Reichlin, Debra

TREATMENT

After claim closure

RCW 51.36.010 permits the Director to exercise discretion to provide continued treatment in circumstances other than claims closed with a total permanent disability determination. The decision of *In re David Malmberg*, Dckt. No. 86 1326 (November 12, 1987), to the extent that the Board concluded that the statute only applied in circumstances of total permanent disability, is overruled. ***….In re Debra Reichlin*, BIIA Dec., 00 15943 (2003)** [*Editor's Note*: *Overruled, Department of Labor & Indus. v. Slaugh*, 177 Wn. App. 439 (2013). The court held that the final proviso of RCW 51.36.010(4) granting discretion to the supervisor to authorize continued life-sustaining treatment plainly applies only in case of permanent total disability.]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: DEBRA L. REICHLIN	)	**DOCKET NO. 00 15943**
	)	
CLAIM NO. P-391454	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Debra L. Reichlin, by
Law Offices of Calbom & Schwab, P.S.C., per
David L. Lybbert

Employer, Broadway Truck Stop,
None

Department of Labor and Industries, by
The Office of the Attorney General, per
Steven J. Nash, Assistant

The claimant, Debra L. Reichlin, filed an appeal with the Board of Industrial Insurance Appeals on May 30, 2000, from an order of the Department of Labor and Industries dated May 10, 2000, and letters the Department sent to Ms. Reichlin's legal representative on May 10, 2000 and May 24, 2000. In its order of May 10, 2000, the Department affirmed the provisions of an order dated February 23, 2000. In that order, the Department declared that, in accordance with an order of the Board of Industrial Insurance Appeals dated February 15, 2000, the claim was closed with compensation for permanent partial disability equal to 25 percent as compared to total bodily impairment for unspecified disabilities. In its letter of May 10, 2000, the Department declared that it would not pay for ongoing medical treatment or medicines after the date it closed a claim with compensation for permanent partial disability. In its letter of May 24, 2000, the Department declared that under WAC 296-20-124, it lacked authority to pay for ongoing medications or medical treatment after the date a claim had been closed with compensation for permanent partial disability, as opposed to compensation for permanent total disability. The Department order is **REVERSED AND REMANDED.**

EVIDENTIARY AND PROCEDURAL MATTERS

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on timely Petitions for Review filed by the claimant and the Department to a Proposed Decision and Order issued on March 26, 2003, in which the industrial appeals judge affirmed the order of the Department dated May 10, 2000, and its letters of May 10, 2000 and May 24, 2000.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. The rulings are affirmed.

DECISION

The issue raised by Ms. Reichlin in this appeal is whether RCW 51.36.010, that permits the Director of the Department of Labor and Industries to exercise discretion to provide continued treatment under certain circumstances, only applies to claims closed with total permanent disability (TPD), and not to claims closed with permanent partial disability (PPD). Ms. Reichlin seeks ongoing medication for her serious occupational asthma. We have granted review because we determine the Director has discretion to provide ongoing treatment in a claim closed with permanent partial disability.

In its Petition for Review, the Department agrees with our industrial appeals judge's disposition of the case. However, the Department contends that additional findings of fact and conclusions of law should have been made relevant to the merits of the case. The Proposed Decision and Order makes a jurisdictional finding and then a finding that there is no genuine issue of material fact. The conclusions of law include a jurisdictional statement, and conclude that the Department is entitled to a Summary Judgment and that its order should be affirmed.

In this case, the matter was submitted by stipulated facts. The submission of the stipulated facts was followed by a Motion for Summary Judgment by the Department. We agree with our industrial appeals judge that, in cases decided by Summary Judgment, no findings and conclusions of the factual merits of the case are legally necessary. The law requires only findings on material, contested issues. Nevertheless, making findings and conclusions is not prohibited, and can be useful for purposes of clarity for the reader, and particularly to give a context to the directive to the Department. For that reason, in this case, we make findings and conclusions consistent with the stipulated facts.

