

Garcia, Pablo

PERMANENT TOTAL DISABILITY (RCW 51.08.160)

Continuing medical benefits

The Supervisor has discretion to allow post pension treatment pursuant to RCW 51.36.010, including medications which are necessary to alleviate continuing pain. This includes medications which would be palliative, not curative, and it is an abuse of discretion to deny them based only on the palliative nature of the treatment. ...*In re Pablo Garcia*, BIIA Dec., 05 15329 (2006)

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

1 **IN RE: PABLO GARCIA**) **DOCKET NO. 05 15329**
2)
3 **CLAIM NO. P-638858**) **DECISION AND ORDER**

4 **APPEARANCES:**

5 Claimant, Pablo Garcia, by
6 Calbom & Schwab, P.S.C., per
7 Randy Fair

8 Employer, Shannon McKay Farms, by
9 Washington State Farm Bureau,
None

10 Department of Labor and Industries, by
11 The Office of the Attorney General, per
12 David W. Coe, Assistant

13 The claimant, Pablo Garcia, filed an appeal with the Board of Industrial Insurance Appeals
14 on May 16, 2005, from an order of the Department of Labor and Industries dated April 18, 2005. In
15 this order, the Department modified its orders dated August 16, 2004 and October 21, 2004;
16 terminated time loss compensation as paid through October 15, 2004; found the claimant totally
17 and permanently disabled; placed him on the pension rolls effective October 16, 2004; deducted
18 \$8,902.82 from the pension reserve based on previously paid permanent partial disability; denied
19 responsibility for allergic rhinitis as not caused or aggravated by the industrial injury; and denied
20 medical treatment after the effective date for the pension. The Department order is **REVERSED**
21 **AND REMANDED.**

22 **DECISION**

23 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
24 and decision on a timely Petition for Review filed by the claimant to a Proposed Decision and Order
25 issued on January 9, 2006. In the Proposed Decision and Order, the industrial appeals judge
26 affirmed the April 18, 2005 Department order.

27 The sole issue on appeal is whether the supervisor of industrial insurance abused his
28 discretion under RCW 51.36.010 by denying authorization for medications after Mr. Garcia was
29 placed on a pension. We conclude that he did, because his denial was based on an erroneous
30 interpretation of the law. He misinterpreted RCW 51.36.010 to preclude the authorization of any
31 medications which are palliative rather than curative.

1 The Board has reviewed the evidentiary rulings in the record of proceedings and they are
2 affirmed, with one exception. The industrial appeals judge erroneously prevented Mr. Garcia from
3 asking Laura Farley, a Department pension adjudicator, why his request for medications had been
4 denied. This error was ultimately rendered harmless by the parties' stipulation regarding the
5 rationale for that decision. However, some discussion is warranted because of the importance of
6 this issue.

7 During the discovery process, the claimant attempted to take Ms. Farley's deposition. In
8 response, the Department filed a Motion to Exclude Witnesses. The Department argued that
9 Mr. Garcia should be precluded from calling either Ms. Farley or Robert J. Malooly, the supervisor
10 of industrial insurance, as witnesses. According to the Department, their testimony would be
11 irrelevant hearsay, which would confuse the issues, result in unfair prejudice, and waste time. The
12 Department also contended that it would be inappropriate for the claimant's attorney to question
13 Department employees about their mental processes. *Ledgering v. State of Washington*, 63 Wn.2d
14 94 (1963). In addition, according to the Department, its decision-making process was irrelevant to
15 any issue on appeal. *McDonald v. Department of Labor & Indus.*, 104 Wn. App. 617 (2001).

16 The claimant agreed that the Department's decision-making process is irrelevant in cases
17 where the standard of review is de novo. Indeed, *McDonald* stands for that proposition. However,
18 Mr. Garcia argued that a different standard applies to the review of discretionary decisions. When
19 the issue is whether the Department has abused its discretion, both the decision-making process
20 and the reasons for the decision become relevant. Because *McDonald* involved a de novo
21 standard of review, it does not speak to this issue.

