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STATE OF WASHINGTON

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DIVISION II, COURT OF APPEALS
OF THE STATE OF WASHINGTON

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

Appellant

v.

Washington Department of Revenue,

Respondent

BRIEF OF APPELLANT

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ASSIGNMENT OF ERRORS

1. The Superior Court erred in holding that CPAPs and BiPAPs “do not fit the ordinary [dictionary] definition of prosthetic devices or orthotic devices.”

2. The Superior Court erred in holding that the “meaning of the phrase ‘worn on the body,’” enacted effective July 1, 2004, is to create an “illogical dichotomy between devices that are portable and [those that] are not portable.”

ISSUES PRESENTED

1. Whether the ordinary meaning of prosthetic device requires replacement of a missing body part?

2. Whether the ordinary meaning of orthotic device is limited to items “similar” to “braces, collars, casts, and splints” and, if so, what characteristic(s) cause an item to be sufficiently “similar” to braces, collars, casts, or splints to fit within the ordinary meaning of orthotic device?

3. Whether the statutory words “worn on” can be replaced with “portable” or “designed to be wholly worn and portable” instead of accorded their ordinary meaning?

STATEMENT OF THE CASE

1. Whidbey's prescription sales of CPAP and BiPAP equipment.

Plaintiff North Central Washington Respiratory Care Services, Inc., d/b/a Whidbey Home Medical ("Whidbey") is a licensed provider of prescription medical equipment, including Continuous Positive Air Pressure ("CPAP") and Bi-level Positive Air Pressure ("BiPAP") equipment.

CPAP and BiPAP are prescribed for the treatment of Obstructive Sleep Apnea, Chronic Obstructive Pulmonary Disease, and other respiratory conditions. CP 8. Patients with Obstructive Sleep Apnea ("OSA") suffer from repeated collapse of the upper airway during sleep, obstructing breathing and cutting off oxygen flow. OSA significantly increases the patient's risk of heart disease, heart attacks, strokes, and high blood pressure. CP 9, 35.¹

CPAP and BiPAP treat OSA by creating a pneumatic splint, using positive air pressure to brace the patient's airway open during sleep to prevent the airway from collapsing. CP 11. CPAP uses a single

¹ OSA is generally diagnosed by polysomnography, a sleep test that monitors the patient's sleep in a clinical environment. The results of the polysomnography help to diagnose OSA and assist the physician in evaluating the appropriate treatment. If CPAP or BiPAP is prescribed, the test results are also used by the physician to determine the specific air pressure (titration) to be applied by the CPAP/BiPAP equipment. CP 10.

continuous air pressure while BiPAP uses two different air pressures, a higher pressure during inhalation and a lower pressure during exhalation. BiPAP is better tolerated by some patients and may also provide inspiratory support in patients with hypoventilation. CP 11.

The CPAP/BiPAP patient wears a mask that creates an airtight seal around the patient's nose and/or mouth. The mask is specially fitted by a clinician based on the size/shape of the patient's features, their sleeping habits, mouth breathing, presence of claustrophobia, predisposition toward complications, and other considerations. The mask is connected by tubing to a device that delivers positive air pressure through the mask to the patient's airway, thereby pneumatically splinting open the airway and preventing it from collapsing during sleep. The airflow pressure applied by CPAP or BiPAP is determined by the prescribing physician based on the results of the polysomnography. CP 11-12.

2. The statutory exemption for prescription sales of prosthetic and orthotic devices.

During the period January 2001 through June 2004, RCW 82.08.0283 provided an exemption for prescription sales of "prosthetic devices" and "orthotic devices." Prior to July 2004, neither term was defined in the statute. Effective July 2004 the legislature amended RCW 82.08.0283, deleting the word orthotic and adding a statutory definition of

prosthetic devices the Department describes as “combin[ing] orthotics into a broader definition of prosthetics.” CP 26.

3. The parties’ dispute whether CPAPs and BiPAPs are prosthetic and/or orthotic devices.

Whidbey reported and paid B&O tax on its prescription sales of CPAPs and BiPAPs. However, based on the exemption for prescription sales of prosthetic and orthotic devices in RCW 82.08.0283, it did not collect sales tax from CPAP and BiPAP patients. During a routine audit of Whidbey’s Washington tax returns covering the period January 2001 through September 2004, the Department asserted that CPAPs and BiPAPs are not prosthetic or orthotic devices and assessed sales tax on Whidbey’s prescription sales of CPAP and BiPAP equipment. As provided by RCW 82.32.150, Whidbey contested the assessment by paying it and filing this tax refund suit. CP 17.