Ms. Reichlin petitions from our industrial appeals judge's determination that RCW 51.36.010 does not allow the Director to exercise his discretion to continue treatment after claim closure except in cases of TPD. In letters supporting its decision not to continue treatment for asthma after claim closure, the Department cited WAC 296-20-124, which states that treatment cannot continue after claim closure. That provision does not mention the Director's discretion to allow continued treatment, as set forth in the statute, however, and the WAC provision cannot be read to narrow it. It is the statute, therefore, that must be addressed. Our industrial appeals judge followed a non-significant Board decision, *In re David Malmberg*, Dckt. No. 86 1326 (November 12, 1987), as

was necessary under the circumstances. In that case, the Board stated, without explanation, that the statutory discretion for continued treatment under RCW 51.36.010 applies only to cases of permanent total disability. We agree with the special concurring opinion in the *Malmberg* case and with the Petition for Review that there is absolutely nothing in the statute that prevents the Director from exercising discretion to provide continued treatment in the case of **any** claim that has been closed. To the extent that this holding is inconsistent with *Malmberg*, that case is hereby overruled.

This claim has an interesting procedural history. Ms. Reichlin originally filed a timely appeal from a May 10, 2000 Department order; a letter of the same date, as well as a letter dated May 24, 2000. The May 10, 2000 order affirmed a prior order in which the Department closed the claim in accordance with a Board order of February 15, 2000, with an award for disability equal to 25 percent of total bodily impairment (TBI) for unspecified disabilities caused by her respiratory problems. The two letters stated that the Department could not pay for ongoing medications; the May 24, 2000 letter also cited the above-mentioned WAC 296-20-124, that states that treatment cannot continue after claim closure, though it provides for prosthetics. According to the stipulated facts, the Board decided that the May 10, 2000 order was ministerial and dismissed that appeal for lack of subject matter jurisdiction. A superior court decided that, when considering the correspondence accompanying and following the order that dealt with matters not addressed by the earlier Board decision, the May 10, 2000 order was more than ministerial. The case was remanded to the Board to adjudicate the issue of entitlement to continued medical care after claim closure.

RCW 51.36.010 provides, in pertinent part:

> § **51.36.010** Extent and duration.
>
> 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 added.)

The section of the statute that is material to this case is the final proviso that states the supervisor of industrial insurance, in his sole discretion, may authorize continued medical and surgical treatment for accepted conditions to protect the worker's life or to provide for the administration of medical and therapeutic measures, including (non-narcotic) prescription medications that are necessary to alleviate continuing pain. As stated in the *Malmberg* concurrence and in the claimant's Petition for Review, that proviso follows the discussion of treatment for both PPD and TPD workers. **There is no distinction made in the proviso**. Although the more typical course for a worker whose claim has been closed would be to apply to reopen for further treatment if the condition has worsened, given the nature of certain illnesses like asthma, that can be life threatening or with acute temporary flare-ups, that process is not of much benefit.

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

relief. We reverse the order and letters under appeal and remand this matter for the Director to exercise his discretion.

FINDINGS OF FACT

1. On November 13, 1995, the claimant, Debra L. Reichlin, filed an application for benefits with the Department of Labor and Industries, alleging that she had developed a disabling respiratory ailment on November 5, 1995, proximately caused by an exposure to propane gas during the course of her employment with Broadway Truck Stop. On June 23, 1997, the Department issued an order that allowed the claim for benefits, determined that the injury event had proximately caused mucosal and respiratory irritation, and closed the claim with no compensation for permanent partial disability. Ms. Reichlin protested the order on July 17, 1997, but the Department affirmed the provisions of the order on January 12, 1999. On January 28, 1999, Ms. Reichlin filed a Notice of Appeal with the Board of Industrial Insurance Appeals from the order. This Board assigned the appeal Docket No. 99 11058 and granted the appeal on February 26, 1999. The Board ordered that further proceedings be held in the appeal.

   On January 13, 2000, a Proposed Decision and Order was issued in the appeal, which reversed the January 12, 1999 Department order and remanded the claim to the Department with directions to issue an order that closed the claim with compensation for permanent partial disability equal to 25 percent as compared to total bodily impairment for unspecified disabilities. On February 15, 2000, the Board issued an Order Adopting Proposed Decision and Order.

