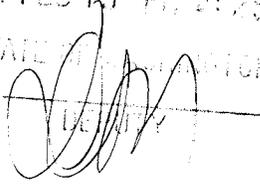


COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
BY 

No. 40642-II

DIVISION II, COURT OF APPEALS  
OF THE STATE OF WASHINGTON

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**North Central Washington Respiratory Care Services, Inc.  
d/b/a Whidbey Home Medical,**

Appellant

v.

**Washington Department of Revenue,**

Respondent

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**REPLY BRIEF**

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## INTRODUCTION

The Department completely ignores its own published precedent expressly holding that devices “used to keep a patient’s airway open ... qualify for the prosthesis exemption.” Washington Tax Determination No. 91-261, 11 WTD 439, 445 (1992) (App. Br., Appendix I). Instead the Department makes three arguments that each contravene the plain language of the statute at issue. Each argument must be rejected.

First, the Department argues that, prior to July 1, 2004, RCW 82.08.0283 required that prosthetic devices *must* replace a missing body part – an argument that forces the Department to (1) disavow its long history of applying the statute to devices that replace the function of dysfunctional body parts, Br. at 26-27, and (2) ask the Court to declare its own rule invalid, Resp. Br. at 29. Yet both the Department’s published determinations and its rule are based on a court ruling holding that a prosthetic “need only replace the function” of a dysfunctional body part – a ruling the Department has expressly and repeatedly accepted in determinations it published as precedent.

Second, the Department argues that, prior to July 1, 2004, devices that do not replace missing body parts qualified under the statute only if they “improve the function of the patient’s *spine or limbs*.” Resp. Br. at 35 (emphasis added). This argument is also contrary to the rule as well as

contrary to the cited legislative history and dictionary definitions on which the Department purports to rely. As the Department concedes, WAC 458-20-18801(1)(g) acknowledges that the statute applies to devices “*used to support*, align, prevent or correct deformities or to improve the function of *movable parts of the body*.” (Emphasis added). While the airway is not the spine or a limb, it is a “moveable part of the body.” Like splints and braces, CPAPs and BiPAPs function by holding a moveable part of the body in place.

Finally, for the period July to September 2004, the Department argues that this Court is “required” to re-write the statutory language “worn on or in the body” to read instead “designed to be wholly worn on the body and portable.” Resp. Br. at 10-14. The Department’s contention is based on a “list” drafted years after the statute at issue was enacted by the Legislature – a list that does not contain any of the words the Department asks the Court to add to the statute. The list, which contains no reasoning or analysis, is neither controlling nor of any persuasive value. In any event, neither the Department nor the courts have the authority to add limitations to the statute that the Legislature did not enact.

## Argument

- A. As reflected in the Department’s published determinations, its own rule, and dictionary definitions, CPAPs and BiPAPs are prosthetic devices because they replace the function of a dysfunctional body part.**

The Department argues that “no” CPAPs or BiPAPs were prosthetic devices “until July 1, 2004,” because they do not replace missing body parts. Resp. Br. at 20.<sup>1</sup> The Department’s litigating position is contrary to numerous published determinations holding that the pre-definition statute did not require replacement of missing body parts, only replacement of a body function. Thus, the Department simply ignores its published determination (discussed in App. Br. at 8) holding that devices that, like CPAPs and BiPAPs, replace the function of a patient’s airway by bracing it open are prosthetic devices. 11 WTD at 445.

The Department at least acknowledges that WAC 458-20-18801(5)(e) provides many “examples of prosthetic devices,” *none* of which replace missing body parts and all of which replace body function. Resp. Br. at 26. And although it quibbles that the rule’s explanation about “assist[ing] dysfunctional” body parts appears “only in connection” with one of the exemplars (Resp. Br. at 27), this strained reading forces the

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<sup>1</sup> The implication of the Department’s argument – that the Legislature intended the statutory definition to repeal a missing body part limitation – is inconsistent with the legislative history describing the adoption of the definition as making minimal changes to the pre-definition statute as well as the long history of not requiring a missing body part.

Department to challenge its own rule as “invalid.” Resp. Br. at 29. But an agency’s rules are “presumed valid” and anyone asserting that a rule is invalid “has the burden of showing *compelling* reasons why the rule conflicts with the intent and purpose of the legislation.” *Green River Cmty. Coll. v. Higher Educ. Pers. Bd.*, 95 Wn.2d 108, 112, 622 P.2d 826 (1980) (emphasis added). Any rule that is “reasonably consistent” with the underlying statute should be upheld. *Id.*<sup>2</sup> The Department does not meet its burden in challenging the validity of its own rule.