The Superior Court granted the Department’s request for summary judgment, holding that CPAPs and BiPAPs “do not fit under the ordinary definition of prosthetic devices or orthotic devices.” RP 58-59. While the Court rejected the Department’s argument that the ordinary meaning of prosthetic requires replacement of missing body parts, it declined to explain the basis for its conclusion, saying simply “I don’t think I am required to dictate a specific meaning of prosthetic devices.” RP 60.

With respect to the period subject to the statutory definition (July to September 2004), the Court noted that “the issue comes down to ... the meaning of the phrase ‘worn on the body’” and held that the phrase creates an “illogical dichotomy between devices that are *portable* and [those that] are *not portable*.” RP 58 (emphasis added). This appeal follows.

SUMMARY OF ARGUMENT

CPAPs and BiPAPs are prosthetic devices both within the ordinary meaning of the term, which was undefined prior to July 2004, and under the statutory definition adopted effective July 2004. Dictionary definitions as well as the Department’s own published precedents confirm that the ordinary meaning of prosthetic includes devices that that supplement, augment, or assist an impaired, damaged, or defective body part. CPAPs and BiPAPs fit within the ordinary meaning of prosthetic device because they assist the functioning of an impaired body part by pneumatically splinting open the patient’s malfunctioning airway during sleep to prevent it from repeatedly collapsing.

Even if the ordinary meaning of prosthetic device required replacement of a missing body part, CPAPs and BiPAPs are orthotic devices within the ordinary meaning of that term because they “are used to

support, align ... or to improve the function of moveable parts of the body,” specifically the patient’s airway. WAC 458-20-18801(1)(g).

Finally, the statutory definition does not support a “portable” or “capable of being wholly worn on the body and portable” requirement. Plug in CPAPs/BiPAPs are “worn on” the body within the ordinary meaning of the statutory words and to the same extent as battery operated CPAPs the Department concedes are within the statute.

ARGUMENT

The issues in this case present questions of statutory construction subject to the Court’s *de novo* review. *Agrilink Foods, Inc. v. Dep’t of Revenue*, 153 Wn.2d 392, 396, 103 p.3d 1226 (2005). As both the Department and the Superior Court acknowledged, for periods prior to July 2004 the undefined terms “prosthetic device” and “orthotic devices” are accorded their common and ordinary meaning, which may be determined by reference to the dictionary. *HomeStreet, Inc. v. Dep’t of Revenue*, 166 Wn.2d 444, 451, 210 P.3d 297 (2009); *Ravenscroft v. Wash. Water Power Co.*, 136 Wn.2d 911, 921-22, 969 P.2d 75 (1998).

1. The ordinary meaning of prosthetic device does not require replacement of a missing body part.

The ordinary meaning of prosthetic device as reflected in dictionary definitions is not limited to replacement of missing body parts

but also *includes* devices that supplement, augment, or assist an impaired, damaged, or defective body part. *Random House Webster's Unabridged Dictionary* (2d Ed. 1998) (“a device, either external or implanted, that substitutes for or **supplements** a missing or **defective part of the body**”) (emphasis added); www.wikipedia.org/wiki/prosthetic (visited June 12, 2009)² (device “typically used to replace parts ... or to **supplement defective body parts**”) (emphasis added); *Tabor's Cyclopedic Medical Dictionary* (2002) (“device to **augment performance of a natural function**”) (emphasis added); *Steadman's Medical Dictionary* (28th Ed. 2006) (“used to **assist a damaged** or replace a missing **body part**”) (emphasis added); and *Merriam-Webster Medical Desk Dictionary* (1st Ed. 1996) (“an artificial device to replace or **augment** a missing or **impaired part of the body**”) (emphasis added).

The Department's own published precedents have repeatedly affirmed that the ordinary meaning of prosthetic *includes* devices that supplement, augment, or assist an impaired, damaged, or defective body part. For example, in holding that a dental device that “replaces the function of the gums and bones” qualifies as an exempt prosthetic device the Department noted:

² And revisited October 10, 2010.

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.

Washington Tax Determination 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)). Thus in Det. No. 91-290, 11 WTD 477, 481 (1992) the Department expressly noted that “the statute does ***not*** limit access to the exemption based on ... whether ... a body part is physically missing.” (emphasis added). Most notably, in Det. No. 92-261, 11 WTD 439, 445 (1992) (copy attached as Appendix I), the Department, after noting that exempt prosthetic devices “either replace a missing part or organ or the function of the part or organ,” held that “devices (tubes) used to keep a patient’s airway open ... ***qualify*** for the prosthesis exemption ***because*** they also ***replace the function of the body’s own airway.***” (emphasis added).³

³ The Department’s administrative rule, WAC 458-20-18801, also reflects the Department’s long-standing recognition that the ordinary meaning of prosthetic does not require replacement of a missing body part, identifying “sutures, pacemakers, hearing aids and kidney dialysis machines” as “examples of exempt prosthetic devices” explaining that the exemption applies to items that “either replace missing body parts ***or assist dysfunctional ones.***” WAC 458-20-18801(5)(e) (emphasis added).

