Jarvis, Debra

PERMANENT TOTAL DISABILITY (RCW 51.08.160)

Continuing medical benefits

The director's decision to provide treatment to a permanently and totally disabled worker, as well as the treatment authorized, are both within the discretion of the director and reviewable under an abuse of discretion standard. **….*In re Debra Jarvis*, BIIA Dec., 10 14734 (2011)**

SECOND INJURY FUND (RCW 51.16.120)

Permanent partial disability payment (RCW 51.16.120(1))

RCW 51.16.120 requires a self-insured employer to pay the full amount due without deduction for any advances made by the self-insured employer to the claimant. The fact that the claimant owes the self-insured employer money for the advance does not relieve the employer from paying its full obligation to the Department to help fund the pension. **….*In re Debra Jarvis*, BIIA Dec., 10 14734 (2011)**

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: DEBRA A. JARVIS	)	**DOCKET NOS. 10 14734, 10 14734-A,**
	)	**10 15132 & 10 16440**
	)	
CLAIM NO. W-800654	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Debra A. Jarvis, by
Williams, Wyckoff & Ostrander, PLLC, per
Douglas P. Wyckoff

Self-Insured Employer, Providence Health & Services, by
The Law Office of Robert M. Arim, PLLC, per
Robert M. Arim

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

In **Docket No. 10 14734**, the claimant, Debra A. Jarvis, filed an appeal with the Board of Industrial Insurance Appeals on May 12, 2010, from an April 20, 2010 letter of the supervisor of industrial insurance for the Department of Labor and Industries, in which the Department granted the permanently totally disabled worker's application for discretionary treatment under RCW 51.36.010, and authorized treatment for major depression, to consist of the medications Prozac and Zanaflex and periodic monitoring, effective April 20, 2010. The Department letter is **AFFIRMED.**

In **Docket No. 10 14734-A**, the self-insured employer, Providence Health & Services, filed a cross-appeal with the Board of Industrial Insurance Appeals on June 23, 2010, from an April 20, 2010 letter of the supervisor of industrial insurance for the Department of Labor and Industries, in which the Department accepted the permanently totally disabled worker's application for discretionary treatment under RCW 51.36.010, and authorized treatment for major depression, to consist of the medications Prozac and Zanaflex and periodic monitoring, effective April 20, 2010. The Department letter is **AFFIRMED.**

In **Docket No. 10 15132**, the claimant, Debra A. Jarvis, filed an appeal with the Board of Industrial Insurance Appeals on May 26, 2010, from an order of the Department of Labor and Industries dated April 21, 2010. In this order, the Department affirmed an order dated December 18, 2009, in which it determined the claimant was permanently totally disabled effective

January 16, 2010; denied further treatment beyond that date; and terminated time-loss compensation benefits as paid through January 15, 2010. The Department order is **REVERSED AND REMANDED**.

In **Docket No. 10 16440**, the self-insured employer, Providence Health & Services, filed a protest with the Department on June 1, 2010, that was forwarded as an appeal to the Board of Industrial Insurance Appeals on July 6, 2010, from an order of the Department of Labor and Industries dated April 22, 2010. In this order, the Department affirmed a December 21, 2009 order in which it granted second injury fund relief to the self-insured employer; determined that the permanent partial disability caused by this injury would have resulted in an award of $54,422.64; directed the self-insured employer to pay the Department that amount; and ordered that the balance of the pension reserve required to pay the pension should be charged against the second injury account. The Department order is **REVERSED AND REMANDED**.

DECISION

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The self-insured employer filed a timely Petition for Review of a July 1, 2011 Proposed Decision and Order, in which the industrial appeals judge reversed the supervisor's April 20, 2010 letter, and the Department's April 21, 2010, and April 22, 2010 orders. The claimant filed a Reply on September 6, 2011. The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. The rulings are affirmed.