To the contrary, the rule’s history confirms that the addition of the word “generally” and subsection (5)(e) was intended to clarify that, consistent with its plain meaning, the term “prosthetic” includes devices that assist dysfunctional body parts. As the Department notes, it added these to the rule “in the aftermath of litigation” regarding the scope of the statute. Resp. Br. at 26-27. In that litigation: (1) the Superior Court held that the statute does *not* require replacement of a missing body part (CP

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<sup>2</sup> Ironically, the South Carolina case cited by Department in Resp. Br. at 23, *Home Med. Sys. Inc. v. Commissioner of Revenue*, 677 S.E.2d 582 (S.C. 2009), acknowledged that the ordinary meaning of prosthetic reasonably includes “not only a device to replace a missing body part but also a device to replace missing functionality.” 677 S.E.2d at 565. The court upheld an agency rule requiring replacement of a missing body part because either was reasonably consistent with the statute. Thus, WAC 458-20-18801(5)(e), which identifies pacemakers, dialysis machines and other devices that replace missing functionality as prosthetic devices, is also reasonably consistent with the statute. *See Cordis Corp. v. Commissioner*, 762 SW2d. 138, 139-40 (Tenn. 1988) (pacemakers are prosthetics because “a device is a ‘prosthetic’ if it substitutes for the missing function of a bodily part”); *RenalWest L.C. v. Arizona Dep’t of Revenue*, 943 P.2d 769, 774 (Ariz. 1997) (dialysis machine is a prosthetic device because it replaces a body function).

207), and (2) the Department did *not* appeal that part of the Superior Court’s ruling. CP 204. Instead, the Department expressly adopted the Superior Court’s ruling on that point in a determination it published as precedent under RCW 82.32.410:

The ordinary meaning attached to “prosthetic devices,” as defined in *Dorland’s Illustrated Medical Dictionary*, 26th Edition and *Tabor’s Cyclopedic Medical Dictionary*, ... indicate[s] the prosthesis *need only replace* a missing part, organ, or part of an organ or *the function of the part* or organ.

Det. No. 92-094, 12 WTD 135, 138 (1993) (*quoting Deaconess Medical Center v. Dep’t of Revenue*, Thurston County Cause No. 87-2-2055-7 (1988) (emphasis added)); *also* Det. No 91-290, 11 WTD 477, 480 (1992) (“Following the reasoning in *Deaconess*, we believe that collagen implantations ... are prostheses ... the collagen does *replace a lost function of the skin*”) (emphasis added). (Copies attached as Appendix II). The Department also cites to *Deaconess* in the Determination in which it held that devices “used to keep a patient’s airway open” are prosthetic devices because they “assist a dysfunctional” body part. 11 WTD at 445.

Moreover, the Department’s litigating position is contrary to the very dictionary definitions it cites in support of its argument. In addition to the *Dorland’s* definition on which *Deaconess* based, the Department cites *Stedman’s Medical Dictionary* (28<sup>th</sup> ed. 2006) for the definition of

prosthesis as a “substitute used to assist a damaged *or* replace a missing body part.”<sup>3</sup> (Emphasis added.) Resp. Br. at 22-23. It is well settled that “or” is disjunctive. *Riofta v. State*, 134 Wn. App. 669, 682, 142 P.3d 193 (2006). While a prosthetic device *may* replace a missing body part, it is *not required* to. There is no dispute that CPAPs and BiPAPs are “used to assist a damaged” body part and thus are prosthetic devices. Thus, it should not be surprising that CPAPs have been described by disinterested authors as prosthetic devices (CP 32), reflecting the ordinary meaning of the term as recognized in *Deaconess*, WAC 458-20-18801(5)(e), and the Department’s published determinations.

**B. Even if (pre-definition) prosthetic devices were required to replace missing body parts, orthotic devices were not limited to “improving the function of a patient’s *spine or limbs*” but include devices, like CPAPs and BiPAPs, used to support, align, or improve the function of movable parts of the body.**

The Department concedes that the ordinary meaning of orthotic devices is an “apparatus used *to support*, align, prevent, or correct deformities *or to improve the function of movable parts of the body*.” Resp. Br. at 32-33, *quoting Dorland’s Illustrated Medical Dictionary* (26th ed. 2000) (emphasis added). The Department also agrees that this

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<sup>3</sup> That the ordinary meaning of prosthetic includes replacing the functionality of malfunctioning body parts is also reflected in additional dictionary definitions discussed in App. Br. at 7 as well as in federal law. *See* 42 C.F.R. §440.120(c) (prosthetic devices include devices that correct or support a weak or malfunctioning portion of the body).

same definition was recited almost verbatim on the house floor to describe the scope of the statute. Resp. Br. at 33-34. This ordinary meaning of the term is reflected in the Department's rule, which recognizes an orthotic device as an "apparatus designed to activate or *supplement a weakened* or atrophied limb or *function*." WAC 458-20-18801(1)(g) (emphasis added). It is undisputed that a patient's airway is a "movable part of the body," (see App. Br. at 10) and that CPAPs and BiPAPs support, improve, and supplement the function of a weakened body part by creating a pneumatic splint to brace the patient's airway open. CP 11.