As in that Determination, Whidbey's prescription sales of CPAPs and BiPAPs qualify for the prosthetics exemption because they are "used to keep a patient's airway open," assisting or replacing the function of the patient's malfunctioning upper airway.

Contrary to its own published precedents recognizing that the ordinary meaning of prosthetic includes items that "assist dysfunctional" body parts, including devices "used to keep a patient's airway open," the Department argued below that CPAPs and BiPAPs were not prosthetic devices prior to the enactment of a statutory definition because the patient's airway is only malfunctioning, not "missing." CP 43. Ironically, the Department quotes *Steadman's Medical Dictionary* (28th Ed. 2006) defining prosthetic as a device "used to *assist a damaged* or replace a missing *body part*" as support for its contention that the ordinary meaning of the term is limited to replacement of missing body parts. CP 43 (emphasis added). Not surprisingly, the Superior Court rejected the Department's argument that the ordinary meaning of prosthetic device requires replacement of a missing body part RP 60. Yet, having rejected the only argument presented by the Department regarding the ordinary meaning of prosthetic, the Court declined to explain the basis for its conclusion that "these devices do not fit the ordinary definition of

prosthetic devices,” *Id.* at 58-59, saying simply “I don’t think I am required to dictate a specific meaning of prosthetic devices.” *Id.* at 60.

One of the Court’s fundamental roles is “to determine the purpose and meaning of” statutes. *Brown v. City of Seattle*, 117 Wn. App. 781, 791, 72 P.3d 764 (2003). As discussed above (and as the Department has previously acknowledged) the ordinary meaning of prosthetic device includes items like CPAPs and BiPAPs that augment the function of a malfunctioning body part by “keep[ing] the patient’s airway open.”

2. CPAPs and BiPAPs are within the ordinary meaning of orthotic device; they support and improve the function of the patient's airway, a moving part of the body.

Even if the ordinary meaning of prosthetic device were limited to the replacement of missing body parts (which, as discussed above, it is not), CPAPs and BiPAPs are orthotic devices. An undefined term, orthotic device is accorded its ordinary meaning as determined by reference to the dictionary. *HomeStreet*, 166 Wn.2d at 451. The ordinary meaning of orthotic is a device “used to **support, align**, prevent, or correct deformities or to **improve the function of movable parts of the body.**” *Dorland’s Illustrated Medical Dictionary* (26th Ed. 2000). As the Department noted below, this definition was quoted on the House floor by the co-chair of the Revenue Committee to clarify the intended meaning of the statute. CP 50-51. This ordinary meaning established by the

dictionary is also acknowledged by the Department in its administrative rule, which describes an eligible orthotic device as a device “designed to activate or *supplement a weakened* or atrophied limb or *function.*” WAC 458-20-18801(1)(g) (emphasis added). CPAPs and BiPAPs are well within the ordinary meaning of orthotic device; they support or align the patient’s airway to improve the function of that moveable part of the patient’s body.

The Department’s argument on this issue, apparently accepted by the Superior Court, is nonsensical and absurd. The Department argues that, notwithstanding the ordinary meaning of orthotic reflected in the dictionary and incorporated into its own rule, the statute should be deemed to apply only to items the Department would label “similar” to braces, collars, casts or splints. CP 48. Yet the Department fails to even articulate, let alone present supporting authority suggesting what function braces, collars, casts, and splints perform that CPAPs/BiPAPs do not. The undisputed evidence in the record is that CPAPs and BiPAPs create a pneumatic splint to brace open the patient’s airway (CP 11); they are orthotic devices within the ordinary meaning of the term reflected in the dictionary definition cited by the Department and the Legislature.

Moreover, as the Department has noted (CP 26), the ordinary meaning of orthotic was incorporated into the 2004 statutory definition of

prosthetic device, by including “corrective, or supportive devices that either “correct a physical deformity or malfunction” or “[s]upport a weak or deformed portion of the body.” RCW 82.04.0283(4)(a). The Department does not dispute that all CPAPs and BiPAPs satisfy the corrective or supportive function portion of the statutory definition.

3. The ordinary meaning of “worn on” the body is not “portable” or “designed to be wholly worn on the body and portable.”