22 In response to the parties' motions and arguments, the industrial appeals judge ruled that:

23 The claimant can call and present the testimony of Laura Farley,
24 the pension adjudicator, who issued the decision on appeal, but her
25 testimony is limited to what she reviewed and considered, and when she
26 considered it, but shall not include her mental processes in making the
27 decision or the grounds and reasons for that decision.

28 November 1, 2005 Interlocutory Order.

29 Under *Ledgering*, it would probably have been inappropriate for the claimant to question
30 Ms. Farley about her mental processes. However, neither *McDonald* nor *Ledgering* precludes an
31 appellant from exploring the "grounds and reasons" for a decision, when the standard of review is
32

1 abuse of discretion. As the Court said in *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26 (1971):

2 Where the decision or order . . . is a matter of discretion, it will not be
3 disturbed on review except on a clear showing of abuse of discretion,
4 that is, discretion manifestly unreasonable, or exercised on untenable
5 grounds, or for untenable reasons.

6 An appellant cannot show that a decision is based on untenable grounds or untenable reasons
7 unless those grounds and reasons are delved into. The Department cannot shield a discretionary
8 decision from meaningful review under *Junker* by preventing an appellant from exploring the basis
9 for that decision.

10 It was therefore incorrect for the industrial appeals judge to preclude the claimant from
11 inquiring into the reasons why the supervisor denied Mr. Garcia's request for medications.
12 However, the error was rendered harmless by the parties' stipulation that Ms. Farley's April 6, 2005
13 memorandum contained the reasons for that decision. Board Exhibit No. 1, Exhibit A.

14 We turn, then, to the merits of Mr. Garcia's appeal. The claimant was placed on a pension
15 effective October 16, 2004. His doctor, Robert L. Schneider, M.D., requested that the following
16 medications be authorized after that date: Lexapro (for pain and depression), Nexium (for the
17 epigastric distress related to taking medications), and Neurontin (for pain). In its April 18, 2005
18 order, the Department denied that request.

19 Limited post-pension treatment may be authorized pursuant to RCW 51.36.010, which
20 provides that:

21 [T]he supervisor of industrial insurance, solely in his or her discretion,
22 may authorize continued medical and surgical treatment for conditions
23 previously accepted by the department when such medical and surgical
24 treatment is deemed necessary by the supervisor of industrial insurance
25 to protect such worker's life or provide for the administration of medical
26 and therapeutic measures including payment of prescription
27 medications, . . . which are necessary to alleviate continuing pain which
28 results from the industrial injury.

29 Mr. Garcia is not contending that he requires treatment to protect his life. Instead, he has asked the
30 supervisor to exercise his discretion and "provide for the administration of medical and therapeutic
31 measures including payment of prescription medications, . . . , which are necessary to alleviate
32 continuing pain which results from the industrial injury." RCW 51.36.010. The parties stipulated
that the supervisor denied that request for the following reasons:

 Concerning "*the administration of medical and therapeutic measures, including payment of prescription medications*", Merriam-Webster dictionary defines therapeutic as, "*Providing or assisting in a cure.*"

1 Mr. Garcia's medication regime is palliative at best. There is no medical
2 evidence of it "*providing or assisting in a cure.*"

3 Board Exhibit No. 1, Exhibit A. (Emphasis theirs.)

4 Thus, the supervisor's decision was based on his understanding that RCW 51.36.010
5 precluded him from authorizing palliative medications. However, the statutory language is
6 unambiguous and clearly permits the supervisor to authorize post-pension medications which are
7 "necessary to alleviate continuing pain." RCW 51.36.010. By definition, such medications would
8 be palliative, not curative. By basing his denial on an erroneous view of the law, the supervisor
9 abused his discretion. *Washington State Physicians Insurance Exchange & Association v. Fisons*
10 *Corporation*, 122 Wn.2d 299, 339 (1993). The Department order must therefore be reversed and
11 the matter remanded to the Department for reconsideration in light of the correct statutory
12 interpretation.

13 **FINDINGS OF FACT**

- 14 1. The claimant, Pablo Garcia, filed an Application for Benefits with the
15 Department of Labor and Industries on June 10, 1998, in which he
16 alleged that he suffered an industrial injury involving his neck on May 8,
17 1998, while acting in the course of his employment for Shannon McKay
18 Farms. On August 14, 1998, the Department allowed the claim and
provided benefits.