On this issue too, the Department is forced to ignore the statute's plain meaning and disavow its own rule. The Department argues that the term orthotic devices should be judicially limited to devices that "improve the function of the patient's *spine or limbs*." Resp. Br. at 35 (emphasis added). The Department also contends that CPAPs and BiPAPs are not orthotic devices because they are not sufficiently "similar" to "braces, collars, casts and splints." Resp. Br. at 31.<sup>4</sup> There is simply no basis for the Department's gloss. Neither the rule, nor the legislative history cited by the Department limits orthotic devices to devices that improve the function of a patient's "spine or limbs." Moreover, even if a device must be akin to a "brace" or "splint" to qualify as an orthotic device, the record

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<sup>4</sup> Presumably because they do not improve the function of the patient's "spine or limbs."

is undisputed that CPAPs and BiPAPs create a pneumatic *splint* to *brace* open the patient's airway. CP 11.<sup>5</sup>

Thus the Department is left with the erroneous claim that according the statutory language its ordinary meaning “would encompass virtually any medical device, equipment or supplies” because physicians only issue prescriptions “to treat some disease or disorder.” Resp. Br. at 36. This *reducto ad absurdum* argument, however, expands well past the ordinary meaning of orthotic device reflected in the dictionary definitions on which the legislative history and the Department's rule is based, definitions that do *not* use the words “disease” or “disorder.” Moreover, not all diseases or disorders are treated by supporting a movable part of the body.<sup>6</sup>

Even if the ordinary meaning of prosthetic required replacement of a missing body part (which as discussed above it does not, it also includes replacement of body function), CPAPs and BiPAPs are nevertheless orthotic devices that support a weakened portion of the body by bracing open the patient's malfunctioning airway.

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<sup>5</sup> In fact, *Dorland's* defines brace as an appliance “used to support, align, or hold parts of the body in correct position” and splint as an appliance “used to hold in position a displaced or moveable part,” which is what CPAPs and BiPAPs do.

<sup>6</sup> The Supreme Court rejected the “strained reasoning” of a similar argument in *AgriLink Foods, Inc. v. Dep't of Revenue*, 153 Wn.2d 392, 398-99, 103 P.3d 1226 (2005) in holding that the extra-statutory limitation proposed by the Department was not needed to accord ordinary meaning to the words of the statute.

**C. The statute says “worn on or in the body” not “designed to be wholly worn and portable.”**

The Department does not assert that the statutory definition requires replacement of a missing body part, or that in the absence of a missing body part, it is limited to devices that improve the function of “the spine or limbs.” Thus, for the period July to September 2004 (the end of the audit period), the sole issue before the Court is whether CPAPs and BiPAPs are “worn” on the body as within the ordinary meaning of that undefined word in statutory definition. Yet, instead of addressing the ordinary meaning of the word “worn” the Department argues that “a device satisfying the [statutory] definition must be ‘designed to be wholly worn and portable.’” Resp. Br. at 10 (emphasis added). The additional words proffered by the Department were not adopted by the Legislature.

**1. Neither the Department nor the Court can add words to the statute that were not enacted by the Legislature.**

The Department’s initial argument appears to be that its proposed “wholly worn and portable” limitations should be added to the statute because the Department says so. Resp. Br. at 10-11. Yet as discussed in App. Br. at 13 and completely ignored by the Department, the Department has no authority, whether by rule or determination, to add unwritten limitations to tax statutes. *HomeStreet v. Dep’t of Revenue*, 166 Wn.2d 444, 452, 210 P.3d 297 (2009) (court determines the meaning of a

statute's words "regardless of contrary interpretation by an administrative agency").

In *HomeStreet*, the Department attempted to limit a statutory tax deduction for "amounts derived from interest" based on the why the bank retained part of the borrower's interest payment. The Court rejected the Department's limitation, noting the meaning of "derived" is "take[n] ... from a source" and thus "the revenue is derived from interest because it is taken from the interest borrowers pay on their loans ... it is not essential to determine why the money is ... taken ... [t]he statute requires *only* that the amount be "derived from interest." 166 Wn.2d at 454.

Here, RCW 82.08.0283(4) only requires that that a prosthetic device be "worn" on or in the body, not that it be "wholly" worn or "portable." As discussed in App. Br. at 15 and undisputed by the Department, the ordinary meaning of "worn" as reflected by its dictionary definition is "to have attached to the body or part of it." *Webster's Third New International Dictionary* (2002). It is undisputed that CPAPs and BiPAPs are worn within the ordinary meaning of the word. CP 8, 11, 226. The statute does not distinguish between models the Department would characterize as "wholly" worn and those the Department would characterize as "partially" worn.

**"wholly" worn**



**"partially" worn**



The added limitation of “portable” is likewise without any foundation in the text of the statute, its legislative history, or the rule. The Department’s effort in this case to add the limiting qualifiers “wholly” and “portable” to the word worn, when the legislature did not so qualify the statute is reminiscent of *Lone Star Indus., Inc. v. Dep’t of Revenue*, 97 Wn.2d 630, 647 P.2d 630 (1982), in which the Supreme Court struck down the Department’s effort to add the qualifier “primary” to the word “purpose” in a sales tax exemption statute. *Lone Star* held that the Department unlawfully limited the statutory sales tax exemption for property “purchased for the purpose of consuming [it] ... as an ingredient” to goods whose “primary purpose” was to be an ingredient. 97 Wn.2d at 634. The Court emphasized that the Legislature did not qualify purpose with “primary” and held that all goods purchased for ingredients purposes

qualify even if the use as an ingredient is minor in comparison to other purposes to which the goods are put. *Id.* at 635-36.<sup>7</sup>