The parties agree that the claimant is permanently totally disabled and that the employer is entitled to second injury fund relief. They agree that the effective date for the pension should be September 29, 2009, not January 16, 2010, the date used by the Department in the April 21, 2010 order.[1] They agree that the employer's liability is limited to the permanent partial disability caused by the injury, and that the correct monetary amount is $31,746.54, not $54,422.64, which is the amount assessed by the Department. They also agree that the employer paid the claimant a $5,000 advance on permanent partial disability.

What the parties disagree about is whether the advance may be deducted from the amount the employer is required to pay to the Department to satisfy its obligations under RCW 51.16.120, or whether that amount may be recouped in some other fashion. In addition, they disagree

[1] This issue was the subject of a December 23, 2010 Order on Agreement of Parties disposing of the employer's appeal from the April 21, 2010 order in Docket No. 10 15132-A, as explained below.

regarding the claimant's entitlement to post-pension treatment for the accepted condition of depression under the second proviso of RCW 51.36.010.[2]

The industrial appeals judge's explanation of these intertwined appeals, the parties' stipulations, and what they are seeking is, for the most part, accurate. However, the Proposed Decision and Order fails to mention that both the claimant and the employer appealed the April 21, 2010 order, the claimant in Docket No. 10 15132 and the employer in Docket No. 10 15132-A. The employer's appeal was resolved by an Order on Agreement of Parties issued on December 23, 2010. We take judicial notice of that fact and the operative contents of the order, which are set forth in Finding of Fact No. 4. The issues resolved in Docket No. 10 15132-A cannot be re-litigated in the remaining claimant's appeal from the same order in Docket No. 10 15132. The only additional issue raised in that pending appeal is whether the claimant was entitled to post-pension treatment as of the effective date of the pension, rather than April 20, 2010, the date established by the supervisor of industrial insurance in his April 20, 2010 letter in which the Department authorized such treatment.

We have granted review because we disagree with the industrial appeals judge's determination that the employer's $5,000 advance to the claimant cannot be recouped and his interpretation of the second proviso of RCW 51.36.010. In addition, the date through which Ms. Jarvis is entitled to time-loss compensation benefits must be corrected. In Docket No. 10 15132-A, the parties agreed that the effective date for the pension should be September 29, 2009, and that the Department should reimburse the employer for the time-loss compensation benefits it had paid between September 29, 2009, and January 15, 2010, a period for which the claimant was entitled to pension benefits. However, in the current appeal, the industrial appeals judge directed that time-loss compensation benefits be terminated as paid through January 15, 2010, which would result in a double payment to the claimant. As a matter of law, time-loss compensation benefits cannot be paid under RCW 51.32.090 once the claimant is permanently totally disabled and entitled to benefits under RCW 51.32.060 and RCW 51.32.067. The last date through which Ms. Jarvis was entitled to time-loss compensation benefits is September 28, 2009. Thereafter, she was entitled to pension benefits. We have made the necessary correction in Conclusion of Law No. 8.

[2] RCW 51.36.010 was amended during the 2011 legislative session. The second proviso was not changed, but new numbered subsections were added to the statute. The language at issue in this appeal now appears as the second proviso in subsection (4) of RCW 51.36.010.

The $5,000 advance on permanent partial disability: The employer paid Ms. Jarvis a $5,000 advance on an anticipated permanent partial disability award, $2,500 on December 18, 2004, and $2,500 on April 7, 2005. However, the Department ultimately determined that Ms. Jarvis was permanently totally disabled, not permanently partially disabled. We begin by addressing the question of whether RCW 51.32.080(4) applies to these facts.

RCW 51.32.080(4) dictates the method for deducting a previously paid permanent partial disability award from the pension reserve when a worker is later determined to be permanently totally disabled. However, the statute only applies when there has been an order directing the payment of a permanent partial disability award to the claimant, followed by an order placing the claimant on a pension. No order awarding Ms. Jarvis permanent partial disability was ever issued. RCW 51.32.080(4) is therefore inapplicable. *See*, *In re Michael Woodley*, BIIA Dec., 01 16625 (2002).

