

Carey, Andrew

TREATMENT

Hearing aids

In order to require provision of hearing aids without regard to the date treatment was concluded or the claim closed, the ongoing responsibility to provide hearing aids must be stated in an order entered at, or prior to, closing.*In re Andrew Carey, BIIA Dec., 04 18928 (2005)* [dissent] [Editor's Note: The Board's decision was appealed to superior court under Pacific County Cause No. 05-2-00377-6.]

Scroll down for order.

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

IN RE: ANDREW R. CAREY) DOCKET NO. 04 18928
CLAIM NO. S-256994)
) DECISION AND ORDER

APPEARANCES:

Claimant, Andrew R. Carey, Pro Se

Self-Insured Employer, Simpson Timber Company, by
Wallace, Klor & Mann, P.C., per
Schuyler T. Wallace, Jr.

Department of Labor and Industries, by
The Office of the Attorney General, per
Natalee Fillinger, Assistant

The self-insured employer, Simpson Timber Company, filed an appeal with the Board of Industrial Insurance Appeals on July 12, 2004, from an order of the Department of Labor and Industries dated June 23, 2004. In this order, the Department affirmed its order of April 27, 2004, in which it directed the self-insured employer to pay for hearing aids. The Department order is **REVERSED AND REMANDED**.

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the Department to a Proposed Decision and Order issued on March 15, 2005, in which the industrial appeals judge dismissed the appeal from the Department order dated June 23, 2004.

The issue presented by this appeal is whether the self-insured employer must furnish hearing aids. The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. The rulings are affirmed. We are persuaded that the substance of the Proposed Decision and Order issued by our industrial appeals judge on March 15, 2005, is supported by the preponderance of the evidence, and we adopt the body of the decision as our own.

On March 14, 1978, Andrew R. Carey filed an application for benefits with the Department of Labor and Industries, in which he alleged an occupational hearing loss while in the course of his employment with Simpson Timber Company (Simpson). The Department considered Mr. Carey's application and, in an order dated November 2, 1981, allowed and closed the claim, directing Simpson to pay Mr. Carey a permanent partial disability award consistent with 5.9 percent of the

1 complete loss of hearing in both ears. Pertinent to the present appeal, the Department order of
2 November 2, 1981, failed to include language indicating the self-insured employer was to be
3 responsible for the purchase and maintenance of hearing aids. Following a timely protest from
4 Mr. Carey, the subject of which is unknown, the Department issued its order of January 15, 1982, in
5 which it affirmed the order of November 2, 1981. The January 15, 1982 order was neither
6 protested nor appealed and became final. Twenty-one years passed.

7 In early 2003, Simpson received a letter from Avada Hearing Care Center in Centralia that
8 referenced Mr. Carey's 1978 claim number and requested authorization to provide Mr. Carey with
9 hearing aids. Simpson declined to provide authorization, and, apparently, the request was
10 forwarded to the Department.

11 On April 27, 2004, the Department issued an order in which it directed Simpson to pay for
12 Mr. Carey's hearing aids. Simpson protested, the Department affirmed its order, and Simpson
13 appealed to the Board, moving for summary judgment. The affirmance order of June 23, 2004, is
14 presently before the Board.

15 The Department suggests that RCW 51.36.020(5) gives it the authority to order self-insured
16 employers to provide necessary mechanical appliances to a worker without regard to the date
17 treatment was completed or whether the claim was closed. While acknowledging that the
18 Department of Labor and Industries has the authority to provide mechanical appliances in certain
19 situations, we do not believe that the Department's interpretation of RCW 51.36.020(5) is entirely
20 accurate. WAC 296-20-1101 states that when the Department or self-insurer has accepted a
21 hearing loss condition either as a result of an industrial injury or an occupational exposure, the
22 Department or self-insurer will furnish a hearing aid (hearing aids when bilateral hearing loss is
23 present) when prescribed or recommended by a physician. In the case at hand, we fail to find
24 evidence that hearing aids were prescribed or recommended to Mr. Carey by any such physician.
25 We note that prior to the claim being closed in 1981, Richard Voorhees, M.D., commented that
26 hearing aids could help Mr. Carey, but he was not sure. Beyond that, we find no other doctors'
27 opinion on the subject.

28 The Department order dated January 15, 1982, failed to indicate that the self-insured
29 employer was responsible for the purchase and maintenance of hearing aids. The order was
30 neither protested nor appealed. It became final and binding, both on the Department and on the

31
32

1 parties. *Marley v. Department of Labor & Indus.*, 125 Wn.2d 533, 537 (1994).

2 RCW 51.36.020(5) provides:

3 All mechanical appliances necessary in the treatment of an injured
4 worker, such as braces, belts, casts, and crutches, shall be provided
5 and all mechanical appliances required as permanent equipment after
6 treatment has been completed shall continue to be provided or replaced
7 without regard to the date of injury or date treatment was completed,
8 notwithstanding any other provision of law.

9 As noted by our industrial appeals judge, the statute addresses treatment while a claim
10 remains open. There is provision to "continue" treatment but not to provide it for the first time some
11 twenty-two years after claim closure. If Simpson had been directed to provide hearing aids prior to
12 or by the January 15, 1982 closing order, RCW 51.36.020(5) would be compelling authority that
13 hearing aids should "continue to be provided" by Simpson. Here, Simpson was never required to
provide hearing aids so cannot be required to "continue" to provide them.