**2. The Streamlined Agreement does not (and could not) “require” judicial amendment of statutory language enacted by the Washington Legislature.**

As the Department notes (Resp. Br. at 5), the statutory definition of prosthetic device enacted effective July 1, 2004 was adopted as part of an initial effort to start conforming Washington’s sales tax regime with parts of the Streamlined Sales and Use Tax Agreement (the “Agreement” or “SSUTA”), the work product of a group of states to cooperatively establish more uniform sales tax systems in the hope of persuading the U.S. Congress to pass federal legislation authorizing states to require mandatory sales tax collection by remote sellers. The Department contends for the first time in this case, and without citation to supporting authority, that this Court is “required” by the Agreement, to judicially add the unstated limitations “wholly” worn “and portable” to the Legislature’s statutory definition of prosthetic device. Resp. Br. at 12. This Court should reject the Department’s request that the Court abdicate its duty of statutory interpretation.

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<sup>7</sup> And in *Agrilink, supra*, the Supreme Court rejected the Department’s effort to add an unwritten perishable end product requirement, noting “the complete absence of any express language establishing such a requirement.” 153 Wn.2d at 397.

- a. **Washington has conformed to the Agreement provision calling for definitions that use “substantially the same language” as the Agreement’s Library of Definitions.**

The Agreement promotes uniformity by calling on member states to adopt definitions of terms contained in the Agreement’s Library of Definitions using “substantially the same language” as the library definitions. Agreement § 327(A). Effective July 1, 2004, the Washington legislature adopted a definition of “prosthetic device” identical to that Agreement’s Library of Definitions. *Compare* RCW 82.08.0283(4) *with* Library of Definitions, Agreement Appx. C at 152-53. Washington’s definition is therefore in full compliance with the Agreement pursuant to § 103 and § 327. Moreover, the agreement only requires that member states be in “substantial compliance” with the terms of the Agreement. A “single definition in the context of an entire state code is unlikely by itself to be viewed as rendering a state not substantially in compliance.” Galle, *Designing Interstate Institutions, infra* at 1418.

- b. **The “list” referenced by the Department is not authoritative and does not support its argument.**

The Department now contend that the Court is “required” to judicially re-write the statutory language enacted by the Legislature “worn on or in the body” to “designed to be wholly worn and portable” because the Agreement’s governing board adopted a rule that approves a “list” that

places certain healthcare items in “workgroups” associated with the Agreement’s library of definitions. Resp. Br. at 12.<sup>8</sup>

The Department claims that the list “distinguishes between CPAP *models* that are “not worn” ... and CPAP *models* that are ‘worn’” (Resp. Br. at 13 (emphasis added)), but there is no reference in the list to “models”

Health Care Item List Addendum  
Revision Date: January 29, 2007

Item	Workgroup
. . .	. . .
C.P.A.P. - Not Worn	Durable medical equipment
C.P.A.P. - Worn	Prosthetic device
. . .	. . .

Addendum to App Health Care Item List Appendix M Page 1 of 9

The list does not provide any clue what the list entry “C.P.A.P – Not Worn” means. It has apparently been interpreted by some to mean “apnea monitors.” *See* Resp. Br. at 17, *citing* TB-63R at 5-6 (N.J. Div. Taxation Feb. 16, 2010).

There are several fundamental flaws with the Department’s new argument. First, the list has no binding authority in Washington law. Second, because the list contains no reasoning or explanation it has no

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<sup>8</sup> While the Department presumably contends that this is a permissible new argument supported by the record below, the list was not introduced below. Moreover, while discovery was conducted regarding the list now proffered by the Department, that discovery did not become part of the record because the Department made the strategic decision not to assert this argument in any Superior Court pleadings or briefs.

persuasive value. Third, the list does not contain the language the Department asks the Court to judicially enact.

(i) **The “list” is not controlling authority in Washington.** The Agreement specifically provides that it is an agreement “among individual cooperating sovereigns in furtherance of their governmental functions.” Agreement § 1101. As such, the Agreement expressly states:

*No provision of the Agreement in whole or part invalidates or amends any provision of the law of a member state.* Adoption of the Agreement by a member state does not amend or modify any law of the state. *Implementation of any condition of the Agreement in a member state, whether adopted before, at or, or after membership of a state, must be by the action of the member state.*

Agreement § 1102 (emphasis added). Thus, the Agreement itself “has no formal legal status.” Brian Galle, *Designing Interstate Institutions: The Example of the Streamlined Sales and Use Tax Agreement (“SSUTA”)*, 40 U.C. Davis L. Rev. 1381, 1394 (2006-2007) (hereinafter “Galle, *Designing Interstate Institutions*”). In other words, because “there is no SSUTA equivalent of the Supremacy Clause,” once states have “enacted their mirror provisions into law those provisions simply become part of each jurisdiction’s statutory or constitutional scheme.” *Id.* at 1394. By itself, the Agreement “does nothing” and is “nothing more than the agreement of representatives of states” to simplify and modernize their

state tax codes. Walter Hellerstein & John A. Swain, *Streamlined Sales and Use Tax* 3-2 (2008-2009). No change to a state's tax code occurs unless the legislature "acts to conform its statutes" to the Agreement's provisions. *Id.*

While the Agreement authorizes the Streamlined governing board to interpret the provisions of the Agreement, as one scholar has noted, "states, including *state courts* and state agencies, ***are not bound by the Board's determinations***. States are not obliged to codify new interpretations" of the Board. Galle, *Designing Interstate Institutions* at 1408-09 (emphasis added); *see also* Hellerstein & Swain, *Streamlined Sales and Use Tax* at 4-5 to 4-6 (Board actions do not have the "force of law," and "state courts and taxing authorities may split in their resolution of these [interpretative] issues").