We turn, then, to the question of whether the $5,000 advance can be recouped under the terms of RCW 51.32.240(1)(a), which provides:

> Whenever any payment of benefits under this title is made because of clerical error, mistake of identity, innocent misrepresentation by or on behalf of the recipient thereof mistakenly acted upon, or **any other circumstance of a similar nature**, all not induced by willful misrepresentation, the recipient thereof shall repay it and recoupment may be made from any future payments due to the recipient on any claim with the state fund or self-insurer, as the case may be. The department or self-insurer, as the case may be, must make claim for such repayment or recoupment within one year of the making of any such payment or it will be deemed any claim therefor has been waived. (Emphasis added)

In *In re Justin David*, BIIA Dec., 03 11776 (2004), the Board held that an advance on permanent partial disability qualified as "any other circumstance of a similar nature." The Board therefore allowed the self-insured employer to recoup such an advance to the extent that it exceeded the ultimate award. The Board reasoned that to do otherwise would discourage employers and the Department from advancing funds to needy claimants and would allow workers to keep windfalls to which they were not entitled.

In *David*, the Board determined that the one year time limit under RCW 51.32.240(1)(a) for the self-insured employer to claim repayment or recoupment did not begin to run on the date the advance was made. The advance itself was not an overpayment. It was the payment of a full award for permanent partial disability, without deduction for the prior advance, that would result in an overpayment. Thus, the employer had one year from the date of the initial Department order

establishing permanent partial disability to make its claim, because that was when the overpayment occurred.

Likewise, in the current case, it is the payment of full pension benefits, without a deduction for the prior advance, that will result in an overpayment. The first order establishing Ms. Jarvis's permanent disability was issued on December 18, 2009, when the Department determined that she was permanently totally disabled, not permanently partially disabled. Shortly thereafter, on December 21, 2009, the Department granted the employer second injury fund relief and determined the amount the employer was required to pay to the Department under RCW 51.16.120. Both orders were timely protested and the subsequent orders were appealed to the Board, with the employer arguing that there was a $5,000 overpayment that should have been addressed in the second injury fund order. The employer has therefore made a timely claim for recoupment of the $5,000 overpayment under RCW 51.32.240(1). The repayment claim is also timely under the terms of RCW 51.32.240(4), because the pension and second injury fund orders were timely appealed and have not become final.

Under RCW 51.32.240(1)(a), "recoupment may be made from any future payments due to the recipient on any claim with the state fund or self-insurer." However, because the employer has been granted second injury fund relief, it is not liable for any further direct compensation payments to the claimant. The employer argues that it should be allowed to recover the $5,000 up front and place the burden on the Department to recoup that amount from the claimant out of future pension benefits. But, under the plain language of RCW 51.16.120, the employer "shall pay directly into the reserve fund only the accident cost which would have resulted solely from the further injury or disease, had there been no preexisting disability, and which accident cost shall be based upon an evaluation of the disability by medical experts." There is no provision for deducting any amounts voluntarily advanced to the claimant. Furthermore, the fact that the claimant owes the self-insured employer money does not relieve the employer from paying its full obligation to the Department, to help fund the pension.

At the same time, as the administrative agency, the Department has a role to play in assisting the self-insured employer to recover the overpayment. In *In re Frederic Cuendet*, BIIA Dec., 99 21825 (2001), the Board reversed the Department order and established an earlier effective date for the worker's pension. In so doing, it directed the Department to reimburse the self-insured employer for time-loss compensation benefits the employer had previously paid for the period after the new effective date.

In the current case, the parties have already agreed to use the same mechanism to reimburse the self-insured employer for overpaid time-loss compensation benefits. That is, in resolving the employer's appeal from the April 21, 2010 order in Docket No. 10 15132-A, the parties agreed to an earlier effective date for the pension, September 29, 2009. Consistent with *Cuendet*, they agreed that the Department must reimburse the self-insured employer for the time-loss compensation benefits it paid from September 29, 2009, through January 15, 2010. We believe the Department should provide similar assistance with respect to recouping the advance on permanent partial disability.

