is placed upon the permanent pension roll: PROVIDED, HOWEVER, That the supervisor of industrial insurance, solely in his 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 workman's life. 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.)

As indicated in the emphasized portions of these successive enactments, the legislature has established separate and distinct provisions on the extent of treatment "in the case of" the three separate kinds of disability: permanent partial, temporary and permanent total.

The form of the 1965 statute differs most significantly from that of 1961 in that two provisos have been added. The first was inserted following the language terminating treatment in cases of temporary disability when monthly payments cease as they would when the worker returns to work or is able to do so. The proviso modifies that language by allowing treatment after the return to work if deemed necessary to more complete recovery by the supervisor.

It is clear that the first proviso was inserted in the existing statute from the context, but the fact that the provisos were printed in italics when House Bill 387 was amended by the Senate by adding a new section making the changes in RCW 51.36.010 in 1965 makes the point manifest beyond any doubt. See Senate Journal 1965, pp. 1400-1401.

The existing language about cases of permanent total disability was then continued and the period and the beginning word "But," of the next sentence in the 1961 act were deleted and the "second"

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proviso was added after which the remainder of the sentence of the 1961 act beginning with "But" was deleted leaving the last sentence intact.

The effect of the addition of the two provisos is that the case of temporary disability is modified by the first proviso and the case of permanent total disability is modified by the second.

A significant difference in the 1965 Act between the provisos is that the first authorizes treatment necessary for "more complete recovery," whereas the second authorizes treatment necessary to protect life. In the context of the case law discussed earlier, the first proviso speaks to treatment before closure of the claim and the second addresses treatment after closure. The first circumstance is that of temporary disability and the second is that of permanent total disability.

It is a general rule of statutory construction that qualifying phrases and clauses are ordinarily confined to the last antecedent; that is, the words and phrases immediately preceding. 73 Am.Jur. 2d Statutes, § 230. The Washington courts adhere to this last antecedent rule. See Architectural Woods v. State, 7 Wn. App. 855, 503 P.2d 1138 (1972) and In re Renton, 79 Wn.2d 374, 485 P.2d 613 (1971). The antecedent to the second proviso added to the statute in 1965 is "in case of a permanent total disability . . ." The second proviso modifies that antecedent and allows treatment. The significant change made by the 1965 Act is in the positioning of the second proviso immediately following the language of the limitation on treatment in permanent total disability cases. The rule of construction is set out by our court in Seattle v. Western Union Tel. Co., 21 Wn.2d 838, 153 P.2d 859 (1944) at page 850:

> What are the settled rules of construction in regard to provisos? This court announced the rule to be followed in this state in Sackman v. Thomas, 24 Wash. 660, 64 Pac. 819, in almost the identical words of Judge Story in United States v. Dickson, 15 Pet. (40 U.S.) 141. We quote from the opinion in the Sackman case:
>
> "Now, it is a rule of construction that where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms. In short, a proviso carves special exceptions only out

of the enacting clause, and those who set up any such exception must establish it as being within the words, as well as within the reason, thereof."

In the context of RCW 51.36.010 since it was amended in 1965, the enacting clause provides limitations on the continuation of medical treatment in regard to temporary disability, permanent partial disability, and permanent total disability. The second proviso carves out a special exception to the limitation on treatment in permanent total disability cases. The construction urged by Mr. Kenney would have the effect of making the statute read that treatment is limited in all types of disability, but that it isn't really limited because the supervisor of Industrial Insurance can authorize further treatment in all cases of disability at his discretion. This ignores the function of a proviso as stated by our court in Seattle v. Western Union Tel. Co., supra.

The statutory scheme can be illustrated in tabular form. The enacting clause as to each type disability may be summarized as follows:

Permanent Partial Disability	Temporary Disability	Permanent Total Disability
Treatment not to extend beyond permanent partial disability award.	Treatment not to extend beyond cession of monthly disability payments. (Time loss compensation.)	Treatment not to extend beyond date of lump sum settlement or placement on pension roll.

Each of these enacting clauses is modified, the first by a clause beginning with "except" and the other two by provisos. The modifications may be summarized as follows:

Treatment may continue when worker returned to work before PPD award is made but not beyond when TL ceases.	Treatment may continue after return to work if deemed necessary by Supervisor for more complete recovery.	Treatment may be authorized after closure of claim by written order of the Supervisor to protect life or alleviate pain.

The interpretation suggested by Mr. Kenney does not take into account the fact the Legislature has consistently treated the three types of disability separately both as to enacting limitations on

extent of treatment and modifications of those limitations.

Another significant factor is the Departmental interpretation since it was amended in 1965. The Department has consistently for the past thirteen years since the 1965 Act followed the administrative construction that treatment after closure of a claim can be authorized only in cases of permanent total disability. In my personal opinion, the statutory language is clear and unambiguous. For the purpose of discussion, however, assuming, as is apparently Mr. Kenney's contention, that the statute is ambiguous, this consistent administrative construction must be given great weight. Our court has applied this principle of law frequently. Hama Hama v. Shorelines Hearings Board, 85 Wn.2d 441, 536 P.2d 157 (1975) has a statement of the principle at page 448:

> Finally, when a statute is ambiguous--as in the instant case--there is the well known rule of statutory interpretation that the construction placed upon a statute by an administrative agency charged with its administration and enforcement, while not absolutely controlling upon the courts, should be given great weight in determining legislative intent. Bradley v. Department of Labor & Indus., 52 Wn.2d 780, 329 P.2d 196 (1958); White v. State, 49 Wn.2d 716, 306 P.2d 230 (1957). The primary foundation and rationale for this rule is that considerable judicial deference should be accorded to the special expertise of administrative agencies. Such expertise is often a valuable aid in interpreting and applying an ambiguous statute in harmony with the policies and goals the legislature sought to achieve by its enactment. At times, administrative interpretation of a statute may approach "lawmaking," but we have heretofore recognized that it is an appropriate function for administrative agencies to "fill in the gaps" where necessary to the effectuation of a general statutory scheme. See Barry & Barry, Inc. v. Department of Motor Vehicles, 81 Wn.2d 155, 500 P.2d 540 (1972). It is likewise valid for an administrative agency to "fill in the gaps" via statutory construction--as long as the agency does not purport to "amend" the statute.

The legislature has met repeatedly since the Department began to follow its interpretation and has taken no action to change that interpretation.

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There have been three subsequent amendments to RCW 51.36.010 since 1965. The changes made by section 50, chapter 289, Laws of 1971, 1st Ex. Sess. removed the references to the accident and medical aid funds. Those changes were required because of the provisions allowing self-insurance which were also included in that 1971 Act.

The change introduced by section 1, chapter 235, Laws of 1975, 1st Ex. Sess. was the addition of the words in the second proviso following "life" to the end of that sentence. That addition allows measures to alleviate continuing pain.

The changes in section 56, chapter 350, Laws of 1977, 1st Ex. Sess. are entirely devoted to removing references to gender.

The Legislature thus had the statute before it three different times and amended it in other respects, but did not alter the language to give it a different interpretation from that made administratively by the Department.

From the foregoing, it will be seen that the statutory scheme and the decisional law contemplate the termination of all benefits by closure of a claim. The statute limits the right to treatment in all cases so that it is terminated by the entry of the final order if not before, except in cases of permanent total disability the Supervisor of Industrial Insurance may at his discretion by written order continue treatment to protect the life of the injured worker or alleviate continuing pain.

I hope the foregoing discussion is helpful to you.

WALTER F. ROBINSON, JR.

WFR:mjr

c: John C. Martin, Deputy Attorney General