The Department cites to the legislature's statement of intent in Laws of 2003, Ch. 168 § 1, codified at RCW 82.02.210 to suggest that the legislature intended to cede authority for interpreting Washington statutes to the Streamlined Board. Resp. Br. at 7. However, RCW 82.02.210(2) expressly provides that "Chapter 168 Laws of 2003 does not include changes to Washington law that may be required in the future and that are not fully developed under the agreement." This is certainly an area that was not fully developed under the Agreement at the time the Washington

legislature enacted Chapter 168 Laws of 2003. The Streamlined governing board did not even come into existence until October 2005. The Agreement was amended in August 2006 to authorize the governing board to adopt interpretive rules. And the board did not adopt Rule 327.3 in December 2006. Moreover, the list cited by the Department is a 2007 addendum to an appendix purportedly referred to in Rule 327.3.<sup>9</sup> The “list” proffered by the Department on appeal is not evidence of the Legislature’s intent when it enacted the statutory definition in 2003 since the list simply did not exist.

**(ii) The list has no persuasive value.** As a non-Washington authority, the list is at most “merely persuasive authority, not binding authority.” *State v. Salavea*, 141 Wn.2d 133, 144 n.9, 86 P.3d 125 (2004). However, foreign authorities are accepted as persuasive only if well-reasoned. *E.g., York v. Wahkiakum School Dist. No. 200*, 163 Wn.2d 297, 331, 178 P.3d 995 (2008) (Washington courts “may consider *well-reasoned* precedents from federal courts and sister jurisdictions”) (emphasis added). Since the list provides no reasoning or explanation for either the purported distinction between “C.P.A.P. – Worn” and “C.P.A.P.

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<sup>9</sup> The reference is ambiguous at best. Rule 327.3, which was adopted in 2006 and has not been amended, references an “Appendix A attached hereto” but there is no attachment to the rule as published and the list the Department relies on is dated January 29, 2007 and bears the footer “Addendum to Health Care Item List Appendix M.” The Health Care Item List dated June 2, 2006, to which the Rule presumably refers is labeled Appendix L and does not contain any reference to CPAPs.

– Not Worn” or any reasoning or explanation for the assignment of these or any other item to the various workgroups listed, the list has no persuasive authority.

**(iii) The list does not use any of the words the Department seeks to add to the statute.** Ironically, the list the Department cites as authority for the proposition that the Court is required to judicially revise the statutory language “worn on or in the body” to read instead “designed to be wholly worn and portable” does not contain either of those words.

As discussed at pp. 9-11 above as well as in App. Br. at 6 and uncontested by the Department, it is the role of Washington Courts to determine what Washington statutes mean. As the Superior Court acknowledged below, the Department’s effort to add the unwritten limitations “wholly ... and portable” creates an “illogical dichotomy.” In other words, the Department’s efforts to add unwritten words to the statute also violates the well-settled proscription against construing statutes in a manner that would lead to unlikely, strained or absurd consequences.” *State v. Fjermestad*, 114 Wn.2d 828, 385, 791 P.2d 897 (1990).

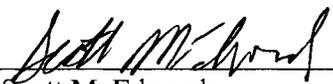
### **CONCLUSION**

For the reasons set forth above and in the Brief of Appellant, CPAPs and BiPAPs are prosthetic devices within the ordinary meaning of

the words used by the Legislature in RCW 82.08.0283 both before and after the adoption of a statutory definition; there is (1) no requirement to replace a missing body part, (2) no limitation to improving the function of “the spine or limbs,” and (3) no limitation to battery powered devices. Accordingly, appellant North Central Washington Respiratory Care Services, Inc. d/b/a Whidbey Home Medical requests that the Superior Court’s order be reversed and the matter remanded for entry of judgment in its favor.

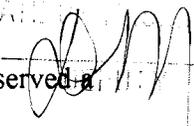
RESPECTFULLY SUBMITTED this 15th day of February, 2011.

LANE POWELL PC

By   
\_\_\_\_\_  
Scott M. Edwards  
WSBA No. 26455  
Attorneys for Appellant

11 FEB 15 PM 4:25

**CERTIFICATE OF SERVICE**

STATE OF WASHINGTON  
BY 

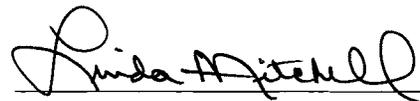
I hereby certify that on February 15, 2011, I caused to be served a

copy of the foregoing **REPLY BRIEF** on the following person(s) in the  
manner indicated below at the following address(es):

Mr. Donald F. Cofer  
Office of the Attorney General of Washington  
Revenue Division  
7141 Cleanwater Lane SW  
PO Box 40123  
Olympia, WA 98504-0123

DonaldC@ATG.WA.GOV

- by CM/ECF
- by Electronic Mail
- by Facsimile Transmission
- by First Class Mail
- by Hand Delivery
- by Overnight Delivery

  
Linda Mitchell

## **APPENDIX II**

Cite as Det. No. 91-290, 11 WTD 477 (1992).