The identity of the payer is not the determining factor. If the self-insured employer were responsible for making the pension payments directly to the claimant, presumably the Department would allow it to deduct the $5,000 overpayment from future pension payments under the authority of RCW 51.32.240, unless the repayment was waived under the Department's discretionary authority. There is no reason why the fact that the Department is now the responsible payer should lead to a different outcome.

We hold that the self-insured employer is required to pay $31,746.54 to the Department under RCW 51.16.120, and the Department may recoup the overpaid $5,000 from the claimant under RCW 51.32.240, by deducting amounts from future pension payments. The Department should then reimburse the self-insured employer. We recognize that the Department has the authority to waive the recoupment, in whole or in part, as a discretionary matter, under RCW 51.32.240 and WAC 296-14-200.

Post-pension treatment: As a general rule, once an injured worker becomes eligible for permanent disability benefits, treatment stops. However, under the second proviso of RCW 51.36.010, there is an exception for treatment necessary to protect the worker's life and for non-narcotic pain relief, as follows:

> [t]he 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.

On April 12, 2006, the Department determined that the claimant's depression was related to the industrial injury and directed the self-insured employer to pay all related services. After Ms. Jarvis was placed on a pension, the supervisor of industrial insurance issued a letter on April 20, 2010, in which the supervisor authorized treatment for the accepted condition of major depression, and determining that: "Treatment will consist of the medications Prozac and Zanaflex and periodic medical monitoring." In challenging that decision, the claimant's attorney has contended that there was "no evidence presented explaining or justifying those specific medications." Claimant's Reply to Petition for Review, at 3. However, on March 25, 2011, Ms. Jarvis testified that she was still seeing Richard A. Crabbe, M.D., the treating psychiatrist who testified on her behalf, and that she was taking Zanaflex and Cymbalta. She said she was no longer taking Prozac, because of side effects, but she could not say whether she had been taking that medication in April 2010, when post-pension treatment was approved.

Dr. Crabbe testified that he had begun treating the claimant for depression on May 18, 2005, and continued to see her about once a month as of the date of his deposition, March 21, 2011. When asked if Ms. Jarvis was taking Prozac and Zanaflex in April 2010, he responded, "I think so, yes. She was on Prozac at the time, yeah." Crabbe Dep. at 17. He agreed that he had prescribed both medications for her. By the time of Dr. Crabbe's deposition, the claimant was no longer taking Prozac. The doctor noted that Zanaflex is a pain medication and he was not sure if Ms. Jarvis continued to take it.

When prompted, Dr. Crabbe expressed some concern that only two medications had been approved by the Department in April 2010, fearing that would hamstring his ability to consider other treatment options. In addition, he said it was normal in treating depression to try different medications through time, because patients may develop tolerances or side effects. He said the claimant's current medications that he knew about were Cymbalta, Lorazepam, Trazodone, and Lyrica.

In Dr. Crabbe's opinion, both when he testified and in 2010, if Ms. Jarvis were no longer able to receive psychiatric treatment and medications, she would commit suicide. Jeanette G. ReVay, ARNP, an advanced registered nurse practitioner with a specialty in psychiatry, echoed that opinion. She saw Ms. Jarvis on referral from the claimant's attorney on December 12, 2010, and February 21, 2011. In her opinion, there was a "huge possibility that she would end her life" if Ms. Jarvis did not continue to receive psychiatric treatment. ReVay Dep. at 15. Like Dr. Crabbe, she also said it was common to try different medications and that the claimant's had been changed

through time. She listed some of the medications Ms. Jarvis had taken since the industrial injury, including Cymbalta, which is an anti-depressant and helps with chronic pain. She said Ms. Jarvis had used Prozac in the past, but was not currently taking it as far as she knew. In her opinion, it would be preferable to have flexibility in terms of what medications were used, as well as the dosages.