It is undisputed that under the statutory definition of prosthetic device effective July 2004 there is no requirement to replace a missing body part. It provides:

“Prosthetic device” means a replacement, *corrective, or supportive device*, including repair and replacement parts for a prosthetic device, worn on or in the body to:

- (i) Artificially replace a missing portion of the body;
- (ii) Prevent or *correct a physical deformity or malfunction*;
- or*
- (iii) *Support a weak or deformed portion of the body.*

Laws of Washington 2003, Ch. 168, Sect. 409(4)(a) (emphasis added).

As the Superior Court noted, the issue for the period July to September 2004 “comes down to ... the meaning of the phrase ‘worn on the body’” RP (07/17/09) at 59. On this issue, the Department argued that the statutory language “worn on” the body, instead of its ordinary meaning, should be judicially revised to apply only to devices “*designed to be wholly worn and portable.*” CP 53 (emphasis added). The Superior

Court acquiesced and held that the CPAP on the left is “worn on” the body (and therefore a prosthetic device) because it “portable” by virtue of being battery powered, while the CPAP on the right was held “not worn on” the body (and therefore not a prosthetic device) because it is “not portable” by virtue of needing to be plugged in:

held "worn on" the body



held "not worn on" the body



This construction is “contrary to the requirement that [courts] ‘remain careful to avoid unlikely, absurd or strained results.’” *Berrocal v. Fernandez*, 155 Wn.2d 585, 594, 121 P.3d 82 (2005) (quoting *Burton v. Lehman*, 153 Wn.2d 416, 423, 103 P.3d 1230 (2005)). Moreover, the Supreme Court has repeatedly emphasized that “a statute’s meaning must be derived from the wording of the statute itself” and that a court “is required to assume the Legislature meant exactly what it said and apply the statute as written.” *HomeStreet*, 166 Wn.2d at 452. Consequently, a

court cannot add language to a statute that the Legislature did not use. *Agrilink*, 153 Wn.2d at 398. The language actually used by the legislature in RCW 82.08.0283, simply says “worn on” the body; it does *not* include either the adjective “wholly” or the word “portable.” Consequently, the requirement the Department persuaded the Superior Court to create, that a prosthetic device be “designed to be wholly worn and portable” CP 53 (emphasis added) exceeds the statutory language. *Agrilink*, 153 Wn.2d at 398 (invalidating a Department construction that “added a requirement ... that the statutory text does not dictate”).

As the Superior Court acknowledged, its construction creates an “illogical dichotomy” between models that are “made portable” and models that are “plugged in.” RP at 58.⁴ The Court also acknowledged that its strained construction does not “make[] sense” in the context of a product that “is typically not made portable because ... it provides assistance to people during sleep when they generally are not moving.” *Id.*

⁴ Even if the Court could substitute the non-statutory word “portable” for the language actually used by the Legislature, all CPAPs and BiPAPs are portable within the ordinary meaning of that word, which is defined in *Webster’s Third New International Dictionary* as meaning “capable of being carried ... light or manageable enough to be readily moveable.”

The statutory definition of prosthetic device only requires that it be “worn on” the body. The ordinary meaning of worn, which is a form of the verb to wear, is “to bear or have upon the person ... *to have attached to the body or part of it* ... to carry on or as if on the person <~ a sword> <~ a cane>,” *Webster's Third New International Dictionary* (2002) (emphasis added). As illustrated by the images above and established by the undisputed evidence in the record, the CPAP/BiPAP patient wears a specially fitted mask that creates an airtight seal around the patient’s nose and/or mouth and is connected by tubing to equipment that supplies positive air pressure to the patient’s airway creating a pneumatic split that braces the airway open to prevent the airway from repeatedly collapsing during sleep. CP 11. Thus the images also reflect that CPAP is worn by the patient (attached to the patient’s body) to the same extent regardless of whether the equipment is battery-powered or plugged in.

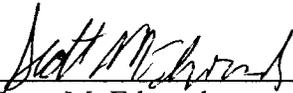
CONCLUSION

For the reasons set forth above, CPAP and BiPAP equipment are prosthetic devices or orthotic devices within the meaning of RCW 82.08.0283 both before and after the adoption of a statutory definition. 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 for a refund of the contested assessment.

RESPECTFULLY SUBMITTED this 11th day of October, 2010.

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By  _____
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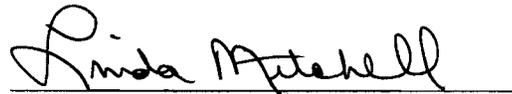
CERTIFICATE OF SERVICE

I hereby certify that on October 11, 2010, I caused to be served a copy of the foregoing **BRIEF OF APPELLANT** on the following person(s) in the manner indicated below at the following address(es):

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