BEFORE THE INTERPRETATION AND APPEALS DIVISION  
DEPARTMENT OF REVENUE  
STATE OF WASHINGTON

In the Matter of the Petition ) D E T E R M I N A T I O N  
For Correction of Assessment of )  
 ) No. 91-290  
 )  
 . . . ) Registration No. . . .  
 ) . . ./Audit No. . . .  
 )

[1] RCW 82.08.0283, RCW 82.12.0277 and RULE 18801: RETAIL SALES AND USE TAXES -- PROSTHETIC DEVICES -- DEFINITION. The term "prosthetic device" is not defined by the statute. Use of such devices for cosmetic purposes does not disqualify them as "prostheses" merely because the procedure is voluntary or because the body part replaced or augmented is not technically "missing." ACCORD: Deaconess Medical Center v. Department of Rev., Docket Number 87-2-2055-7 (Thurston County Superior Court, 1988), Det. No. 90-97, 9 WTD 195 (1990). Also cited: Plastic Surgery Clinic of Springfield, Inc. v. Director of Revenue, Case No. 88-001987RS (Mo.AHC, November 29, 1989).

Headnotes are provided as a convenience for the reader and are not in any way a part of the decision or in any way to be used in construing or interpreting this Determination.

TAXPAYER REPRESENTED BY: . . .

NATURE OF ACTION:

Taxpayer petitions for correction of assessment of use tax.

FACTS:

Adler, A.L.J. -- Taxpayer is a physician specializing in plastic and reconstructive surgery. His records were audited for the period from January 1, 1986 through June 30, 1990. At issue is whether use tax applies to his purchases of collagen used for skin implants or to purchases of materials used as breast and chin implants.

The collagen is injected into the skin in an effort to remove lines or "pock" marks caused by aging or scarring. It is a protein material intended to "puff out" the skin where creases or indentations have occurred.

With regard to the breast implants, the auditor used an estimate supplied by the taxpayer's representative and assessed the tax on the portion of taxpayer's breast-implant materials purchased for cosmetic surgery. Conversely, the portion of materials deemed to have been purchased for reconstructive surgery was not subjected to use tax. Cosmetic surgery was deemed to include procedures such as enlargement or augmentation of breasts or receding chins. Reconstructive surgery was deemed to be surgery performed to return the breast to a normal appearance after the patient's breast was removed to prevent the spread of disease. Similarly, where implants were used to repair a chin injury, use tax was not assessed; where the implants were only to improve the patient's appearance, use tax was assessed.

#### TAXPAYER'S EXCEPTIONS:

Taxpayer argues that use tax should not apply to any purchases of materials where the items purchased are injected into, and remain in, the human body. He argues that the statute contains no limitations based on the type of use to which the device is put and contends that the Department is attempting to narrow access to the exemption by placing qualifications on the definition which exceed those contained in and authorized by the statute.

#### DISCUSSION:

[1] Physicians are subject to use tax on all materials deemed consumed by them in rendering medical services under WAC 458-20-151 (Rule 151), unless an exemption from use tax applies to the materials themselves. The rule references WAC 458-20-18801 (Rule 18801), which discusses the sales and use tax exemptions and defines "prosthetic device" to mean

artificial substitutes which physically replace missing parts of the human body, such as a limb, bone, joint, eye, tooth, or other organ or part thereof, and materials which become ingredients or components of prostheses.

...

The retail sales tax does not apply to sales of prosthetic devices, orthotic devices prescribed by

physicians, osteopaths, or chiropractors, nor to sales of ostomic items, medically prescribed oxygen, or hearing aids. (See RCW 82.08.0283.)

The use tax does not apply to the use of articles and products which are exempt from sales tax as specified herein. (See RCW 82.12.0277.)

RCW 82.08.0283 and RCW 82.12.0277 contain no definition of "prosthetic," nor do they contain any limitations indicating that eligibility for exemption is conditioned on how the prosthetic device is used.

In Deaconess Medical Center v. Department of Rev., Docket Number 87-2-2055-7 (Thurston County Superior Court, 1988), the court used similar logic and commented:

prosthetic devices [are exempted from] sales and use taxes imposed by Chapters 82.08 and 82.12 respectively. In neither chapter is the term "prosthetic devices" defined . . . . (Brackets supplied.)

However, absent a statutory definition, terms used in statutes are to be given their ordinary meaning, which may be determined by reference to extrinsic aids, such as dictionaries. [Citation omitted.] In the ordinary meaning attached to "prosthetic devices," as defined in Dorland's Illustrated Medical Dictionary, 26th Edition, and Taber's Cyclopedic Medical Dictionary, there is not a requirement that the prosthesis be a permanent replacement. These definitions also indicate the prosthesis need only replace a missing part, organ, or part of an organ or the function of the part or organ. (Emphasis supplied.)