John E. Hamm, M.D., a psychiatrist, evaluated the claimant on May 22, 2008, as part of an independent medical examination (IME) with Lance N. Brigham, M.D., an orthopedic surgeon. Both testified on behalf of the employer. In Dr. Hamm's opinion, the industrial injury had aggravated the claimant's pre-existing depression. He said Ms. Jarvis "does need maintenance medication for depression," and he said that would have been true as of the date of the supervisor's April 20, 2010 letter. Hamm Dep. at 17-18. He also agreed that periodic monitoring by a psychiatrist was necessary and that the medications and the monitoring were needed to treat the claimant's depression, part of which was caused by the industrial injury.

Dr. Hamm did not specify what medications were appropriate, but noted that the claimant was taking Cymbalta and Lorazepam when he saw her in 2008, and she reported that they were helping her. He did not know why the Department had approved the Prozac and Zanaflex. He indicated the latter was not a psychiatric medication, but a muscle relaxant. His review of Dr. Crabbe's records showed the doctor was prescribing Prozac. He agreed that it was "fairly common" for doctors treating depression to have to change medications due to toxicity or ineffectiveness.

While Dr. Hamm was not specifically asked whether continued maintenance care was necessary to protect the claimant's life, he agreed that she had been hospitalized three times since the industrial injury, with suicidal ideation. He also he said the industrial injury, combined with the claimant's pre-existing disability, rendered her unemployable.

Dr. Brigham testified that both Lyrica and Zanaflex were pain medications and that neither was indicated when he examined the claimant on May 22, 2008, because there were much better drugs. He said his opinions would be the same as of April 2010.

The claimant made two legal arguments regarding the supervisor's April 20, 2010 decision. She contended that the supervisor abused his discretion by making the effective date for the treatment later than the effective date for the pension and that he exceeded his authority in specifying what drugs were approved in a permanent order that, according to the claimant, would

not allow the treatment to change through time, based on Ms. Jarvis's condition and medical advances.

Based on the Jurisdictional History, the claimant appears to have sought post-pension treatment on February 5, 2010. The supervisor made his authorization effective on the date of his letter, April 20, 2010. Under the statute: "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." RCW 51.36.010(4). In *In re Edward L. Green*, Dckt. No. 98 19138 (January 26, 2000), the Board interpreted this language to mean that the treatment may only be authorized prospectively, not retrospectively. By making his directive effective on the date of his letter, the supervisor complied with the statute.

The claimant's attorney's second argument is based on an assumption that the April 20, 2010 letter is the only time the supervisor will ever address the question of what specific treatment is authorized. However, by saying that certain medications were authorized as of April 20, 2010, the supervisor did not preclude the claimant from seeking authorization of other drugs in the future.

To correct the perceived problem, the claimant essentially wants the supervisor to issue a blank check, authorizing treatment for depression as a general matter, but leaving all the details to the medical professionals. In the Proposed Decision and Order, the industrial appeals judge directed the Department to authorize treatment for the depression, without specifying the details. He also determined that the question of whether the claimant is entitled to ongoing treatment for her depression is within the supervisor's discretion, but the question of what the treatment should consist of is reviewed under a preponderance of the evidence standard.

In so finding, the industrial appeals judge relied on *In re Gail Conelly*, BIIA Dec., 97 3849 (1998), which held that: "[I]n matters of claims administration, not involving the actual adjudication of entitlement to benefits," the standard of review is abuse of discretion. *Conelly*, at 5. In *Conelly*, the Board articulated an exception to the general rule that the Board reviews Department determinations under a preponderance of the evidence standard. The Board concluded that the choice of a doctor to perform an independent medical examination (IME) was a matter of claims administration, reviewable under an abuse of discretion standard. The industrial appeals judge has turned *Conelly* around to mean that any decision having to do with the adjudication of entitlement to benefits is reviewable under a preponderance of the evidence standard.

If that were true, then the determination that Ms. Jarvis needs continuing post-pension treatment for her depression would not be discretionary, because it is clearly an adjudication of

entitlement to benefits. However, the statute explicitly vests the decision regarding post-pension treatment in the sole discretion of the supervisor of industrial insurance. The *Conelly* rationale has no application when there is a specific statutory grant of discretion. Instead, we must look to the language of the statute.