   On February 23, 2000, the Department issued an order in accordance with the Board's order. The claimant protested the order on March 29, 2000, but the Department affirmed the provisions of the order on May 10, 2000. Also on May 10, 2000, the Department sent a letter to Ms. Reichlin's legal representative, in which the agency declared that it would not pay for ongoing medicine or medical treatment after the date the claim was closed with compensation for permanent partial disability. On May 24, 2000, the Department sent another letter to the claimant's legal representative, in which it declared that in accordance with WAC 296-20-124, the Department would not pay for ongoing medications after the date it closed Ms. Reichlin's claim because her claim was closed with compensation for permanent partial disability, not compensation for permanent total disability. On May 30, 2000, the claimant filed a Notice of Appeal with this Board from the May 10, 2000 Department order. This Board assigned the appeal Docket No. 00 15943 and granted the appeal on June 12, 2000. The Board ordered that further proceedings be held in the appeal.

On February 12, 2001, a Proposed Decision and Order was issued in the appeal, which dismissed the appeal on the grounds that the Board lacked subject matter jurisdiction over the appeal. On April 30, 2001, the Board issued an order Denying Petition for Review.

Ms. Reichlin filed a Notice of Appeal of the Board's April 30, 2001 order with Grant County Superior Court on May 8, 2001. The superior court assigned the appeal Cause No. 01-2-00489-8. On July 24, 2002, the Grant County Superior Court issued an Order Granting Plaintiff's Motion for Summary Judgment in the matter. The order reversed the April 30, 2001 Board order and remanded the appeal to this Board, with directions to further adjudicate the appeal after deeming the content of the May 10, 2000 and May 24, 2000 Department letters to Ms. Reichlin's attorney as part of the order on appeal. The superior court order was filed with this Board on August 5, 2002.

On August 29, 2002, the Board issued a Notice Assigning Case to Industrial Appeals Judge for Hearing.

2. On November 5, 1995, the claimant, Debra L. Reichlin, sustained a disabling industrial injury when she was exposed to propane gas during the course of her employment with Broadway Truck Stop.

3. As of May 10, 2000, as a proximate cause of her industrial exposure, Debra L. Reichlin developed hyper-reactive and/or reactive airways disease, otherwise known as occupational asthma.

4. As of May 10, 2000, on a medically more probable than not basis, the claimant's condition, proximately caused by her industrial exposure, had reached maximum medical improvement, best described as 25 percent of total bodily impairment for unspecified disabilities.

5. Between February 21, 1996 and May 10, 2000, as a result of the condition, proximately caused by her industrial exposure, Ms. Reichlin has been prescribed necessary and proper cortisone type inhalant medications, such as Accolade, to reduce airway inflammation, and also medication to reduce airway irritability.

6. Because of her reactive airways disease, proximately caused by her industrial exposure, Ms. Reichlin is more susceptible to superimposed bacterial infection. Between February 21, 1996 and May 10, 2000, Ms. Reichlin has been treated with antibiotics for such infections.

7. As of May 10, 2000, Ms. Reichlin's condition, proximately caused by her industrial exposure, requires ongoing treatment and medical monitoring to prevent worsening and to treat exacerbations that are life threatening. This treatment is medically necessary to protect the claimant's life, and/or to provide for the administration of medical and therapeutic

measures to alleviate ongoing pain and problems resulting from the injury.

8. The documents filed in this appeal by the parties demonstrate that there is no genuine issue as to any material fact, and the above Findings of Fact are set forth in accordance with the parties' Stipulations of Fact.

9. The Director of the Department of Labor and Industries has not exercised his discretion on the issue of whether to provide ongoing treatment for Ms. Reichlin's life-threatening occupational asthma, under RCW 51.36.010.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter of this appeal.

2. RCW 51.36.010 provides that the Director may exercise his discretion to provide ongoing treatment in a claim closed with permanent partial disability to protect such worker's life or provide for the administration of necessary medical and therapeutic measures.

3. The Department order of May 10, 2000 and letters of May 10, 2000 and May 24, 2000, are reversed. This matter is remanded to the Director of the Department of Labor and Industries to exercise his discretion on the issue of allowing continued treatment to Ms. Reichlin, pursuant to RCW 51.36.010.

It is so **ORDERED.**

Dated this 25th day of July, 2003.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
THOMAS E. EGAN Chairperson

/s/_____
FRANK E. FENNERTY, JR. Member