Therefore, since the department's definition, in so far as it requires the replacement be permanent, broadens the sales and use tax imposed by the statute. This results in this regulation being invalid to this extent.

In this case, as in Deaconess, the statute contains no language suggesting that the exemption can be denied based on the fact that the patient's choice to undergo the procedure is motivated by cosmetic concerns. The only limitation in the statute is that the device must be prescribed by a qualifying person. Under the broad interpretation given by the court, application of the law or rule in a manner that limits access to the exemption granted by the legislature is invalid. As a result, we find that the

fact that the surgery is generally voluntary is not determinative of whether the exemption applies.

Following the reasoning in Deaconess, we believe that collagen implantations, which become a part of the skin and remain in the body indefinitely, are prostheses. Although the decision to undergo the procedure may be motivated by cosmetic concerns, the collagen does replace a lost function of skin which has been damaged by disease, accident, or time.

We believe that the same logic governs taxability of breast and chin implants. Although this is a close question, the Deaconess court has instructed that, in the absence of a definition, "prosthetic device" cannot be administratively defined in any way that narrows the scope of the exemption. As a result, denying the exemption because the surgery is voluntary is invalid. Similarly, denial because the body part is perceived to be "missing" only in the eyes of the patient exceeds the statutory authority. The rule does not limit the exemption on these grounds, and the statute definitely does not.

We are further persuaded by an administrative opinion from Missouri on this exact issue. The state Administrative Hearing Commission was considering a statute which is virtually identical to RCW 82.08.0283 and RCW 82.12.0277, and applied logic consistent with that of the Deaconess opinion. The Missouri statute differs only slightly, in that it ties the definition of "prosthetic device" to Title XVIII of the Social Security Act of 1965. No such limitation exists in the Washington statute.

The Missouri state revenue division had assessed tax only on implants used for cosmetic, generally augmentation, purposes and had granted the exemption where they were used for reconstructive purposes. The commission's findings of fact stated that breasts were internal organs and that implants were prostheses, for medical purposes. Its conclusions of law stated

The Director argues that breast implants used for cosmetic augmentation replace nothing and are, therefore, outside of the statutory definition. We disagree. It is our view that a device is a prosthetic device whether the tissue or organ replaced was once present, but lost due to accident, surgery or disease, or was never present. The uncontroverted testimony of the Clinic's expert was that breast implants always replace natural tissue which is missing due to disease, surgery, malformation, or simply inadequate growth . . .

The Director concedes that implants used for other than cosmetic purposes are exempt, but insists that implants used for purely cosmetic purposes are not exempt because they are not prostheses. The prosthetic device exemption does not, however, unlike certain other exemptions, require a purpose or actual use test. The statute plainly and simply exempts all sales of qualifying devices and does not inquire into the uses to which devices are put . . . . Where the legislature has not included an express actual use requirement, we will not read one into the law. It is our determination that any sale of a qualifying device is exempt, regardless of the use to which it is put or, indeed, whether it is put to any use. (Emphasis supplied.)

Plastic Surgery Clinic of Springfield, Inc. v. Director of Revenue, Case No. 88-001987RS (Mo.AHC, November 29, 1989).

Because we believe the statute does not limit access to the exemption based on voluntariness of the surgery or on whether a patient can prove a body part is physically missing, we find that the substances or materials used by the taxpayer are not subject to use tax, either where the surgery is for reconstructive purposes or where it is for cosmetic purposes.

DECISION AND DISPOSITION:

Taxpayer's petition is granted. The file will be remanded to the Audit Division for adjustments consistent with this Determination.

DATED this 2nd day of October, 1991.

Cite as Det. No. 92-094, 12 WTD 135 (1993).

BEFORE THE INTERPRETATION AND APPEALS DIVISION  
DEPARTMENT OF REVENUE  
STATE OF WASHINGTON

In the Matter of the Petition        ) D E T E R M I N A T I O N  
For Determination of Tax            )  
Liability of                            )            No. 92-094  
                                          )  
                                          )            Registration No. . . .  
)  
                                          )

[1] RULE 18801 -- RETAIL SALES TAX -- EXEMPTIONS --  
PROSTHETIC DEVICES. Dental device implanted below  
patient's gums and used to guide regeneration of bone  
and tissue is a prosthetic device under the statute.  
Fact that device is eventually absorbed by the body or  
surgically removed is not determinative where  
implantation occurs. ACCORD: Deaconess Medical Center  
v. Department of Rev., Docket No. 87-2-2055-7 (Thurston  
County Superior Court, 1988); Det. No. 90-97, 9 WTD 195  
(1990).

Headnotes are provided as a convenience for the reader and are  
not in any way a part of the decision or in any way to be used in  
construing or interpreting this Determination.

TAXPAYER REPRESENTED BY: . . .

NATURE OF ACTION:

Taxpayer petitions for determination of whether new dental device  
qualifies as an exempt prosthetic device.