There is nothing in the second proviso of RCW 51.36.010 to suggest that two different standards of review apply to the supervisor's decisions, abuse of discretion with respect to the eligibility determination and preponderance of evidence for the specific forms of treatment that are approved. By the terms of the statute, both determinations are within the supervisor's sole discretion. We read RCW 51.36.010 the same way we have read similar language in RCW 51.32.095 with respect to vocational benefits. Under RCW 51.32.095, it is not just the vocational eligibility decision that is discretionary; it is also decisions regarding entitlement to specific benefits, like time-loss compensation, while the worker is receiving vocational services. *In re Michael Pinger*, BIIA Dec., 97 2210 (1998). Likewise, under the second proviso of RCW 51.36.010, it is not just the eligibility decision that is discretionary with the supervisor. Any specific treatment authorization is also a discretionary matter.

In *State Rel Carroll v. Junker*, 79 Wn.2d 12, 26 (1971), the Supreme Court stated:

> [D]iscretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously. [citation omitted] Where the decision or order . . . is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. [citations omitted]

At the time the supervisor issued his April 20, 2010 letter, Dr. Crabbe was prescribing Prozac and Zanaflex, as well as providing periodic medical monitoring. The supervisor authorized the treatment the claimant's treating psychiatrist was providing. Dr. Hamm and Ms. ReVay both concurred that the continuing treatment was necessary as of April 20, 2010. There is no contrary psychiatric opinion in the record before us. Furthermore, based on Dr. Crabbe's and Ms. ReVay's opinions, continuing treatment is necessary to protect Ms. Jarvis's life, within the meaning of RCW 51.36.010. The Zanaflex was apparently being prescribed to alleviate pain resulting from the industrial injury, which is another basis for authorizing post-pension treatment under the second proviso of RCW 51.36.010.

After April 20, 2010, Dr. Crabbe's views regarding what medications were appropriate apparently changed. However, the Board's jurisdiction is appellate only. At the time the supervisor

authorized Prozac and Zanaflex, those were the medications Dr. Crabbe was prescribing. The supervisor clearly did not abuse his discretion by authorizing the treatment being provided by the attending psychiatrist. Furthermore, nothing in the supervisor's April 20, 2010 letter or in our decision today precludes the claimant from seeking approval of other medications and types of treatment for the depression in the future.

FINDINGS OF FACT

1. On September 12, 2003, Debra A. Jarvis filed an Application for Benefits with the Department of Labor and Industries, in which she alleged an August 9, 2003 industrial injury in the course of her employment with the Sisters of Providence (Providence Health & Services). On September 19, 2003, the Department allowed the claim.

   Docket Nos. 10 15132 and 10 15132-A: On December 18, 2009, the Department determined the claimant was permanently totally disabled effective January 16, 2010; denied treatment beyond that date; and terminated time-loss compensation benefits as paid through January 15, 2010.

   On February 5, 2010, the claimant protested the December 18, 2009 order, and on April 21, 2010, the Department affirmed that order.

   On May 26, 2010, the claimant appealed the April 21, 2010 order to the Board of Industrial Insurance Appeals.

   On June 1, 2010, the self-insured employer filed a protest of the April 21, 2010 order with the Department and on June 23, 2010, the employer filed an appeal of that order with the Board.

   On June 10, 2010, the Board granted the claimant's appeal of the April 21, 2010 order under Docket No. 10 15132.

   On July 13, 2010, the Board granted the employer's appeal of the April 21, 2010 order under Docket No. 10 15132-A.

   On December 23, 2010, the employer's appeal in Docket No. 10 15132-A was resolved by an Order on Agreement of Parties.

   Docket No. 10 16440: On December 21, 2009, the Department granted second injury fund relief to the self-insured employer; determined that the permanent partial disability caused by this injury would have resulted in an award of $54,422.64; directed the self-insured employer to pay the Department that amount; and ordered that the balance of the pension reserve required to pay the pension should be charged against the second injury account.

   On February 9, 2010, the self-insured employer protested the December 21, 2009 order, and on April 22, 2010, the Department affirmed that order.