14 Once the Department's January 15, 1982 closing order became final, in the absence of a
15 reopening of the claim based on aggravation of condition, the Department no longer had the
16 authority to order further treatment.

FINDINGS OF FACT

- 17 1. On March 14, 1978, the claimant, Andrew R. Carey, filed an application
18 for benefits with the Department, in which he alleged an occupational
19 hearing loss while working within the scope of his employment with
20 Simpson Timber Company.

21 On June 19, 1981, the Department issued an order in which it rejected
22 the claim. On July 14, 1981, the claimant filed his protest with the
23 Department from the Department order dated June 19, 1981. On
24 September 10, 1981, the Department issued an order in which it
affirmed its order dated June 19, 1981, wherein it rejected the claim.

25 On November 2, 1981, the Department issued an order in which it set
26 aside its earlier orders dated June 19, 1981 and September 10, 1981,
27 allowed the claim, and closed the claim with an award for permanent
28 partial disability equal to 5.9 percent of the complete loss of hearing in
both ears, but without directing that the self-insured employer pay for
hearing aids.

29 On December 31, 1981, the claimant filed his protest with the
30 Department from a prior order dated November 2, 1981. On
31 January 15, 1982, the Department issued an order in which it affirmed
32 its claim closure order dated November 2, 1981. That Department

1 closing order, dated January 15, 1982, was neither protested nor
2 appealed.

3 Twenty-one years later, on March 25, 2003, the claimant wrote to the
4 self-insured employer to request hearing aids. The self-insured
5 employer denied the claimant's request. On April 27, 2004, the
6 Department issued an order in which it directed the self-insured
employer to provide hearing aids for the claimant.

7 On June 4, 2004, the self-insured employer filed its protest with the
8 Department from an order dated April 27, 2004. On June 23, 2004, the
9 Department issued an order in which it affirmed its earlier order dated
April 27, 2004.

10 On July 12, 2004, the self-insured employer filed its Notice of Appeal
11 with the Board of Industrial Insurance Appeals from the Department
12 order dated June 23, 2004. On August 11, 2004, the Board granted the
13 self-insured employer's appeal, assigned the appeal Docket
14 No. 04 18928, and directed that proceedings be held on the issues
raised by the Notice of Appeal.

- 15 2. Mr. Carey has not filed an aggravation application since his claim was
16 closed in 1982.
17 3. There are no genuine issues of material fact.

18 **CONCLUSIONS OF LAW**

- 19 1. The Board of Industrial Insurance Appeals has jurisdiction over the
20 parties to and the subject matter of this appeal.
21 2. RCW 51.36.020(5) does not authorize the Department of Labor and
22 Industries to order the post-closure purchase and maintenance of
23 hearing aids if the order wherein the Department closed the claim does
not contain provisions to this effect.
24 3. The Department of Labor and Industries lacked the authority to issue the
25 order appealed from because the final order wherein the Department
26 closed the claim did not include language making the employer
27 responsible for the post-closure purchase and maintenance of hearing
aids.
28 4. The Department order of June 23, 2004, is incorrect and is reversed.
29 This matter is remanded to the Department of Labor and Industries with
30 instructions to issue a further order indicating the self-insured employer

is not responsible for the purchase and maintenance of hearing aids and denying the claimant's request for hearing aids.

It is so ORDERED.

Dated this 30th day of August, 2005.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/ _____
THOMAS E. EGAN Chairperson

/s/ _____
CALHOUN DICKINSON Member

DISSENT

I am unconvinced that RCW 51.36.020(5) requires that we read into the statute that the provision of hearing aids or other mechanical devices must be determined in the closing order. Although the Department generally does not provide treatment or other benefits to an injured worker once the injured worker has reached maximum medical improvement, there are limited situations in which the Industrial Insurance Act authorizes the Department to provide aid to an injured worker, despite the fact that the worker's condition has become fixed and stable and the worker's claim is ready to be closed.

RCW 51.36.020(5) states:

All mechanical appliances necessary in the treatment of an injured worker, such as braces, belts, casts, and crutches, shall be provided and all mechanical appliances required as permanent equipment after treatment has been completed shall continue to be provided or replaced without regard to the date of injury or date treatment was completed, notwithstanding any other provision of law.

I believe that the language "without regard to the date of injury or date treatment was completed" is that language that requires the Department to provide devices after claim closure. If not interpreted this way, I am unaware of any other statutory provision that authorizes the Department to provide such devices on a closed claim. It follows that the existence of language in an order requiring provision of the devices is unnecessary because of the statutory obligation. The Department must provide, or require the self-insured employer to provide, the devices when they are necessary.

For the above reasons, I believe that the Department order of April 27, 2004, wherein the Department directed the self-insured employer to provide Mr. Carey with hearing aids, is correct. Under the liberal interpretation of the Industrial Insurance Act, as mandated by statute, Mr. Carey is entitled to hearing aids under this claim. I would affirm the order under appeal, allow Mr. Carey to be fitted for hearing aids, and require the self-insured employer to be responsible for the maintenance of the hearing aids for as long as such maintenance is required.

Dated this 30th day of August, 2005.

BOARD OF INDUSTRIAL INSURANCE APPEALS

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