FACTS AND ISSUES:

Adler, A.L.J. -- Taxpayer is a manufacturer of products sold to  
dentists. It seeks a determination on whether a recently-  
developed product is exempt from sales or use tax. Taxpayer  
explains:

The product is a bio-medical device that will be sold  
to dentists (periodontists and general practitioners)  
for reconstructive surgery resulting from periodontal

disease. In the industry, the product is referred to as a "Guided Tissue Regeneration" (GTR) device and is subject to FDA approval as a class II medical device (defined by 510K submission).

Briefly, the product is a foil-thin, perforated device with pre-attached sutures (used to fasten around the neck of a tooth) that is placed beneath a patient's gums in the area where bone and periodontal ligament loss occurred. The purpose of the device is to enable and guide the regeneration of periodontal tissues lost due to disease.

The primary difference between this product and the only other device currently on the market...is that it is bio-absorbable and is not removed from the patient's mouth. The product is made of a polylactic acid.

In the field of periodontology, it wasn't discovered until only a few years ago that the body can regenerate bone and ligament to its original anatomy. This device, which was invented as a result of this discovery, will most likely reduce the incidence of tooth loss in the future, making GTR applications an alternative or replacement for dentures and implants. Furthermore, for patients who have already suffered tooth loss, this device will be used in implant surgery, guiding regrowth of bone tissue around a titanium post rather than a natural tooth.

#### DISCUSSION:

[1] Dentists are subject to use tax on all materials deemed consumed by them in rendering medical services under WAC 458-20-151 (Rule 151), unless an exemption from use tax applies to the materials themselves. The rule references WAC 458-20-18801 (Rule 18801), which discusses the sales and use tax exemptions and defines "prosthetic device" to mean

artificial substitutes which generally replace missing parts of the human body, such as a limb, bone, joint, eye, tooth, or other organ or part thereof, and materials which become ingredients or components of prostheses.

. . .

The retail sales tax does not apply to sales of prosthetic devices, orthotic devices prescribed by physicians, osteopaths, or chiropractors, nor to sales

of ostomic items. (See RCW 82.08.0283.) Sutures, pacemakers, hearing aids, and kidney dialysis machines are examples of prosthetic devices. Drainage devices which are particularly prescribed for use on or in a specific patient are exempt from sales or use taxes as prostheses because they either replace missing body parts or assist dysfunctional ones, either on a temporary or permanent basis. A prosthetic device can include a device that is implanted for cosmetic reasons.

. . .

The use tax does not apply to the use of articles and products which are exempt from sales tax as specified herein. (See RCW 82.12.0277.)

(Emphasis supplied.)

RCW 82.08.0283 and 82.12.0277 contain no definition of "prosthetic," nor do they contain any limitations indicating that eligibility for exemption is conditioned on how the prosthetic device is used or whether it is a permanent replacement.

In Deaconess Medical Center v. Department of Rev., Docket Number 87-2-2055-7 (Thurston County Superior Court, 1988), the court used similar logic and commented:

prosthetic devices [are exempted from] sales and use taxes imposed by Chapters 82.08 and 82.12 respectively. In neither chapter is the term "prosthetic devices" defined. . .

However, absent a statutory definition, terms used in statutes are to be given their ordinary meaning, which may be determined by reference to extrinsic aids, such as dictionaries. [Citation omitted.] In the ordinary meaning attached to "prosthetic devices," as defined in Dorland's Illustrated Medical Dictionary, 26th Edition, and Taber's Cyclopedic Medical Dictionary, there is not a requirement that the prosthesis be a permanent replacement. These definitions also indicate the prosthesis need only replace a missing part, organ, or part of an organ or the function of the part or organ.

Therefore, since the department's definition, in so far as it requires the replacement be permanent, broadens the sales and use tax imposed by the statute. This results in this regulation being invalid to this extent.

(Brackets and emphasis supplied.)

In this case, as in Deaconess, the statute contains no language suggesting that the exemption can be denied based on the fact that the device is used temporarily and then absorbed. Additionally, the device clearly replaces the function of the gums and bone until they can regenerate themselves. In this respect, it is like sutures, which replace the function of the skin temporarily and which often are absorbed by the body when their task is completed. Under the broad definition of "prosthesis" relied upon by the court and reflected in the rule amendment, application of the law or rule in a manner that limits access to the exemption granted by the legislature would be invalid.

DECISION AND DISPOSITION:

Taxpayer's petition is granted, and the device is entitled to the sales or use tax exemption. This legal opinion may be relied upon for reporting purposes and as support of the reporting method in the event of an audit. This ruling is issued pursuant to WAC 458-20-100(9) and is based upon only the facts that were disclosed by the taxpayer. In this regard, the department has no obligation to ascertain whether the taxpayer has revealed all of the relevant facts or whether the facts disclosed were actually true. This legal opinion shall bind this taxpayer and the department upon those facts. However, it shall not be binding if there are relevant facts which are in existence but not disclosed at the time this opinion was issued; if, subsequently, the disclosed facts are ultimately determined to be false; or if the facts as disclosed subsequently change and no new opinion has been issued which takes into consideration those changes. This opinion may be rescinded or revoked in the future, however, any such rescission or revocation shall not affect prior liability and shall have a prospective application only.

DATED this 2nd day of April 1992.