On May 4, 2010, and June 1, 2010, the self-insured employer protested the April 22, 2010 order with the Department.

On July 6, 2010, the Department forwarded the employer's June 1, 2010 protest to the Board of Industrial Insurance Appeals, to be treated as a direct appeal of the April 22, 2010 order. On July 13, 2010, the Board granted the appeal under Docket No. 10 16440.

Docket Nos. 10 14734 and 10 14734-A: On April 20, 2010, the supervisor of industrial insurance for the Department of Labor and Industries issued a letter in which the Department granted the claimant's request for post pension treatment.

On May 12, 2010, the claimant appealed the April 20, 2010 letter to the Board of Industrial Insurance Appeals. On June 8, 2010, the Board granted the claimant's appeal under Docket No. 10 14734.

On June 23, 2010, the self-insured employer filed a cross-appeal from the April 20, 2010 letter. On July 13, 2010, the Board granted the self-insured employer's cross-appeal under Docket No. 10 14734-A.

2. On August 9, 2003, Debra A. Jarvis sustained an industrial injury while transferring a patient in the course of her employment as a nurse with the Sisters of Providence (Providence Health & Services), resulting in a right shoulder sprain and aggravation of pre-existing right shoulder and depression conditions.

3. By its April 12, 2006 order, the Department determined that the condition diagnosed as depression was related to the industrial injury and directed the self-insured employer to pay all related services.

4. On December 23, 2010, the Board issued an Order on Agreement of Parties in which it resolved the employer's appeal from the April 21, 2010 pension order in Docket No. 10 15132-A as follows:

> The Department order dated April 21, 2010, is reversed and remanded to the Department of Labor and Industries with direction to issue a new order in accordance with the stipulation and agreement of the parties. Particularly,
>
> 1. Find the claimant totally and permanently disabled as of September 29, 2009; this is the new pension affective date.
> 2. Pension benefits charged to the Second Injury Fund and are due and payable to the claimant as of September 29, 2009.
> 3. The Department agrees to reimbursement the employer within a reasonable period of time the overpaid time-loss compensation benefits the employer paid to the claimant for the period from September 29, 2009, to January 15, 2010, inclusive.

4. The employer agrees to waive the right to pursue the difference from the claimant between the time-loss compensation rate it paid and the pension benefit amount to which the claimant would be entitled for the period from September 29, 2009, to January 15, 2010, inclusive.

5. The employer shall immediately provide the Department with a total amount of wage replacement benefits paid between September 29, 2009, and January 15, 2010, inclusive, and supporting documentation.

6. The Department will provide a lump sum payment for the amount of time-loss compensation benefits paid during this period.

7. The employer agrees to waive the right to pursue reimbursement from the claimant for any previously paid medical expenses covered under the claim between September 29, 2009, and January 15, 2010, inclusive.

5. As of September 29, 2009, Ms. Jarvis was permanently precluded from obtaining or performing reasonably continuous gainful employment as a proximate result of the combined effects of the August 9, 2003 industrial injury and previous bodily disability.

6. As of September 29, 2009, the employer was required to pay the Department $31,746.54, the monetary value of the permanent partial disability that would have resulted solely from the August 9, 2003 industrial injury, had there been no pre-existing disability.

7. The employer paid Ms. Jarvis a $5,000 advance on an anticipated permanent partial disability award, $2,500 on December 18, 2004, and $2,500 on April 7, 2005.

8. The $5,000 advance on permanent partial disability became an overpayment on December 18, 2009, and December 21, 2009, when the Department determined that Ms. Jarvis was entitled to permanent total disability benefits and that the employer was entitled to second injury fund relief, without specifying a mechanism for recouping the advance.

9. The self-insured employer made claim for repayment or recoupment of the $5,000 overpayment within one year of the date the Department initially determined Ms. Jarvis's entitlement to permanent disability benefits.

10. On February 5, 2010, the claimant requested coverage of post-pension treatment.

11. On April 20, 2010, the supervisor of industrial insurance issued a letter in which it authorized treatment for the accepted condition of major depression, to consist of the medications Prozac and Zanaflex and periodic monitoring, effective April 20, 2010.