19 On August 16, 2004, the Department terminated time loss compensation
20 benefits as paid through October 15, 2004, determined that the claimant
21 was totally and permanently disabled as of October 16, 2004, placed
22 him on the pension rolls as of that date, and determined that medical
23 treatment would not be covered after October 16, 2004. On
24 September 1, 2004, the claimant protested the August 16, 2004 order,
25 and on October 21, 2004, the Department affirmed the August 16, 2004
order. On November 19, 2004, the claimant filed an appeal of the
26 October 21, 2004 order with the Board of Industrial Insurance Appeals,
27 and on December 21, 2004, the Department reassumed jurisdiction.

28 On April 18, 2005, the Department modified the August 16, 2004 and
29 October 21, 2004 orders; terminated time loss compensation as paid
30 through October 15, 2004; found the claimant totally and permanently
31 disabled; placed him on the pension rolls effective October 16, 2004;
32 deducted \$8,902.82 from the pension reserve based on previously paid
permanent partial disability; denied responsibility for allergic rhinitis as
not caused or aggravated by the industrial injury; and denied medical
treatment after the effective date for the pension. On May 16, 2005, the
claimant filed an appeal of the April 18, 2005 order with the Board. On

1 June 15, 2005, the Board granted the appeal and assigned it Docket
2 No. 05 15329.

- 3 2. On May 8, 1998, Pablo Garcia sustained an industrial injury to his neck
4 while in the course of his employment with Shannon McKay Farms.
- 5 3. Effective October 16, 2004, Mr. Garcia was placed on the pension rolls
6 as a result of the May 8, 1998 industrial injury.
- 7 4. Mr. Garcia requested that the supervisor of industrial insurance
8 authorize the following medications after the effective date of his
9 pension: Lexapro (for pain and depression), Nexium (for the epigastric
10 distress related to taking medications), and Neurontin (for pain).
- 11 5. In considering Mr. Garcia's request, the supervisor of industrial
12 insurance interpreted RCW 51.36.010 to preclude the authorization of
13 any post-pension medications which are palliative rather than curative.
- 14 6. The supervisor of industrial insurance denied authorization for Lexapro,
15 Nexium, and Neurontin because "Mr. Garcia's medication regime is
16 palliative at best. There is no medical evidence of it 'providing or
17 assisting in a cure.'"
- 18 7. The following medications are necessary to alleviate Mr. Garcia's
19 continuing pain which resulted from the industrial injury: Lexapro (for
20 pain and depression), Nexium (for the epigastric distress related to
21 taking medications), and Neurontin (for pain).

22 **CONCLUSIONS OF LAW**

- 23 1. The Board of Industrial Insurance Appeals has jurisdiction over the
24 parties to and the subject matter of this appeal.
- 25 2. RCW 51.36.010 permits the supervisor of industrial insurance to
26 authorize post-pension medications which are "necessary to alleviate
27 continuing pain." The supervisor's denial of Mr. Garcia's request for
28 medications was based on an erroneous view of the law, *i.e.*, that
29 RCW 51.36.010 prohibits the authorization of palliative post-pension
30 medications. The supervisor therefore abused his discretion in denying
31 Mr. Garcia's request.
- 32 3. The April 18, 2005 Department order is incorrect and is reversed. The
claim is remanded to the Department with directions to terminate time
loss compensation as paid through October 15, 2004; find the claimant
totally and permanently disabled; place him on the pension rolls
effective October 16, 2004; deduct \$8,902.82 from the pension reserve
based on previously paid permanent partial disability; deny responsibility
for allergic rhinitis as not caused or aggravated by the industrial injury;

1 and reconsider Mr. Garcia's request for authorization of medications with
2 the understanding that RCW 51.36.010 permits the supervisor of
3 industrial insurance to authorize palliative post-pension medications.

4 It is so **ORDERED**.

5 Dated this 28th day of March, 2006.

6
7 BOARD OF INDUSTRIAL INSURANCE APPEALS

8
9 /s/
10 THOMAS E. EGAN Chairperson

11
12
13 /s/
14 FRANK E. FENNERTY, JR. Member

15
16 /s/
17 CALHOUN DICKINSON Member