12. As of April 20, 2010, Ms. Jarvis's treating psychiatrist was prescribing Prozac and Zanaflex, and providing periodic monitoring for the depression proximately caused by the industrial injury. Such treatment was necessary to protect Ms. Jarvis's life and to alleviate pain resulting from the industrial injury.

CONCLUSIONS OF LAW

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

2. As of September 29, 2009, Ms. Jarvis was permanently totally disabled within the meaning of RCW 51.08.160.

3. As of September 29, 2009, the self-insured employer was entitled to second injury fund relief pursuant to RCW 51.16.120 and was required to pay the Department $31,746.54, the monetary value of the permanent partial disability that would have resulted solely from the August 9, 2003 industrial injury, had there been no pre-existing disability.

4. The employer's claim for recoupment or repayment of the $5,000 advance paid to the claimant was timely under RCW 51.32.240(1) and (4).

5. Under RCW 51.32.240, the self-insured employer is entitled to recoupment of the $5,000 advance on permanent partial disability paid to the claimant, unless repayment is waived by the Department, in whole or in part, as a discretionary matter under RCW 51.32.240 and WAC 296-14-200. Any such recoupment may be made from future pension payments to the claimant, with the Department reimbursing the employer as those deductions are taken.

6. The supervisor of industrial insurance did not abuse his discretion under the second proviso of RCW 51.36.010 by authorizing specific post pension treatment, effective April 20, 2010, for the accepted condition of major depression.

7. In Docket Nos. 10 14734 and 10 14734-A, the supervisor's April 20, 2010 letter is correct and is affirmed.

8. In Docket No. 10 15132, the April 21, 2010 order is incorrect and is reversed. The matter is remanded to the Department to issue an order:

   a. Determining the claimant was permanently totally disabled effective September 29, 2009;

   b. Terminating time-loss compensation benefits as paid through September 28, 2009;

c. Denying further treatment beyond September 29, 2009, other than that approved as a discretionary matter by the supervisor of industrial insurance under the second proviso of RCW 51.36.010 (currently contained in subsection (4));

d. Stating pension benefits charged against the second injury fund are due and payable as of September 29, 2009;

e. Stating the Department agrees to reimburse the employer within a reasonable period of time for the overpaid time-loss compensation benefits paid by the employer to the claimant for the period from September 29, 2009, to January 15, 2010, inclusive;

f. Stating the employer waives the right to pursue the difference from the claimant between the time-loss compensation benefits rate it paid and the pension benefit amount to which the claimant would be entitled for the period from September 29, 2009, through January 15, 2010;

g. Stating that the employer shall immediately provide the Department with a total amount of wage replacement benefits paid between September 29, 2009, and January 15, 2010, and supporting documentation;

h. Stating that the Department will provide a lump sum payment for the amount of time-loss compensation benefits paid during this period;

i. Stating that the employer agrees to waive the right to pursue reimbursement from the claimant for any previously paid medical expenses covered under the claim between September 29, 2009, and January 15, 2010; and

k. Taking further action as appropriate.

9. In Docket No. 10 16440, the April 22, 2010 order is incorrect and is reversed. The matter is remanded to the Department to issue an order:

a. Granting second injury fund relief to the self-insured employer;

b. Determining that the permanent partial disability caused by the August 9, 2003 injury would have resulted in an award of $31,746.54;

c. Directing the self-insured employer to pay the Department that amount;

d. Directing that the balance of the pension reserve required to pay the pension should be charged against the second injury account;

e. Determining that the self-insured employer is entitled to recoupment of the $5,000 advance on permanent partial disability paid to the claimant, unless repayment is waived by the Department, in whole or in part, as a discretionary matter under RCW 51.32.240 and WAC 296-14-200;

f. Determining that any such recoupment may be made from future pension payments to the claimant, with the Department reimbursing the employer as those deductions are taken; and

g. Taking further action as appropriate.

DATED: November 17, 2011.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
DAVID E. THREEDY Chairperson

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